Improving *Res Ipsa Loquitur* Doctrine in Child Abuse Cases: A Step Toward Racial Justice

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Abstract: The American child welfare system intrudes on, separates, and permanently severs Black and Indigenous families at significantly higher rates than white families. It is profoundly troubling that the well-established harms associated with taking children from their homes are inflicted disproportionately on families of color. In light of the long and shameful American history of separating non-white children from their families, child welfare professionals have begun addressing racial bias in decision-making. But implicit bias training (the favored response of child welfare agencies) and efforts to make policies colorblind are not enough. True redress of the longstanding racial harms of the child welfare system requires scrutinizing the legal rules that too often stack the deck against innocent parents. Often the legal rules that cause the most harm have no explicit markers of racism. Because one of the critical aspects of addressing structural racism is recognizing that it is embedded in ways that make racist outcomes appear to be the result of neutral processes, we must vigorously reassess existing legal doctrine that disproportionately harms non-white litigants.

[*] Co-Director, NYU School of Law, Family Defense Clinic. I would like to thank Emma Alpert, of Brooklyn Defender Services, and Jessica Horan-Block, of The Bronx Defenders, for comments on an earlier draft. Their ground-breaking work has transformed practice in medically complicated child abuse cases and averted incalculable harm to families. And my thanks—once again and always—to Marty Guggenheim.

Lawyers and judges can pursue racial justice within existing law by interrogating whether and how legal rules are implemented differently in arenas that impact more and less privileged litigants. Undertaking such a reassessment, this article identifies a significant step that could be taken to improve legal doctrine to promote racial justice in the child welfare system: reconfiguring how the *res ipsa loquitur* doctrine is implemented in child abuse cases.

Imported from tort law, *res ipsa loquitur* doctrine has come to play an important role in child protective proceedings, allowing courts to make findings of abuse without direct proof that a parent harmed a child. Although the doctrine as used in tort law has been the subject of extensive commentary, there has been little attention paid to its use in civil child abuse cases. This article fills that gap, arguing that family courts have wrongfully imposed liability on multiple caretakers under circumstances in which such an approach is not allowed in the tort context.

Analyzing court decisions in which parents and babysitters have been held jointly liable for incidents of child abuse, this article concludes that such decisions violate both common sense and accepted legal doctrine by allowing defendants to be held liable without a showing of fault by a preponderance of the evidence.

The article proposes a more principled approach to *res ipsa loquitur* child abuse doctrine that adopts the safeguards used in tort law to ensure courts require a showing of fault by a preponderance of evidence, prohibit shifting the burden of proof to defendants, and (following Prosser's admonition regarding tort law) avoid surreptitiously imposing strict liability. The article also proposes ways to customize the doctrine to the child protective context to ensure it serves the broader goals of child welfare law.

Smuggling strict liability into a legal scheme that purports to be fault-based is particularly dangerous when the rule is disproportionately imposed on Black families. At a minimum, the doctrine used should be transparent so that litigants understand the standard being imposed. The approach recommended in this article would provide transparency and ensure that unnecessary family separations are not baked into the governing liability rule.

I. INTRODUCTION

For over twenty years, scholars and family defenders have decried the persistent racial disparities of the American child welfare system, which intrudes on, separates, and permanently severs Black and Indigenous families at significantly higher rates than white families.[1] As recent calls for racial

[1] *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001); Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68 (2017);

justice have swelled in the face of police violence, community activists and advocates are working to highlight the analogies between abuses of power by law enforcement and abuses by child welfare authorities, and to bring the momentum for change to a field in which racially skewed outcomes have proven frustratingly intransigent.[2] A shocking fifty-three percent of Black children's homes are investigated by child welfare officials.[3] These investigations routinely involve degrading and traumatic invasions.[4] Not only are these families subjected to more government surveillance, but Black children are also substantially more likely to be separated from their parents by the child welfare system than white children.[5] It is profoundly troubling that the well-established harms associated with taking children from their homes are inflicted disproportionately on Black families.[6]

In light of the long and shameful history of separating non-white children from their families, some of the work ahead will certainly entail directly addressing racial bias in decision-making.[7] Yet implicit bias training (the favored response of government agencies) and efforts to make policies

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Robert B. Hill, *Institutional Racism in Child Welfare*, 7 RACE & SOC'Y 17 (2004); SHAMINI GANASARAJAH ET AL., NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (2017); CHILDREN'S RIGHTS FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS: A CALL TO ACTION 12–14 (2021); Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 35 (2019).

[2] *See* ALAN DETTLAFF ET AL., HOW WE ENDUP: A FUTURE WITHOUT FAMILY POLICING 3–5 (2021), http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf [https://perma.cc/AD7R-MPTG]; Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021 9:00 AM), https://time.com/5946929/child-welfare-black-families/ [https://perma.cc/MT8P-L7HF]; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/.

[3] Hyunil Kim et al., *Lifetime Prevalence of Investigating Child Maltreatment Among US Children*, 107 AM. J. PUB. HEALTH 274, 277 (2017).

[4] ERIN MARKMAN ET AL., RISE PAR TEAM, AN UNAVOIDABLE SYSTEM: THE HARMS OF FAMILY POLICING AND PARENTS' VISION FOR COMMUNITY CARE 13–14 (2021), https://www.risemagazine.org/wp-content/uploads/2021/09/AnUnavoidableSystem.pdf [https://perma.cc/MZX6-28JC].

[5] Ganasarajah et al., *supra* note 1, at 5–6.

[6] *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 534 (2019); Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 210–13 (2015) (citing studies on the "debilitating effects" of even short stays in foster care).

[7] *See generally* LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020) (detailing the history of separating children of color from their parents); Peggy C. Davis, *"So Tall Within"- The Legacy of Sojourner Truth,* 18 CARDOZO L. REV. 451, 455 (1996).

colorblind can never be enough.[8] True redress of the longstanding racial harms of the child welfare system will require steps that go well beyond training and entail scrutinizing the legal rules that too commonly stack the deck against innocent parents. Often the rules that cause the most harm have no explicit markers of racism. If one of the critical points in understanding structural racism is recognizing that it is embedded in ways that make racist outcomes appear to be the result of neutral processes, we must vigorously reassess those processes.[9]

This piece, which is intended as the first in a series of such efforts, identifies one relatively modest step that could be taken to improve legal doctrine to promote racial justice in the child welfare system. The legal rule—an aspect of the *res ipsa loquitur* doctrine used in child abuse cases—does not single out Black families, but it falls far harder on them because every legal rule that works poorly in the child welfare system falls hardest on Black families.[10] The case example I will use to illustrate the legal issue involves a mother named Simona D. It is not necessary to the legal point at issue that Simona D. is a Black woman, but it is far from incidental. Simona D. lives in New York City, where more white than Black families live, but where Black children are *thirteen times* more likely to go into foster care.[11] Understanding

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[8] *See* J.C. Pan, *Why Diversity Training Isn't Enough*, THE NEW REPUBLIC (Jan. 7, 2020), https://newrepublic.com/article/156032/diversity-training-isnt-enough-pamela-newkirk-robin-diangelo-books-reviews [https://perma.cc/9TC4-MSAE]; Destiny Peery, *Implicit Bias Training for Police May Help, but It's Not Enough*, HUFFPOST (Mar. 14, 2016, 9:29 PM), https://www.huffpost.com/entry/implicit-bias-training-fo_b_9464564 [https://perma.cc/4LP2-AWMY].

[9] For introductory overviews of structural understandings of racism, *see* john a. powell, *Structural Racism: Building Upon the Insights of John Calmore*, 86 N.C. L. REV. 791, 793–800 (2008) (explaining how a structural approach reveals racism that might otherwise go unrecognized); William M. Wiecek, *Structural Racism and the Law in America Today: An Introduction*, 100 KY. L.J. 1 (2011).

[10] This article focuses on a legal rule that exacerbates disparities between how the child welfare system interacts with Black families and white families. The American child welfare system also inflicts vastly disproportionate harm on Native American families, but those harms fall under the purview of the Indian Child Welfare Act, which is outside the scope of this piece. In some jurisdictions in the United States, Hispanic families are overrepresented in the child welfare system, but they are not overrepresented nationally. Ganasarajah et al., *supra* note 1, at 5–6.

[11] N.Y. OFF. OF CHILD. & FAM. SERVS., BLACK DISPARITY RATE 7 (2019), https://ocfs.ny.gov/reports/sppd/dmr/DMR-County-Comparison-2019.pdf [https://perma.cc/KGM8-BZ8A]. In New York City's child welfare system, racial disproportionality gets more extreme at each decision point. Black families are six times more likely than white families to be reported to the child abuse hotline, eight times more likely to have a case indicated (creating a record of child maltreatment that limits employment opportunities), and thirteen times more likely to be separated. *Id.* at 1, 4, 7.

this racial context both makes it more urgent to address the legal problem and helps explain why it has not yet been addressed.[12]

Dismantling structural racism in the child welfare system will require legislative and policy change. At the same time, it is important to recognize that lawyers and judges have a critical role to play in fighting for racial justice within existing statutory law by raising the bar for interpreting and implementing that law. If the harms of a legal rule are falling disproportionately on disadvantaged groups, that should be a call to vigorously question whether the rule is as good as it should be. One useful strategy is to examine how similar legal rules play out in arenas that impact more privileged litigants. Another critical strategy—perhaps so simple as to seem trite—is for advocates to help judges and opposing parties understand a legal rule as they would understand it if it were being imposed on their own families. I will argue here that applying these strategies to the *res ipsa loquitur* doctrine in child abuse cases leads to the conclusion that the doctrine should be modified to ensure it is fault-based and consistent with traditional understanding of the preponderance of the evidence standard.

II. PROSECUTION OF CIVIL CHILD ABUSE: DEMOGRAPHICS AND *RES IPSA LOQUITUR* DOCTRINE

It is well documented that parents of color are more likely than white parents to be suspected of abuse when their children suffer identical injuries.[13] Depending on a child's race, children routinely are subject to different diagnostic testing and Black and Brown parents are more likely to be charged as suspected abusers.[14]

In civil child abuse proceedings[15] if the state proves that a parent abused or neglected a child, that provides a basis for the state to intervene in the

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[12] Dorothy Roberts, among others, has explained the heightened importance of addressing the flaws of the child welfare system in light of the racial harms it inflicts. *See* Dorothy Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 179 ("Family and community disintegration weakens blacks' collective ability to overcome institutionalized discrimination and work toward greater political and economic strength. The [child welfare] system's racial disparity also reinforces negative stereotypes about black people's incapacity to govern themselves and their need for state supervision.").

[13] *See, e.g.,* Kent P. Hymel et al., *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 J. PEDIATRICS 137 (2018); Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603 (2002).

[14] *See e.g.*, Hymel et al., *supra* note 13; Lane et al., *supra* note 13.

[15] Sometimes criminal proceedings are initiated simultaneously, but often no criminal case is filed in connection with the injuries that lead to the civil child abuse proceedings on which this article is focused.

parent's right to care and custody of the child.[16] Even before such an adjudication, courts have the power to temporarily remove children from their home and place them in foster care. After an adjudication, the court's power extends to a long-term foster care placement which, under termination of parental rights laws may (and commonly does) lead to the permanent dissolution of the family relationship, making the child eligible for adoption by others.[17]

Because much of the worst child abuse is committed without witnesses other than the victims, special evidentiary rules have been created to ease the civil prosecution of child abuse. While the details of these rules vary by state, they typically provide exceptions to standard rules of evidence in order to allow for increased protection of children. For example, children's out-of-court statements are often admissible, an exception to traditional hearsay rules.

One significant evidentiary rule in child protective cases allows courts to make findings of abuse without any direct proof that a parent actually harmed the child. Based on a *res ipsa* theory, many states authorize courts to find against a parent (or multiple parents/caregivers) when there is proof of injuries that would not normally occur in the absence of abuse without direct evidence of who committed the abuse. Rules of this kind shift the burden to the parent to present at least some evidence, either explaining how the injury occurred or explaining why the parent should not be held accountable for it. These statutes do not employ a theory of strict liability, but it may feel that way to the innocent parent who cannot explain how the child was injured. It is important to have this evidentiary rule available to hold parents responsible for inflicting abuse to ensure the state is sufficiently empowered to protect children because there often is not direct evidence of specific abusive actions in situations in which the state should be empowered to protect children from further harm. Although intentional child abuse by parents is less common than often suggested in mainstream media, it does occur and sometimes involves infants or children too young to testify, leaving the prosecutor with no proof except the injury itself and that the child was in the parent's care when it was sustained. Without a method for imposing legal

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[16] Courts, as well as child welfare experts, have emphasized that the legal prerequisites to intervention are justified not only by the parents' rights to raise their children, but also by the children's rights to be raised by their parents absent a compelling government interest in protecting the children from harm. *See, e.g.,* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) (quoting Smith v. Organization of Foster Families, 431 U.S. 816, 844 (1977)) (explaining that the right to family integrity "encompasses the reciprocal rights of both parent and children" and discussing the interest "of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent").

[17] CHILD WELFARE INFORMATION GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf [https://perma.cc/FNZ5-9E6C]; ADMIN. FOR CHILD. & FAMS., THE AFCARS REPORT NO. 27, 4–5 (2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/V3HE-ZKSB].

liability in such cases, the government would be unable to protect children from further harm.

The *res ipsa loquitur* doctrine—the idea that some things "speak for themselves"— developed in tort cases. First in simple accident cases and later in more complex product liability cases, courts have held that certain occurrences, such as barrels of flour falling from a window and soda cans exploding, "contain within themselves a sufficient basis for an inference of negligence".[18] Some courts have worried that use of the Latin phrase clouds a simple facet of circumstantial evidence, but few now question the importance of the principle.[19]

Although the doctrine as used in tort claims has been the subject of extensive commentary, there has been little attention to its use in civil child abuse cases.[20] The doctrine was first introduced in child abuse proceedings through case law and was subsequently codified in many states.[21]

Most of the key elements of the *res ipsa loquitur* doctrine, which I will discuss below, have been imported from the tort context into child protection law. But there is a critical difference in how the doctrine has been implemented in child abuse cases. In tort law, typically *res ipsa* doctrine does not allow imposing liability on multiple defendants except where there is a non-delegable duty.[22] Indeed, case law has consistently emphasized that "the ultimate issue in a res ipsa loquitur case is whether it is more likely than not that the defendant was negligent."[23] The insistence that the doctrine does not diminish the necessity of a showing of fault, however, has not been carried

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[18] *Foltis, Inc. v. City of New York,* 287 N.Y. 108, 116 (N.Y. 1941).

[19] *See* Dullard v. Berkeley Assocs. Co., 606 F.2d 890, 894 (2d Cir. 1979) ("This is a simple enough principle of circumstantial evidence and has none of the vice of creating a presumption of negligence that the mere incantation of the Latin phrase so often evokes.").

[20] For a rare exception, *see generally* Allyson B. Levine, *Failing to Speak for Itself: The* Res Ipsa Loquitur *Presumption of Parental Culpability and its Greater Consequences*, 57 BUFF. L. REV. 587 (2009).

[21] *See id.* at 589–91; N.J. STAT. ANN. § 9:6–8.46(a)(2); CAL. WELF. & INST. CODE § 355.1 (West 1999).

[22] There is another category of cases in which multiple defendants have been held liable but, as explained below, those cases are better understood as cases in which strict liability is imposed for policy reasons that are not applicable in the child abuse context. *See infra* text accompanying notes 81–87.

[23] RESTATEMENT (THIRD) OF TORTS § 17 cmt. b (AM. L. INST. 1975).

over to child protective cases.[24] In child abuse cases, the *res ipsa* doctrine has been permitted to support rulings against multiple caretakers who had access to a child even when the evidence did not show each caretaker was individually at fault.

III. SPREADING THE BLAME

It is important to bring to life how the *res ipsa loquitur* doctrine plays out in practice and to appreciate the effects of holding multiple people responsible for something only one of them did, particularly when the consequences of blaming a parent include the loss of custody of a child. Here is what the rule meant for one family:

Shortly after Simona D. immigrated to the United States from Jamaica, she gave birth to a daughter, Zoey.[25] Simona was a single mother and for the first two months of Zoey's life was her sole caretaker.

When Zoey was two months old, Simona returned to full-time work as a cashier. While she was working, Simona left her daughter in the care of a babysitter, Ms. A, who had been recommended to Simona by a friend. For two weeks, Ms. A babysat for Zoey for seven to eight hours a day five to six days each week. One evening, when Simona picked up her daughter from Ms. A's apartment, she took her straight to the hospital because it seemed to her that something was wrong with Zoey's leg. She had been unusually fussy the night before and was now showing signs of discomfort. Following a series of X-rays, the hospital informed Simona that her daughter had sustained multiple fractures. Simona asked that all possible tests be done to determine the extent and nature of the injuries and remained by her daughter's side at the hospital.

When questioned by the hospital staff, Simona was unable to identify or explain the source of the injuries. Because they were unexplained, the hospital called in a report of possible child abuse.

According to the hospital staff and investigating caseworkers, Simona's reaction to learning of the fractures was that of a loving and concerned mother. They said she "appeared shocked," "very upset," "very concerned for [Zoey's] welfare," and "appeared to have a very loving relationship with her daughter." Simona had no record of any kind, criminal or child

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[24] *See, e.g., In re* L.Z., 111 A.3d 1164, 1185 (Pa. 2015) ("We emphasize that, when a child is in the care of multiple parents or other persons responsible for care, those individuals are accountable for the care and protection of the child whether they actually inflicted the injury or failed in their duty to protect the child."); *In re* Matthew O., 956 N.Y.S.2d 31, 36 (N.Y. App. Div. 2012) (rejecting the argument that the case had to be dismissed because the evidence did not "point to any one respondent who was the culpable caregiver.").

[25] The NYU Family Defense Clinic, where the author is Co-Director, represented Simona D., serving as co-counsel with Brooklyn Defender Services and Skadden, Arps, Slate, Meagher & Flom LLP in the case discussed in the text.

protective. She cooperated with the investigators but was unable to explain how her daughter had been injured, other than to clarify that the only people who had taken care of the baby were herself and the babysitter.

Child protective services filed petitions charging both the mother and babysitter with committing the abuse, relying on New York's *res ipsa* statutory provision. At the trial neither respondent disputed that Zoey suffered multiple fractures or that they must have been the result of physical abuse. They each argued that the other was responsible. The parties disputed how frequently Ms. A. babysat Zoey. During the investigative phase, Simona told the investigating caseworker that Zoey was with the babysitter while Simona worked at a part-time job, and she did not provide contact information for her employer. At trial, Simona testified she worked full-time, and that Ms. A. babysat full-time, explaining that she initially understated the amount of time she was employed because she was afraid she would get in trouble for working without a legal immigration status.[26]

It was undisputed that Zoey suffered no harm before Ms. A. began babysitting for her, but no one could pinpoint when Zoey's injuries occurred. In the end, the trial essentially came down to a "she said/she said" situation regarding who did it.

Remarkably, the court found both guilty. It did not find that they abused Zoey together but held them both legally responsible for the abuse based on the *res ipsa* statute. The Judge explained that he could not say which respondent committed the abuse and, because of that, both should be held accountable.

Zoey remained in foster care for nineteen months. She was returned to her mother's care only after Simona completed a parenting class and had hundreds of monitored visits. Since being reunified, Zoey has remained with her mother without incident.

Simona D. was lucky compared to parents who never regain custody after unexplained injuries, but she continues to have a record with New York State that labels her a child abuser. And, of course, she will never regain the

[26] Inconsistencies in statements or other efforts to conceal information by the accused tend to be viewed as extremely suspicious by investigators and courts. This can exacerbate the effects of intersectional disadvantages, as seen in Simona D.'s case. Parents without a legal immigration status may have motives to lie or hide family members; parents who are interviewed in English when that is not their first language are more likely to be misunderstood; Black parents who are reported disproportionately to children's services may be less likely to bring their children for medical treatment when accidents occur.

months she and Zoey were kept apart or fully know the effects that separation had on her daughter.[27]

IV. UNPRINCIPLED USE OF *RES IPSA LOQUITUR* DOCTRINE IN CHILD ABUSE CASES: NEW YORK EXAMPLE

Every state has a mechanism to grant child welfare authorities the ability to assign responsibility for harm inflicted on a child when the precise cause of the injury is unknown and many states have adopted statutory provisions that specifically import the *res ipsa loquitur* principle into their child protective scheme.[28] New York poses a clear example of the problematic approach because its child protective scheme is more explicitly fault-based than some and because its case law has been developed sufficiently to draw out the direct conflict between its application of *res ipsa* doctrine in child abuse cases and elsewhere. Examining how the issue has played out in New York will elucidate the problem as well as possibilities for how it could be challenged by lawyers and addressed by judges. The legal arguments available in other jurisdictions will vary based on the particulars of their statutes and case law, but the overarching point—that we should be vigilant in guarding against unjustified use of *res ipsa loquitur* doctrine against parents and caretakers of children—applies broadly.

Family Courts first introduced the *res ipsa* doctrine in child protective cases in New York in the 1960s.[29] In these early cases, the courts were clear that they were "borrowing from the evidentiary law of negligence the principle of res ipsa loquitur" to hold parents responsible for injuries to a child when the condition would not ordinarily occur "if the parent who has the responsibility and control of an infant is protective and non-abusive."[30]

In 1970 the Legislature codified the approach by adding an evidentiary provision to New York's Family Court Act, which states:

> proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the

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[27] The harms of parent-child separation are well-documented. *See generally* Trivedi, *supra* note 6 (documenting the harms resulting from separation).

[28] *See, e.g.,* N.J. STAT. ANN. § 9:6—8.46(a)(2); CAL. WELF. & INST. CODE § 355.1 (West 2021); N.Y. FAM. CT. ACT § 1046(a)(ii). Perhaps some will find it counterintuitive—offensive even—to draw on tort law involving corporations to sculpt rules for child protective cases as if that is to draw an equivalence between accidents and child abuse. But it must be recognized that child protective law drew explicitly on tort law to establish the rules for imposing liability for child abuse. At minimum, it seems important to consider whether it is justified to import rules that expand liability for parents who are primarily low-income and disproportionately of color without importing the protections that tort law provides to business owners and corporations.

[29] *See In re* S., 259 N.Y.S.2d 164, 165 (Kings Cnty. Fam. Ct. 1965); *In re* Young, 270 N.Y.S.2d 250, 253 (Westchester Cnty. Fam. Ct. 1966).

[30] S., 259 N.Y.S.2d at 165 (internal quotation marks omitted).

> parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible.[31]

The statute leaves open numerous questions including whether it establishes a rebuttable presumption, what defense evidence is sufficient to prevail once a prima facie case has been established, and what is supposed to happen when there are multiple caretakers.

In tort law, the *res ipsa loquitur* doctrine "simply recognizes what we know from our everyday experience: that some accidents by their very nature would ordinarily not happen without negligence."[32] It may be applied only when three preconditions have been met:

> (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.[33]

The Supreme Court explains that in torts "*res ipsa loquitur* means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference,"[34] and New York courts emphasize that the doctrine does not create a presumption against the defendant, but rather allows the finder of fact to draw an inference from the evidence against the defendant.[35] The case law and all commentary are in agreement that the burden always remains on the plaintiff to show that the injury more likely than not was caused by the defendant.[36] Rather than relieving this burden, it offers a mechanism for meeting it.

Most of these features of the doctrine have been imported into the case law interpreting the Family Court Act. Most importantly, in *In re Philip M.*,

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[31] N.Y. FAM. CT. ACT § 1046(a)(ii).

[32] Dermatossian v. New York City Transit Auth., 67 N.Y.2d 219, 226 (N.Y. 1986) (citations omitted).

[33] *Id.* (internal quotations omitted) (quoting Corcoran v. Banner Super Market, 227 N.E.2d 304, 305 (N.Y. 1967)).

[34] Sweeney v. Erving, 228 U.S. 233, 240 (1913).

[35] Foltis, Inc. v. City of New York, 38 N.E.2d 455, 462 (N.Y. 1941).

[36] *See, e.g., Sweeney*, 228 U.S. at 240*; see also Foltis*, 38 N.E.2d at 461; Weeden v. Armor Elevator Co., 468 N.Y.S.2d 898, 905 (2d Dep't 1983).

New York's highest court explained that when the prosecution presents proof of an injury to a child that would not ordinarily occur without the acts or omissions of the parent and proof that the parent was the caretaker at the time the injury occurred, the burden of production shifts to the parent, but the burden of proof always remains on the state to prove child abuse by a preponderance of the evidence.[37]

In the tort law context, New York courts have also been clear that—in contrast with a strict liability rule—*res ipsa loquitur* doctrine is not meant to spread liability beyond those at fault. The Court of Appeals has quoted William Prosser, who said with his typical panache:

> It is never enough for the plaintiff to prove merely that he has been injured by the negligence of someone unidentified. Even though there is beyond all possible doubt negligence in the air, *it is still necessary to bring it home to the defendant*. On this too the plaintiff has the burden of proof by a preponderance of the evidence.[38]

This requirement that blame be established is located largely in the second element of a *res ipsa* case in tort law: the requirement of exclusive control by the defendant.[39] It is only after a defendant has been shown to have exclusive control of the mechanism of an injury that ordinarily does not occur absent negligence that fault can be imputed.[40] So, for example, when manufacturing rolls were mounted on skids to be transported on a tractor trailer and a roll broke free during transport and collided with a car, the defendant owners of the transport company could not be held liable on a *res ipsa loquitur* theory because they had not had exclusive control of the skids and rolls.[41]

The requirement of exclusive control in tort has been relaxed in limited circumstances. Understanding these exceptions to the requirement of exclusive control is integral to appreciating the defect in the application of

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[37] *In re* Phillip M., 624 N.E.2d 168, 172 (N.Y. 1993).

[38] *Corcoran,* 227 N.E.2d at 431 (quoting PROSSER, TORTS (3d ed.), § 39, p. 222, with emphasis added by the court).

[39] Calabretta v. Nat'l Airlines, 528 F. Supp. 32, 35 (E.D.N.Y. 1981); *cf.* RESTATEMENT (THIRD) OF TORTS § 17 cmt. b (AM. L. INST. 1975) ("Exclusive control is omitted as an element of res ipsa in the black letter of the Restatement Second of Torts § 328D. A Comment reasons that while exclusive control is usually a good criterion for identifying the negligent party, exclusive control is not . . . necessary to the inference [of probable defendant negligence]. According to the Prosser treatise, 'it would be far better, and much confusion would be avoided, if the rigid "control" test were disregarded altogether, and we were to require instead that the apparent negligent cause of the accident be such that the defendant would more likely than not be responsible for it.'" (citations omitted)).

[40] Farrell v. Stafford Machinery Corp., 205 A.D.2d 951, 654 (3d Dep't 1994); Mercatante vs. City of New York, 286 A.D. 265, 267–68 (1st Dep't 1955).

[41] *Farrell*, 205 A.D.2d at 951.

New York's *res ipsa* doctrine to child abuse cases involving multiple respondents. In tort, exclusive control is not required where two players had "joint control" and each had a duty to the plaintiff. Thus, where a board that fell injuring a pedestrian had been attached to two buildings, the owners of both buildings shared control of the instrument of injury and a duty of care, and could be found liable on a *res ipsa* theory.[42] Applying the *res ipsa* doctrine "in such cases is similar to alternative liability, in which the plaintiff knows that all the defendants have acted tortuously, but only one has caused the plaintiff harm. In such a case the defendants are joint tortfeasors, unless as amongst them they prove which defendant is solely culpable."[43]

New York courts have also held that control need not be exclusive where the duty to the injured party is non-delegable.[44] For example, where a contractor by statute has a non-delegable duty, it need not be established that that contractor had exclusive control of the construction site to be found liable.[45] In such cases, the lack of exclusive control does not vitiate fault because the party was legally responsible whether or not they had sole control of the mechanism of injury.

In the cases in which the Court of Appeals has relaxed the exclusivity requirement, it has been very clear that it only does so where the evidence nevertheless demonstrates that it still "*probably* was the defendant's negligence which caused the accident."[46] When exclusive control is not required, there must be proof of a "degree of dominion sufficient to identify the defendant (or defendants) with probability as the party responsible for the plaintiff's injuries."[47] Thus, loosening the exclusivity requirement in this way has not moved New York's *res ipsa* rule away from being fault-based.

There is no exact analogy to the exclusivity requirement in child abuse cases. In tort cases the question is who has control of the instrument of injury (e.g., the board that falls off the building or the skids and rolls that come off the tractor trailer). Although there is a requirement in abuse cases that the child have been in the care of the accused parent at some point during the period in which the child was injured for the *res ipsa* rule to be invoked,

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[42] *Corcoran,* 227 N.E.2d at 433.

[43] 16 N.Y. Prac., NEW YORK LAW OF TORTS § 20:21 n.18 (2021).

[44] Whalen v. Tower 53 Condominium, 202 A.D.2d 267, 268 (1st Dep't 1994); *See* Dullard v. Berkeley Assoc. Co., 606 F.2d 890, 893 (2d Cir. 1979).

[45] *Dullard*, 606 F.2d at 893.

[46] *Corcoran*, 19 N.E.2d at 432 (emphasis in original).

[47] Calabretta v. National Airlines, 528 F. Supp. 32, 36 (E.D.N.Y. 1981) (citing Lindenauer v. New York, 356 N.Y.S.2d 366, 368 (3d Dep't 1974) (internal quotation marks omitted)).

prosecutors are not required to prove that the parent was exclusively caring for the child during that time. Very often, the precise time a child sustained an injury cannot be pinpointed and the child will have spent time in the care of more than one adult during the window in which the injury occurred (as was the situation with Simona's daughter Zoey in the case described above). Of course, the amount of time a child has spent in the care of the accused may be relevant to determining whether the evidence supports a finding that a particular caregiver is more likely than not to have inflicted the abuse.[48] But the state's legitimate interest in child protection would be unacceptably thwarted if all a parent needed to show to avoid responsibility for a child's abuse is that the child spent five minutes with someone other than the accused. For this reason, New York courts, like courts elsewhere, do not require exclusivity of control as an element of a child abuse finding based on a *res ipsa* theory.[49] Importantly, however, relaxing the exclusivity requirement need not relax the fault-based character of the finding. New York's entire child protective scheme is fault-based,[50] and New York's highest court has explicitly said this is true in cases in which findings are based on the *res ipsa* provision.[51]

Yet this is where the application of the *res ipsa loquitur* doctrine in child abuse cases has gone awry. In recent years, New York courts have taken *res ipsa* doctrine in child abuse cases in a significantly different direction from the way the doctrine is applied in tort cases. They have begun to hold multiple respondents liable in child abuse cases without finding there is a preponderance of evidence that any specific individual was more likely than not responsible for the abuse.[52] The First Department's decision in *In re Matthew O.*[53] is illustrative. There, the court found both a nanny and the child's parents responsible for abusing a five-month-old baby, although there was no contention that the nanny worked in concert with the parents—on the contrary, the nanny and the parents pointed the blame at each other. The prosecution proved the child had seven fractures, none of which could have

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[48] *See generally In re* Ashley RR., 30 A.D.3d 699 (3d Dep't 2006) (considering the amount of time each of the multiple respondents spent with the abused children in determining liability under a *res ipsa* theory).

[49] *Id.*; *In re* Zachary MM., 276 A.D.2d 876, 881 (3d Dep't 2000) (describing situation in which a childcare provider was found to have abused a child on a *res ipsa* theory "[a]lthough the child was also in his parents' care during the relevant time period.").

[50] *See* N.Y. FAM. CT. ACT § 1012; Nicholson v. Scoppetta, 3 N.Y.3d 357, 368–72 (2004) (explaining that New York law "requires proof of the parent's failure to exercise a minimum degree of care" to justify state intervention.).

[51] *In re* Philip M., 82 N.Y.2d 238, 243 (N.Y. 1993) (applying the Family Court Act's *res ipsa* provision and stating "[t]he statute is fault based.").

[52] *See, e.g.*, *In re* Grayson R.V., 200 A.D.3d 1646 (4th Dep't 2021), *mot. lv pending*; *In re* Matthew O., 103 A.D.3d 67 (1st Dep't 2012); *In re* Aniyah F., 13 A.D.3d 529 (2d Dep't 2004). The author is counsel for one of the appellants in the motion for leave to appeal in *Grayson R.V.*

[53] *Matthew O.*, 103 A.D.3d at 67.

been self-inflicted, thereby establishing a prima facie case on a *res ipsa* theory. The injuries were at various stages of healing, all within three months old, a period during which the nanny was with the child approximately sixty hours a week. The Family Court heard from eleven witnesses, including the parents and the nanny, over forty-two days of trial. Yet at the conclusion of the trial, the Family Court declined to evaluate whose testimony was more credible and better supported by the other evidence in the record. Instead, the Family Court held all three respondents liable for the abuse without making factual determinations that they were each more likely than not to be responsible for the injuries.[54] The Appellate Division affirmed.[55]

In re Aniyah F. offers another vivid example of this problematic trend.[56] There, evidence showed that a five-month-old had a "subdural hematoma, a scalp hematoma, a circular scar on her forehead, healed fractures of two bones in her right arm, and a lip abrasion."[57] The government civilly prosecuted the mother, the father and a maternal aunt for child abuse.[58] The mother and aunt lived together with the injured baby.[59] The baby's father did not live with them but had visits with his child.[60] The trial court found that the father had abused the baby and dismissed the allegations against the aunt.[61] It also dismissed the abuse charge against the mother, although it concluded that she neglected her daughter by inappropriately allowing the father to have unsupervised contact and failing to get proper medical care for the fractures.[62] So far, so good. By finding only one respondent had abused the baby, the trial court followed a fault-based approach to sorting among possible perpetrators of abuse. But the government appealed the dismissal of

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[54] *Id.* at 72. The Family Court Act defines "abuse" to include not only committing, but also "allowing" abuse of a child, which means that multiple parties may have "abused" a child in that some participated in the abuse and others allowed it, but that distinction is not pertinent here. N.Y. FAM. CT. ACT § 1012(e). In *Matthew O.*, as in the other examples discussed, the courts did not make findings that some respondents committed abuse and others allowed it. They declined to make any individualized assessments of the evidence as to the different respondents. *Matthew O.*, 103 A.D.3d at 72.

[55] *Matthew O.*, 103 A.D.3d at 72. The Family Court opinion was not published, so the discussion in the text is based on what is recounted in the Appellate opinion.

[56] *In re* Aniyah F., 13 A.D.3d 529, 529 (2d Dep't 2004).

[57] *Id.* at 530.

[58] Brief of Law Guardian for the Children at 1, *In re* Aniyah F., 13 A.D.3d 529, 529 (2d Dep't 2004) (No. 2002-11199) (copy on file with author).

[59] *Id.* at 5.

[60] *Id.* at 6.

[61] *Id.* at 1–2, 8.

[62] *Id.* at 8.

abuse charges against the mother and aunt.[63] Remarkably, the appellate court reversed and concluded that both the mother and aunt should have been found guilty of abuse despite the absence of evidence that the two had worked in concert with each other or the father, and without discussing the finding of abuse against the father at all.[64]

The opinions in *Matthew O.* and *Aniyah F.* clearly indicate that the sole basis for the findings of abuse were the injuries and that guilt was imputed entirely through the *res ipsa* provision of the Family Court Act. A preponderance of evidence showed that someone committed abuse, but these cases spread the liability across all those who might have been the perpetrators. Absent evidence that the multiple respondents acted together or evidence that the various injuries were more likely than not inflicted by different people, it logically cannot be that more than one person more likely than not committed the abuse. Put in the language of the tort case law, it cannot be the case that the nanny in *Matthew O.* "probably" inflicted the abuse *and* that the parents also "probably" did.[65] Indeed, in *Aniyah F.*, the Appellate Division made findings of abuse against the mother and the aunt even though the trial court had found that the father "more likely than not" had "sole care and custody" of the child when the injuries occurred.[66]

These and similar cases directly contradict the longstanding principle that *res ipsa loquitur* doctrine does not allow findings against anyone who has not been shown (albeit circumstantially) to have acted wrongfully.[67] They do so without justifying—or even acknowledging—the contradiction.[68] This

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[63] *Id.* at 530.

[64] *Aniyah F.*, 13 A.D.3d at 531.

[65] *See* Corcoran v. Banner Super Market, 19 N.Y.2d 425, 432 (N.Y. 1967); Calabretta v. National Airlines, 528 F. Supp. 32, 36 (E.D.N.Y. 1981) (citing Lindenauer v. State of New York, 356 N.Y.S.2d 366, 368 (3d Dep't 1974)).

[66] Brief of Law Guardian for the Children at 8, *In re* Aniyah F., 13 A.D.3d at 529.

[67] *See In re* Matthew O., 103 A.D.3d 67, 72 (1st Dep't 2012); *Aniyah F.*, 13 A.D.3d 529, 531 (2d Dep't 2004); *In re* Fantaysia L., 36 A.D.3d 813, 814 (2d Dep't 2007) (holding the father and the paternal grandmother both liable for sexual abuse of the subject child); *In re* Amir A., 189 A.D.3d 401, 401 (1st Dep't 2020). Other appellate decisions in New York have stuck with the traditional rule. *See, e.g., In re* Ashley RR., 30 A.D.3d 699, 702 (3d Dep't 2006) (reversing findings of abuse against the parents after the trial court had found both parents and the maternal grandmother responsible for sexual abuse where the children had spent time in the care of each of the three adults, and holding that although the parents could not prove that the abuse had not occurred while they were responsible for the children, it was more likely that it had occurred when the grandmother was responsible).

[68] *See Matthew O.*, 103 A.D.3d 67; *Aniyah F.*, 13 A.D.3d 529; *Fantaysia L.*, 36 A.D.3d 813; *Amir A.*, 189 A.D.3d 401. Note that some discussions of *Fantaysia L.* have incorrectly indicated that the decision upheld findings of abuse as to four respondents when, in fact, it upheld findings as to two respondents (the father and the paternal grandmother), who resided together. *Compare In re* Brandon G., 41 Misc.3d 1201(A) (Kings Cnty. Fam. Ct. 2013) (unreported) *with Fantaysia L.*, 36 A.D.3d 813. The case had been dismissed by the trial court as to two other

departure is inconsistent not only with *res ipsa* doctrine, but also with New York's broader statutory scheme for protecting children from child abuse. New York's highest court has emphasized that in drafting the Family Court Act, the Legislature was "deeply concerned" to avoid "unwarranted state intervention into private family life."[69]

The statutory *res ipsa* provision in the Family Court Act is a wholly evidentiary provision; it does not create a new cause of action. Under the plain language of the statute, a finding of neglect requires a parent have fallen below a minimum degree of care.[70] A finding of abuse requires that the parent have inflicted or allowed a serious, non-accidental injury, or created or allowed a substantial risk of serious, non-accidental injury, or committed or allowed a sex offense against a child.[71] These statutory terms—"below a minimum degree of care," "inflicted," "allowed," "created," "committed"—clearly indicate that this is a fault-based statute. If a parent or caretaker has not behaved in a blameworthy way, the Family Court has no jurisdiction.

The most robust explication of New York's child protection law came in *Nicholson v. Scoppetta*, where the high court considered cases in which children were exposed to domestic violence.[72] The court held that even when children have been seriously harmed by exposure to domestic violence, the question of whether a parent is to be held responsible for that harm turns on whether it resulted "by reason of her failure."[73] In the opinion, the court specifically considered and rejected the idea that we should or could ever err on the side of caution by purposely being over-inclusive when intervening in family life because abuse or neglect is suspected, and repudiated the so-called safer course doctrine that had been based on that idea.[74] There is no easy out of "erring on the side of caution" because errors in either direction are so grave. We cannot simply throw a wide net to protect children without hurting some of those very children by needlessly putting them through the trauma of separation from their parents.

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respondents (the mother and step-father), who resided in a different household, and the dismissals were not appealed. Thanks to Emma Alpert, of Brooklyn Defender Services, for identifying this misunderstanding.

[69] Nicholson v. Scoppetta, 3 N.Y.3d 357, 368 (N.Y. 2004) (internal quotation and citation omitted).

[70] N.Y. FAM. CT. ACT § 1012(f)(i).

[71] *Id.* § 1012(e).

[72] *Nicholson*, 3 N.Y.3d at 365.

[73] *Id. at* 372.

[74] *Id.* at 380.

Given the clear commitment to a fault-based statutory scheme that carefully prevents overstepping by child protective officials into family life, why have some courts begun to depart from longstanding *res ipsa loquitur* doctrine in the child abuse context? At times, there seems to have been misunderstanding of the *res ipsa* rule. Some courts have treated the *res ipsa* rule as creating a presumption when in fact it gives rise to a permissible inference, not a presumption.[75] Other courts have misunderstood the rule to require parents to offer a specific explanation of an injury even when they have shown the child was in the care of another who could have inflicted the abuse and no innocent parent would be able to provide the details demanded by those courts.[76]

In addition to understanding the analytic flaws in these courts' reasoning, it is important to consider that implicit bias and the relative lack of social capital and political influence of the respondent parents may be pushing decisions in a direction that it would not go if the questions affected more privileged families. While the advent of a robust defense bar in New York City has led to substantial progress in contesting *res ipsa* claims of abuse,[77] the move toward holding parents responsible when there is not a preponderance of evidence to justify that has continued. In describing this case law, the practice commentaries to the New York statute put it bluntly: "[t]he upshot is that several innocent parties along with the guilty party may become trapped by the presumption."[78] Part of the work of challenging structural racism is to ask whether that would be allowed if it were leading to the separation of higher-income, white parents from their children in situations where another adult had been identified as the most likely perpetrator of abuse.

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[75] *Compare In re* Aniyah F., 13 A.D.3d 529, 530 (2d Dep't 2004) ("[O]nce a prima facie case is established, the burden shifts to the respondents, who are then required to offer a satisfactory explanation for the injuries.") *with In re* Ashley RR., 30 A.D.3d 699, 700 (3d Dep't 2006) (explaining that "[a]lthough generally referred to as a presumption, this method of proof does not create a true presumption; it creates a permissible inference."); *see also* Morejon v. Rais Constr. Co., 851 N.E.2d 1143, 1148 (N.Y. 2006) (discussing the presumption/inference dichotomy in the tort context and concluding that New York law "denominate[s] res ipsa loquitur as creating an inference.").

[76] *In re* Brandon G., 41 Misc.3d 120, 1201 (Kings Cnty. Fam. Ct. 2013) (unreported) (holding both the mother and a babysitter liable for abuse of the subject child, who had spent time separately with each of them during the period in which injuries were inflicted, because "neither respondent presented any credible alternative explanation for [the child]'s injuries sufficient to rebut the presumption of culpability that was established by the *prima facie* case."), *rev'd sub nom. In re* Miguel G., 134 A.D.3d 711 (2d Dep't 2015).

[77] *See generally* Jessica Horan-Block & Elizabeth Tuttle Newman, *Accidents Happen: Exposing Fallacies in Child Protection Abuse Cases and Reuniting Families Through Aggressive Litigation*, 22 CUNY L. REV. 382 (2019) (describing how New York City family defenders have developed more assertive litigation strategies that have led to better outcomes for their clients in child abuse cases based on *res ipsa loquitur* theories).

[78] N.Y. FAM. CT. ACT § 1046 cmt. (McKinney Supp. 2008) (Prof. Merill Sobie, Supplementary Practice Commentaries).

It is certainly understandable that no court is at ease leaving a seriously injured child in the custody of the parent without being absolutely certain how the child was injured. Yet however understandable such discomfort, Family Court judges and practitioners well know that absolute certainty is frequently beyond reach. As the *Nicholson* court reminded us, there is no avoiding difficult calls by "erring on the side of caution" because the harm of family separation is so great.[79] If our starting point is—as it must be—that the law allows intervention in family life only where the government makes the requisite showing, the question facing courts today is what, if any, deviation from traditional *res ipsa* doctrine is appropriate in civil child abuse cases.

V. PRINCIPLED USE OF *RES IPSA LOQUITUR* IN THE REALM OF CHILD ABUSE

There is no justification in the language of the governing statute or the case law for abandoning the longstanding fault-based approach to *res ipsa loquitur* doctrine in the child protective context. Prosser, among others, has warned against condoning the use of *res ipsa* doctrine as a cover for clandestine strict liability.[80] Courts have accepted policy arguments for imposing strict liability in certain product liability situations, but there is broad agreement that these are the exceptions to the general rule and that they should be explicitly identified and justified as such.[81] The most recent Restatement of Torts put it bluntly: "the res ipsa loquitur doctrine, properly applied, does not entail any covert form of strict liability."[82] This commitment to transparency and caution about unjustly expanding the liability rule is all the more important in the child protective context where it is used primarily against less privileged respondents who have limited resources to litigate in defense.

None of the policy considerations that have justified the limited exception of imposing strict liability—which have to do with fairly spreading the cost of manufacturing risks and creating efficient incentives for

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[79] *Nicholson*, 3 N.Y.3d at 380.

[80] William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L. J. 1099, 1134 (1960) ("[I]f there is to be strict liability in tort, let there be strict liability in tort, declared outright.").

[81] *See, e.g.,* Greenman v. Yuba Power Products, 59 Cal.2d 57 (Cal. 1963) (citing *Escola v. Coca Cola Bottling Co.,* 24 Cal.2d 453, 461 (Cal. 1944) (Traynor, J., concurring); *see also* RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[82] RESTATEMENT (THIRD) OF TORTS § 17 cmt. a (AM. L. INST. 1975).

precautions—apply in the child protective context.[83] Moreover, it is particularly dangerous to covertly bring strict liability into child protective law for the obvious reason that separating children from fit parents is an egregious injury to all involved. The harm to children of separations from their parents is both intuitively obvious and well documented.[84]

Exacerbating the initial harm of separation, once we impose strict liability without acknowledging that is what we are doing, we put parents held liable in an untenable position with respect to regaining custody of their children. Our child welfare system is structured around the idea that once children go into foster care, the system will proactively work to reunify families by providing rehabilitation services to parents to address the issues that led to foster care placement.[85] Demonstrating rehabilitation, unsurprisingly, typically requires acknowledging and addressing the underlying parental failing.[86] But if parents are found to be abusive and children enter foster care based on covert strict liability, at least some of those parents are put in a position in which reuniting with their children is contingent on their admitting they did something they cannot honestly admit.

Recognizing that all findings of abuse must be fault-based is thus the critical starting point for any principled approach to the use of *res ipsa* doctrine in child abuse cases. Yet important questions remain which are unique to this context. Most notably, it is unworkable to import the exclusive control

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[83] *See Escola,* 24 Cal. 2d at 461–68 (Traynor, J., concurring) (explaining that public policy is served by imposing liability on manufactures who can most effectively protect against product defects and spread the costs of harm).

[84] *See* Trivedi, *supra* note 6, at 527–60; Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161 (2019); AMERICAN ACADEMY OF PEDIATRICS, STATEMENT OPPOSING SEPARATION OF CHILDREN AND PARENTS AT THE BORDER 2 (2018) https://docs.house.gov/meetings/IF/IF14/20180719/108572/HHRG-115-IF14-20180719-SD004.pdf [https://perma.cc/MJ3S-HSGR] ("[H]ighly stressful experiences, like family separation, can cause irreparable harm, disrupting a child's brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.").

[85] *See* CHILDREN'S BUREAU, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 1 (2019), https://www.childwelfare.gov/pubPDFs/reunify.pdf [https://perma.cc/ESB5-VARB] ("Laws in all States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands require that child welfare agencies make reasonable efforts to provide services that will help families remedy the conditions that brought the child and family into the child welfare system.")

[86] *See, e.g., In re* Kayden E., 111 A.D.3d 1094, 1097 (N.Y. App. Div. 2013) (upholding termination of parental rights because a father "failed and/or refused to plan for the children's future by acknowledging and correcting the conditions that led to the removal of the children in the first instance" when he did not "acknowledge the cause of and responsibility for [one of the children]'s injuries."); *In re* Emily Jane Star R., 117 A.D.3d 646, 647 (N.Y. App. Div. 2014) (terminating parental rights because father refused to enter a sex offender program and "neither the mother nor the father gained insight into the reasons the children had been placed into foster care.").

element that is typically required in the tort context to the realm of child protection. Requiring a showing that a respondent had exclusive control of a child, the way tort law requires exclusive control of the mechanism of injury, would undermine the ability to protect children who have multiple caretakers during the time in which an injury occurred.[87] Given that most children will be in the care of different adults, at least for brief periods, and that frequently the timing of injuries cannot be specified with precision by medical experts, *res ispa* doctrine would be useless to most child protective efforts if the exclusivity provision were imported wholesale. The window in which suspicious fractures or other signs of abuse occurred often cannot be pinpointed more specifically than to a period of several days or even weeks.[88] It would be unacceptable to forego the ability to protect children from further exposure to abuse in the common scenario in which they have more than one caretaker during such a time span.

Relinquishing the exclusive control requirement can be kept consistent with the commitment to a fault-based approach, so long as it is understood that what is established by injuries which "speak for themselves" is a prima facie case and it remains incumbent upon the court to weigh the evidence and determine which, if any, of the caretakers more likely than not is responsible for the abuse. A prima facie case can justly be established against multiple caretakers because, as the case law has stressed, a prima facie *res ipsa* case means it is permissible for a court to draw an inference, not that it is obliged to because there is never a presumption of guilt. Indeed, the establishment of prima facie cases against multiple respondents may in some cases optimize the benefits of shifting the burden of production as *res ipsa* doctrine does because it will encourage the most extensive airing of relevant facts during the litigation. The fault requirement will be met so long as the court goes on to weigh the evidence to determine whether there is not only a prima facie case, but also a preponderance of evidence of culpability.[89]

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[87] *See supra* text accompanying notes 39–47.

[88] *See, e.g.*, *In re* Grayson R.V., 200 A.D.3d 1646, 1648 (4th Dep't 2021) (describing evidence of injuries shown to be "inflicted over the course of several months."),

[89] This approach is fully consistent with the plain language of the *res ipsa* provisions in several states' statutes, including New York's, which do not reference exclusive control and explicitly state that what the circumstantial evidence of injuries establishes is a prima facie case. For good examples of this approach, *see, e.g.*, *In re* Ashley RR., 30 A.D.3d 699 (N.Y. App. Div. 2006) (where Family Court made findings of abuse as to both parents and the grandmother, on appeal, the findings of abuse as to the parents are dismissed because the child was more likely abused while in the care of her grandmother); *In re* Zachary MM., 276 A.D.2d 876 (N.Y. App. Div. 2000) (upholding a finding of abuse against the child care provider and dismissal of abuse allegations as to the parents, although a prima facie case was established against all three,

What is critical, however, is to recognize that while a prima facie case can be established as to multiple caretakers based on a *res ipsa* theory, typically multiple caretakers cannot ultimately be held liable on such a theory. A prima facie case establishes that a court could legally make a legal finding against any one of the respondents, but the preponderance standard requires that for a court to go on to make a finding of abuse, it must determine that it is more likely than not that each respondent against whom a finding is made was responsible for the abuse.[90] As a matter of mathematics, it simply cannot be that there is over a fifty percent likelihood that each of two people committed the abuse if they did not act in concert. The sense in which "the thing speaks for itself" in these cases is that the condition of the child indicates abuse took place. Such circumstantial evidence can be sufficient to allow an inference that some particular individual abused the child, but that same circumstantial evidence alone cannot support an inference that two or more people separately abused the child.[91] Of course, the situation is different if there is evidence showing that two people or more acted culpably in concert or direct evidence they acted culpably in different ways.[92] But that requires affirmative evidence beyond the showing of the injured condition that triggers the *res ipsa* provision.

In cases involving multiple injuries to a child that occurred at different times, while it is conceivable that two people independently abused a child on separate occasions, it typically strains credulity to say that it is most likely that the child had the random misfortune to be left in the care of two completely independent adults who both turned out to be abusive. The exaggerated fear of child abusers in contemporary American culture notwithstanding, the odds of a child being left in the care of two people who are not acting together, but each separately decide to abuse the child is

because "petitioner failed to establish by a preponderance of the evidence that [parents] abused [the child].").

[90] *See generally* N.J. Div. of Child Prot. & Permanency v. J.R.-R, 248 N.J. 353, 360 (N.J. 2021) (reversing findings of abuse as to both parents and remanding for a new hearing and stating, "[w]e disapprove of the Appellate Division cases that have imported the doctrine of conditional res ipsa loquitur from our common law into a comprehensive statutory scheme to relieve [the state] of its burden of proving that a particular parent abused or neglected a child.").

[91] There is a strong argument to be made that this approach is required by the Constitution, which, of course, only allows infringement on the fundamental right to the care and custody of one's child when there is a compelling state interest and the intrusion is narrowly tailored. *See generally* Stanley vs. Illinois, 405 U.S. 645 (1972) (holding that a state must prove parental unfitness before separating a child from the parent). While I would expect defense counsel to raise a constitutional claim in such cases, there typically should be no need for courts to reach the constitutional question in light of the statutory argument in the text.

[92] One person may be found guilty of having inflicted abuse and another found to have allowed that same abuse if the fault-based standard of the statutory term "allowed" is met. *See* N.Y. FAM. CT. ACT § 1012(e). Similarly, one parent may be found to have abused a child while the other parent is found to have neglected her. *See, e.g., In re* Vincent M., 193 A.D.2d 398 (N.Y. App. Div. 1993).

extremely low—too low to get over the required fifty-percent mark absent an additional evidentiary showing.[93]

Thus, a principled approach would allow the establishment of a prima facie case against multiple respondents but would not allow findings of abuse against multiple respondents absent evidence beyond that required to trigger the *res ipsa* provision. Such evidence would need to show that the respondents acted in concert or otherwise affirmatively demonstrate that each acted culpably. Both counsel and courts would proceed on the understanding that the gravamen of any abuse finding would remain that the particular individual was at fault, and the *res ipsa* doctrine would not be allowed to over-inclusively sweep innocent caretakers into the net of liability. This approach recognizes that at times there is evidence that "speaks for itself" as to the injury being abusively inflicted, but not as to the perpetrator. In such cases, courts must reach determinations about whether the evidence sufficiently points to a particular perpetrator. Such determinations may rest on circumstantial evidence, but they can never rest on less than a preponderance of the evidence.

Applied to the case described above, the principled approach would have allowed children's services to charge both Zoey's mother, Simona, and her babysitter with civil child abuse, but it would have required the court to weigh the evidence and determine which of the two respondents the evidence indicated was responsible and dismiss the charges as to the other one. Under the principled approach, the *res ipsa* rule would have recognized the commonsense point that either Simona or the babysitter was responsible for Zoey's abuse, but not both. Because it would allow both individuals to be charged, this approach would have allowed the court the full benefit of the shifting of the burden of production, leading to the fullest possible evaluation of the facts. In the case, the court had the opportunity to assess the credibility of the testimony of both Simona and the babysitter. Had either of them chosen not to testify, the court could have drawn a negative inference against them.[94] Having encouraged the fullest possible development of the record, the principled approach would have required the court to make a call as to

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[93] At least one New York Family Court appears to agree with this point. *See In re* T.A., 34 Misc.3d 1236(A) (N.Y. Fam. Ct. 2012) (unreported) (dismissing a petition against a nanny after finding she did not care for the child during the time two of the child's multiple abusive injuries were inflicted and explaining "[t]he court finds it highly unlikely that a person other than the individual or individuals who fractured T.A.'s humerus and his 7th rib caused the earlier, healing fractures of the child's 8th, 9th and 10th ribs.").

[94] As typical in civil litigation, courts are allowed to draw a negative inference in child abuse cases, and there may be particular reason for a court to do so where the legislature has explicitly shifted the burden of production. *See In re* D.S. [Shaqueina W.], 147 A.D.3d 856, 857 (2d Dep't 2017).

what that record demonstrated. Given that Zoey had been thriving before the brief period in which she was sometimes in the care of the babysitter and that Simona had actively sought out medical assessment and treatment, if pressed to make the call between the two accused adults, the court presumably would have dismissed the case as to Simona unless it found her testimony less credible than the babysitter's. The length of the separation of mother and child would have been substantially reduced and Simona. would not have a record of abuse, as she does today. In addition to the substantial intangible harm of being labeled a child abuser, that record significantly limits her employment opportunities for 28 years.[95] Those limits are focused in fields of employment which women of color and immigrants are particularly likely to pursue. Thus Simona was not only more likely to have been prosecuted than someone of a different demographic background would have been, the financial effects on her family are also likely to be worse. And she and Zoey are luckier than many families caught up in the child welfare system. Simona was able to convince the Family Court that heard her case to reunify her with her daughter, while many courts will not reunite a parent with a child she was found to have abused unless the parent "admits" the abuse in order to be deemed "rehabilitated."

VI. HOLDING PARTNERS LIABLE: PATH TO A PRINCIPLED EXCEPTION

The principled approach as I have articulated it so far leaves open an important question that is worth anticipating: can two parents be treated as a unit for purposes of liability? This article has emphasized the significant costs associated with a rule that is over-inclusive in assigning liability for child abuse. To allow family separations when a parent has not been shown to more likely than not have abused a child is to inflict unjustified harm on both parent and child. Yet there may at times be reason to conclude that the parents acted in partnership in a way that might justify assigning them liability as a unit. Many parental rights and responsibilities inhere jointly in both parents unless a court determines otherwise. Parents are widely encouraged to act as a team and often do. This is, of course, generally the best thing for children, but there will be situations in which a parent will not be willing or able to recognize that the other parent is abusive. Just as it would undermine the effectiveness of the *res ipsa* doctrine for an abusive parent to avoid prosecution by arguing *res ipsa* claims cannot be used any time a child has multiple caretakers, it also may not be advisable to preclude *res ipsa* claims against two parents who act as a team before and throughout the litigation.

This exception to the rule that generally only one individual can be held liable under a fault-based statute (absent evidence that multiple individuals worked in concert) could be drawn by analogy to the joint control exception

[95] N.Y. SOC. SERV. LAW § 424-a (Consol. 2021).

that is used in tort law in some jurisdictions.[96] That case law allows liability for two individuals where they share control and responsibility for something that causes harm, such as where two neighboring landowners share the duty to maintain a wall that sits on the line between their properties and that wall falls injuring a passerby.[97] The rule would not necessarily be exactly identical to the tort rule, which requires simultaneous control of the instrument of injury, but it could draw on the idea that shared control and responsibility can support joint liability.[98]

Such an exception should be carefully circumscribed and would certainly not appropriately apply in every case. If the evidence indicates that the child was in the care of only one of the parents during the time the injury occurred, or if in some other way a preponderance of evidence points toward the culpability of one parent over the other, the question of whether to apply the exception and hold them jointly liable would not arise.

Where the evidence indicates that the child spent time with each parent during the time period in which the injury occurred, the court should do an individualized analysis of whether applying the exception is justified. Factors to be considered in this analysis include whether the parents are still a couple and generally acting as a co-parenting unit, whether they put on a joint defense in the abuse proceeding, and whether one of the parents has any defense the other does not. An important justification for the exception is that in situations in which there is a co-parenting partnership, there might be reason to believe one parent will not protect the child from the other parent following a finding of abuse. This is in strong contrast to situations in which a non-parent is found abusive. In the regular course, there is no reason to doubt that if a babysitter or other caretaker is found to have abused a child, the parents will protect the child from that caretaker in the future. If after hearing a case in which both parents are charged with abuse on a *res ipsa* theory, the court concludes there is reason to believe the parents' co-parenting partnership is such that they jointly present substantial risk to the child, that would weigh in favor of finding that the exception for joint liability should be applied.

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[96] *See* RESTATEMENT (SECOND) OF TORTS § 328D cmt. g (1965) (discussing exceptions to the exclusive control element in *res ipsa* cases and explaining "[the defendant] may be responsible, and the inference may be drawn against him, where he shares the control with another, as in the case of the fall of a party wall which each of two landowners is under a duty to inspect and maintain.").

[97] Corcoran v. Banner Super Market, 227 N.E.2d 304, 305 (N.Y. 1967).

[98] *Id.*

This approach of allowing parents to be treated as a unit is not based on a parent's duty of care being non-delegable. On the contrary, the law allows (and could not but allow, absent a strict liability approach) parents to delegate care of their children to each other or other caretakers, assuming they have no reason to believe the caretaker is inadequate.[99]

This analysis of the possibility of treating parents as a unit suggests that in the *Matthew O.* case critiqued above, where the parents presented a joint defense suggesting the babysitter was the abuser and the babysitter pointed the finger back at the parents, the court's error was not in finding more than one respondent responsible, but in finding all three responsible. The court could have found either the babysitter or both the parents responsible without vitiating the fault-based rule.

VII. CONCLUSION

Our ability to protect children from harm has benefitted greatly from importing *res ipsa loquitur* principles developed in tort law into the realm of civil child protection. There is, however, even greater reason to be careful in child abuse cases than in others to prohibit *res ipsa* claims from spreading liability where there is no showing of culpability. It is critical to preserve a fault-based approach to child protection in order to avoid the harm to children and families of government overreach into the sacred realm of parent-child relationships. We must keep at the forefront recognition that government intervention in family life always comes at significant cost.

There are sound reasons to diverge from the exclusive control requirement of tort law to ensure the ability to protect children given how frequently they have multiple caretakers, and there are times when it may be appropriate to treat parents as a unit for purposes of culpability. But there is no justification for veering away from the fundamental idea that liability established through *res ipsa* doctrine is grounded in fault.

This means that in cases in which there is prima facie *res ipsa* evidence of child abuse against multiple respondents, courts have the unenviable, but imperative responsibility of determining whom the evidence establishes is to blame. These determinations may not have the certainty we would wish, but there is no better alternative available than for courts to make the best informed, most thoughtful assessments of fault they can.

Returning to the starting point of this article, smuggling in a legal rule is particularly dangerous when we know that whatever rule is used will be imposed disproportionately on Black families. At a minimum, we need transparency so the doctrine can be fully and fairly assessed and so that all

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[99] *See generally* Albany Cnty. Dep't. for Child., Youth & Fams. v. Ana P., 827 N.Y.S.2d 525 (Fam. Ct. 2006) (holding that a mother could not be held liable on a *res ipsa* theory for failing to protect her daughter from the father, who was found liable for sexual abuse based on a *res ipsa* theory).

the parties involved can understand the rules under which they are operating. For a child protective system to claim it is fault-based, but then impose liability on parents of color who are faultless—not because courts unavoidably err at times, but because that outcome is baked into the legal rule—is to ensure that Black families experience the system as unjust. And if we take seriously the idea that structural racism is noxious to those who hold positions of privilege as well as those it oppresses, we should also be concerned that the current doctrinal direction ensures that those of us who support the current system are imposing a regime we would experience as unfair were it imposed on those we care most deeply about. As with many steps that could be taken to improve the implementation of child welfare law, modifying the current approach to *res ipsa loquitur* doctrine would not only benefit the families directly affected, it also would fortify the broader principles to which our child welfare system aspires.