Parenthood in the (Child) Welfare State

Legitimation of care orders and care rights in Norway

Ida Benedicte Juhasz

Thesis for the degree of Philosophiae Doctor (PhD)
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Scientific environment

This thesis has been completed through a Ph.D. position at the Department of Administration and Organization Theory, at the Faculty of Social Sciences at the University of Bergen. I have been affiliated with the Centre for Research on Discretion and Paternalism (DIPA), and a member of the Law, Politics, and Welfare (LPW) research group at the Department.

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Abstract

This thesis examines a specific black hole of democracy and the welfare state, that of child welfare interventions in families to safeguard children. Under study are legitimation processes as argumentation and justifications in decisions about involuntary care orders and revoking parents' rights to care for their children. How does the State assess and justify such interventions? This thesis applies a street-level bureaucracy perspective on the process of legitimation, seeking to understand what legal decision-makers do when equipped with discretionary authority to intervene in family life, and which arguments, information, and indicators are invoked to substantiate these decisions. Legitimacy is furthermore examined through birth parents' engagement with this child welfare intervention, analyzing parents' arguments provided against a care order. Building on a deliberative approach, parents' engagement with a serious state intervention contributes to our understanding of legitimacy as a measure of the 'quality of government'.

The empirical setting is the Norwegian child welfare system, more specifically care order interventions involving newborns taken into care directly from the hospital. Within a somewhat unique child welfare context, legal decision-makers need to assess the *high probability of a situation or risk to the child, as mentioned in the general care order paragraph, if the child moves home with his or her parents*. These decisions pose some specific, but not unique, decision-making challenges. Due to the parents having cared minimally for the child or not at all, and some level of uncertainty of intervening at birth, a higher threshold for intervention has been set. Simultaneously, the vulnerability and immediate care needs of children in their infancies are undisputed. As the removal of a newborn is arguably one of the starkest displays of state power over the family, far removed from the parliamentary democratic committees in which policy and law originated, these decisions challenge and place pressure on discretionary authority and legitimate decision-making. In addition to this, a selection of ordinary care order judgments from a Norwegian district court is analyzed, specifically capturing parents' reasons for appealing care order decisions. Four individual articles in sum contribute to our understanding of how decision-makers and affected citizens in sum

engage with and participate in in a complex, critical, and life-changing part of the modern welfare bureaucracy.

The broader discussion emphasizes three main findings and contributions emerging from the dissertation work. Firstly, it establishes and discusses the empirical reality of newborn care orders in Norway between 2012 and 2016, which has not previously been systematized. This empirical contribution is the *what* – *who* – and *why* of Norwegian care interventions at birth. The thesis sheds light on *what* these legal decisions are, with a focus on legal outcomes, *who* they involve and affect, and finally *why*, on what legal basis, they are made. The regional variation in prevalence, the social reproduction of parenting, and the distribution of risks across parents and infants are of particular interest. Secondly, the thesis probes the managing of uncertainty involved in newborn care order decision-making, highlighting prognostic decision-making as a grey area in child welfare practice and law application. How decision-makers utilize their discretion is revealed by the types of evidence used to substantiate future parenting capacities, as well as the amount and types of contexts and sources applied in justifications. Where care observations are lacking, broader social and welfare histories are invoked as parenting indicators. There is a lack of transparency in the translation of risks to future insufficiencies, as cases receiving the same legal outcomes display great variation in risks. Finally, parents provide complex oppositions against care orders. This indicates potential legitimacy gaps towards both procedural and substantive aspects of state intervention that need to be acknowledged and confronted.

Article 1 approaches decision-making in all newborn care orders before the County Board in Norway decided between 2012 and 2016. Probing the principle of formal justice, the analysis examines the treatment of these cases as legal outcomes and risk factors emphasized in cases with and without parental intellectual disability. The analysis reveals that cases with parental intellectual disability receive more uniform and restrictive outcomes than those cases without. Significant differences in emphasis on certain parental and child factors are evident, as well as the large variation in risk and protection within cases with intellectual disability. The article concludes by requesting

more transparency in how this significant variation in risks surrounding parental intellectual disabilities is reasoned and translated into 'similar' future parenting.

Article 2 studies all written care orders involving newborns decided in 2016 in Norway when the infant is the firstborn to the family, asking how future parenting is assessed and substantiated. With a primary focus on the parents' problems and assessed capacity to change, the findings overall reveal that the County Board uniformly finds high, long-lasting risk and equates this with minimal capacity to change. Three levels of change capacity emerge: most frequent is a *permanent* incapacity, some instances involve a *slow-moving* capacity, and very few cases display a *transient* capacity. Decision-makers display large variations in the number of sources and contexts utilized to substantiate risk across the cases. The article concludes by suggesting that welfare history is used to mitigate future uncertainty and serves as indicative of future parenthood.

Article 3 studies all appealed care order cases from 2012 concerning children between ages 0 and17 from one Norwegian District Court. Under examination is parents' legal argumentation when involved in appealed care order case proceedings. Using a discourse ethics framework, the pragmatic, ethical, and moral bases within parents' arguments are analyzed, structured by the intent of the claims, as either excuses or justifications. The analysis reveals complex reasons for appealing, displaying parents both justifying and excusing both specific situations and the totality of their parenthood. Parents primarily apply pragmatic and ethical adversarialism, followed by pragmatic blaming and claims of change, moral justifications about due process, and ethical excuses about age and own life histories. Normalization emerges as a third strategy, where parents explicitly aim to widen the scope of parental normality and adequacy, challenging the defense dichotomy.

While article 3 approaches a small sample in-depth, article 4 takes a broader approach in exploring birth parents' engagement, by studying all cases decided between 2012 and 2016 in Norway. The study asks which arguments parents use to assert their care rights and whether there are differences in arguments depending on the parents' problems or risks. The analysis reveals that parents primarily both justify and excuse their risks and

in two-thirds of cases use rationalizations to assert their care rights. Parents primarily deny harm and pinpoint (failed) service provision efforts, as well as excuse their situation by claiming sufficient change and placing blame on child welfare services and others. Parents' rationalizations do not defend their parenting as such, but claim normalcy and deservingness, as well as echoing concerns raised by social work and legal professionals. Besides a parental and agency focus, as well as variation in arguments across parental risks, the analysis reveals both alignment and misalignment in the understanding of acceptable state intervention and responsibilities.

In sum, the thesis paves new ground in its approach of legitimation through arguments from both government and governed concerning a complex State intervention into family life.

List of abbreviations, translations

CWS	Child Welfare Services (Barneverntjenesten)
CWA	Norwegian Child Welfare Act of 1992 (Lov om Barneverntjenester av 1992)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
County Board	County Social Welfare Board (Fylkesnemnda for barnevern og sosiale saker)

List of publications

Article 1

Juhasz, I. B. Comparing justifications in newborn care orders with and without parental intellectual disability in Norway, unpublished manuscript.

Article 2

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Article 3

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Article 4

Juhasz, I. B. (2022). Asserting the right to care - birth parents' arguments in newborn care orders, *Journal of Social Work,* OnlineFirst. https://doi.org/10.1177/1468017322110969

Contents

1. Introduction

This doctoral thesis studies legitimation through arguments and reasons provided by two parties involved in a serious child welfare intervention. These parties are the State, through its child welfare system, and birth parents, asserting their care rights. This introductory section lays out the general approach to democratic legitimacy in the context of child welfare, presents the research questions steering the thesis work, displays the distribution of research questions and foci across the four individual articles, and lays out the structure and purpose of the framing introduction.

1.1. Democratic legitimacy and child welfare

A primary concern for modern, liberal democracies is ensuring their citizens' basic rights and freedoms. States maintain legitimacy by actively ensuring their citizens' possibilities for self-fulfillment and participation, while simultaneously preventing external restraints on private life. This tension has become particularly visible in the modern-day welfare state. Here, critical decisions are made on a day-to-day basis by front-line welfare state employees. Said welfare decisions can on one level be legitimate if the laws and policies underpinning them are created by, and through, democratic practices and procedures – when all citizens can participate in collective political decision-making (Dahl 1989). However, the rise of the complex and intricate modern welfare bureaucracy has changed the nature of the relationship between the state and its citizens (Handler 1983). Decision-making, service provision, and distribution of welfare have moved out of the parliamentary bodies and committees in which they were created, and into the *black hole of democracy* (Rothstein 1998). Within this hole, decision-makers decide over the welfare of citizens, create boundaries and decide who in reality gets what, when, and how. The distance between citizen engagement with and influence over their governments through democratic, electoral processes, and the end services they end up receiving as a product of these processes becomes problematic, as it erases and blocks visibility, control, and public accountability over implementation, assessment, and decision-making processes (Bovens 2007; Jørgensen 2016; Rothstein 2009). As such, while the input side of the political system may be democratically

legitimate, the output may not. This is a central reason why legitimate State authority needs to be seen through the lens of the quality of policies reaching out to citizens.

The central, crucial mechanism involved in this welfare expansion and bureaucratization is the delegation of discretionary authority to decision-makers in implementing law and policy. The working, socio-legal definition of discretion as it is used through the course of this study is the adaption, discussion, and application of relevant yet general legal rules to specific, individual cases (Handler 1983; Lens 2012; Brodkin 2020; Hawkins 1992a). Discretion is a prerequisite for decision-makers to treat individual cases appropriately and individually. One size does not fit all and discretion makes it possible to tailor a broad and complex set of welfare services to specific individuals or families. As the black hole of democracy narrative and following potential for lack of accountability alludes to, delegating discretion to decision-makers comes with the pitfall of decision-makers establishing non-written rules of thumb and biases in making decisions. This may result in arbitrariness, a lack of predictability, and unjustified unequal or equal treatment of contexts and situations (Molander 2016; Molander, Grimen, and Eriksen 2012). As such, when State authority to intervene is necessary, it must be ensured that it be maintained and exercised fairly.

The thesis explores a complex and sensitive part of modern welfare bureaucracy - that of intervention in families to safeguard children. The Norwegian response to child welfare is "ensuring that children and youth living under circumstances harmful to their health and development receive necessary and timely help and care" (Barnevernloven 1992). In the child welfare system, the tension between negative and positive freedoms translates to balancing the best interest of the child and maintaining children's rights, while simultaneously securing citizens' rights to privacy and respect for family life on the other by intervening no more than necessary (CRC 1989; European Convention on Human Rights, 2010/1953). At the core of this tension between necessary intervention and unnecessary intrusion is the threshold the State sets for intervention to safeguard children. When revoking care rights from parents and placing children with alternative

caregivers, for example, the State draws the boundary between private and public responsibility for children.

This thesis takes a novel approach to exploring legitimation through arguments and reasons provided as justifications by two (of the three) parties involved in a serious child welfare intervention[1]. These are the State, through its child welfare system street-level bureaucrats - legal decision-makers in the County Board - on the one hand, and the birth parents as affected parties and engaged citizens asserting their care rights on the other. Arguments and reasons provided in care order decisions are seen as rational justifications for (non-)intervention into family life and of state power, within a deliberative approach to democracy (Cohen 1997; Habermas 1996; Peter 2007). Arguments and reason-giving in care proceedings are seen as processes of *communicative legitimacy* (Kihlström 2020). They represent the practical enactment of the politically and legally established threshold for intervention into family life and removing a newborn child from parental care and the following counter-arguments towards this threshold. As child welfare is a particularly complex and sensitive part of welfare provision, mostly inaccessible and 'hidden' from the general public (Burns et al. 2019), it is accordingly essential to subject it to research. Knowledge about the reality of these interventions is the only way in which they can be held to a standard of fairness.

1.2. Research questions

The empirical point of entry for the thesis is child welfare care order decisions involving newborn children. In these decisions, an infant is sought removed from the care of his or her birth parents, including the revoking of the parents' care rights and placement of the infant in alternative care. For the past decade, there has been an upsurge in care orders of newborns in Norway, before a decline starting in 2018 (Sentralenheten for Fylkesnemnda for Barnevern og sosiale saker, 2022). In some countries, care orders of

[1]Children are naturally at the center of child welfare decision-making. Research highlights the need for child centrism and the lack of child participation in such proceedings (Magnussen and Skivenes 2015; McEwan-Strand and Skivenes 2020; Gerdts-Andresen and Aarum Hansen 2021). These legal and formal rights are no different in care orders of newborns. However, there are natural reasons for not being able to research infants' argumentative participation in care orders. This thesis focuses on birth parents, whos' care rights are infringed and family lives intervened into.

newborns have increased exponentially in recent years (Broadhurst et al. 2018). As part of a prevention and early intervention focus informed by studies on adverse childhood experiences, as well as developmental psychology and neuroscience research, there has been a shift in focus on the youngest children in the child welfare system. As Dwyer states, albeit from a U.S. context, "newborns are simply different from older children, a basic fact that the child protection system and legal scholars have failed to fully recognize" (Dwyer 2008, 409) While research describes the developmental benefits of early interventions, these interventions simultaneously carry with them specific issues related to legitimacy and the rule of law. In these cases, because birth parents have cared minimally for the child or not at all and because there is some level of uncertainty connected with intervening at birth, a higher threshold for intervention has been set in Norwegian legislation (Oppedal 2008). Furthermore, like most serious child welfare interventions, decision-making is challenging due to the necessary balancing act between several competing, normative principles that do not necessarily harmonize, such as the best interest of the child, intervening as little as necessary, and working towards children being raised in their family of origin (Berrick 2018). The puzzle becomes how to ensure that decision-makers make fair life-changing decisions while also managing at times conflicting instructions. As such, the following research question has steered the progression of the thesis:

How are care order decisions assessed and legitimized?

The overarching research question approaches two legitimation processes involving care orders and the revoking of care rights. Firstly, the thesis seeks to understand *State legitimation processes through legal assessments and arguments substantiating care order decisions of newborns*. Two sub-research questions pursue this theme and are answered across the first two articles. These are

1) Which case factors are emphasized in justifications for care order decisions with parental intellectual disability (ID) compared to cases without?

and

2) What arguments and evidence substantiate and justify conclusions about a newborn child's best interest?

The second research question captures the centrality of the child's best interests principle in newborn care order decisions. While these decisions are anchored in this principle, they are ultimately in practice oriented towards the risks of harm to the child, and the child's best interests as, ideally, the absence of said risks. Secondly, the thesis probes legitimation processes through birth parents' *argumentative engagement with, and opposition to, care interventions.* By analyzing birth parents' arguments against a care order, the thesis elicits citizens' substantial engagement with the State in a specific context. This study goes beyond more common research approaches of measuring either citizens' levels of trust or confidence in welfare systems and service, or as parents' experiences and levels of participation with child welfare services, by examining parents' substantive and argumentative engagement with the legal realm. Parents' arguments are analyzed as both empirical understandings of a sufficient parenting threshold, as well as expressions of norms and values applied to assert the right to parent one's biological child. Two sub-research questions pursue this theme and are answered across the two last articles. These are:

3) On what grounds do parents appeal care order cases?

and

4) What arguments do parents use to support their care rights?

In sum, these four research questions jointly contribute to understanding the legitimation processes invoked to support and oppose care order interventions and the revoking of care rights.

1.3. The individual articles

As mentioned, answers to the research questions are sought throughout four individual articles:

Article 1 approaches the total sample of written newborn care order decisions (N=177) from the County Board over five years (2012-2016), exploring the fundamental tension between formal justice and the delegation of discretion. The article asks how the formal principle of justice is upheld, by whether similar cases are treated similarly. This is examined by comparing legal outcomes and risk factor emphasis in cases with and without parental ID. Under analysis are established risk factors across three domains, that of the parents, child, and environment, and how they are assessed across cases with and without parental ID. Of interest is conformity or variation across cases, and whether relevant similarities or differences are evident.

Article 2 examines newborn care orders in a context of the utmost uncertainty, where hypothetical parenting capacities are assessed. Through an in-depth analysis of all newborn care order decisions (N=19) from one year (2016) where the parents have their first child subjected to care proceedings, the paper asks what arguments and evidence substantiate and justify conclusions about a newborn child's best interests. Under analysis is how the County Board assesses parents' problems or problematic behavior and subsequent capacity for change.

Article 3 explores on what grounds parents appeal care order cases – how they defend their right to care for their children. This is done by approaching all ordinary care order judgments appealed to, and decided by, one Norwegian District Court (N=15) in 2012. The analysis captures parents' grounds for appealing care order decisions through the accounts evident in their arguments, resting in the sociology of accounts literature. The aim is to capture the intent of the appeal. In combination with the accounts provided in face of claims of untoward behavior, the norms resting within them are also explored.

Article 4 similarly approaches birth parents' arguments as processes of legitimation. Due to the particularities of intervention at birth, however, the aim is to elicit how parents question state intervention at the outset of parenting. This study analyses all written newborn care order decisions from the County Board between 2012 and 2016, where parents oppose the placement (N=132). The research design in part replicates the *accounts* framework from article 3, approaching the intents with written opposition claims from parents. However, the study also investigates which case factors parents focus on, to complement the contributions from articles 1 and 2 on what case factors figure in the County Board justifications.

The project has gained access to, and utilizes, a unique material, that of all (N=177) newborn care order decisions from the Norwegian County Social Welfare Board decided between 2012-2016. As such, a central part of the thesis has been gaining an initial descriptive overview of the cases, as a premise for further analyses across articles 1, 2, and 4. Article 3 explores general care orders, specifically cases appealed to a District Court. This article investigates justifications in a somewhat different context, to distinguish both characteristics of appeal proceedings as an accountability measure and discretionary control mechanism, as well as to elicit potential particularities in reasoning in the newborn context versus cases with older children and more care history. Table 1 gives an overview of the four articles, including the overarching topic, the research questions, as well as the methodological design and approach.

Table 1. Overview of the individual articles

Topic	**Article**	**Research question**	**Methods - design and approach**
State legitimation of intervention	1. Comparing justifications in newborn care orders with and without parental intellectual disability in Norway	*Which case factors are emphasized in justifications for care order decisions with parental intellectual disability (ID) compared to cases without?*	Comparative inductive content analysis of County Board justifications in all 177 newborn care order decisions, between cases with and without parental ID
	2. Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway	*What arguments and evidence substantiate and justify conclusions about a child's best interest?*	In-depth inductive content analysis of County Board justifications in all 19 newborn, first-born care order decisions from 2016
Parent legitimation of care rights	3. Defending parenthood: A look at parents' legal argumentation in Norwegian care order appeal proceedings	*On what grounds do parents appeal care order cases?*	In-depth argumentation analysis of parents' opposition arguments in 15 written care order appeal judgments
	4. Asserting the right to care - birth parents' arguments in newborn care orders	*What arguments do parents use to support their care rights?*	Abductive content analysis of parents' opposition arguments in 132 newborn care order decisions

1.4. Framing introduction structure and purpose

Apart from, and as a supplement to, the individual articles in the thesis, this framing introduction is intended to provide an additional overview and synthesis of the connection between the research questions and conclusions across the four articles. It connects the articles to the existing research field(s) and outlines and connects the articles to a broader and overarching theoretical framework which can be seen through the lens of communicative legitimacy. In the methods section, some additional

explanations and reflections are presented, related to the data material, the analyses, limitations of the study and ethical considerations. Furthermore, new descriptive characteristics of newborn care orders in Norway are presented in the results section, which have not been systematized or presented previously. Finally, three main findings are discussed, as well as the implications that can be derived from them. Theory and methods are reflected upon, before ending the framing introduction with some concluding remarks.

2. The Norwegian context for child welfare care orders

Section 2 provides a contextual frame for this study of legitimation of stark interventions into the private sphere and families – the Norwegian child welfare system. This includes an overview of certain systemic features characterizing the Norwegian system - early intervention, parents' engagement and user involvement in child welfare, newborns in the Norwegian context, the structures within which the decisions are made, the institutions and decision-makers making the decisions, as well as the current climate for child welfare work in Norway. In sum, this context makes Norway on the one hand, a case comparable to other contexts, but on the other, also a unique case.

2.1. A systemic view on Norwegian child welfare

A starting point for this thesis is that systemic features affect how welfare decisions are made and how professional discretion is structured and utilized. Central for a system perspective on child welfare is that most high-income countries' child welfare systems are based on the same basic principles, that family or parents have the primary responsibility for their children, that removals from birth parents should be temporary, and that the welfare or best interest of the child should be considered (Burns, Pösö, and Skivenes 2017; cf. Skivenes and Sørsdal 2018, 82). As these mandates allude to, child welfare systems are delegated a critical but necessary social responsibility.

Different child welfare systems are identified and distinguished by their risk perceptions and varying thresholds for state intervention (Berrick, Gilbert, and Skivenes in press; Gilbert 1997; Gilbert, Parton, and Skivenes 2011; Skivenes et al. 2015). In Norway, common ground exists between the child welfare orientation and the broader social democratic welfare state, which is characterized by its tight safety net and a broad spectrum of universal welfare services (Pösö, Skivenes, and Hestbæk 2014). Norwegian child welfare is currently described as family service-oriented, child-centric, and child rights-protective (Berrick, Gilbert, and Skivenes in press; Skivenes 2011). In Norway, child welfare law and jurisprudence build on three main principles. These are the biological principle, the principle of least intrusive intervention, and the principle of the best interest of the child, anchored in the UN Convention on the Rights of the Child (CRC). The principle of the best interest of the child takes legal center stage for all

welfare and social work related to children and was incorporated into the Norwegian constitution in 2014, which now has article 104 stating that "For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration" (Kongeriket Norges Grunnlov (Constitution) 1814/2014). These legal principles in sum serve to steer child welfare practice and legal decision-making, which is described as providing early intervention services to children and families in at-risk situations to prevent future harm to the child (Skivenes, 2011). This approach is seen as taking a therapeutic view of rehabilitation in which people can revise and improve their lifestyles and behaviors (ibid). Early intervention services function as, for example, financial and social compensation, increased control or monitoring, or assistance in increasing the parents' care capabilities, depending on the need of the family (Bufdir 2015). These services are administered at the agency (which is also the municipality) level. As part of the family service orientation, the child welfare agency attempts to avoid placing children outside their homes through these in-home services, and it is only when these services have proven themselves to be of no use, or are assessed as ineffective, that a care order can be sought through legal proceedings (Skivenes 2011).

From the early 1990s, it has been claimed that Norwegian child welfare work has increasingly oriented itself towards parents' or children's problems and needs. Child neglect is increasingly seen as a result of these individual needs, rather than as directly connected to how socio-economic factors, poverty, and marginalization can trigger child abuse, neglect, and following interventions (Ogden and Backe-Hansen 1994). It has been claimed that this "individualist" perspective has contributed to both investigations and services focusing more on consequential problems such as emotional parenting skills rather than on families' fundamental problems (Haugland 2020).

Finally, the basis for child welfare decision-making in the Norwegian context, as in most other developed systems, is the premise that decisions should not result from coincidences, moral reactions, or the individual caseworker's personal preferences. Rather, decisions should be grounded in scientific knowledge, following research evidence, and widely accepted theoretical models (Christiansen and Kojan 2016, 21).

The type of child welfare system thus serves as an important contextual indicator for the threshold for and types of intervention, types of challenges facing families at risk, as well as decision-making practices (Skivenes and Søvig 2017).

2.2. Early intervention and the newborn subset in Norwegian child welfare

In protecting and safeguarding the youngest subset of children, most developed systems do perform some form of removal at birth where infants need immediate protection, but the dimensions in which this happens vary between systems (Burns, Pösö, and Skivenes 2017; Gilbert, Parton, and Skivenes 2011; Hestbæk et al. 2020). Nonetheless, placing the youngest children and infants can be seen as a larger and gradual welfare state movement towards prevention and early intervention (Exford and Berry 2018). The central idea is to intervene early to prevent exposure to adverse experiences and increase the possibilities for good life quality as adults. This shift is largely motivated by some well-established research camps. Most prominent in the child welfare field are the Adverse Childhood Experiences studies from the U.S. (CDC 2021). Furthermore, and connected to these studies, is the emerging knowledge base from neurobiology on adverse childhood and infancy experiences' impact on brain development. Explicit connections have been established between experiences of neglect or abuse and the development of cognitive and emotional deficiencies. This is explained by the development of altered nerve connections in the brain and the lack of formative experiences and stimuli essential for brain development (Braarud 2012; Dwyer 2008; Filippa, Kuhn, and Westrup 2017; Herrod 2007; Wulczyn et al. 2005). Psychological attachment theory is also a central pillar in the increased focus on early intervention (Dozier, Zeanah, and Bernard 2013; Hestbæk et al. 2020; Zeanah 2009). In England, the rationale for intervening early has been more explicitly linked to crime prevention than in other countries (Parton 2014, 29).

Norwegian studies on risk groups for maltreatment in child welfare also emphasize the significance of the first years of life (Hansen and Jacobsen 2008, cf. Clausen and Valset 2012; Slinning et al. 2010). Research communities are not established on newborns in child welfare specifically, despite valuable knowledge about the subset with regards to

development. The recent report released about the CWS' responsibility for the unborn requested by The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir) may be a signal that newborns are emerging even more as a specific population of interest for the child welfare system (Netland, Stavrum, and Söderström 2021).

More has been done on the infant subset and decision-making in child welfare interventions internationally (Broadhurst et al. 2015; Gregory-Wilson et al. 2021; Masson and Dickens 2015; Ward, Brown, and Westlake 2012), with Britain, the U.S., and Australia among the forerunners in established research knowledge on newborns in the child welfare context. The Nuffield Family Justice Observatory's *Born into Care* from 2018 is the first-ever national study of newborn babies (under one week old) in the family justice system in England (Broadhurst et al. 2018). Key observations from the interventions were delayed response and insufficient time for robust pre-birth assessments, the importance of effective, collaborative relationships, the psychological impact this type of intervention has on those involved, and the insufficiency of current levels of professional knowledge and guidance (ibid). Harriet Ward and colleagues have also published significant studies both related to safeguarding babies at risk of significant harm (Ward, Brown, and Westlake 2012) and assessing parents' capacity to change (Ward, Brown, and Hyde-Dryden 2014) in the U.K. context. In 2014, researchers published a reworked Common Assessment Framework to fit a newborn context, incorporating research on factors relevant to the youngest children in the child welfare system (Barlow et al. 2014).[2] Central and distinct from the general framework are a baby's developmental needs, in addition to parenting capacity and family and environment. These factors are central when making case-specific considerations and assessments.

[2] English decision-makers utilize The Common Assessment Framework as a professional tool in order to analyze, understand and record essential factors when there is concern for a child's safety, health and/or wellbeing (Department of Health 2000). This framework covers three inter-related domains with associated critical dimensions for each domain. The framework has been transferred to, amongst other contexts, a Scandinavian one (Barns behov i centrum, BBIC, n.d.)

Due to the system's focus on family service, a prevailing trend has been that in contrast to the UK and U.S., children placed out-of-home in the Nordic child welfare systems have mainly been adolescents and only rarely infants or young children (Hestbæk et al. 2020; Pösö, Skivenes, and Hestbæk 2014). Care orders of newborns, where the rights of the parents are distinctly restricted, represent a low-frequent phenomenon relative to care orders involving older children. However, Norway has till recently lead the Nordic countries in the number of care orders in this group (infants 0-11 months). The number of infants placed through a care order in Norway in 2016 was almost four times as high as in Sweden, Denmark, or Finland, with 2.4 per 1000 infants placed (Hestbæk et al. 2020). Since 2018 however, the numbers have decreased in Norway. Table 1 below illustrates this drop in newborn care orders over the past four years.

Table 2: Decisions made anchored in CWA Section 4-8, 2. Section, and Section 4-12 regarding care orders of newborns

Year	**Number of decisions**	**Number of children**	**Cases decided in favor of CWS**
2021	18	18	100%
2020	15	16	100%
2019	15	16	100 %
2018	29	31	97 %
2017	25	25	96 %

Source: Central Office for the County Social Welfare Boards (Sentralenheten for fylkesnemndene for barnevern og sosiale saker)

As evident in the figures, the number of newborn care orders is on the decline. Possible explanations may be substantial effects of the ECtHR scrutiny and confirmed violations of human rights, as well as more practical consequences of the Covid-19 outbreak, but these possible reasons need further substantiation. Some will be discussed in the final section.

2.3. User involvement and parents' engagement in Norwegian child welfare

When involved with serious and involuntary child welfare proceedings, parents in the Norwegian system do have strong formal and legal rights. This becomes particularly interesting and critical in the context of newborn interventions, as will be discussed. Nationally, parents' legal and procedural rights are located both in the CWA (1992), the Legal Aid Act (1980), as well as the Civil Procedures Act (2005) governing procedures in the County Board and ordinary Courts (Barnevernloven 1992; Skivenes and Tonheim 2017; Tvisteloven 2005; Rettshjelploven 1980). In brief and unexclusively, they include legal aid and representation, access to information, participation in hearings, and the right to judicial review. Internationally, Norway has committed to securing its citizens' human rights through the European Convention on Human Rights (European Convention on Human Rights, 2010).

The demographic involved in care proceedings, both in Norway and on a global scale, is known to be marginalized families with poorer living conditions, lower levels of education, weaker links to the labor market, and increased poverty risks (Backe-Hansen et al. 2014; Bywaters et al. 2016, 2015; Clausen and Kristofersen 2008; Kojan and Clifford 2018; Kojan and Storhaug 2021). This puts additional and critical strain on rights assertion and participation. As lack of participation and representation of the families involved in child welfare has been identified, user participation has increasingly been emphasized and valued over the past decade(s) (Slettebø 2008; Slettebø and Seim 2007; Willumsen 2005). Concerning parents specifically, user perspectives can be grouped across different domains. As perceptions and voices of birth parents are rarely prioritized in dominant discourses of professional practice in the child welfare area (Smeeton and Boxall 2011), much Norwegian research has focused on system and professional workers' perceptions of parent engagement (Berrick et al. 2017; Fylkesnes et al. 2015; Otterlei and Studsrød 2021; Syrstad and Ness 2021). The knowledge from the Norwegian context that does exist is typically in the form of cognitive and emotional reactions and experiences with workers and the system, as well as more direct experiences with service engagement and interventions (Marthinsen and Lichtwarck 2013; Otterlei and Engebretsen 2021; Rørvik 2005; Samsonsen and Willumsen 2015;

Slettebø 2013, 2008; Storhaug 2013; Studsrød, Ellingsen, and Willumsen 2016; Studsrød, Willumsen, and Ellingsen 2012; Tøssebro et al. 2014).

Not much knowledge exists on parents' engagement in the legal realm of the child welfare system. International research indicates that parents often disengage, experience fear, confusion, and feel overwhelmed in and by the legal process (Sankaran 2010; Sankaran and Lander 2007; Lens 2017; Thomson, McArthur, and Camilleri 2017; Masson and Dickens 2015; Cleveland and Quas 2020; O'Mahony et al. 2016). Current British research on birth parents' and 'consent' in adoption proceedings from care explain that parents' views change throughout the adoption process. Care proceedings could be traumatic, parents lacked understanding, and disparities existed in the quality of legal advice and social work support that birth parents received (Lewis 2022). This highlights the complexity and challenges involved in securing participation from this group. As such, knowledge is needed about parents' substantial engagement with involuntary child welfare interventions.

2.4. Deciding care orders (of newborns) in Norway

In its targeting of newborns, Norwegian child welfare legislation is specific. Care orders of newborns directly from the hospital involve two separate paragraphs in the Norwegian Child Welfare Act (CWA). There needs to be *a high probability that a situation or risk of harm will occur if a newborn moves home with her or his parents*, anchored in section 4-8, clause 2 of the CWA. This *situation or risk of harm* is described in the main care order provision, Section 4-12 of the CWA, directed towards children who live at home with their parents and are under their care. It lists the criteria for removal of a child from its parents' care, and at least one of these must be fulfilled:

> *(a) if there are serious deficiencies in the everyday care received by the child, or serious deficiencies in terms of the personal contact and security needed by a child of his or her age and development,*

(b) if the parents fail to ensure that a child who is ill, disabled, or in special need of assistance receives the treatment and training required,

(c) if the child is mistreated or subjected to other serious abuses at home, or

(d) if it is highly probable that the child's health or development may be seriously harmed because the parents are unable to take adequate responsibility for the child.

Newborn care order proceedings start with an interim care order, made by the CWS leader at the hospital, under Section 4-9 of the CWA. It must be approved through a legality check by the County Board within 48 hours. The CWS then has six weeks to build their case and promote an application for the regular newborn removal through Section 4-8 cf. Section 4-12 of the CWA. The necessary professional case preparation is undertaken by the child welfare agency, which sends the case material substantiating the decision to the County Board (Skivenes and Tonheim 2017). The standard of proof for regular newborn removals is strict, due to the severity of the intervention, the complexity of the evidence base, and the necessity of a prediction of a future situation (Ofstad & Skar, 2015; Oppedal, 2008, p. 270). Lindboe states that this uncertainty and intrusiveness at birth is why the threshold for newborn interventions is higher than ordinary care orders for children who have been in their birth parents' care (Lindboe 2007).

Newborns are typically placed directly from the hospital into interim foster care. The parents can contest the interim placement and legality check, by filing a complaint. If the complaint is dismissed, which it typically is, the parties meet again for formal care proceedings. These proceedings last typically 2-3 days, where both parties (CWS and private parties) present their arguments orally. Deliberations between the decision-makers, described in the next section, follow this hearing, and a final decision is made and written (Skivenes and Søvig 2017). In recent years, Alternative Dispute Resolution proceedings (samtaleprosess) have been piloted and implemented as an alternative to

adversarial hearings (Fylkesnemndene for barnevern og sosiale saker 2022; Viblemo et al. 2019). The adversarial form was the norm over the years covered by the data material.

The authority to make decisions about care rights and child placements in Norway lies with the County Board. There are ten regional County Boards, all headed by a Central Office, and they describe themselves as "court-like, independent government agencies" (Fylkesnemndene for barnevern og sosiale saker 2019).[3] Formally, the County Boards are government agencies subordinate to the Ministry of Children and Equality. Neither the Ministry nor the County Governor can review the decisions, however. A decision made by a County Board may only be appealed to, and reviewed by, the courts. The County Board is therefore considered independent (Skivenes and Tonheim 2018; Skivenes and Søvig 2017). They are also court-like in that the procedural rules are based on the Dispute Act governing court procedures for all civil disputes (Tvisteloven 2005). Still, as opposed to the typical unitary, generalist Norwegian court system, the County Board has been described as a 'somewhat unique solution for Norway' (Andersland 2011), given that the country has only three specialized courts, and does not have a separate administrative court system. Serious proposals to discontinue the County Boards and have the District Court be the first legal instance for child removals have been put forward in recent years (Justis- og beredskapsdepartementet and Barne- og likestillingsdepartementet 2017). The government has dismissed these proposals, however, on the grounds of a desire to "safeguard the judiciary's role as a controller of the government in the child welfare cases" (ibid).

The County Board bench assessing and applying child welfare law is an interdisciplinary unit, normally made up of three members.[4] These are the legal member, who is a lawyer and the Chair of the bench, one expert member (most often a psychologist or other expert in child development such as a medical doctor or specialized social worker), as well as one layperson. The Norwegian model has been described as a hybrid model within child

[3] As the individual articles 1,2 and 4 also specify, the implementation of regional and municipality reforms between 2016-2020 reduced the number of County Boards in Norway from 12 to 10.
[4] When all parties agree, the case can be subjected to a 'simplified treatment', where the case is decided based on written material, without a hearing, and by the County Board Chair alone.

welfare decision-making (Hultman, Forkby, and Höjer 2020). The interdisciplinarity is intended to provide the necessary legal competence and knowledge about children's health, development, and needs, as well as the legitimacy and knowledge from 'the public', as such securing due process (Falck and Havik 2000; Skivenes and Tonheim 2017).

In line with the court-like, independent nature of the County Board, and its placement as the first instance in legal child welfare matters, legal culture provides an important perspective in understanding decision-making and reasoning in this arena. Crudely articulated, elements such as the single court hierarchy headed by the Supreme Court passing down precedent, mostly generalist judges, the preference for statutes and decrees to codes of law, and the prevalence of multiple legal sources (preparatory work, custom, and value-based considerations) may be labeled as essential parts of the Norwegian legal culture (Sunde 2017, 15). Furthermore, the idea of justice in the Norwegian legal system is said to be not strict predictability, but adjustment of law through the appliance, ensuring an equitable result in individual cases (Sunde 2017, 22). The legal expertise, mandate, and legislation regulating the County Board as well as the Courts in child welfare matters constitute a presumption that legal culture in the County Boards does not deviate much from the Courts, despite it being specialized in child welfare matters (Barnevernloven 1992; Tvisteloven 2005). In addition to scientific knowledge about child development and parental risk, as well as the legal sources mentioned, central principles, case law, governmental practice as well as broader legal theory and general perceptions of fairness and justice all play into the decision-making process (Eckhoff 1971, cf. Skivenes and Søvig 2017).

2.5. Current climate for Norwegian child welfare

An additional element currently impacting decision-making in Norwegian child welfare is the heightened political, legal, and public criticism that has come over the past half-decade. Nationally, government-appointed working groups, the Norwegian Board of Health Supervision as well as local audits have identified worrisome trends in the landscape of serious child abuse and neglect. This includes lack of service provision, lack of governmental response, and lack of due process at all governing levels (Sasaoka

et al. 2020; Andersen 2019; Helsetilsynet 2022). Various stakeholders in Norway have simultaneously mobilized and are questioning the quality of the child welfare system (Thune et al. 2015). In March 2021, a public expert committee was appointed to assess how to improve the legal safeguards for children and families involved in the Norwegian child welfare system (Barnevernsutvalget 2021).

Internationally, 43[5] child welfare cases from Norway have been communicated[6] by the ECtHR since 2015. A total of 14 have ended in established human rights violations of the right to respect for family life (article 8 of the ECHR). Several of these cases have concerned children in their infancies. [7] Claims and violations have unexclusively concerned procedural aspects relating to documentation and thorough case assessments, as well as the national courts' anticipated 'permanence' of the placements and thus limited contact granted between birth parents and children. This has been connected to minimizing the chances of attachment and reunification between birth parents and children from the outset, which has been seen to conflict with the intention of the law (Barne- og familiedepartementet 2020). Lack of sufficient follow-up for Norwegian parents who have been subjected to care orders and have had their children placed in care has also been identified. The Norwegian government has therefore put a special focus on such improvement, after insights about the impacts such intervention has on parents' health and functioning, as well as possibilities for continued parenthood (Slettebø 2009). Considering the judgments from the ECtHR, the impression might be that the Norwegian state is failing both on procedural terms, by not securing due process in child welfare interventions, and on substantive terms, by misinterpreting legislation and legal principles. These mentioned audits and judgments serve as examples of a voiced need for more knowledge about what occurs in day-to-day child welfare work, and on what grounds intrusive decisions are made.

In sum, Norway thus stands out as both a comparable and also unique case in which to study serious child welfare interventions. The Norwegian system is comparable to other

[5] As of March 10th, 2022.
[6] That a case has been 'communicated' entails that the ECtHR addresses the involved parties and asks for their opinions on all or parts of a case matter. It is still possible for a case to be dismissed at this point.
[7] *See i.e., Strand Lobben vs. Norway, K.O. & V.M. vs. Norway, M.L. vs. Norway.*

family service and child-centric and protective child welfare systems, such as the Nordic countries, as well as systemic elements identifiable in several other European countries. On the other hand, the current climate for, and international spotlight on, Norwegian child welfare is exceptional. Parents have in one sense been granted an increased opportunity to have their voices heard and human rights status assessed by a supranational Court, which again has identified violations in Norwegian child welfare practice. This makes it a critical case in which to be able to probe legitimation processes.

3. Building a theoretical framework

This thesis paves new ground in that it approaches arguments and reasoning from both government and a particular group of 'governed' as legitimation processes of and in a complex child welfare intervention. While the previous section provided contextual insights about intervention in the Norwegian child welfare system, this section aims to establish a wider theoretical platform. Due to the interdisciplinarity embedded both in the research questions, as well as the empirical field, a singular 'research front' is difficult to discern. Section 3 as such has a two-fold purpose. On the one hand, it provides a research review on the essential theoretical concepts and perspectives in the thesis – street-level bureaucracy and discretion in the welfare state. As part of this, these concepts and mechanisms as evident in current child welfare research are presented. Secondly, subsection 3.3 as such maps out the theoretical approach to State and parents' arguments in care orders as expressions of communicative legitimacy. This approach entails seeing both parties as rational actors in a legal discourse participating through reason-giving and argumentation on issues that are both empirical and normative. As the overarching research question is concerned with arguments intended to (de-)legitimize care order intervention, the theoretical approach provides tools with which these mechanisms can be understood.

3.1. Street-level bureaucracy, discretion, and trust in the welfare state

Agencies and institutions within the welfare state have for decades been seen as *street-level bureaucracies,* as notoriously labeled by Michel Lipsky. These are "the schools, police and welfare departments, lower courts, legal services offices, and other agencies whose workers interact with and have wide discretion over the dispensation of benefits or the allocation of public sanctions" (Lipsky 2010, xi). Street-level bureaucrats are then those "public service workers, who interact directly with citizens in the course of their jobs (…) and have substantial discretion in the execution of their work" (Lipsky 2010, 3). Structures such as law, policy, and guidelines are in place to shape and aid this work. However, (administrative) practice at the street level is inherently bound by tradition, experience, norms, materialities, peer pressure, and background knowledge (Wagenaar 2020). Street-level workers' decisions, routines, and coping mechanisms therefore effectively become the public policies they carry out (Lipsky 2010, xiii). As such, these

workers constitute the *de facto* implementers of law, through the everyday work with citizens. This is as opposed to policymakers, legislators, and those bureaucrats who are officially tasked with creating and implementing policy. As Rothstein (2008) explains, the need for *situational adjustment* and *scarcity of time* challenges the democratic process in decision-making in these systems. Due to these critical institutional limits, frontline workers face painful moral dilemmas when attempting to satisfy both their clients and their organizations (Wagenaar 2020, 260–61). How the tensions, dilemmas, and sometimes contradictions embodied in the law are worked out in practice is seen as *law in action,* as opposed to *the law on the books* (Artis 2004, 771). Discretion as such becomes the tool that facilitates the transition of law from books to application in practice.

Historically, discretion has primarily been studied by legal scholars. It has been approached as a continuum where stringent rules are located on the one end, and complete freedom of choice because of the lack of rules, on the other. Legal philosopher Ronald Dworkin captured this distinction through an eloquent donut analogy, where discretion, "like the hole in a donut, does not exist except as an area left open by a surrounding belt of restriction. It is, therefore, a relative concept" (Dworkin, 2013 [1977], p. 48). The donut analogy can be connected to an epistemic-structural distinction used by Robert Alexy, concerning the sources of discretion (Alexy 1999, 1989; Klatt 2007). While structural discretion is constituted by the limits of what the law commands and prohibits, epistemic discretion concerns the activity of judgment. The structure-epistemic divide is further developed by Molander et al. (2012). They differentiate between *discretionary space,* the formalized structures that decision-makers work within (such as legislation, guidelines, and other policy documents), and *discretionary reasoning,* how the decision-makers apply heuristics and knowledge to justify their decisions (Molander et al., 2012). In this vein, Larsson and Jacobson (2013) emphasize the procedural and substantive dimensions that this way of understanding discretion implies. As procedural and substantial legal rules exist, the authors propose a similar dichotomy for discretion. Decision-makers utilize discretion both in procedural aspects of how to make the decision, as well as in the substantial considerations of the case matter, what the case *is*, and which decision needs to be made.

The rules-discretion continuum is also reflected in the reasons for accepting the delegation of discretion. Discretion has on one end then been seen as an individual power posing a significant threat to law and justice, in need of confinement and built-in constraints and accountability measures (Davis 1970; Dicey 1982). Extensive discretionary powers within the welfare state are said to threaten predictability and legality. This undermines democratic control of the policy implementation by street-level bureaucrats, creating the black hole of democracy where these decisions ultimately are made (Molander et al., 2012; Wallander & Molander, 2014). This is due to the perspective on individualized judgment as potentially overriding the criteria of an individual's legal rights in terms of predictability and equal treatment before the law (Ottosen 2006). Discretionary behavior has been said to sever the crucial connection between democratically established law and administrative behavior, evoking a specter of arbitrary, unjust, unlawful behavior by the state (Wagenaar 2020, 260).

At the other end of the continuum, discretion is seen as a crucial mechanism facilitating necessary individualized treatment, flexibility, and the actual functioning of the legal system, managing the lack of fit between legal rhetoric and reality (Evans and Harris 2004; McBarnet 1981; Molander, Grimen, and Eriksen 2012). On this end, it must be accepted that crucial and potentially life-changing decisions for an individual always lack democratic legitimacy in a sense, for the simple reason that no democratically chosen assembly can have any decisive influence over them (Rothstein 1998). As such, it is seen as both inevitable and ineludible, and the only way in which to make formal rules work in the real world of poverty, welfare, policing and teaching (Hupe and Hill 2007; Lipsky 2010). The middle ground on this continuum, therefore, sees welfare organizations as having both an "important and problematic structural position within welfare state politics, where they, effectively, mediate between citizens and the state, as well as between policy and practice" (Brodkin 2020, 75). The problems arise when, and because, welfare state decision-makers exercise discretion differently; different situations may end up with the same conclusions, and vice versa, despite workers deciding rationally, to the 'best' of their ability.

Since Lipsky, the street-level bureaucracy perspective has been developed with a speed and scope much like welfare service provision has, and it has traveled across empirical fields and disciplines (Evans and Hupe 2020b; Hill, Buffat, and Hupe 2015). Central distinctions have been made about organizational structures, and how these affect both behavior and roles of street-level bureaucrats. The most critical dimensions are the size of respective bureaucracies, the type of decision-making tasks involved, and the types and specificities of policy tools in place to aid decision-making (Brodkin 2008; Evans 2020). These distinctions are highly relevant lenses through which to understand decision-making by street-level bureaucrats in various areas of the Norwegian child welfare system.

Alongside, or as a consequence of, the expansion of the welfare state and public service provision, control mechanisms, and management models have emerged through global public management reforms over the past decades (Hood & Dixon, 2015, cf. Djupvik et al. 2021). Of relevance and interest to this thesis is how these reforms and changes have aimed at curtailing discretion and the room for individual autonomy. The use of technology to aid in decision-making has been one central development in this pursuit of controlling discretion. This has been labeled *digital discretion* equates to "the use of computerized routines and analyses to influence or replace human judgment (Busch 2019). Street-level bureaucrats in some areas of welfare provision have thus been renamed screen-level bureaucrats (Bovens and Zouridis 2002). This has been examined in child welfare work in Norway and Wales, finding that Norwegians tend to work more as street-level bureaucrats directly with families, while the Welsh spend more time as screen-level workers (Djupvik et al. 2021). Interestingly enough, both sets of practitioners value their administrative duties and consider their work to be of quality (ibid). This provides yet another structural frame for discretion to operate within.

3.1.1. Discretion and child welfare

In Norway, research environments have for decades sought to understand and examine this *law in practice* in the Norwegian child welfare context (Backe-Hansen 2001, 1995;

Christiansen and Kojan 2016; Falck and Havik 2000; Grinde, Egelund, and Bunkholdt 2004; Ogden and Backe-Hansen 1994; Oterholm 2003). Decision-making in the agencies has been in focus in studies on various phases of child welfare involvement, ranging from investigations, in-home services, and emergency and care placements (Christiansen et al. 2019, 2015; Christiansen and Anderssen 2010; Jardim et al. 2020; Juhasz and Skivenes 2018). Social workers' perceptions of (thresholds for) involuntary interventions such as care orders and adoption from care have been studied (Berrick et al. 2017; Helland 2020; Tefre 2017). The impact of power, culture, migrant background and class relations in agency work has also been explored and emphasized as critical for the quality of decisions (Fauske, Kojan, and Skårstad Storhaug 2018; Fylkesnes et al. 2015; Hennum 2016; Langsrud, Fauske, and Lichtwarck 2017). Recently, comparative studies have aimed at distinguishing the legitimacy of child welfare agency practice across systems (Berrick et al. 2017, 2016; Dickens et al. 2017; Križ and Skivenes 2017).

As broader organizational and welfare agency studies have long since concluded (Hill, Buffat, and Hupe 2015; Hupe and Hill 2007; Lipsky 2010), it has subsequently been discovered that child welfare workers assess similar cases differently, as previously mentioned (Benbenishty, Osmo, and Gold 2003; Benbenishty et al. 2015; Križ and Skivenes 2015; Grinde, Egelund, and Bunkholdt 2004; Tefre 2017; Egelund and Hestbæk 2003). The same can be identified for the various professions contributing to child welfare decision-making. When substantiating ID as a parenting risk, for example, a Canadian study finds that different sources conclude differently on parenting capacity. Thus, "the mandated source of the report (ID services or CW services) seemed to be a determining factor in the conclusion of the report" (Aunos and Pacheco 2020). This suggests that the rule of law for citizens involved in child welfare seems to differ from municipality to municipality, and from social worker to social worker. Recently, discussions and research contributions are thus increasingly explicit in highlighting the crucial nature of both structural and argumentative aspects of discretion in securing high-quality child welfare decision-making (Berrick et al., 2015, 2018; Helland, 2021a, 2021b; Krutzinna and Skivenes, 2020; Magnussen and Skivenes, 2015). Included in this, comparative research on child welfare practice and legitimacy is emerging, focusing on discretion in legislation and policy (Berrick et al. 2015; Skivenes and Sørsdal 2018), as

well as the status of accountability measures, specifically investigated in adoption proceedings (Burns et al. 2019). As part of this quest to control discretion and the inevitable human limitation of not being able to accurately predict future outcomes, child welfare decision-making tools have been developed and implemented, albeit in varying scopes comparatively. Following this, their impact and effect on decision-making quality has increasingly been examined (Bartelink et al. 2014; Heggdalsvik, Rød, and Heggen 2018; Hoybye-Mortensen 2015; Sletten and Ellingsen 2020). As part of the mentioned technological advancement, methods of accurately and effectively predicting outcomes in child welfare work are also being developed (Putnam-Hornstein and Needell 2011; van Der Put, Assink, and van Solinge 2017; van der Put et al. 2017). Stepura and colleagues explain that machine learning approaches, models, and algorithms can be used to improve decision-making and lessen judgment inaccuracy due to human error (Stepura et al. 2020).

3.1.2. Public trust and child welfare

Finally, as welfare services, in general, are dependent on trust and confidence from the population in which they serve, the general populations' levels of trust in their respective child welfare systems are of vital importance. Some trust studies focus directly on measuring confidence or trust levels in the system, as well as specific components within the system. Others measure populations' perspectives on various interventions to measure alignment with policy and with perspectives from workers and decision-makers from within the system. These latter studies have measured populations' perspectives on care interventions (Berrick et al. 2020), as well perspectives on adoption from care (Helland, Pedersen, and Skivenes 2020), biases against migrants (Helland et al. 2018), and the balance between parents and children's rights (Berrick, Skivenes, and Roscoe 2022). Specific findings reveal that people in general believe that governments have a responsibility to restrict parents' freedom if a child's welfare is suffering. More than eight out of ten expect the state to demand changes in parental behavior (Skivenes 2021). Regarding explicit system (component) trust, comparative results show that about 40–50% of populations express general trust in the child welfare agencies, social workers, and judges that make decisions (Juhasz and Skivenes 2016; Skivenes and Benbenishty

in press). There are clear differences between jurisdictions, with the Anglo-American countries at the lower end of the trust scale, and the Nordic at the top (Juhasz and Skivenes 2016; Skivenes and Benbenishty in press). These results may indicate system legitimacy challenges and voice a need to understand on what foundations these varying child welfare systems' trust levels are built.

3.2. Theoretical approach – State and parent care order argumentation as communicative legitimacy

While acknowledging and stressing the importance and significance of social workers' street-level child welfare work, this thesis studies legal decision-makers in the County Board and Courts as a critical and consequential subgroup of street-level bureaucrats. In a strict legalistic arena, they justify interventions into the lives of citizens. This process of justifications is seen as expressing *communicative legitimacy*. Parents' arguments are seen as contributions to these same legitimation processes, from the perspective of the affected citizen. Below follows an elaboration on this approach.

3.2.1. Judges as street-level bureaucrats

Lipsky himself included judges on his list of original street-level bureaucrats. Newer research also uses and discusses the framework on and for judges, and highlights the fruitfulness and applicability of the framework in different legal systems (Biland and Steinmetz 2017; Lens 2012; Mascini 2020). For the Norwegian context, at least two factors make the framework appropriate. These are the (most often) close client interaction through case preparations and hearings lasting several days, as well as the administrative organization of the County Board, as headed by the Child and Family Ministry. Legal decision-makers, therefore, function as street-level bureaucrats in their implementation of child welfare legislation. Specifically, child welfare legislation, legal preparatory works, white papers, and case law all constitute the discretionary space within which decisions are made. However, it is essential to emphasize that the County Board and Courts are strict legalistic arenas and not the archetype of street-level bureaucracy. These institutions must adhere to the legal system's logic of presenting and assessing arguments within a legal discourse, which is distinguished by its institutional and authoritative character (Klatt 2007). Courts are expected and mandated to provide

authoritative and final interpretations of legal norms (Menéndez 2004). Lawyers are educated in and practice a profession that has a distinct methodological tradition and approach. This also goes for the lawyers formally representing parents and presenting the legal argumentation. Nonetheless, researchers have described the discretionary space for decision-making in child welfare as wide, as a lack of concrete professional guidelines and instructions assisting professional judgments has been identified (Falch-Eriksen and Skivenes 2019).

Since the County Board is purely a decision-making body, the necessary professional case preparation is undertaken by the child welfare agency (Skivenes and Tonheim 2017). This implies that casework and evidentiary information established at the very front of the street-level bureaucracy makes its way into the legal realm through the care order application, with the intent of substantiating that the threshold for intervention is reached. The County Board decision-makers assess, interpret, and balance arguments and evidence about neglect, abuse, safety, and well-being from the involved parties against the thresholds set out by the discretionary space. This is necessary, in that legal rules cannot be applied mechanically. Mascini explains that without active interpretative work, judges cannot determine what the case they are about to decide is, what rules apply to the case, and how to apply those rules (Mascini 2020, 133). They are not hermetically sealed in a legal universe, but make decisions and utilize discretion anchored in assumptions, commitments, and biases embedded in their role as social actors (Evans and Hupe 2020a, 114).

This interpretative work becomes especially crucial within child welfare. Decision-makers need to navigate within a legislative and policy landscape shaped by a battle of theoretical, moral, and political ideas about how to balance the right to respect for family and private life, while simultaneously safeguarding children from harm (Broadhurst, Burns, et al. 2017, 175). As such, argumentation invoked by decision-makers, on the one hand, makes up the hole in Dworkin's donut. On the hand, this hole is not expected to be empty. Tata rephrases Dworkin, stating that "the dough is always full of discretion and the holes are replete with codes, expectations, and cultural-cum-organizational rules" (Tata 2007, 430). This strikes at the core of the socio-legal approach supported

by this thesis, where extra-legal factors make up the pieces of dough in the hole, shaping decision-makers' argumentation and preferences. The core of this approach seeks to uncover the judicial activities of judges, and examine how judges draw on the written law, both statutes and previous case law, when they make decisions (Artis 2004, 771).

3.2.2. The deliberative ideal and communicative legitimacy

The issue at stake then is how such State interventions can fall within the scope of democratic legitimacy. One way legitimacy has been understood is through the relationship between citizens and the democratic process. 'Input-oriented legitimacy' refers to the opportunities of individual citizens to participate in political decision-making processes directly or indirectly through representatives. In contrast, 'output-oriented legitimacy' places emphasis on the substantive quality of decisions to 'effectively promote the common welfare of the constituency in question' (Scharpf 1999; cf. Strebel, Kübler, and Marcinkowski 2019). According to Rothstein, this is the part of the political system where "legitimacy is created, maintained, and destroyed" (Rothstein 2009, 313). Several established political science communities echo this perspective (Martin, Mikolajczak, and Orr 2020; Rothstein 2009; Strebel, Kübler, and Marcinkowski 2019). The principle of impartiality is central, implying that when implementing laws and policies, government officials are not allowed to take into consideration anything about the citizen, or the case at hand, which is not beforehand stipulated in the policy or law (Rothstein and Teorell 2008). Mansbridge and colleagues explain how impartiality can be connected to that of 'fairness' (Mansbridge et al. 2010).[8]

The leap is small to an equal tension in theories on democracy. These differ in how much normative weight they place on procedures, relative to substantive considerations about the quality of the outcomes of decision-making processes. Joshua Cohen describes the deliberative ideal as a state where "outcomes are democratically legitimate if and only if they could be the object of a free and reasoned agreement among equals" (Cohen

[8] Mansbridge and colleagues explain that when participating appropriately in integrative and fully cooperative negotiations, "participants often should at one and the same time both try to conceive and follow a goal of fairness, a process that may require an impartial or third person perspective and stand up for their own self-interests. The participants thus need to be partisan or partial in identifying their own interests and promoting them" (Mansbridge et al. 2010, 77).

1997). Child welfare decision-making is notoriously embedded in normative principles and the mentioned battle of ideas, where competing interests and standards can be equally relevant and legitimate. Still, decisions are necessary and must be made. This places the thesis in a Rawlsian and Habermasian tradition of the deliberative *ideal* as a measure of democratic legitimacy and rationality. Emphasis is put on ideality, as the pure deliberative advocates have been confronted to a significant extent about the pitfalls and paradoxes of a pure deliberative model (Bohman and Rehg 1997; Friberg-Fernros and Schaffer 2014).[9] Furthermore, as related to the legal proceedings in which the thesis analyzes, Robert Alexy nuances the deliberative aim of civil proceedings. He states that the involved parties do not inherently wish to convince each other, but rather claim to speak in such a way that every rational person would have to agree with their viewpoint. Decisions need to proceed under a claim to correctness and by reference to ideal conditions, and claims need to be rational within the legal order (Alexy 1989, 219).

Although Kihlström's overall discussion of the legitimacy of welfare work has not been central to this thesis, her working terminology *communicative legitimacy* eloquently captures the essence of how I see State and parents' arguments in care orders as processes of legitimation. In other words, communicative legitimacy sees legitimacy emerging by and through rationally founded argumentation for a decision or choice of action. Care order and care rights argumentation figure in a legal sphere which facilitates and requires communicative action. This entails linguistic interaction based on subject-subject relations that together establish a mutual validated, collective truth (Habermas 1987; cf. Kihlström 2020). Legal procedures facilitate an institutional frame needed for the free argumentation about what norms support a certain case. Legal procedures are said to compensate for fallibilities in communicative processes and enforce procedural justice (Eriksen and Weigård 1999). The parties are obligated to provide relevant, true, truthful, and rational arguments in support of their position. In essence, legitimate arguments are those that remain unchallenged in open and free rational deliberation between the affected parties. Drawing from discourse ethics, the conditions Habermas

[9] For this thesis, I do not wish to take on the debate around, and criticism of, the pure deliberative democracy model, as well as the role of consensus in argumentation and decision-making. I acknowledge central arguments brought forward by Bohman and Rehg (1997), Blattberg (2003) and Friberg-Fernros and Schaffer (2014).

places upon the deliberative process are the demand for intersubjective rational justification. Rational justification in discourse ethics is that which "all can will in agreement to be a universal (moral) norm" (Habermas, 1990, p. 67, cf. Peter 2007). On this deliberative account, democratic decisions derive their legitimacy not simply from counting votes as expressions of preferences formed before political interaction, but from the sincere, reasoned unanimity among all affected parties (Friberg-Fernros and Schaffer 2014). Within such an ideal, all participants have equal rights to validate truth, rightness, and truthfulness by saying yes or no to claims, without being excluded (Kihlström 2020). As Peter reiterates Habermas:

> "Deliberative politics acquires its legitimating force from the discursive structure of an opinion- and will-formation that can fulfill its socially integrative function only because citizens expect its results to have a reasonable quality" - (Habermas 1996, 304; cf. Peter 2007)

The thesis supports those connecting discourse ethics to the deliberative ideal. In this view, legitimate answers can also be identified for normative issues (Alexy 1989; Habermas 1996; Rawls 1993). In a legal setting, this is possible through rational-legal discourse in which all parties involved participate and all relevant arguments are presented for open and free discussion (cf. Skivenes 2010). Practical discourse attempts to justify the assertion of normative statements through the burden of judgment. In Alexy's words, this means that "whoever proposes to treat a person A differently from a person B is obliged to provide justification for so doing" (Alexy 1989, 196). The State is mandated as such to justify the care intervention using practical, rational argumentation. In this perspective, legitimate decisions are attained through the ideal of rational consensus.

As such, a legitimate state sees citizens who consent and acquiesce to state policy and intervention as doing so because they perceive the established political institutions as just and fair. Legitimate state power exists when those subjected to state power believe in the justifications provided for it (Peillon 1996). Ideally, a political system is

legitimate to everyone who is required to live under it. Successful legitimation means that no one has grounds for moral complaint about the way the state considers and weighs a citizen's interests and point of view. This is because, in addition to being social recognition of some form of power, legitimacy is also based on conformity to a norm or system of values (Rosanvallon 2011).

3.2.3. Parents in child welfare interventions as affected citizens

This view of legitimate State authority as the quality of its deliberations and justifications is inherently connected to the expansion of the public sector and the welfare state, as mentioned. Over the past 60 years, new relations between citizens and their governments have been established, increasing the focus on participation and lay influence in welfare services (Eriksen 1993). The expansion of the black hole of democracy and service provision from welfare bureaucracies and street-level bureaucrats places critical importance on the quality of government and justifications for intervention. In questions of subjective legitimacy, trust, and quality of government, populations' opinions have often been approached as the yardstick for measuring, and rightly so. Public institutions must be supported by their constituencies, and executed politics should be coherent with normative principles shared by citizens. As a safeguard, the rule of law implies that all citizens can challenge administrative decisions, and as such a clear basis in democratically established laws is crucial (Wagenaar 2020).

From the deliberative perspective, it is self-evident that birth parents need to be included in intrusive child welfare decisions. This serves as a main reason for the focus on parents' arguments in care orders as a (procedural) legitimacy indicator. They illuminate the different relevant interests, needs, and opinions, as well as establish adequate information and evidentiary bases. However, their perspectives and arguments need to be tested and weighed against each other and against other knowledge bases, as their situational understanding may be skewed (Eriksen and Skivenes 1998). This is critical because there is indeed a difference between the general citizen as a member of a constituency and the individual service user or client involved in a coercive welfare measure asserting their rights.

However, the thesis argues that parents' arguments express more than 'merely' those of affected parties. I do indeed acknowledge that there is a leap from seeing parents as service users and affected parties asserting their rights and 'truths' in a specific case, to seeing parents in care orders as representing a broader group of citizens engaging directly with the State through deliberation about child welfare policy. I also do not claim that parents themselves necessarily see their role as something other than asserting their individual and procedural case rights. Collectively, however, their arguments in care orders can and should be interpreted as broader expressions of misalignment and State legitimacy challenges. Norwegian child welfare is currently in a situation where ECtHR caselaw has claimed human rights violations in Norwegian child welfare practice towards birth parents. These violations have included both lack of procedural fairness, as well as lack of prioritization of biological family ties. As such, parents' moral stances and approaches to parenting and childhood need to be acknowledged and interpreted in a wider context of policy discussions about child welfare mandates and thresholds for severing family ties. I argue therefore that parents' legal arguments go beyond parents as affected, individual parties. Rather, they can be seen as expressions from *affected citizens'* engaging in practical discourse, challenging the quality of administrative decisions. They do not accept how the state evaluates their behavior and differ in perceptions of overarching goals and normative ideals. Article 3 in the thesis specifically investigates parents' expressions of procedural illegitimacy, and the utilization of an accountability measure in place to safeguard citizens against illegitimate application of discretion. This has been communicated through judicial review and parents' appealing their case from the County Board to the District Court.

Across both articles 3 and 4 in the thesis, parents' arguments are specifically analyzed as *accounts*. Originally, Scott and Lyman (1968) analyzed accounts as a linguistic form offered for untoward behavior through social interaction in the form of *talk*. Legal institutions' fixed and formalized structures and codes of conduct imply a certain form of legal discourse and 'talk'. The accounts framework facilitates the extraction of the parents' meaning-making and understanding of their social worlds. Analyzing accounts in this thesis aims to bridge the gaps between the strict legal discourse, the social diversity represented, and the proximity to the citizens at whom child welfare services

are aimed. Accounts help explain how individuals make meaning and sense of their social world and can help identify culturally embedded normative explanations for behavior, conditions, or situations (Orbuch 1997). This illuminates the intrinsic linkage between social accounts and the common defense framework utilized to understand defenses in criminal law (Dressler 2006; Husak 2005). Parents' arguments as accounts aid in eliciting their perceptions of a 'good' childhood, (harmful) parenting, as well as their perceptions of the child's best interest, value orientations related to the location of responsibility, and views on morality. The parents' moral stance and claims of responsibility can be located within their claims, as they assign responsibility to either themselves, their surroundings, or the State through accounts. The same rationale can be used when approaching parents' arguments as rational-legal discourses, as is done in article 3 in the thesis. Here, the norms that parents use as justification for non-intervention are explored, asking specifically whether they are pragmatic, ethical, or moral in nature.

In sum, care proceedings become an arena where the County Board legitimizes intervention through rational justifications. The premise is that the State sustains and maintains the legitimacy of what occurs within the black hole of democracy through reasoning and justifying interventions and rights infringements. Despite most of the activity in child welfare occurring in camera and under strict confidentiality hidden from the public, both child welfare agencies and the County Boards have a responsibility to provide fair and just rationales for intervention for those involved and affected by said interventions. Parents' arguments can represent their views of appropriate and valid norms and project perceptions of state (il)legitimacy and what constitutes legitimate State intervention when enacting thresholds for sufficient care and parenting.

4. Research design

Thus far, the framing introduction has introduced democratic legitimacy in a Norwegian child welfare context, as well as provided an overview both of relevant literature and the theoretical platform. The objective of section 4 is to establish and substantiate the research design, as well as the methodological choices and considerations taken in answering the research questions. The section consists of firstly, reflections on using legal documents in social science research, as well as both the theoretical and practical processes involved in analyzing legal decisions from the County Board and District Court. Secondly, study limitations and ethical considerations are presented. As the methods have been described thoroughly across the four articles in the thesis, section 4.2. covering the analyses and coding processes has somewhat of a summarized form.

4.1. Using legal documents in social research

Several issues must be taken into consideration when using document documents in social science research. Understanding the consummation, use, and function of specific texts in organizational settings is critical (Prior 2003). As such, it is necessary to first situate written legal decisions and judgments as texts subject to scientific analysis. The thesis approaches both County Board decisions and District Court judgments as representations of case parties' and legal bodies' official statements in legal proceedings. The decisions and judgments are used as sources for the specific legal argumentation provided for the parties and for the decision and judgment outcomes. The legal process requires the County Boards and Courts to be explicit and clear in their written reasoning and justification as basis for the decision. These end decisions or judgments are distributed to the parties as documentation of the process, and a selection of them, ideally 20 percent, are published online.[10] As such, the texts are interpreted as the State's formal legitimation of the intervention and sufficient legal argumentation supporting intervention (or non-intervention). Thus, these documents represent the end document and result of the formal legal legitimation of state intervention.

[10]The following website provides an overview of the requirements for written Norwegian care order decisions: https://discretion.uib.no/resources/requirements-for-judgments-in-care-order-decisions-in-8-countries/#1588242680256-00a159db-e96f

Secondly, the institutional history of the cases is important to have in mind. This is important both as context for what information is included as case material, as well as what shapes discretionary decision-making. Care order decisions in the County Board or in a District Court, as described in section 2, can be seen as one decision in a *chain of decisions* (Emerson and Paley 1992; Hawkins 1992b). A care order decision made at one decision-making point, has an institutional past, current and future. The same goes for the reasoning from earlier decision-making points, by other agencies, services, and professions. A description departing from the criminal justice system, but also applicable in the wider welfare bureaucracy, is that discretion flows back and forth through the agencies involved in decision-making (Gelsthorpe and Padfield 2003). This institutional history and progression through various agencies and decisions is also important to have in mind when working with the specific texts. The written decision or judgment does not represent a complete overview of all available information in, and history of, the case, and does not reflect all mentioned arguments by all parties. However, it includes and conveys what is deemed relevant to substantiate the decision (Tvisteloven 2005; Lundeberg 2009).

4.2. Analyzing qualitative (legal) data

Welfare state decision-making, legitimacy, as well as user perspectives in child welfare has been, and continues to be, studied in a variety of ways, as the reviews in section 2, and parts of section 3, have illustrated. As this thesis seeks to consolidate these research fronts to understand two facets of legitimacy, through both State and affected citizen argumentation, legal texts serve as appropriate sources of such argumentation. They function both as the display of what are deemed the 'best' arguments for a certain outcome from the State's perspective, and as the manifestation of parents' legal engagement in such proceedings. The data material has been probed through qualitative analysis of text. This overall venture has resulted both in a descriptive overview of the Norwegian newborn material, as well as four independent text analyses. As the analytical approaches utilized across the thesis have been elaborated upon across the individual articles, only a brief presentation will be given here.

4.2.1. Descriptive analysis of newborn cases

The descriptive analysis of the newborn material included identifying specific descriptive content throughout the decisions and judgments using text searches, as the structure of the judgments is similar enough to identify in each judgment where different types of information is located. Examples of such content were information about outcomes and contact visits, information about the decision-makers, such as composition and dissent, and descriptive information about the parties and the case. It was deemed necessary to first carry out a descriptive mapping of the newborn cases, as information about this specific intervention had not been systematized previously. The motivation for this was to be able to empirically describe the landscape of newborn care orders and to provide descriptive arguments about what *is*, or was (Gerring 2012). Gerring argues that empirical description has, or ought to have, an independent status within the political science discipline. If description is not done independently of the quest for investigating causality, "what we know will be less precise, less reliable and perhaps subject to systematic bias" (Gerring 2012, 733). As such, a descriptive overview, in the form of the *what, who* and *why* (of) newborn care orders in Norway over the years 2012-2016 has been established. This is presented as a separate section of the results, since some of this descriptive data has not been published or discussed across the four articles across the total sample, and thus not received either publicity or proper discussion. Specifically, this includes details of the legal outcomes and types of risk found and ruled, as stated in section 4-12 of the CWA. Furthermore, descriptive results concerning regional distribution of cases, socio-demographic variables related to the parents and children in the cases are presented, as well as historical parental risks across the whole newborn sample.

4.2.2. Article coding and analyses

Moving on to the substantial text analyses of the County Board and birth parent argumentation, these were rooted in both inductive and abductive approaches to data-driven, qualitative text analysis (Cho and Lee 2014; Coffey and Atkinson 1996; Schreier 2012; Tavory and Timmermans 2014). The actual coding processes and sequences roughly followed elements inspired by Corbin and Strauss' approach to grounded theory

(Corbin 2008). This entailed approaching the parents' claims and County Board justifications through rounds of open and broad coding for relevant phenomena, axial coding to compare and connect the various categories and codes and identify thematic commonalities and patterns for subcodes, and finally merging and extracting essences of each main and sub-category and linking to theoretical concepts. However, the analytical frameworks had closer ties to theoretical concepts and expectations than what is typically the case in grounded theory approaches. The approaches to analysis varied between the inductive analytical approaches in articles 1 and 2 and the process of more abductive theorizing in articles 3 and 4.

Specifically, *article 1* approached the totality of the newborn cases (N=177), and as such had a variable-oriented approach to the County Board justifications. The analysis focused on the prevalence of risk factors in the County Board justifications, across the three case factor domains commonly approached in child welfare work and research, that of parents, the child, and the environment (Barlow et al. 2014; Department of Health 2000). Appendix 1 for this article provides an elaboration of the justification codes and descriptions. It is essential to emphasize that the coding of arguments across the three domains is non-exclusive, as several factors most often appear within each domain. This 'cumulative risk' typical of newborn cases is evident and discussed across articles 1, 2 and 4.

Article 2 took an in-depth approach to the newest cases in the material, those from 2016. This approach was based on a desire to explore recent practice and what discretionary reasoning looked like in cases with as little care information as possible, those where the infant is the first born to the parents (N=19). The article took an inductive approach to *capacity for change* and factors aiding in such assessment, using central literature on newborn placement decision-making (Barlow et al. 2014; Hindley, Ramchandani, and Jones 2006; Ward, Brown, and Westlake 2012).

Article 3 examined all care order cases from 2012 from one District Court in Norway (N=15), and specifically parents' grounds for appealing their case. This article was an

argumentation analysis rooted in a discourse ethics framework inspired by Habermas (Eriksen and Weigård 1999; Habermas 1996), where a more abductive approach characterized the development of the codes and the coding process. It was structured by the *accounts* framework (Scott and Lyman 1968), with the ambition to investigate both the intent of the appeal and its normative bases.

Finally, *article 4* subjected all newborn care orders to analysis of parents' argumentation, where the parents opposed the intervention (N=132). The coding scheme departed from the defense argumentation framework utilized in article 3 but was open to the presence of arguments outside this dichotomy, allowing for flexibility in line with abductive analysis and theorization (Tavory and Timmermans 2014). In addition, the analysis in article 4 focused on case factor domains (parent, child, environment) to complement what emerged from the analysis of these domains present in the assessments and justifications from the County Board. An appendix was submitted alongside the article, giving an overview of the coding of arguments in the three domains in focus in article 1.

Due to the sample sizes and analytical approaches, articles 1 and 4 quantified both the case factor coding output, as well as the output presented as results. Articles 2 and 3, on the other hand, examined a small case number in depth. The actual coding was primarily executed using Nvivo 12. This made it possible to consolidate, review and compare vast amounts of textual data in a systematic and rigorous way. For article 3, the 15 judgments were analyzed physically through color coding on transcripts, as well as through Excel worksheets. For article 1, as well as the general descriptive overview, classification sheets were transferred to Stata to simplify the extraction of frequencies and descriptive statistics, as well as for cross-checking code content. The analytical codes and code excerpts for the articles was cross-checked by the supervisor, and the descriptive codes were developed in collaboration with research assistants in the DISCRETION project.

4.3. Study limitations

Two main critiques related to validity and reliability are discussed across the individual articles, and so they will be only briefly summarized here. They concern firstly, the utilization of written legal documents as sources of discretionary decision-making, and secondly, as sources of authentic representations of the parties' perspectives. Still, reflections and transparency regarding the institutional history and situation of the texts ensure that the research as it is conducted is necessary and accurate in answering the research questions.

Firstly, legal judgments and decisions do not represent the totality of individual child welfare cases or their complete trajectories through the system. Rather they can be seen as 'end documents', intended to represent the final, relevant, and necessary argumentation justifying the legal outcomes from the respective legal decision-making bodies. Furthermore, it is not straightforward to set out to analyze discretion in written legal documents. Drobak and North (2008) eloquently state that in written texts, "arguments are made logically, step by step to a conclusion, almost as if the law were a form of mathematics…(…) Plus most legal questions are straightforward enough to be answered by doctrine with little appearance of discretion". However, the decisions as they stand do indeed reveal discretionary decision-making behavior. Influences on discretion are evident, both in terms of the arguments that are invoked or not, the sources, contexts and witnesses that are used or not used, and the substantial and procedural choices made. As Feteris states, law can be seen as an argumentative activity in which courts must account for how they have used their discretionary power in interpreting and applying legal rules (Feteris 2017, 19). As such, legal judgments appear as prime forum(s) for expressions of public reasoning and legitimation processes from the State and concerned parties.

Despite a primary focus on decision-makers and the parents' arguments, it has been essential also to capture and identify what is deemed the "background and facts" of a case, in contrast to what is utilized as arguments. Kolflaath argues that legal content labeled as "background material" or "facts" makes it appear "indisputable" (Kolflaath 2013, 13), when in fact a selection rooted in legal interpretation has been made (Løvlie

2014). This is important to keep in mind both when analyzing the material and interpreting the findings, which is also why the analysis has captured both background categories and justification categories.

Secondly, the written claims under study in both articles 3 and 4 are not direct, unfiltered claims from parents. They are authored by the parents' lawyers in some form of collaborative effort and incorporated into the final written decision by the County Board Chair or District Court judge, following the legal requirements for care proceedings. As Prior (2003, 13) states, these are documents that are "social products, constructed according to rules, express a structure and nestled within a specific discourse". Furthermore, article 3 analyses appeal cases from the District Court, cases that arguably have even more institutional history, as they have already been subjected to legal assessment by the County Board. Knowing in detail the quality and proximity of cooperation between the parents and their appointed or selected lawyers is outside the scope of this research design. Within the research design, it cannot be discerned whether the parents' arguments reflect a 'strategy' proposed by the lawyer or to what extent they are amended and changed to fit a legal discourse. However, the written County Board decisions and District Court judgments are approached as representing the parents' official statements and display the legal arguments provided in support of their care rights.

4.4. Ethical considerations and ensuring privacy

Research on vulnerable demographics naturally carries with it a heightened responsibility towards ethically sound approaches and working methods. As the thesis utilizes 195 written unanonymized decisions and judgments, reflections have mainly focused on ethically sound storage, access, analysis and utilization of the data material, and responsible and sound dissemination of the findings. However, the thesis owes a significant responsibility towards those families the cases concern. As such, the process of gaining access to the data and being allowed to conduct analyses was comprehensive concerning privacy considerations.

Access to the district court judgments was gained through collaboration with the respective district court on confidential data processing upon gaining access to all written child welfare judgments made in the respective court in 2012 (n = 50). This was done as part of the *Legitimacy and Fallibility in Child Welfare Services* research project, funded by the Norwegian Research Council.[11]

Access to the newborn material was granted following an extensive application process starting in 2016 to the Norwegian Centre for Research Data (NSD), with project number 51427 titled "Godt nok foreldreskap - vurderinger og begrunnelser ved omsorgsovertakelser av nyfødte i Norge og England»". The project was also reported to the Norwegian Data Protection Authority (Datatilsynet) in applying for and gaining access to working with the material. In combination with the DISCRETION project, led by Principal Investigator professor Marit Skivenes at the department and funded by the European Research Council, the project was required to apply for approval by the Data Protection Officer at the University of Bergen (UiB), after the implementation of the new Norwegian Personal Data Act and the EU General Data Protection Regulation in 2018.[12] The project applied for, and was granted, exemption from confidentiality in research by The Norwegian Directorate for Children, Youth and Family Affairs (Bufdir).

The written cases were identified, printed and distributed by the (then) County Social Welfare Board for Hordaland og Sogn og Fjordane, and collected at their location. This was done through several rounds in collaboration with research assistants from the DISCRETION project. The DISCRETION project research assistants identified 18 additional cases for 2016 that fell within this projects' scope during their search for a wider sample of cases. These cases were as such added to the pool of cases from 2016. The documents were then scanned using an offline scanner, and the UiB IT department assisted in transferring the documents to SAFE (Sikker Adgang til Forskningsdata og E-infrastruktur/Secure Access to Research data and E-infrastructure), the UiB

[11] Website for *Legitimacy and Fallibility in Child Welfare Services* project: https://discretion.uib.no/projects/legitimacy-and-fallibility-in-child-welfare-services/
[12] Website for DISCRETION project: https://discretion.uib.no/projects/discretion-and-the-childs-best-interest-in-child-protection/

infrastructure system for secure access and storage of sensitive data. The written decisions were only accessed and analyzed on the SAFE server, and what was finally disseminated across the published articles was subjected to a thorough process of anonymization.

The access to the decisions granted by Datatilsynet came with a duty of informing the families and caseworkers involved about the research. Adhering to this duty, letters with information about the research were sent to biological parents and caseworkers where the contact information was available through names and personal numbers evident in the decisions. A total of 127 letters covering 416 (both interim and ordinary care orders) cases were sent out with the aid of two research assistants. Fewer involved parties were identified than was expected. This is unfortunate, as the aim was to inform all possible involved parties. However, the usefulness of merely informing parties that their case is being subjected to research, as opposed to either obtaining consent for example, or not informing due to potential re-traumatization, has also been reflected upon.

5. Results

The output of this thesis is a descriptive overview of newborn care order decisions in Norway between 2012-2016, and four empirical articles. Two articles have been published, one has been accepted for publication pending minor presentational revisions, and one has been submitted to a peer-reviewed journal. The four articles in sum aim to reveal both the implications of delegating discretionary authority to welfare state professionals and the expressions of communicative legitimacy invoked through arguments for (and against) complex state interventions into family life. The two first articles (1 and 2) shed light on State legitimation of care order intervention. The two last articles (3 and 4) investigate how affected citizens assert their care rights through legitimizing their parenthood and rights to care for their children.

5.1. Descriptive overview of newborn cases in Norway 2012-2016

The first empirical contribution of this thesis is a descriptive overview of some central traits of the newborn care order intervention in Norway between the years 2012-2016. These include regional distribution of cases (table 3), central aspects related to case outcomes and County Board composition and decision alignment (table 4), child characteristics (table 5), and birth parent characteristics (tables 6 and 7).

Looking first at the regional distribution of cases as evidenced in table 3, we see that there is great variation in the number of newborn cases decided across the County Boards. Over the period of five years, we see that the Trøndelag County Board had 31 such cases, while the Nordland County Board only decided three newborn care orders.

Table 3. Newborn care orders between 2012-2016 across County Boards

County Board[13]	**Number of decisions**	**% of decisions**
Fylkesnemnda i Trøndelag (FTR)	31	17.5 %
Fylkesnemnda i Østfold (FOS)	25	14.1 %
Fylkesnemnda i Oppland og Hedemark (FOH)	21	11.9 %
Fylkesnemnda i Oslo og Akershus (FOA)	19	10.7 %
Fylkesnemnda i Agder FAG	17	9.6 %
Fylkesnemnda i Rogaland (FRO)	16	9.0 %
Fylkesnemnda i Telemark (FTE)	14	7.9 %
Fylkesnemnda i Hordaland og Sogn og Fjordane (FHS)	11	6.2 %
Fylkesnemnda i Buskerud og Vestfold (FBV)	9	5.1 %
Fylkesnemnda i Troms og Finnmark (FTF)	7	4.0 %
Fylkesnemnda i Møre og Romsdal (FMR)	4	2.3 %
Fylkesnemnda i Nordland (FNO)	3	1.7 %
Total	**177**	**100 %**

Moving to the case outcomes as illustrated in table 4, we see that most cases are decided as care orders, nine are non-removals, six cases including revoking parental rights and three are finalized as adoptions. Most cases are based in both sections of the CWA Section 4-12 a), that there is a high risk of *serious deficiencies in the everyday care received by the child,* as well as *serious deficiencies in terms of the personal contact and security needed by a child of his or her age and development* if the child moves home with his or her parents. Most cases are allocated between two and six annual contact visits between birth parents and child, by a most often non-dissenting County Board made up of the three members.

[13]Since 2016, there has been both a regional and municipality reform in Norway. The number of counties is now 11, and the number of municipalities is 356. Following this reform, there are now 10 regional County Boards. At time of data collection and years under study, the number of County Boards was 12. The following website provides updated information on the current organization of the County Boards: https://www.fylkesnemndene.no/no/om-fylkesnemndene/organisasjonskart/

Table 4. Overview of outcomes and County Board composition and alignment (N=177)

Case outcome	**Number of decisions**	**% of decisions**
Care order	159	89.8 %
No care order	9	5.1 %
Threshold for high risk of 4-12a-d not met	*5*	*55.6 %*
Threshold met, but help measures will suffice	*4*	*44.4 %*
Care order including revoking of parental rights	6	3.4 %
Care order and adoption	3	1.7 %
Total	**177**	**100 %**
Paragraph of CWA Section 4-12 used in care order decision		
Section 4-12 a	117	69.6 %
Section 4-12 a+d	41	24.4 %
Section 4-12 d	10	6.0 %
Total	**168**	**100 %**
Section of Section 4-12a used in care order decision		
Both section 1 and 2	76	45.2 %
Section 2 – Serious deficiencies in personal contact and security	49	29.1 %
General reference to 4-12	24	14.3 %
N/A	9	5.4 %
Unclear	9	5.4 %
Section 1 – Serious deficits in everyday care	1	0.6 %
Total	**168**	**100 %**
Annual contact visits granted		
2-6 visits	137	81.6 %
7-12 visits	15	8.9 %
0 visits	11	6.6 %
Conditional specification pending ongoing development	3	1.8 %
Contact visits not decided in case	2	1.2 %
Total	**168**	**100 %**
County Board bench composition		
3 members	145	81.9 %
Chair only	22	12.4 %
5 members	10	5.7 %
Total	**177**	**100 %**
County Board dissent		
No dissent	163	92.1 %
Dissent on amount of visitation	7	3.9 %
Dissent on care decision	4	2.3 %
Dissent on supervision of visit	1	0.6 %
Dissent on disclosure of placement address	1	0.6 %
Dissent on revoking parental rights	1	0.6 %
Total	**177**	**100 %**

Moving on to characteristics of the infants and children across the cases, we see from table 5 that the families involved in newborn care order cases have relations to more children than those involved in the care order under study. Across the 177 cases, 110 cases include families with older children, while in 67 cases the infant is the first born to the family. In total, 197 infants are removed in the 177 cases, and in 15 cases, the infant and older siblings are removed simultaneously. The average age of the infant at time of decision is 4.4 months, and a little less than half of the infants across the cases have no special needs explicitly stated. Across the 177 decisions, the infant's condition is impossible to discern in 19 cases.

Table 5. Overview of infant characteristics (N=177)

The children in the cases	**Number of decisions**	**% of decisions**
Number of children between parents in sum	444	-
Number of cases where infant is first child to parents / infant has older sibling(s)	67 / 110	37.9% / 62.1%
Number of cases with siblings removed in same case / only infant removed	15 / 162	8.5% / 91.5%
Number of children removed across the cases	197	-
Number of cases with twins removed	4	-
Average age of infant at decision	4.4 months (min 1, max 10)	-
Infant condition at decision		
No special needs	76	42.9 %
Special needs	37	20.9 %
Unclear	19	10.7 %
Vulnerable	16	9.0 %
Possible innate vulnerabilities	12	6.8 %
Assumed no special needs	11	6.2 %
Innate vulnerabilities	6	3.4 %
Total	**177**	**100 %**

I also examined characteristics central to the birth parents across the cases as illustrated in table 6. This focus was on the parents as parties in the case, background, and demographic variables, and finally risks in question across the cases. As the descriptive overview illustrates, the mother was most often the sole care seeker in the case, as well as most often having sole parental rights. Parents most often opposed all aspects of the intervention, while the parents consented to placement in 40 (22.6 %) of cases. The

average age of the mother across all cases was 28.6, while in those cases where the father's age was known, the average age was 33.9. A large majority (82 %) of birth mothers who have their infants subjected to care orders are Norwegian, with an additional 5 % being adopted from abroad as small children and having been raised in Norway. A small number of parents across the cases have national minority backgrounds or have migrated recently to Norway, and some fathers (who are not a party to the case) are still located abroad. In most of the cases the parents have explicit marginal childhoods and have had challenging upbringings. Finally, by far, the largest category of health and/or disability risks across the decisions are those of parental mental health issues, followed by severe learning disabilities, drug or substance misuse and finally personality disorders or problematics in descending order of appearance.

Table 6. Overview of birth parent characteristics and circumstances[14] (N=177)

Parental care seeker in case	**Number of decisions**		**% of decisions**	
Mother[15]	69		38.9 %	
Both	60		33.9 %	
N/A (parents consent to placement)	40		22.6 %	
Father	8		4.5 %	
Total	**177**		**100 %**	
Parental rights holder in case				
Mother	95		53.7 %	
Both	82		46.3 %	
Total	**177**		**100 %**	
Stance on care order question				
Opposition to all aspects of decision	135		76.3 %	
Both parents consent to placement	40		22.6 %	
One parent opposes decision	2		1.1 %	
Total	**177**		**100 %**	
Age				
Average age at decision – mother	28.6[16]		-	
Average age at decision – father	33.9[17]		-	
Parents' national/regional background	*Maternal*	*Paternal*	*Maternal*	*Paternal*
Norwegian	145	106	81.9 %	59.9 %
African	10	9	5.7 %	5.1 %
Asian	9	10	5.1 %	5.7 %
Norwegian, foreign adopted as child	7	2	4 %	1.1 %
European	5	4	2.8 %	2.3 %
American	1	2	0.6 %	1.1 %
Unclear	0	5	0 %	2.8 %
Unknown	0	39	0 %	22 %
Total	**177**	**177**	**100 %**	**100 %**
Parents' marginal childhoods – background fact	93	37[18]	52.5 %	20.9 %
Parents' health/disability risks[19] - County Board justification (N=177)				
Mental health problems	107		60.5 %	
Severe learning disabilities	60		33.9 %	
Drug/substance misuse	59		33.3 %	
Personality disorders, problematics	45		25.4 %	

[14] Overview of issues affecting parenting capacities after inspiration and adaption from Hindley, Ward and colleagues (Hindley, Ramchandani, and Jones 2006; Ward, Brown, and Westlake 2012).
[15] Across the total pool of newborn care orders, six mothers appear twice in the material, meaning that she has two care order cases of newborns within the time period. Two fathers appear twice.
[16] Based on 132 cases where age was available.
[17] Based on 73 cases where age was available.
[18] Mother's childhood unknown in 28 cases, father's childhood unknown in 105 cases.
[19] Coding for risk factors has been presented and operationalized in appendices across articles 1 and 4. Categories are non-exclusive.

5.2. Article 1: Comparing justifications in newborn care orders with and without parental intellectual disability in Norway

Article 1 explores a central pitfall of delegating discretion to professionals in the welfare state, that of fairly adhering to the principle of formal justice - the similar treatment for similar cases, and vice versa. The context for the study is a particularly sensitive Norwegian child welfare intervention, that of care orders for newborn children. Under study is a comparison between those cases where one or both parents have an ID and those without. As parents with ID share some specific risks to parenting, as well as are argued to face discrimination in the child welfare system, the case type represents a solid case for studying the status of formal justice. The study asks which legal outcomes are provided for cases with parental ID, what case factors are emphasized by the County Board in these decisions, and how does the reasoning compare internally, as well as to the group of cases without such risks. Can arguably similar cases be said to be treated similarly?

The data material under study is all newborn cases decided by the County Board between 2012-2016. In the analysis, the way the cases are treated is studied threefold: Firstly, the specific legal outcomes of the cases; Secondly, the prevalence of specific risks substantiating the outcomes; and lastly, the patterns of these risks across the cases. ID is utilized as a case distinguisher, and similarity and variation are analyzed as the risk factors emphasized for this group of cases, contrasted to those cases without ID risk. Risk (and protective) factors are studied across three established domains, that of parental, child, and environmental factors.

The analysis reveals that cases with parental ID receive more uniform and restrictive outcomes than those cases without parental ID. Furthermore, significant differences between the two groups are found in specific parental and child factors emphasized by the County Board. These factors are related to previous parenting, parent dynamics, compliance, parenting skills, and child vulnerability. Finally, large variation in levels and amounts of risk and protection factors is evident within the cases with parental ID. This can explain which factors can carry more, less, or decisive weight for decision-makers when assessing the context of parental ID or illustrate in which capacity the

County Board associates ID and risky parenting. It is evident that central case factors can vary considerably within family contexts, but still be subjected to the same relational and legal future.

The article concludes by observing that the findings do not reassure us that Norway stands clear of discriminatory practices towards this group of parents. Considering the significant variations in associated and relevant risk factors emphasized in this analysis, it appears crucial to further probe both the empirical and normative basis for this type of State intervention. This includes more transparency in how significant variation in risks surrounding parental ID is reasoned into 'similar' future parenting.

5.3. Article 2: Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway

Article 2 approaches the arguably most distinctive feature of newborn care orders and a specific black hole of Norwegian democracy – intrusive decision-making in a context of uncertainty. The setting is the Norwegian child welfare system, and specifically care order decisions concerning newborns and the prognostic task of assessing *future risk of harm.* The aim is to understand how decision-makers reason and justify intrusive care interventions when the context is uncertain and the decision task is predictive. The study as such asks which arguments and evidence substantiate and justify conclusions about whether a parent can secure an infants' short- and long-term best interests.

To explore such prognostic decision-making, all (N = 19) written newborn care order decisions from 2016 decided by the County Board, where the parents have had no previous children removed, are analyzed. These are cases where decision-makers' assessment of, and predictions about, parenting capacities are not based on information about previous actual parenting, but rather take the form of hypothetical assessments about parenting. Under analysis are parents' problems or problematic behavior and subsequent capacity to change. Drawing on the frameworks of parental risk factors associated with future harm developed and reworked by Hindley and colleagues (2006) and Ward and colleagues (2012), and using inductive content analysis, the parental risks or situations in the cases were captured.

The analysis reveals that overall, three levels of capacity to change are evident across the newborn cases. Most often case problematics appear *stagnant*, a quarter is seen as *slow-moving*, and a small number are *transient*, where some form of change is indeed seen to take place. The parents' problems were centered around, in descending order of prevalence, personality, and social functioning issues, mental health issues, own problematic childhood and upbringing, ID, and substance use. Apart from the type of problem as a factor for change, duration and prevalence were analyzed. The analysis reveals that in the cases where the problems have lasted the longest, since childhood, the County Board finds the least potential for change. Findings demonstrate large variation in the number of sources and contexts applied in the justifications. Across the 19 cases, we see that the County Board varies from emphasizing 26 individual sources across eight different contexts to three cases with three contexts, supported by one source each.

In sum, decision-makers, most often dissent-free, find high, long-lasting risk to equal minimal change capacity in most of the cases. Simultaneously, decision-makers appear to mitigate future uncertainty by invoking the parents' childhoods, health, and social welfare histories as parenting indicators. The main critique is the lack of transparency in how inferences are drawn from the past to the future. This indicates a need for discussions about how to aid in making future assessments sound and transparent.

5.4. Article 3: Defending parenthood - A look at parents' legal argumentation in Norwegian care order appeal proceedings

Article 3 studies in-depth parents' legal engagement with care order appeal proceedings in Norway. From a deliberative perspective, failure to adequately include and assess parents' arguments can constitute grounds to question the quality of care order decisions and the preceding process. As appeals of care orders further up the legal system may serve as an expression of such failure, this article asks on what grounds parents appeal care order cases to the District Court, as such asserting their right to care for their

children. The article asks what norms parents use as justifications, and whether the argumentation has a justificatory nature at all, or rather expresses alignment.

The data under study is parents' written claims in 15 appealed care order cases from one Norwegian district court. Under analysis are the pragmatic, ethical, and moral bases in arguments provided by parents and their lawyers, using a discourse ethics framework as inspired by Habermas (1996). Furthermore, the defense dichotomy is utilized as an analytical tool, viewing arguments as either justifying or excusing the parenting in question.

The analysis reveals complex reasons for appealing care order cases. Parents justify and excuse both specific situations and the totality of their parenthood. Parents primarily apply pragmatic and ethical adversarialism, followed by pragmatic blaming and claims of change, moral justifications about due process, and ethical excuses about age and own life histories. Interestingly, normalization emerges as a third strategy, where parents explicitly aim to widen the scope of parental normality and adequacy, challenging the common defense dichotomy. Perceptions of legitimacy emerge in the extent to which the parents claim responsibility for their 'untoward behavior' and whether they assess and understand risk in line with CWS (or not). Through the discourse analysis the level of justification and argumentation is captured as most often residing in pragmatics, and less often in layers of ethical or moral discrepancies.

The study provides new insight into an important and sensitive field and indicates that parents engage in similar concrete strategies when, most often unsuccessfully, defending their parenthood. The analysis confirms that parents' general perceptions of norms of parenthood seem often to collide with the CWS, County Boards, and the Courts. If the opposing parties do agree about empirical facts and truths, parents' interpretation of adequate change is not sufficient, and their excuses are ultimately not considered satisfactory. Although the analysis does not reveal what parents feel on a personal level, or what strategies prove more successful and which do not, it highlights the argumentative complexity of care proceedings and the dire need for more research.

5.5. Article 4: Asserting the right to care - birth parents' arguments in newborn care orders

Article 4 explores parents' legal engagement with child welfare care order proceedings concerning newborns before the Norwegian County Board. As CWS carry the burden of proof in these cases, they need to argue for an expected high probability of risk of significant harm if a newborn moves home with her or his parents. As such, the analysis approaches parents' argumentative responses to accusations that they are not able to care for their newborn baby. Do they deny, comply or present new evidence or arguments in support of their case? Does their focus align with that of CWS? Analyzing parents' perspectives captures how parents understand and view child welfare services and engagement, their experiences with caseworkers, as well as how they view adequate parenting.

The data under study are extracted from the pool of all (n=177) newborn care orders decided by the County Board in Norway between 2012-2016. In 45 of these cases, the parent(s) consented to the actual placement. Thus, the analysis involves the remaining 132 cases where at least one parent opposes the care order decision and provides claims against it. Parents' argument types are identified and captured through three meticulous rounds of abductive text analysis, focusing on 1) types of main argument, 2) subcategories of arguments and 3) case factors in arguments. Three argument types make up the main argument categories - *justifications, excuses, and rationalizations*.

The analysis reveals that parents primarily both justify and excuse their risks and in two-thirds of cases use rationalizations to assert their care rights. Parents primarily deny harm and pinpoint the (failed) service provision efforts by CWS, and they excuse their situation by claiming sufficient change and placing blame on CWS and other external actors. When parents invoke rationalization arguments, they do not defend their parenting as such, but rather claim normalcy and deservingness, as well as echoing concerns raised by CWS and the County Board. Arguments are primarily focused on the parent(s), as well as CWS and services. Parents with substance use risks use significantly fewer blaming arguments than parents with personality risks, and parents with ID risks demand significantly more leeway as 'new parents' than parents with personality risks.

The study reflects how a marginalized demographic engages with the child welfare system. The arguments reveal both alignment and misalignment in understandings of acceptable state intervention and responsibilities for service provision within the family. It points to the dire need for knowledge about parents' actual understanding of service provision, as well as clear communication and feedback between parents, their legal counsel, and CWS workers in the assessments and service provision phase.

6. Discussion and implications of results

This thesis asks how an intrusive form of child welfare intervention, the care order, is assessed, discussed and justified. It seeks to contribute through two overarching research questions: firstly, how the State legitimizes intervention into families through discretionary decision-making and argumentation substantiating care order decisions of newborns. The second research question concerns how affected citizens' (birth parents') argumentative engagement with, and opposition to, care interventions serve as expressions of legitimacy. The joint contribution of the articles and the thesis as a whole comprises three main and novel findings that I now wish to highlight and discuss. These are: 1) a systematized presentation of central aspects of the reality, and complexity, of newborn care orders in Norway between 2012 through 2016 which has not previously been presented; 2) patterns and tendencies in prognostic decision-making, exemplified by newborn care orders, as critical grey areas in child welfare decision-making that need to be discussed; and 3) the potential procedural and substantive legitimacy gaps expressed by parents through their arguments against care orders. Following the discussion of these important research contributions and their implications, relevant theoretical and methodological aspects will be reflected upon. These reflections mainly concern discretion and prognostic decision-making, the data material as well as discerning parents perspectives in the changing landscape that is the Norwegian child welfare system. This final section ends with some concluding remarks.

6.1. What, who, and why - descriptive characteristics of newborn care orders in Norway between 2012 and 2016

What both the descriptive mapping of the cases, as well as analyses of parent and County Board argumentation through the individual articles 1, 2 and 4 have made clear is that ultimately, care orders of newborns are complex and critical decisions with expected lifelong implications for all involved parties. They are however also, at times, completely necessary to safeguard children's interests and rights. This thesis brings the complexities of *newborn* care orders into the spotlight. As has been made clear throughout the work with this thesis, no coherent empirical knowledge base has been systematized previously about this child welfare segment and intervention in Norway. As this intervention has a prognostic frame of reference and a heightened threshold

compared to ordinary care orders, and as it concerns a particularly vulnerable demographic, it is of essence to gain knowledge on how, and towards whom, the state manages and enacts this responsibility and authority.

Firstly, the descriptive mapping provided specific empirical insights about legal outcomes in newborn care orders in Norway over a specific time period. *What* were these decisions? In the five years under study, newborn care orders were, with very few exceptions (5 % non-removals), state interventions where birth parents lost care rights for infants directly from the hospital, having exercised no parental care of the infant. Somewhat fewer birth parents, but still a large majority (77 %) were granted between two and six annual contact visits with their children, implying that the County Board largely restricts and shapes the biological relations between the infants and birth families involved. Decisions made by the County Board were mostly (92% of cases) reasoned without dissenting opinions by the members of the bench. There were also regional variations in how many cases were treated across the then 12 regional County Boards. That one County Board decided 31 such cases (FTR) in the period between 2012-2016, while another decided three cases over the same period (FNO), indicates that decision-makers gathered significantly varying experience with, and exposure to, this type of case. This again may very likely impact how discretion is shaped and exercised. The organizational familiarity and hands-on experience will vary, possibly affecting how the County Board manages and interprets potential biases, associations, and frames of reference.

The descriptive overview also provided insights into the demographic involved in newborn care orders. *Who* did these decisions concern and affect? The birth parents in most cases were birth mothers, aligning with findings and concerns already established about mothers in recurrent and newborn care proceedings (Broadhurst, Mason, et al. 2017; Broadhurst et al. 2015; Griffiths et al. 2020; Luhamaa et al. 2021; Ward, Brown, and Westlake 2012). On average, they were in their late twenties at the time of care order intervention under study, while the fathers for whom age was available, were in their early thirties. When breaking the mothers' age down by whether or not the case in question was their entry to motherhood, the mothers having their first child were on

average 26 years old, while the mothers who had older children were on average 30 years old. Immediately, these mothers appeared older than expected. Comparatively, two-thirds (64%) of mothers in a Welsh study of over 1000 mothers in newborn care proceedings between 2011-2018 were under 21 years old (Griffiths et al. 2020). This difference may very well be a result of the family service-orientation of the Norwegian child welfare system, where a magnitude of services is available and need to be attempted or assessed as ineffective before a care order can be sought.

In 69 cases the mother sought sole care of the infant, in 60 cases both parents sought care of the infant as a joint-care base, and in eight cases the father sought sole care of the child. When removing the 40 consent cases from the distribution, this equated to approximately 50 % of the contesting parents being mothers as sole care providers. As such, this coincides with a significant body of evidence of invisible fathers in Norwegian child welfare (Kitterød 2007; Skramstad and Skivenes 2017; Storhaug 2013). This is also an international trend (Brown et al. 2009; Ewart-Boyle, Manktelow, and McColgan 2015). Furthermore, although not an essential focus across the four articles, the different national/regional backgrounds represented by birth parents in the newborn material were systematized. As was evident, a large majority (82 %) of birth mothers whose infants were subjected to care orders were Norwegian, with an additional 5 % being adopted from abroad as small children and raised in Norway. A small number of parents (13 %) had national/regional minority backgrounds, and some fathers (who were not party to the case) were still located abroad. As such, the number of parents with a background from outside Norway subjected to newborn care orders aligns with the general migrant (and Norwegian-born with migrant parents) population in Norway (Statistisk Sentralbyrå 2021). This contrasts the overrepresentation of migrants in Norway receiving in-home services (Statistisk Sentralbyrå 2020). Again, however, there is unfortunately not as much information about the fathers in the material.

Furthermore, and critically, approximately 50 % of the cases have parental histories of abuse and neglect from own childhoods that are presented and discussed both as background factors and justifications by the County Board. This confirms that social reproduction of risky parenting is indeed a persistent and continuous aspect necessary

to truly engage with and combat at both policy and practice levels. Intergenerational transmission of child abuse and neglect, as well as of care orders and out of home placement, are well known phenomena, but they are under-researched. In addition, these mechanisms have also been discussed as a welfare state critique in failing to break cycles of marginalization and lack of legitimacy in securing the rights of vulnerable citizens (Broadhurst, Mason, et al. 2017; Krutzinna 2021; Roberts et al. 2017). Evidently, one perspective is that the State is not doing enough social compensation through its public care for children.

Finally, what has been the primary ambition of this study has been to gain knowledge as to what rationales underpin the decisions to remove infants from their parents' care at birth. The study has aimed to examine which familial and social circumstances and situations that are emphasized by the County Boards as so acute that parenting needs to be curtailed at the outset. Furthermore, it has sought to understand which contexts are seen as presenting too much risk for a newborn child, so much that she or he needs to be safeguarded outside their birth families directly after birth. Which empirical and normative bases underpin these decisions? *Why* are these decisions made? As the initial overview of legal outcomes has made clear, the newborn material consisted primarily of cases assessed as representing high probabilities of risk of harm to the infants. Only nine cases were assessed as no care order, where five of these cases did not reach the threshold of a high degree of probability of a situation or risk for the child, in accordance with the general care order paragraph 4-12, first clause of the CWA. The remaining four no-care-order-cases had indeed reached this threshold of risk of harm, but the County Board held that the situation could be secured for the child through voluntary in-home-services and that the best interest for the child would be to remain in the care of the birth parents. As such, the County Board found high risk of future harm to the infant in 172 out of the 177 cases. Furthermore, only nine cases were decided using section 4-12d – meaning that the County Board assessed a high probability of the child's health or development being seriously harmed because the parents were unable to take adequate responsibility for the child, meaning a risk of future harm beyond the immediate present and return home from the hospital.

Regarding the specific case factors under analysis, the distributions of risk and protection were identified and discussed in depth across articles 1, 2 and 4. These were examined through the three domains as mentioned above, those of parental, child and environmental case factors. Parental factors were mapped as historical, health and disability related, as well as current behavioral factors. As discussed particularly in article 1 and 2, there are two specific (lacks of) risks and case complexities that distinguish the Norwegian material.

Firstly, there was a lack of cases representing the 'toxic trio', that of substance use, domestic abuse and mental illness. This trio of risk factors is emphasized as significant in serious child welfare cases in both U.S. and U.K. contexts (Cleaver, Unell, and Aldgate 2011; Middleton and Hardy 2014; Ward, Brown, and Westlake 2012). The 'trio' did not emerge as significant in the Norwegian newborn material. What was identified as issues of domestic violence was 'only' present as risk justifications in 14 % of the cases, as identified in article 1. In Ward and colleagues' study on safeguarding babies and very young children from abuse and neglect in England, 40 % of families had domestic abuse as a risk (Ward, Brown, and Westlake 2012, 56). This is a profound difference. However, it may in part be explained by many of the English infants being followed up over a longer period of time in their birth families, as such allowing for more family life to transpire.

Secondly, article 1 also discusses a potential increased Nordic emphasis on parental ID and learning disabilities in the context of parenting. When comparing emphasis on maternal learning disability risks in similar contexts in Germany and England, there was an increased frequency of such parental risks in Norway. While mothers in newborn care orders in England and Germany in 2016 were described as learning disabled in 14 % and 11 % of cases respectively, this number was 40 % in the Norwegian cases (Krutzinna and Skivenes 2020). As was evident through the descriptive mapping as well as analysis in article 1, approximately 34 % of newborn care orders between 2012 and 2016 had parental ID as a justificatory risk. Furthermore, article 1 identified social isolation to appear to matter less in newborn care orders with parental ID. Over 60 % of the cases with parental ID did not include an emphasis on the wider family or social

network. This lack of explicit focus on external factors may be indicative of a heightened focus on, and perhaps trump of parental ID within the Norwegian child welfare system, compared to other national contexts. The reality of this pattern nonetheless needs further examination.

6.2. Prognostic decision-making – a grey area in child welfare practice and law application

Moving beyond the empirical contributions of this thesis, a main concern has been how legal decision-makers utilize discretion when making consequential welfare decisions in contexts of uncertainty. At stake with such delegation of authority is being certain that decision-makers manage this responsibility in a fair manner. This has been approached through this thesis as the reasoning about case factors posing a *high risk of future harm* to an infant. Throughout the analyses of the newborn cases, it has become evident that the parallel uncertainty and complexity of the cases, as well as the timing of the newborn intervention all have an impact on discretion. The discretionary space available can be seen as simultaneously both broader and narrower for decision-makers than what the law intends or caters to. The following sub-sections 6.2.1. and 6.2.2. discusses two mechanisms that affect and are affected by this dual perspective on the discretionary space and discusses ways in which to understand and disentangle prognostic discretionary decision-making.

6.2.1. Invoking social welfare histories as parenting indicators

Firstly, care order interventions for newborns naturally include few, if any, actual care observations or displays of parenting capacities between the specific infant and birth parents outside a supervised environment. This is especially critical where the child is the firstborn to the parents. Here, there are often no specific observations of what the care order paragraph 4-12 sections a) through d) of the CWA describe as constituting the threshold for a care order. Article 2 in particular is concerned with this decision-making under utmost uncertainty. This article studies those cases where without parenting history to apply as evidence to substantiate care capacities. One central issue, as article 2 discusses, is the description of the Norwegian CWA as having the child's

current situation as its norm (Kjær 2019). This is said to be evident despite the fact that some provisions in the law, such as newborn interventions, do require assessments of future care capacities. Article 2 specifically connects this decision-making pattern to Sandra Mitchell's reasoning on policy formation under uncertainty, in how decision-makers draw on the logic of decision-making from simpler circumstances, and then extend these logics to contexts of increased risk and complexity (Mitchell 2009). The way this is analyzed and approached in article 2 in the thesis is guided by how Eileen Munro suggests child welfare workers decide under contexts of uncertainty. Applying this to the legal, but still social work informed, setting of County Board decision-making, the article departs from Munro's notion that "the best guide to future behaviour is past behaviour" (Munro 2008, 77). By looking back, decision-makers make out possible, and likely, futures. Munro provides a practice tool called *factors for change*, which highlights change capacity as essential to assessing future risk of abuse or neglect (ibid). These factors, operationalized in article 2 as the *type, duration of* and *prevalence of parents' problems* appear as central dimensions for the County Board decision-makers. These dimensions appear to provide a frame for extending the past to the current and future, and also a way in which to substantiate and justify the use of historical evidence. As such, making predictions based on past and current events and behavior by sometimes unclearly extending and applying them to future parenting capacities in individual cases highlights the necessity of considering how parenting prognoses are used as justifications in written decisions.

Through the analysis in article 2, as well as when completing the descriptive mapping of the sections of the law the County Board applied to substantiate risk, it was clear that the County Board typically assessed these cases as severe. A central element in this assessment was indeed a limited capacity to change. The analysis revealed that the reasoning amounted to three types of change capacity. Of the 19 cases in the sample, 13 cases appeared to be *stagnant*, where the parents' inherent problems (personality, social functioning, cognitive deficiencies, traumatic childhoods), lack of compliance, insight, and ability to learn were assessed as essential in hindering significant and adequate development. This capacity became evident through the County Board assessing what it saw as the duration of each child placement, and how likely the parents were to change

their situation. This was captured by reasoning about the parents' risks, such as the following formulation from case C-12 in the sample exemplifies, as was also emphasized in the article:

> *"The County Board cannot see that the criteria for a voluntary placement are fulfilled. Mother's difficulties are not of a transient nature. Even if Mother were to be medicated for ADHD, the County Board cannot see that the evidence claims that this would change the totality of Mother's problems."*

To substantiate this lack of change capacity, it becomes clear that the Norwegian welfare state collects and invokes extensive institutional social welfare histories through evidence, arguments, assessments, and statements from a wide range of services and institutions. This 'looking back' as described above was done by calling upon these sources and contexts in substantiation of risk. On the one hand, this institutional evidence base may very well serve its predictive value. On the other hand, it may also aid in cementing the parents' institutional histories, upholding and passing on legacies of marginalized backgrounds and childhoods, as touched upon in the discussion about the mothers' marginalized backgrounds above. Nonetheless, this richness of information may be a result of the extensive welfare state and family-oriented child welfare system in place in Norway, as also discussed in article 2. In other, more risk-oriented systems with higher thresholds for intervention, such information pools may not be available to inform future parenthood, indicating the scope for Norwegian welfare state reach into the private sphere. The rich institutional history needs to be reflected upon and considered by the County Board before application. However, as little guidelines and instructions are provided for substantiating future assessments, this may be a natural and inevitable decision-making strategy. However, most cases did include parent-child interaction from visitation, as such nuancing the idea that these decisions are mere prognostics.

A brief look to the U.S. context provides an interesting perspective. Despite social welfare being administered and governed on a very different scale than in the Nordic

countries, parents involved in child welfare in the U.S. are described as a marginalized population “hyper-visible to the state”. They are people in need who accumulate more perceived risk in a context embedded in several welfare services simultaneously, resulting in a reinforcement of inequality and marginality (Fong 2020). These families may in one arena be involved in rehabilitative services in a health or educational context, but through child welfare become exposed to a system that also assesses risk. With risk assessments drawing on prior system interactions, people in need accumulate more perceived risk, which again reinforces social inequality (Brayne 2017; Hirschman and Bosk 2019)With the dense institutional histories invoked in Norwegian care proceedings, this lens appears to fit well with parents involved in newborn interventions. This is interesting as the two child welfare systems, the Norwegian as child rights protective and family service oriented, versus the American as child maltreatment protective and risk oriented vary greatly in their orientation towards risk and towards intervention into families (Berrick, Gilbert, and Skivenes in press). However, institutional histories and risk accumulation can seem to be measured, collected and applied similarly, despite parents having greater and lesser capacities to protect their children against harm depending on the country and community context (Berrick, Gilbert, and Skivenes in press).

6.2.2. Variations in sources and contexts applied to substantiate (similar) outcomes

The analyses in articles 1 and 2 in particular captured the great variation in both the number of contexts and sources applied and discussed by the County Board to substantiate and justify decisions. They also highlighted the plethora of individuals, institutions and organizations that contributed with information, statements and evidence feeding into assessments of care capacities. These various contexts identified in article 2 were for example child welfare system actors, naturally, as well as social services, somatic or psychiatric health services, the legal system, previous or current employers, schools and day-cares (of older siblings and the parents themselves). The sources identified were both individuals or organizations from whom the statements or information applied or discussed by either the CWS or County Board. As mentioned,

article 2 studied 19 firstborn cases in depth. Across these 19 cases, the County Board varied from emphasizing 26 individual sources across eight different contexts, to three cases being justified using 'only' three contexts. All the while, these cases all ended up as long-term care order placements. Article 1 showed that decisions sharing specific risks to parenting were substantiated very differently. This was examined by isolating cases with parental ID. Parental case factors about mental illness, marginal childhood, couple dynamics, and previous parenting were assessed as a risk in approximately half of the cases, and in the other half assessed as a non-issue or a protective factor. This distribution can indicate what factors may vary, but still represent a high-risk case in the context of ID. The three ID cases that only had one risk factor each (previous parenting, parental dynamics, and social network/extended family respectively), can furthermore be examples of which factors can carry decisive weight for decision-makers when assessing the context of ID, or illustrate in which capacity the County Board associates ID and risky parenting. This shows that large variations in sources can be employed to underscore a similar risk level. As was evident from the analysis in article 2, a case with few sources could on the one hand be a direct result of the actual accessible information in the case, and at-hand knowledge available about the parents. On the other hand, it could also be a result of a single context or source being given considerable weight, such as for example diagnostic statements from psychiatrists or journal notes from drug rehabilitation.

This variation in justifications points to grey areas in legislation needing to be addressed. Specifically, this concerns clarifying why specific sources and contexts are mentioned, and how they relate specifically to assessment of parenting. This coincides with what has been expressed by the Norwegian Supreme Court in the aftermath of the recent human rights violations identified by the ECtHR. The Supreme Court has clarified the implications for Norwegian child protection practice, stating that child welfare decisions "must be based on adequate and up-to-date information and a fair and broad balancing of interests and satisfactory reasoning" (Barne- og familiedepartementet 2020). This relates to challenges identified in a recent scoping review on the role of health information in court decision-making about infant care orders, claiming that this practice

overall is unclear and heterogeneous. Nurses and other health professionals who are required to, and should, provide courts with information, often exhibit a tendency to provide information with a professional bias. This supports the need for clarity of communication and understanding between health professionals and courts as crucial in order for applying health information consistently in court decision-making (Gregory-Wilson et al. 2021). Combatting these challenges is critical in securing the rights of the involved parties.

6.3. Parents' arguments express potential legitimacy gaps

The third main finding important to discuss concerns the perspectives brought forward by parents through their legal arguments in care order proceedings. It is important to stress the formalized nature of legal discourse in care proceedings. The overarching theoretical framework has approached as an arena for legitimating State exercise of power. It is important to acknowledge the undisputed asymmetry in power between the parties, described in section 2.3. about parents legal engagement. This asymmetry naturally applies to the infant as well. Nonetheless, legal care proceedings do provide the formal, and only, arena for parents to engage with the state, contradict, and oppose legal intervention, aided by legal representation.

The analyses across articles 3 and 4 overall revealed that parents used similar, multifaceted, and most often unsuccessful arguments in care proceedings when asserting their care rights. Typically, parents invoked both justifications and excuses in their claims. This discussion wishes to emphasize the critical distinction between these two types of accounts. Denying a pejorative quality associated with something, versus acknowledging that some form of act or behavior is wrong, bad, or inappropriate, and rather alleviating full responsibility for it, is argued in the articles as reflecting either general alignment or misalignment in values and norms of parenting conduct. Especially *denial of harm* arguments represent clear examples of the latter, where parents perceive what is deemed harmful for a child differently. Furthermore, there is an important difference in whether parents assert and allege lacks and insufficiencies in procedure and casework, or rather contest substantive definitions or thresholds for risk of harm.

Across the justifications and excuses, parents questioned procedural aspects of care order interventions as well as substantially about the material content of *harm*. A significant number of parents focused on procedures and aspects of being under investigation and assessment, receiving help and experiencing involuntary intervention. This was expressed through the suggested fourth dimension outside the original triangle, that of CWS and County Board factors. This dimension requires a more reflective, inwards and procedural perspective on the individual case, as well as the role of CWS. When parents invoke such arguments, they can be seen as to highlight a somewhat overlooked part of the decision-making process. Such argumentation can be interpreted as affected parties expressing lack of quality in the decision-making process and the lack of free participation, as stressed by Habermas (1996). Seeing this as a fourth, procedural dimension can provide a valuable addition to making these procedures more transparent.

A main contribution from article 3, which was further explored in article 4, was that of normalization arguments as a separate strategy in asserting care rights, deviating from the well-established defense dichotomy (Dressler 2006; Husak 2005). Arguments outside the defense dichotomy were in the newborn material explored as wider *rationalizations* of parenthood. Through rationalizations, parents neither justified or excused their parenthood or specific behavior or situations, but rather rationalized why they should indeed retain the right to care for their infant. A tendency, although the material was not directly comparable, was that normalization appeared much more frequently in newborn proceedings. With normalization, parents aimed to widen perspectives on adequate parenthood, claiming some level of responsibility for deviant behavior or circumstances, but questioning the deviance and normalizing it. Normalization arguments had an ethical undertone to them, aimed at widening the scope of normality and questioning the State threshold for parenting adequately and for insecurities allowed for new parents. These arguments indicated a gap in understandings of what is acceptable state intervention into the private sphere and where the boundary is drawn for public and private responsibility for children. They highlight a breach from a normative consensus and a perception of unfair and unjust public institutions.

Understanding parents' arguments is critical, especially in decisions such as revoking care rights. The arguments put forward by birth parents identified in this thesis arguably point to two legitimacy gaps that need to be addressed. Clearly, the use of *blaming* arguments towards CWS and claims of *undue process* signalizes a need for increased focus on procedural aspects of care order proceedings. Decision-makers should assess and reflect transparently on casework, service provisions, health assessments, and the duties of CWS and County Board towards the involved parties.

However, as touched upon in section 3, the literature is not in full agreement as to what can explain satisfaction with a system or institution – the procedures leading to a process or decision, or the outcome of a process or decision (Esaiasson et al. 2019; Tyler 2001). Parents' justifications about *denial of harm* and *normalization* clearly point to misalignment that cannot be alleviated by procedural fairness alone. Kihlström states that social control, or coercion, as well as defective professionalism or self-maintaining bureaucracies, can make the moral sphere empty and create a legitimacy gap for its citizens (Kihlström 2020). This resonates with the nature of child welfare and custody cases. Can demands or expectations ever be placed on birth parents to rationally accept a decision concerning care rights and custody? This points back to the inevitable subjectivity of parents asserting their own care rights, defending their own parenthood as affected parties. This is engagement with the state from a different stance than that of broader groups of citizens or minorities engaging with issues on policy levels. However, the stream of cases from Norway before the ECtHR, and the established human rights violations in Norwegian child welfare practice indicate system legitimacy challenges. One such explanation may be that of the opposite of a policy lag - where policies lag behind actual social developments. Rather we may be witnessing a social policy *rush* anchored in children's rights and child-centrism. Parts of the population may be late in recognizing, or aligning with, these developments, and so Norwegian child welfare policy is way ahead of a part of the population, who does not consider them legitimate.

Lastly however, it is critical to stress that the State is not only obligated to secure the rights of parents in care proceedings and child welfare decision-making. It has an

inherent, individual and independent duty to protect children from harm, and place primary consideration on the best interest of the child when making decisions. As such, this discussion comes to a preliminary end by reflection on - *legitimacy towards whom? Autonomy for whom?* What is clear from the outlined course adjustments following the ECtHR judgments, especially about the temporality of care orders and increasing contact between birth parents and children, is that how to fairly secure the right to respect for family life for both parents and children individually, as well as fairly balancing parents and children's rights, remains contested.

6.4. Theoretical and methodological reflections

Discretion in child welfare decision-making is a critical and complex part of the welfare state. While lawyers, on the one hand, advocate constraints in the legal system, such as possibilities for judicial review and other audit functions, socio-legal theorists, on the other, wish to break away from a binary and polarized perspective on rules and discretion (Pratt 1999). This is motivated by the persistence of the 'problem' of discretion, despite the proliferation of laws and rules put in place to rationalize, legalize, and check it (ibid). While not providing a solution to the inevitable conundrum of how to understand and peacefully co-exist with discretionary authority, this study provides insights into how discretion shapes the individual assessment of prognostic cases. The travelling of institutional histories as evidence of future care capacities needs to be explicitly discussed and explained. In reflecting on how such decisions can be improved in these written 'end documents', both procedurally and substantively, two conceptual contributions come to mind. Stenmark emphasizes that when posed with a task of forecasting in social work, examining a wider range of possible outcomes was associated with more ethical decisions (Stenmark 2013). Michell (2009) advocates a similar line of thinking. Instead of seeking to eliminate uncertainty, we highlight it and seek to manage it. In policy development, Mitchell advises drawing up multiple alternative futures and adaptively managing the possibility of different scenarios, rather than predicting and acting on the basis of one single scenario. Adding this type of obligation of explicitly considering and spelling out multiple alternative outcomes, both in decision-making and

subsequent writing, can be one way of adding quality, transparency and ethics to decisions.

Through this thesis, the value of systematically studying legal documents also becomes evident. Critical insights are gained into both the nature and facts of these cases, the arguments provide by parents against intervention, and the justifications provided by the State supporting intervention. As these cases are mostly inaccessible from the public, systematic and rigorous analysis of such data cannot be understated. Through such approaches, the legal rationales and the actual *law in practice* becomes known. After criticism from the ECtHR, the Norwegian Supreme Court has emphasized that justifications for intrusive child welfare interventions must be more explicitly justified. This includes providing clear reasons for choices of actions, transparency in balancing acts and prioritizations when deciding in the best interests of the child. As such, the process of further analyzing County Board and Court decision-making activity is crucial to be able to elicit and measure the effects of the spotlight on Norwegian child welfare practice and the adjustments implemented and made explicit by the Supreme Court.

Furthermore, it is important to reflect on the approach taken in the thesis on the study of discretionary decision-making. A primary focus has been put on the assessment of case factors as part of the exercise of discretion. This is explained firstly by recognizing that individual, organizational or external influences on the specific decision-maker in the specific case are unavailable within the research design. A focus on case factors in decision-making also aligns with the acknowledgment of the significance of case factors for decision outcomes (Graham et al. 2015; Stoddart et al. 2018). Specifically, in relation to forecasting in social work practice, no personal or professional characteristics have been found to be significant predictors of social work forecasting accuracy (Meindl and Wilkins 2021). Ultimately, the interdisciplinarity represented by the decision-makers, as well as the role of social work and psychological knowledge in substantiating and making up the central concepts in law, makes the specific factors under assessment in the cases essential to capture. However, this does not mean that the whole picture of decision-making in newborn care orders is painted. Further investigating the remaining decision-making factors remains important. Through surveys, vignettes, observations of

and interviews with decision-makers about their actual decision-making activities and reasoning, as well as bridging this with background and organizational variables, intrusive welfare state decision-making becomes more transparent, and possible for citizens to engage with.

Finally, as discussed in article 4, Norway is currently going through a shift from adversarialism to the incorporation of Alternative Dispute Resolution (samtaleprosess) measures in legal care proceedings. As also discussed in the article, the evidence is not clear regarding the benefits of implementing less formal decision-making environments when it comes to ensuring participation and engagement from the affected parents and children (Porter, Welch, and Mitchell 2019). The descriptive mapping also revealed that in 40 cases, the parents *consented* to placement. Consent within a care context is related to social workers' ability to recognize resistance, as working with it may lead to transformation from resistance to voluntarism (Pösö et al. 2018). Findings from a recent study on care order decision-making in cases with violence and older children reveal the challenging context for reaching mutual understanding:

> "The CB explicitly discusses the potential for change, and this is closely related to the parent's description of the situation. It is evident from the CB's discussions that the parents' denial, lack of acknowledgement, and blaming the child, are interpreted as parents lack of self-understanding and insight, and thus the basis for an improvement of the situation is deemed absent" (Audun Løvlie and Skivenes 2021, 32)

This example of an often adversarial and conflicting perception on reality underscores a need for the cruciality of agency collaboration and communication with parents through the phases of assessment and service provision. Recognizing this before a case reaches the legal level will have implications for legal engagement and outcomes as well. Gaining insights directly from parents on their experiences with mediation procedures will shed light on whether this format indeed is better suited to secure proper deliberation and procedural rights, and increase 'voluntarism'. In this regard, the role of

legal representation must not be understated. While having gained knowledge on what parents officially communicate in care proceedings, we still also lack information directly from parents or insight into the nature of the collaborative relationship.

6.5. Concluding remarks

Despite this thesis being a study of a particular (child) welfare context, the design and results are arguably comparable and of significance to other domains of sensitive, prognostic, and discretionary welfare state engagement. The Norwegian child welfare shares system features that are similar to other family service oriented and child's rights protective systems, such as the Nordic ones. Systemic similarities are also identifiable in several other European countries, to whom both the European Convention on Human Rights, as well as the UN Convention on the Rights of the Child apply.

To sum up, it becomes clear that (written) prognostic social welfare decisions need to be both transparent and responsive towards those they affect. This is underscored by the findings in this thesis, particularly the variations in justifications for (similar) care order outcomes, and the procedural and material misalignment expressed by parents in such care orders. Even through these decisions may prove themselves to indeed be in the best interest of the child in a long-term perspective, it is important that they be made and communicated legitimately to those concerned.

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Child welfare and future assessments – An analysis of discretionary decision-making in newborn removals in Norway

Ida Benedicte Juhasz*

Department of Administration and Organization Theory, UiB, Norway

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ABSTRACT

This study explores a particularly wide discretionary space set for decision-making within the Norwegian welfare bureaucracy; care order decisions concerning newborns directly removed from the hospital by the child protection system. The aim is understanding how decision-makers reason and justify in applying (child welfare) policy when decisions have a predictive and uncertain nature. To explore this, all (N = 19) written newborn care order decisions from 2016 decided by the County Social Welfare Board, where the parents have had no previous children removed, are analyzed. Under analysis are parents' problems or problematic behavior and subsequent capacity to change. Three categories of change emerge; case problematics most often appear as *permanent*, a quarter as *slow-moving*, and a small number are *transient*, where some form of change is taking place. Further findings are large variations in the number of sources and contexts applied in the justifications. The study concludes that newborn cases involve a highly marginalized demographic within child protection, as decision-makers unitarily find high, long-lasting risk to equal minimal change capacity in a majority of the cases. Simultaneously, decision-makers appear to mitigate future uncertainty by invoking the parents' childhoods, health and social welfare histories as parenting indicators.

1. Introduction

The delegation of discretion in welfare bureaucracy decision-making facilitates necessary individualization, but is not without its drawbacks. A central criticism is that it opens for similar cases to be treated differently, and vice versa, as a result of local practices, heuristics and rule of thumb (Drobak & North, 2008; Tversky & Kahneman, 1974). This may streamline decision-making, but without legislators' authorization or intention, it ultimately breaches the rule of law (Handler, 1983). The critique sees discretion in the welfare state as a threat to democratic control (Molander, Grimen, & Eriksen, 2012; Rothstein, 1998). In this paper, I probe at the accuracy of this critique by examining reasoning in child welfare care orders of newborn children: serious state interventions into family life, aimed at securing a child's best interest.

Legal decision-makers and judges in child welfare systems are authorized discretion in making decisions about family structures, despite little systematic knowledge and research existing on what justifies decisions about removing a child from parental care. These decisions are in the literature characterized as immensely difficult (Broadhurst, 2017; Munro, 2019; Ward, Brown, & Westlake, 2012), and must adhere to law, to established knowledge about children's developmental needs, as well as normative ideas of what are legitimate reasons for state intervention into family life (Gilbert et al., 2011; Burns et al., 2017; Connolly & Katz, 2020; Berrick, Gilbert, & Skivenes, 2020). However, these sources require interpretation, and are open to contrasting views. Furthermore, decision-makers must, based on available evidence and guidelines, make predictions about the future of families (Munro, 2008; Putnam-Hornstein & Needell, 2011; Taylor, Baldwin, & Spencer, 2008). This includes establishing the likelihood of the causes for concern changing in due time so that parents will develop adequate parenting capacities. Of interest for this study is the assessment of future parenting in legal child welfare decisions. What arguments and evidence substantiate and justify conclusions about whether a parent can secure a child's short- and long-term best interests?

To study this, I have collected all child welfare newborn care order decisions decided by the Norwegian County Social Welfare Board (County Board) in 2016 in which the newborn was removed directly from the hospital (N = 46). Amongst these cases I have selected only those where the parents have not had previous children removed (N = 19), in order to eliminate the influence of previous parenting. This is a sample in which decision-makers' assessment of, and predictions about, parenting capacities are not based on information about previous actual parenting, but rather take the form of hypothetical

* Address: Department of Administration and Organization Theory, University of Bergen, Christies gate 17, 5007 Bergen, Norway.
E-mail address: ida.juhasz@uib.no.

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assessments about parenting. An analysis of reasoning in newborn removal cases brings insight to an understudied area of the welfare state, both in terms of revealing the content and severity of these cases, as well as shedding light onto proceedings and justifications that are mostly hidden from external actors (Burns et al., 2019).

The paper has the following structure; the Norwegian (child) welfare system will be introduced first, as well as knowledge about newborns and child welfare decision-making in Norway and internationally. I will then lay out the theoretical framework of discretionary space and reasoning relevant for these decisions, before methods and methodology will be elaborated on. Both descriptive and substantive findings will be presented and analyzed, followed by a discussion and some concluding remarks.

2. The context for decision-making in care orders of newborns in Norway

2.1. The Norwegian welfare state and child welfare system

In order to understand decision-making in newborn child removals, it is vital to understand the context in which they happen. The Norwegian social democratic welfare model is described as comprehensive and universalistic, central features being public and collective responsibilities for ensuring high levels of social security, equality and social redistribution (Esping-Andersen, 1990; Romøren, Kuhnle, & Hatland, 2011). As a sub-field within the Norwegian welfare state, the child welfare system is oriented towards family service, and child-centric in its approach (Skivenes, 2011). Rather than socio-economic factors, poverty and marginalization being directly linked to *child abuse* and triggering interventions, Norwegian child welfare work is oriented towards parents' or children's personal problems and needs, and more often *child neglect* as a result of these (Ogden & Backe-Hansen, 1994). Within the system, provision of in-home services, prevention and early intervention with low thresholds, as well as focusing on the least intrusive intervention, reigns when working with vulnerable children and families. Removing children from their parents' care is considered the last and least favorable solution, only to be used when every other in-home service has been ruled out (Skivenes & Søvig, 2017).

Despite one of the main reasons for child removals followingly being the "parents' harmful care and neglect of the child's needs" (Skivenes & Søvig, 2017, p. 46), Norwegian child welfare legislation[1] opens up for removals of children based on future assessments. The provision allows removing a child even though factual child neglect has not been observed, and may be used when children receive care from parents who, based on a 'high probability', will not be able to care sufficiently in the future, in order to secure children security and continuity in the care provided for them. The core demographic relevant are described to be parents with intellectual disabilities, serious personality disorders, extensive mental health issues and drug use with poor prognoses for changing care capacities. These decisions are normally seen as long-term placements (NOU 2012:5, 2012). However, policy simultaneously states, and is restated, that newborn child removals "may prove to be extremely difficult if the parents have not cared for the child or a previous child, or time has passed since their previous care task, and it is alleged that sufficient changes have taken place" (NOU 1985:18, 1985).

Care orders of infants where the rights of the parents are distinctly restricted, are nonetheless low-frequent throughout Scandinavia compared to removals of older children (Hestbæk, Höjer, Pösö, & Skivenes, 2020). Relative to the other Scandinavian countries however, there is a higher amount of infant care orders in Norway. The number of infants placed through a care order in Norway in 2016 was almost four times as high as in Sweden, Denmark or Finland, as 2.3 per 1000 infants were placed with a formal care order decision by the end of year (aged 0–11 months) (Hestbæk et al., 2020). At the other end of the age spectrum, and unsurprisingly, this number was 13 per 1000 for teenagers aged 13–17, and in sum 8 for all children below 18 years of age (Bufdir, n.d.).

2.2. Knowledge about newborns and child welfare decision-making

The increased focus on the youngest subset in child protection is rooted in emerging knowledge about the particularly damaging effects of experienced abuse and neglect in infancy, as it is a "a period of extreme vulnerability in which specific child welfare experiences have the potential to have devastating, long-term consequences" (Ward et al., 2012, p. 18; Dwyer, 2008; Wulczyn et al., 2005). In Norway, knowledge pools have been emerging about infant mental health and development, as well as the importance and significant effect of prenatal circumstances and exposure to drugs and alcohol in utero (Slinning, Hansen, Moe, & Smith, 2010; Braarud, 2012) which is highly relevant to the context of newborn care orders and parental capacity assessments. Much empirical research and theory development has also been accumulated on child welfare decision-making in the agencies and the professional level (Eriksen & Skivenes, 1998; Backe-Hansen, 2001; Oterholm, 2003; Grinde, Egelund, & Bunkholdt, 2004; Vis & Fossum, 2015; Christiansen & Kojan, 2016) as well as, but to a lesser degree, on the County Boards (Falck and Havik, 2000; Skivenes & Søvig, 2017; Skivenes and Tonheim, 2017, 2019).

Intervention around the birth of a first child requires assessing the likelihood of future child abuse or neglect - assessing the likelihood before it occurs (C. van der Put, Assink, & van Solinge, 2017; C.E. van der Put et al., 2017). Putnam-Hornstein and Needell (2011) contribute towards this field in their investigation of the risk of a child being reported for maltreatment before turning five years old, using population based birth records linked to child protection data. They studied a California birth cohort from 2002, and discovered 11 significant birth variable predictors related to families and children for contact with child protective services before turning five. Interesting, but not surprising perhaps, is that low birth weight, no use of prenatal services and a birth abnormality are strong predictors at birth, but then lose explanatory force after infancy (Putnam-Hornstein & Needell, 2011). Larrieu and colleagues explain that specific risk factors are less important than the number of risk factors for predicting loss of infant and toddler custody. Further, no specific risk profile, such as mothers with substance-use disorders or psychiatric disorders, indicates reunification with the children as impossible (Larrieu, Heller, Smyke, & Zeanah, 2008, p. 58).

Research on actual decision-making in infant removals can nonetheless be said to be limited, as an international trend (Broadhurst et al., 2018). This makes sense, as the cases are both sensitive in nature and exempt from public disclosure. When focusing on capacity to change in the newborn subset, social work research has found that parents who had not "managed to effect major change during pregnancy, but had made some progress around the birth of their child were generally not able to sustain such changes" thus pulling towards removal (Ward et al., 2012; cf. Lushey, Barlow, Rayns, & Ward, 2018, p. 106). Focusing on risk factors and parenting, Krutzinna and Skivenes examine across three European countries which parental capacities courts emphasize as important for their decision to remove or not remove a baby at birth; lack of empathy for the child, poor parental competency and mental illness being the top three risk factors for removal (Krutzinna & Skivenes, 2020).

3. Discretion and decision-making in newborn removals

3.1. Structural frame for decision-making – discretionary space

The discretion delegated to the County Board in assessing the

[1] Both §4-8 and §4–12-d of the Child Welfare Act of 1992.

aforementioned risk in newborn cases has both a structural and epistemic dimension. Despite the latter being the focus of this study, the structures facilitating discretion must be presented first (Wallander and Molander, 2014). The frame for decision-making in this context, "the surrounding belt of restriction" as emphasized by Dworkin (2013), thus contains at least two vital components; *who* makes the decision, and *what* instructions are provided.

The County Board in Norway can be seen as an implementer of law as well as child welfare policy, entrusted with a wide discretionary space, as there is a lack of concrete professional guidelines and instructions assisting professional judgments when interpreting rights and legal criteria (Falch-Eriksen & Skivenes, 2019). In 2016, there were 12 regional County Boards across the country, catering to all the then 428 municipalities and their child welfare services (CWS), who file care order applications to their respective County Board[2]. This includes providing all the written case material such as journal notes and statements from various social and health services, and all written material from the parents' history with CWS. The CWS carries the burden of proof through their submission of the removal application (Skivenes & Tonheim, 2017). The proceedings indicate the vital role of the CWS in framing cases for the County Board. There are some instances where the parents consent to the care order, but all formal care orders[3] are characterized as 'involuntary' when subjected to legal proceedings in the County Board.

Each County Board is a court-like decision-making body representing both legal, professional and lay perspectives necessary in sensitive child welfare issues, and the multidisciplinary bench indicates a focus on due process and legitimacy for the involved parties (Skivenes & Tonheim, 2017). The County Board bench is normally comprised of three members; the Chair who is a lawyer,[4] an expert member (usually a psychologist) and a lay member. The County Board is assigned to assess whether a *high probability of a situation or risk for the child (§4–8, section 2)* as described in the general child removal provision (§4–12, a-d) of the Child Welfare Act (CWA) exists if the child were to move home with its parents (The Child Welfare Act, 1992). If so, this warrants a child removal based in an interim removal immediately after birth. In an ordinary removal decision, the County Board assesses the fulfillment of three legal criteria, resting in the ordinary removal provision §4–12 of the CWA as mentioned. There needs to be (a) a situation where harm or neglect has occurred or was likely to occur, (b) in-home or help services have been unable or assessed as unable to facilitate satisfactory care, and (c) the removal is in the best interest of the child (Skivenes & Søvig, 2017). Since newborn removals include greater uncertainty than removal decisions with older children, legislation and case law emphasizes stricter evidentiary requirements (Oppedal, 2008), the threshold being "highly probable" rather than the usual requirement "more likely than not", that harm will occur.

3.2. Decision-making under uncertainty - discretionary reasoning

As a reason for this higher threshold for intervention, the Norwegian lawyer Lindboe (2007) explains that when predicting the future, it is impossible to be as certain as when assessing conditions and instances that have already taken place. Specifically to child welfare, various authors have described the difficulties in accurately predicting future abuse (cf. Gold, Benbenishty, & Osmo, 2001). Philosopher Sandra Mitchell explains predicting the future in relation to human actions as "challenging because of the complexity of the causal influences on the individual" (Mitchell, 2009, pp. 88–89). Kjær (2019) describes that the Norwegian CWA has the child's current situation as its norm, despite some provisions requiring future assessments, as newborn removals do. Decisions anchored in future assessments can be seen as drawing on the logic of, and contextual premises for, decision-making from simpler circumstances which are then extended to contexts of increased risk and uncertainty (Mitchell, 2009, p. 86), which is not necessarily an unproblematic transfer. These simpler circumstances can be those the CWA is aimed at, such as older children with more life experiences, those newborn cases where parents have had prior children removed, or at least have exercised parental care.

Even though we do expect the professionals entrusted with important decision-making tasks to act in accordance with their best judgment (Wallander and Molander, 2014), this type of transfer of logic from the more certain to the uncertain can be related to the well-known limitations to the human cognitive system. The human mind has a limited capacity to attain, filter, comprehend and process information for later use (Schott, 1991; Simon, 1955; Tversky & Kahneman, 1974). This can lead to errors and biases (Tversky & Kahneman, 1974; Wallander and Molander, 2014). These cognitive biases can concern interpreting experiences and information based on earlier encounters with similar cases or situations (availability bias), selecting and relying on information that confirms, rather than contradicts our initial stances (confirmation bias), and associating events occurring sequentially to be causally linked (Jacobsen & Thorsvik, 2013; Tversky & Kahneman, 1974). Eileen Munro articulates this focus on history and past events in child welfare decision-making under uncertainty, stating that "the best guide to future behavior is past behavior", as the family's way of behaving to date is the strongest evidence of how they are likely to behave in the future (Munro, 2008, p. 77). This can be explained through for example the somewhat disputed intergenerational transmission hypothesis, that parents who experienced abuse or neglect as children are thought more likely to abuse or neglect their own children (Assink et al., 2018; Widom, Czaja, & DuMont, 2015).

As such, the wide discretionary space available alludes to the expectation of both variation as well as conformity between decision-makers in newborn care orders. It is expected that these cases are serious and multifaceted, as intervention before parental care is exercised indicates a high level of risk and concern. However, the threshold is correspondingly higher. Family and social history is expected to be prevalent, and color how the current and future is assessed.

4. Materials and methods

4.1. Data material and the cases

Out of the 46[5] ordinary child removals[6] of newborns directly from the hospital in Norway in 2016[7], this study focuses on all 19 cases from that year where no prior sibling has been removed. Access to the material was granted by the Norwegian Data Protection Authority, and several agencies were involved in granting access to and working with confidential material[8]. The written decisions range from 8 to 23 pages,

[2] Since 2016, there has been a Municipality reform in Norway, and the number of municipalities is down to 356. Following this reform, there are now 10 regional County Boards.

[3] Children may also be placed out-of-home as a voluntary measure, where the premises are set by the parents.

[4] But employed as a civil servant, not a judge (Skivenes & Søvig, 2017, p. 48).

[5] This includes 2 cases filed under §4-6, §4-12, but the child was placed directly from the hospital in both instances.

[6] Newborn removals are a twofold legal process, containing both an interim removal from the hospital (§4-8, §4-9 in the CWA), followed by ordinary removal proceedings (§4-8, §4-12 in the CWA). CWS undertakes the initial interim removal the hospital, supported by a legality check by the County Board Chair. Within six weeks of the interim removal, CWS submits an ordinary removal application. If not, the removal is revoked, and child moved back to its parents.

[7] 2016 represents the most recent cases available.

[8] The following website provides information about data protection ethics and data access: https://www.discretion.uib.no/wp-content/uploads/2019/12/INFORMATION-ABOUT-DATA-PROTECTION-ETHICS-AND-DATA-ACCESS.pdf.

with a relatively fixed structure. They include relevant background information and overview of the undisputed facts, followed by CWS's claims, the parents' claims, and finally the County Board's assessment and final decision. The County Board's written assessment and justification is structured by the three care order criteria (§4-12) mentioned, as well as a paragraph on the selected placement in foster home, and a final longer section on visitation between the birth parents and the newborn. The County Board final assessments and justifications are based on all the written claims and evidence presented by the parties and their lawyers before the hearing, as well as statements made orally in the hearing by the parties, as well as expert and private party witnesses. The background section, final assessment and justification have been read and analyzed both for descriptive and analytical purposes. The background section has informed the descriptive coding and classification of cases, while the substantive analysis is based on the final assessment, as indicative of the rationale for the decision.

The cases have non-identifiable names ranging from C1 to C19. C13 and C16 has included the background section in the analysis as the assessment is in both cases very short and superficial, emphasizing the background section that both parties agree on, and the mothers agree to placement. In C16 the question at hand is not the actual care order, but rather the placement with the biological grandparents, where the mother also will live. The five cases where the parents give consent to placement have shorter assessment sections. The County Board explicitly states that it "nonetheless has an independent responsibility to ensure that the criteria enshrined in the law are fulfilled, even though the consent may affect the assessment of the evidence, as the County Board does not need to comprehensively discuss matters that both parties agree upon" (C13). The substantial coding focuses on arguments relative to the parents seeking to have the child in their care, and in the five consent cases (C10, C13-16)[9] the focus is on the parent with parental authority. In 14 cases this is only the mother[10], and she is the central figure of discussion. As such, there are five cases in the pool of 19 where the father is a presence in the case. In four of these cases, both parents seek joint care of the child. In C1 the father is sole care seeker, and the County Board describes him as dealing with personality/social functioning issues, and untreated childhood trauma. In C2, both parents have drug problems. In C4 and C5 both sets of parents have intellectual disabilities, and in C19 the father has personality/social functioning issues. The newborns were on average three months at the time of the County Board hearing. In seven cases the children were explicitly healthy or assumed healthy at birth, and the rest experienced challenges related to (suspected) drug exposure in utero (C2, C7, C11, C15), prematurity (C4, C16), dysmaturity (C16), asphyxia (C9), blood sugar levels (C1), heart issues (C6) and physical challenges (C11). Three cases are unclear about the child's condition at birth.

4.2. Analytic approach

The written decisions have been explored through inductive content analysis (Cho & Lee, 2014; Taylor, 2016), and coding and classifications have been performed using Nvivo 12. As mentioned, the cases have been read and analyzed both in order to obtain descriptive information about the cases, and to gain an understanding of how the County Board reasons and justifies the removal decisions. Sections of the judgements that were mere repetitions or paraphrases of legislation or guiding principles relevant to the case, as mentioned above, were omitted from the analysis if they were not applied and connected directly to specific individual case elements. The written decisions were first read and reread as a whole to gather descriptive data of case outcome, parties involved, and other descriptive features related to the level and assessment of risk in the cases. After gaining descriptive information throughout the text, the focus shifted to the County Board's reasoning section. The material was coded first openly to explore the content, focusing on change, risk factors and time dimensions. The County Board typically assessed what it saw as the duration of each placement, thus providing a clear indicator of how they saw the parents' capacity to change. This reading roughly shaped the change categories of *permanent*, *slow-moving* and *transient*. All the 13 cases labeled *permanent* were explicitly assessed as long-term placements; that the newborns were likely to grow up in the foster families. Out of the four cases labeled *slow-moving*, three of them were also assessed by the County Board as long-term. They however stood out in how the County Board assessed the possibility of the parents being able to change their situation. Change was not impossible but described as a difficult process taking several years. In the last slow-moving case, the newborn was placed in the care of the maternal grandparents, and length of placement was not discussed. Two cases were *transient*. One of them was a non-removal, while in the second case, the mother was seen as able to achieve adequate change making reunification a possibility in the near future.

Following the focus on change, categories capturing the parental *risks or situations* in the cases were developed drawing on the Ward et al. (2012) and Hindley, Ramchandani, and Jones (2006) frameworks of parental risk factors associated with future harm, as well as descriptions of the nature of the behavior or problem (Munro, 2008). This round of coding investigated the duration and prevalence of the parents' problems, as part of Munro's 'factors for change' (Munro, 2008). Duration was understood both as how long the problematic behavior had lasted, as well as specific relations with Child Welfare Services as a child. Prevalence was the number and types of contexts over which the problems or problematic behavior had been observed (Munro, 2008, p. 87). This was coded first as observations or statements from a direct source (doctor, service) emphasized by the County Board, but also then embedded into larger context categories such as the hospital during the time of birth, the police, or prenatal services. The three change categories structure the presentation of the risk factors, as well as the assessments of the duration and prevalence of the parents' problems. Throughout the remaining of the paper the term *parental problems,* in line with the Munro (2008) usage, represents terminology such as 'risk factors' and 'problematic behavior'.

4.3. Limitations

Several limitations to the study need mentioning. Firstly, the study can be said to be 'parent-focused' by its anchoring in the 'factors for change' and parental risk factor frameworks. This may underplay the role of wider societal and environmental risk factors in the decision-making process. Secondly, not all arguments or facts of the care order case presented to the County Board in writing or orally in the hearing are included or referenced to in the written decision. As such, some information is not explicit in the cases, and some information may have been mentioned in the introduction, but is not mentioned as part of the justification, and therefore is not included in the substantial analysis. Neither can it be retrieved from the data what the decision-makers think, and how they have communicated during deliberations. The written judgments nonetheless include and convey what the County Board deems relevant in order to substantiate the decision (Lundeberg, 2009; The Dispute Act, 2005). As a number of these cases are publicly available, by extension, the judgments are analyzed as the State's written justifications for newborn interventions.

[9] C10 concerns a mother with serious mental health issues, C13 concerns a mother with a moderate intellectual disability, C14 concerns a young mother with personality/social functioning issues, C15 concerns parental drug use, and C16 concerns a young mother with personality/social functioning issues.

[10] Within these 14 cases, the father is unknown in four. In six of these cases, the father is known by name, but no further elaborations are made. In two of the cases both parents have parental rights but only the mother seeks care rights. In the two remaining of the 14 cases the father has no rights or responsibilities, but is granted visitation.

It is inarguable that the number of annual ordinary newborn care orders directly from the hospital in Norway where the child is the first born to the parents is small (N = 19), as 1067 care orders were made in 2016 (Bufdir, n.d.). This makes the case sample small, accordingly. However, the data makes out all the cases of this particular kind in Norway, thus directly representing the phenomenon in question. The totality of the material is disclosed from the Norwegian public, and highly regulated. As such, providing insight to the process, rationales and outcomes underpinning these decisions is extremely valuable and necessary. Furhermore, insights into specific decision-making practices that have a predictive and future oriented nature can be analytically relevant both to cases where parents have only exercised care for a short time period, as well as broader welfare bureaucracy decision-making tasks outside child protection needing future assessments.

5. Findings

All the 19 decisions were unitarily decided by the Board, meaning no dissenting opinions by the three[11] County Board members. 18 of 19 decisions were ruled as removals, with one case ruled as non-removal, proposing the mother and child a transition to a stay at family center (C17). In 16 of the cases, the parents had arranged visitation with the infant between the initial placement and the ordinary County Board hearing, making evident that some form of exercise of care was observed by either foster parents or CWS or both.

5.1. The parents' problems and capacity to change

Parental problems and *capacity to change* appeared as vital elements in the decisions. The cases were complex and the parents' problems overlapped. The County Board found personality/social functioning issues as a main problem in 16 cases. These non-exclusive issues ranged from aggressive behavior, personality disorders, untreated ADHD and more general descriptions of immaturity and vulnerability or anti-social behavior. In 10 cases the parents had mental health issues, ranging from bipolar disorder, anxiety, depression and PTSD. In eight cases the County Board regarded the parents' own problematic upbringing, such as abuse, neglect or bullying, as formative of the parents' struggles. Six cases concerned intellectual disabilities, ranging from borderline to moderate. Four cases had parental drug use as a main problem. In 18 cases the problems intersected and overlapped. In one case the County Board stressed four different problems, and in the rest between two and three. Only one case had only one problem area as defined by the County Board. As indicated, personality/social functioning issues appeared in combination with all other problem areas.

Intrinsically linked to the parents' problems was the ability to change sufficiently within the near future. However, variations appeared as to how plausible change was. As such, three primary categories of change in the cases emerged; *the permanent cases*, *the slow-moving cases* and *the transient cases*. As mentioned, 16 of the cases the County Board saw as long-term placements, meaning that the infants were expected to grow up in the care of their foster parents. These make up all the permanent cases, and three slow-moving cases. The nature of the last three cases not deemed long-term placements is elaborated on below.

5.1.1. The permanent cases

Diving into the 13 *permanent* cases, the parents here were not expected to change their problem behavior or functioning in the near future. The clear indicator of this was naturally the anticipated duration of the placement as 'long-term', but in these cases, the County Board made explicit how they assessed the parents' lack of capacity to change. This was mainly due to the inherent 'permanency' of the problems, and due to lack of insight and compliance. At first glance, the amount of problems in the cases did not necessarily correspond to overall level of risk or seriousness of the case. Furthermore, all problem types appeared across the permanent cases. However, what was interesting, but not necessarily unsurprising, was that all the cases where the parents had an intellectual disability fell within the permanent category (see Fig. 1 for an overview of the problems across the permanent cases).

All the 13 permanent cases included descriptions of the inherent nature of the parents' problems as not facilitating change to occur naturally or with help measures, and that the parents traits, behavior or problem(s) were somewhat 'fixed' or impossible to overcome in the foreseeable future. This was evident in C12, where the mother had an intellectual disability:

> *"The County Board cannot see that the criteria for a voluntary placement are fulfilled. Mother's difficulties are not of a transient nature. Even if Mother were to be medicated for ADHD, the County Board cannot see that the evidence claims that this would change the totality of Mother's problems."*- C12

The inherent nature of the problems was seen to directly affect the parents' ability to learn and utilize help. Three of the 13 permanent cases, all concerning intellectual disabilities, were directly concerned with the parents' actual (lack of) ability to learn or change. The cases included descriptions from CWS and foster parents during visitation between the biological parents and the child, where no sign of learning despite repeated input and counselling efforts how to hold, feed or soothe child was reported:

> *"Foster mother explained to the Board that Mother needs assistance both with feeding and caretaking of Son. Despite counselling, she needs help during every visitation in holding Son securely. Foster mother does not see that Mother is able to utilize help. The supervisor from CWS also confirmed this to the Board."*- C4

Six of the permanent cases were characterized by the parents' lack of insight into their problems, compliance and cooperation with services, and the linkage to possibility for change. The parents appeared to have the inherent capacity to change, but the current situation was characterized by (a) parent(s) who appeared unavailable or unwilling to embark on change and cooperate with services for assessments and treatments, thus resulting in a 'locked' situation. This is illustrative in C18, where the mother had unspecified behavioral problems, but no intellectual disability or reported mental illness:

> *"Mother was not available for guidance at the hospital, and mother is still not showing any acknowledgement or insight indicating that help measures per today will be of benefit."* - C18

5.1.2. The slow-moving cases

Moving on from the permanent cases, four of the 19 cases were *slow-moving*, seeing change not as impossible, but as a lengthy and difficult process for the parents. These four cases shared similar traits; two of them centered around the parents recent drug use and current mental health issues as well as problematic childhood in one case (C15) and personality social functioning issues in one case (C2), while the last two cases focused on young mothers with problematic childhoods and personality/social functioning issues (see Fig. 2 for overview).

In the two cases centered around the parents' recent drug problems, the County Board assessed that the parents were not at a place currently or in the foreseeable future where care for children was considered a safe option. *Stability* and *time* emerged as key elements in these cases:

[11] See footnote 3.

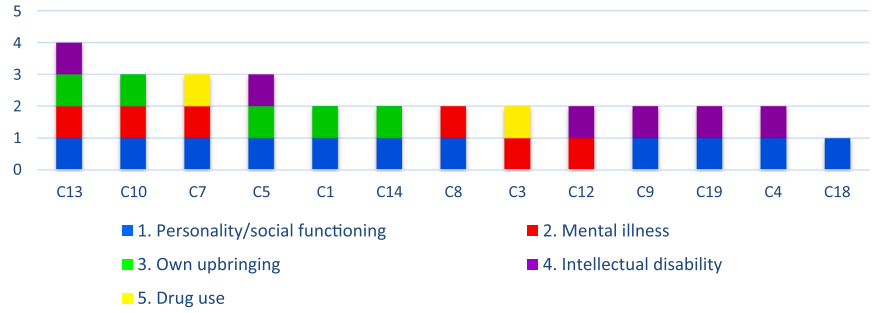

Fig. 1. Parents' problems across the permanent cases. N = 13.

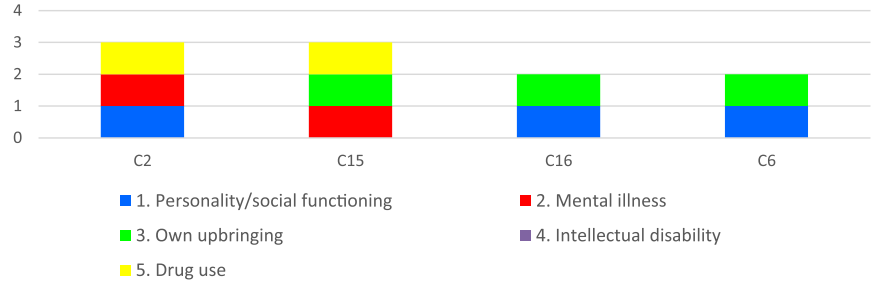

Fig. 2. Parents' problems across the slow-moving cases. N = 4.

"Even though the parents' development has been good, they wish to be drug free and to have clinical follow-up, it will be very difficult for them to change their life situation. Judging by the parents extensive and long-lasting problems, it is assessed that they have a long and demanding process ahead of them in order to obtain a lasting drug free life… (…) The parents need to show a life of stability and stable drug abstinence for several years before a reunification can be considered as an option". -C15

The focus in the 'young mother' cases was primarily on their immaturity (C16) and vulnerability (C6) due to their challenging childhoods, and the conclusion that they needed time to mature and self-develop before being able to care for a child. In C6, where it was claimed that the mother was on a positive path towards change, but that it needed to manifest itself further, this is illustrated:

"In any case, the County Board considers Mothers' positive development not to be pervasive enough, and has not lasted long enough, or has manifested itself to a significant extent, in the relation to caring for a small child". – C6

Despite the second young-mother (C16) case not being assessed as long-term, it was nonetheless ruled as slow-moving. With the child placed in foster care with the maternal grandparents and biological mother, timing was not discussed, other than the mother needing time to focus on being a teenager and mature accordingly.

5.1.3. The transient cases

Two cases were *transient*, representing two out of the three cases that the County Board did not see as long-term placements. The two transient cases both focused on the mothers' mental health problems, and personality/social functioning issues. C17 was ruled as a non-removal, where the County Board found the care order criteria to be fulfilled, but that the condition of attempting, or assessing the effect of, help measures had not, "under serious doubt", been sufficiently substantiated. The mother was thus proposed a transition to a family center with her child, extensively supported by her family and network, as well as accepting medication and showing insight into her problems. C11 had a mother with severe mental illness but also showing insight and accepting treatment, and as such, the County Board did not exclude that she would be ready for custody before boy developed attachment to the foster home:

"Mother has nonetheless now expressed that she is ready for treatment, and the Board deems that she for several months now has had a better functioning than before. Even though there are reasons to believe that mother needs treatment for a long time, the County Board cannot overlook the potential of the mother, before the boy has such an attachment to the foster home that a reunification will be impossible, will be able to be in such a position that she can care for the child. - C11

The two transient cases included personality/social functioning issues, as well as mental health problems. Despite there overall being no clear patterns found as to the amount of problems and the degree of change expected as mentioned, it is evident that the two transient cases 'only' included two problem areas each.

5.2. Duration of problems and capacity to change

The County Board emphasized the duration of the parents' problems in all 19 cases. A main, but unsurprising, finding was that in the cases where the problems had lasted the longest, since childhood, the County Board saw the least potential for change. Fig. 3 illustrates the duration of the parents' problems in the cases, divided by the different change groups:

In the *permanent* cases, eight of the 13 cases had parental problems assessed as starting in childhood. In two cases (C4, C9) where the parents had intellectual disabilities and personality/social functioning issues, the County Board focuses on the parents' problems emerging as adults. However, this did not mean that the parents did not have challenging childhoods and teenage years. The County Board described

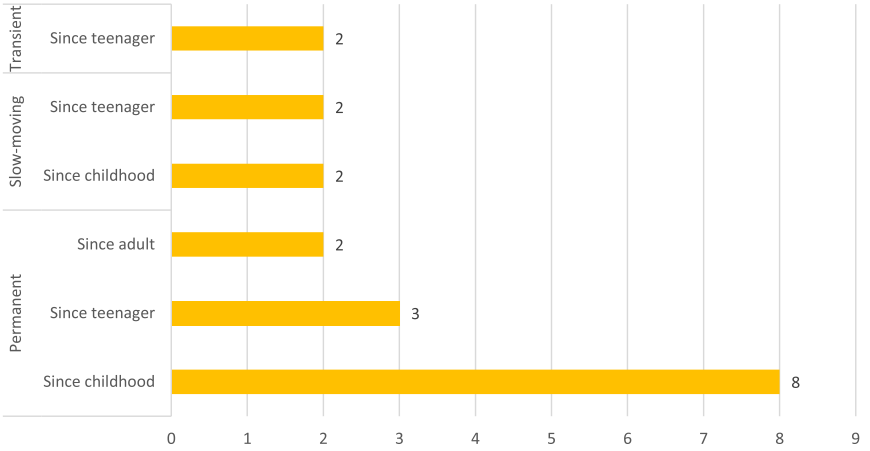

Fig. 3. Duration of parents' problems by capacity to change. N = 19.

the parents' upbringing, including special education, intellectual assessments and challenging transition to facilitated employment, (C4) and immigrant background arriving in Norway as a teenager and interaction with mental health and cognitive services (C9), but the County Board assessment and justification nonetheless focused on parents' adult lives as being problematic:

> *"The County Board noticed that none of the grandmothers emphasized that Mother and Father had challenges in their everyday lives despite both having been work disabled for several years and have obvious and significant social difficulties."* – C4

The four *slow-moving* cases all started during the parents' childhoods or teenage years. The two cases starting in childhood concerned mental health issues, problematic upbringing and following drug use (C15), personality/social functioning issues and problematic upbringing (C6), and the teenage years cases included C16 with the same problem composition, as well as C2 including drug use, mental health issues and personality/social functioning:

> *"Father started using drugs around the age of 12 and has used drugs seemingly continuously throughout his youth and since becoming an adult. He has no completed education, or proven ability to keep a job over time".* - C2

As mentioned, the *transient* cases were cases were the mothers had personality/social functioning issues, as well as mental health issues starting during the mothers' teenage years (C11, C17):

> *"The County Board points to the fact that Mother has had several difficult life experiences. She has been in contact with mental health services since the age of 14. Since this, she has had shorter time spans with better functioning than what has been the norm".* – C11

Finally, where relevant, the County Board also emphasized the parents' direct relations to CWS as children and teenagers. As illustrated in table 1, the parents had some form of relation to CWS as children or teenagers in 11 cases. Nine of the parents lived in either foster homes or residential units or both, five of these through a formal child removal, whereas two parents had contact with CWS, either not specified (C1) or not substantiated (C8). Legally, in five of the 11 cases the parents were taken into public care by a care order (§ 4–12), where the median age at removal was 14.

Table 1
CWS involvement in parents' childhoods (N = 11).

Lived in residential unit	4/11
Lived in both foster home and residential unit	3/11
Lived in foster home	2/11
"Contact" with CWS as teenager	1/11
Investigations but no further actions	1/11

Mutually exclusive categories. Based on Board's assessment.

5.3. Prevalence of problems and capacity to change

The vast prevalence of the parents' problems was also evident through the range of contexts the problem was observed, and reported on. As such, 16 different types of contexts were identified in the County Board's assessment and justification, each including several sources within the type of context. Most prevalent were descriptions from physicians, psychologists, therapists and health personnel assessing the parents' *mental health* and intellectual capacities from appointments, assessments, and treatment programs. Exploring the individual cases, we see that the County Board varied from emphasizing 26 sources across eight contexts (C19), to three cases with three contexts (C1, C7 and C18), illustrated by Fig. 4:

Fig. 4 conveys several aspects related to prevalence of the parents problems and how many sources were emphasized within the different contexts. Firstly, and most visibly and importantly, there was variation between cases in how many contexts and sources they included. Secondly, the figure also illustrates the complexity of each case, and underlines how consuming and fluid the problems actually were, across the various domains in the parents' lives. Despite there being no clear pattern as to the amounts and types of contexts and sources prevalent across the three change categories, some interesting tendencies emerged. In the slow-moving cases the parents' network was mentioned all four cases, with multiple sources within the context. Furthermore, both C11 and C19, two interesting outliers on each end of the change continuum, has six different mental health sources included, despite their different content and outcomes.

6. Discussion

So, how does the Norwegian County Board utilize their discretionary powers in making and justifying future assessments of parenting? From what is revealed through the analysis, future assessments in newborn cases are to a large extent a task of substantiating past and current parental risk factors and behavior, and making inferences from these observations to hypothetical future parenting.

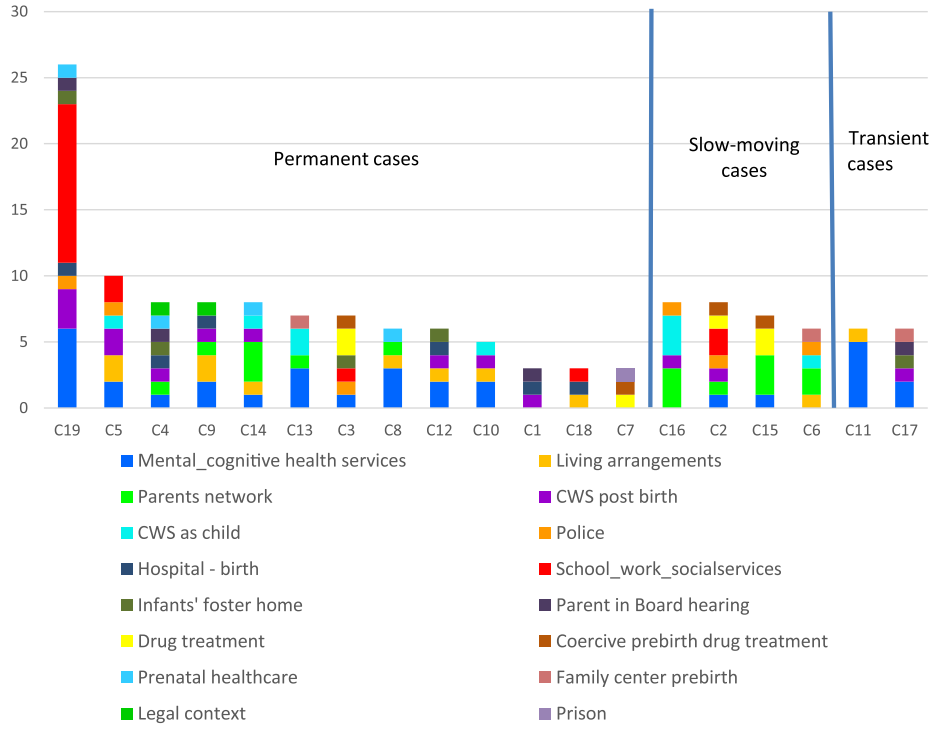

Fig. 4. Amount of problem contexts and sources by change in case. N = 19.

6.1. *High, long-lasting risk equals minimal change?*

Despite policy stating that these decisions are challenging, as they naturally may be, they nonetheless appear as coherent and well-grounded in their final written form, despite the written end document not nearly being able to reveal the "root and nerve of the whole proceeding" (Holmes, 1997; cf. Drobak & North, 2008). This does not mean that the County Board has made an optimal decision. Throughout the analysis, it becomes clear that these are not cases where a perfect solution is available. The parents in these cases are measured against an uncertain and unspecified minimal parenting capacity or 'good enough' parenting standard (Budd & Holdsworth, 1996; Choate & Engstrom, 2014; Krutzinna & Skivenes, 2020) and in all but one case lose custody of their newborns. The cases reveal parents with complex problem constellations and families experiencing reproduction of child welfare history, all corresponding to well-known characteristics of families involved in serious child welfare cases (Dingwall, Eekelaar, & Murray, 2014; Ward et al., 2012; Broadhurst et al., 2018). Specifically, these are not 'clean' cases with single problem areas. These are high-risk cases representing "interlocking, multiple problems" that are said to substantially increase the likelihood that children will be exposed to maltreatment (Cleaver, Unell, & Aldgate, 2011; Ward, Brown, & Hyde-Dryden, 2014). It is the 'multiplicative' impact of combinations of factors that have been found to increase the risk of harm to children (Cleaver et al., 2011), which is striking in this subset of Norwegian care order cases. The six cases where the County Board assess some form of change as plausible indicate several tendencies. Those with later onset problems, who did not have CWS involvement as children, those who are relatively young, who have mental health diagnoses that can be medicated, and those who provide insight and cooperation with social and health services are candidates more likely to attain change. This corresponds with general knowledge about capacities for parental change (Ward et al., 2014). The fact that the two transient cases included personality/social functioning issues, as well as mental health problems, serve as an indication of these problems assessed as manageable, and not indicative of parental insufficiency. The parents' problematic networks came up in all four slow-moving cases, with multiple sources within the context. As social networks in themselves can fluctuate and change, this also appears as a concern that can be mediated.

From a comparative perspective, the parents' problems may represent a specific Norwegian context. Substance misuse, domestic abuse and mental health disorders are described as a 'toxic trio' of risk factors prevalent in serious child welfare cases in the UK and US contexts, that when are combined increases the risk of significant harm (Cleaver et al., 2011; Middleton & Hardy, 2014). This 'trio' does not emerge in the Norwegian newborn cases, as domestic violence is mostly absent. One suggested answer to this can be that the families involved in removals at birth are somewhat more in flux, as the fathers are mostly absent. Furthermore, six of the 19 cases concerned a parent with an intellectual disability. Parents with intellectual disabilities do have a higher risk of experiencing loss of parental rights across all countries with a well-developed child welfare system (Booth & Booth, 1993). However, as indicated by Krutzinna and Skivenes (2020), 37% of Norwegian, 14% of English and 11% of German mothers in newborn care orders are described as learning disabled, thus alluding to a potential problematic lower threshold for risk, and less perceived windows for change within this subgroup in Norway.

6.2. *Welfare history as mitigating future uncertainty?*

Apart from the empirical discussions arising, the arguments and

justifications in the newborn cases allude to several tendencies in County Board decision-making and discretionary predictions. Firstly, somewhat contradicting Lindboe (2007), the County Board seems relatively certain and unitary when making their decisions in newborn cases, as it revisits and evaluates the past as a viable future parenting indicator, without dissenting opinions by the County Board members. Puzzling regarding this sense of unity, however, is the variation in number of sources and contexts emphasized across the permanent cases. Large variations in sources can be employed to underscore the same risk factors at play, exemplified by C19 in the material (cf. Fig. 4). This can appear as confirmation bias - that the County Board uses several sources to convey the same argument about the parents' learning disabilities and problems with employment. Simultaneously, three permanent cases have only three sources. C7 for example, has three sources where two are drug clinics explaining the parents' drug use and problems staying clean. A case with few sources can on the one hand be a direct result of the actual accessible information in the case, and at-hand knowledge available about the parents. On the other hand, it can also be a result of a single context or source being given considerable weight, such as diagnostic statements from psychiatrists or journal notes from drug rehabilitation. The findings can unfortunately not systematize this, only provide food for thought.

A second related tendency, corresponding to Munro (2008) indication of history as a predictor of the future, is that the County Board justifications appear as historically dense. Despite these being new family units and seemingly fresh child welfare cases, they are not new actors within the broader social welfare system. Most of these parents are, or have been, surrounded by social and health services and staff for years, most since early childhood and adolescence. As such, public child-, social- and welfare services have knowledge about them, as well as a duty to report concerns to CWS. As such, parental history and current observations and statements from various sources within the welfare bureaucracy seem to fill up and compensate for future uncertainty about parenting capacities. One can wonder if this is availability bias in practice. Nonetheless, it may also be a result of the extensive welfare state and family-oriented child welfare system in place in Norway. In other more risk-oriented systems with higher thresholds for intervention, such information pools may not have been available to inform future parenthood, indicating the basis for Norwegian welfare state reach into the private sphere. The rich historical focus, at least without reflection and consideration by the County Board in application, represents a discrepancy as opposed to the future assessment that the County Board is supposed to make. The County Board can as such be seen to modify the policy that they are enacting, applying legislation intended for past and current situations to the future. However, as little guidelines and instructions are provided for substantiating future assessments, this is may be a natural and inevitable strategy. Additionally, as most cases include parent-child interaction from visitation, the idea that these are merely future assessments must also be nuanced. The County Board emphasizes specific situations of physical and emotional interaction that it sees as posing direct risks to the newborns.

7. Concluding remarks

In sum, newborn cases in Norway involve a highly marginalized demographic within child welfare, as decision-makers mostly find high, long-lasting risk and minimal change capacity. Decision-making in these cases nonetheless happens within a wide discretionary space set out for the decision-makers, as current legislation and guidelines are primarily oriented to past and current assessments about children's needs and parents' capacities. When making future assessments, the County Board compensates for, and alleviates, uncertainty about future parenting and parenthood by invoking extensive child and social welfare histories as well as problem descriptions as indicators of what the future will hold. Despite the cases being unitarily assessed as severe and with little capacity for parental change, large variations in sources and contexts emphasized are evident as potential decision-making heuristics, as well as perhaps a particular Norwegian focus on intellectual disabilities, and wealth of information available to document the past. Without transparency in how inferences are drawn from the past to the future, this approach can become problematic. This indicates a need for more instructions and guidelines towards future assessments, to further improve predictions about parenting and assessing risk of future harm.

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The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

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REVIEW

WILEY CHILD & FAMILY SOCIAL WORK

Defending parenthood: A look at parents' legal argumentation in Norwegian care order appeal proceedings

Ida Benedicte Juhasz PhD student

[1] Department of Administration and Organization Theory, UiB, University of Bergen, Bergen, Norway

Correspondence
Ida Benedicte Juhasz, Department of Administration and Organization Theory, University of Bergen, Christies gate 17, 5007 Bergen, Norway.
Email: ida.juhasz@uib.no

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Norwegian Research Council

Abstract

This paper examines parents' legal argumentation in 15 appealed care order (child removal) cases in one Norwegian district court, asking on what grounds parents appeal their case. I investigate the pragmatic, ethical, and moral bases in arguments by applying a discourse ethics framework, viewing argumentation as either justifications or excuses of the parenting in question. The analysis reveals complex reasons for appealing, displaying parents both justifying and excusing both specific situations and the totality of their parenthood. Parents primarily apply pragmatic and ethical adversarialism, followed by pragmatic blaming and claims of change, moral justifications about due process, and ethical excuses about age and own life histories. Interestingly, normalization emerges as a third strategy, where parents explicitly aim to widen the scope of parental normality and adequacy, challenging the common defense dichotomy. The study provides new insight into an important and sensitive field, and indicates that parents engage in similar concrete strategies when, most often unsuccessfully, defending their parenthood.

KEYWORDS

assessment, child protection, courts, discourse analysis, parenting/parenthood

1 | INTRODUCTION

An involuntary removal of a child from their parents' care is an extreme intervention by the State into the private sphere, and the involvement of biological parents in the legal decision-making process becomes essential. Various legislation (Barnevernloven, 1992; Council of Europe, 2010; Tvisteloven, 2005) emphasizes the strong formal and legal rights parents have when involuntarily involved in care orders. As such, failure to adequately include and assess parents' arguments can constitute reasons to question the quality of the decision and the process before it (Alexy, 1989; Eriksen & Weigård, 1999; Habermas, 1996). When a care order is decided by the County Social Welfare Board (County Board), parents can appeal their case to the District Court. However, this is often a complex and difficult task. As the legal care order proceedings are described as "the CWS (Child Welfare Services) demonstrating parental failure" (Masson, 2012: 203), on what grounds do these parents appeal their case?

Presumably, an important reason for appealing a care order case is that parents mean that their argumentation has not been properly considered, and this paper therefore aims to investigate parents' appeal grounds. It explores parents' appeal strategies, and aims to identify the type of discourse (Habermas, 1996) applied by parents. Are the norms the parents use as justifications empirical in nature, or is the appeal rather an expression of a different moral or ethical stance and differing views of parenting? Are they at all justifications, or do parents rather excuse their parenthood? Care order proceedings take place in a strictly legalistic arena, and parents have appointed or selected legal representation with whom arguments and strategies are put together in collaboration. Within this context, I aim to deepen our understanding of how parents, aided by their lawyers, contribute to the legal process of child welfare decision-making, a field in which there is an alarming scarcity of knowledge.

The paper consists of six parts. Following section 1 comes an elaboration on the current order of care order and appeal proceedings in the Norwegian child welfare system (section 2), and a presentation of research on parents in care proceedings (section 3). A

theoretical elaboration on discourse ethics follows (section 4), along with methodological issues and reflections in section 5. Findings on parents' argumentation in appealed care order cases are then presented (section 6) and discussed (section 7), ending with some concluding remarks (section 8).

2 | CARE ORDER PROCEEDINGS IN THE NORWEGIAN CHILD WELFARE SYSTEM

The Norwegian child welfare system is described as family service oriented and child-centric; it provides early intervention services to children and families in at-risk situations to prevent future harm to the child (Skivenes, 2011). This approach is seen as to have a therapeutic view of rehabilitation in which it is possible for people to revise and improve their lifestyles and behaviours (ibid). Early intervention services function as, for example, financial and social compensation, increased control or monitoring, or assistance in increasing the parents' care capabilities, depending on the need of the family (Bufdir, 2015). As part of the family service orientation, the child welfare agency attempts to avoid placing children outside their homes through these in-home services, and it is only when these services have proven themselves to be of no use, or assessed as useless, that a removal can be sought (Skivenes & Søvig, 2017).

When the Child Welfare Services (CWS) ultimately pursues a care order, three legal criteria need to be met for the removal of a child based on the care order paragraph (§ 4–12 a–d), where abuse or neglect is the cause for (proposed) intervention. There needs to be (a) a situation where harm or neglect has occurred or was likely to occur, (b) in-home services have been unable to provide satisfactory care conditions, and (c) the removal is in the best interest of the child (Skivenes & Søvig, 2017). The CWS carries the burden of proof through their submission of the removal application to the County Board. The intention with the application is to obtain a formal care order decision and place the child in alternative care. Following the decision, either party in the case may appeal to the District Court within 1 month (Barnevernloven, 1992). When assessing an appeal case, the District Court may agree with the legality of the County Board's decision (the law has been applied correctly), but because the decision also has to be suitable present-day, at the time of the District Court case proceedings, this criterion alone is not enough (Ot.prp. nr. 64 (2004–2005), 2005).

3 | RESEARCH ON PARENTS AND CARE PROCEEDINGS

A pool of research is available on parents involved with CWS, less so on parents and legal care proceedings. Contributions to this field usually focus on relevant actors' experiences of inclusion and representation in court proceedings. Pearce, Masson, and Bader's (2011) *Parent Representation Study* explored the work of British lawyers representing parents in care proceedings through observation of hearings, interviews with legal professionals involved in care proceedings, and focus groups with solicitors, barristers, judges, and magistrates' legal advisers. Lens (2017) analysed concrete interaction between judges and parents in child protection cases, providing new and valuable insight into parents' varying degrees of inclusion in the courtroom in current northeastern United States. Another important contribution from Ireland is brought by O'Mahony, Burns, Parkes, and Shore (2016), regarding the voice of parents in care proceedings. The researchers emphasize several aspects that could improve the current, in the authors' opinion, problematic process of parental engagement. They also highlight research gaps and deficiencies in today's Irish system, such as special advocates for parents in court, more time and resources for lawyers to better prepare their cases, a more coherent and accessible system to obtain independent expert assessments, and increased transparency (O'Mahony et al., 2016: 318–319). Even though Norway and Ireland represent two different child welfare systems, it is evident that some of the challenges in parent participation and representation in court are common.

Parents and their assigned or chosen lawyers together articulate the written arguments for the care proceedings and, as such, also the written judgements that are the focus for this study. This collaboration is presumed to be challenging, as the child protection cases ending up in Court usually involve more conflict, greater harm or risk, and parents who are harder to help (Masson, 2012). As such, care proceedings provide a very challenging environment to create and maintain parental engagement for lawyers and social workers (ibid). Research on parental engagement in care proceedings from the perspective of British specialist lawyers state that their role was to give advice and to represent the parent in the proceedings, and it was the court's role to decide what order to make. They would put forward the parent's case but could not lie or conceal information from the Court. The Court would make its decision on the basis of the specific child's interests (Masson, 2012). Similar research for the Norwegian system is lacking, but crucial to obtain to fully understand how parents personally engage with and in care proceedings.

4 | DISCOURSE ETHICS IN LEGAL ARGUMENTATION

With these valuable contributions in mind, this study seeks to enlighten the field by exploring parents' actual basis for engagement; what the parents' and their lawyers communicate in care proceedings through legal arguments.

Care proceedings can be seen as a communicative arena where various stakeholders provide justifications for their perspectives on the proposed intervention. Habermas' (1996) theory of argumentation presents three different practical discourse types that actors engage in, known as *pragmatic*, *ethical*, and *moral* discourse. These discourses appear as different types of systematic argumentation, with differing objectives, degrees of engagement, and standards for justification, depending on the nature of the contested issue (Eriksen & Weigård, 1999; Habermas, 1996). In *pragmatic* discourse, the outcome of an argument is oriented towards empirical knowledge to given preferences and assesses the (usually uncertain) consequences of alternative choices. It is based in empirically based situational knowledge, in other words, concrete facts and evidence, and the identification of the strategy best suited to solve the problem in question (Habermas, 1996: 161). *Ethical discourse* includes arguments based on a hermeneutic explication of the self-understanding of our historically transmitted form of life. Such arguments weigh value

decisions in a certain context with a view towards an authentic and "good" conduct of life, a goal that is absolute for us (ibid). In other words, they concern value orientations and principles about what constitutes a "good life" for the individual (Eriksen & Weigård, 1999). *Moral discourse* adds the aspect of justice to the ethical discourse, and aims to orient argumentation towards universalization. Can the norms meet with the considered agreement of all those affected? (Habermas, 1996: 162). Moral arguments thus have a universalistic approach towards establishing rights, aiming to identify what is a just and fair outcome for everyone; an outcome that everyone can accept as fair and right. Because the argumentation process in care proceedings takes place within the legal sphere, it must adhere to the legal system's logic of presenting and assessing arguments. Legal procedures nonetheless facilitate an institutional frame needed for the free display of the argument on what norms are appropriate for a certain case (ibid), which Habermas sets as a prerequisite. Legal procedures compensate for the fallibilities in communicative processes and enforce procedural justice (Eriksen & Weigård, 1999).

In court proceedings, there are typically two main types of legal defence strategies, *justifications* and *excuses* (Husak, 2005): "A justification claim … seeks to show that the act was not wrongful, an excuse … tries to show that the actor is not morally culpable for his wrongful conduct" (Dressler, 2006; cf. Husak, 2005: 558). In this study, justifications and excuses are used as analytical tools in which to examine the claims made in the legal statements, focusing on the intention with, or strategy within, the arguments, and the type of defense the parents engage in. Justifications and excuses will primarily function as structuring labels in which to aid the discourse analysis.

5 | METHODS

5.1 | Project and data material

This study is part of a larger comparative study of legitimacy and fallability in child welfare services,[1] funded by the Norwegian Research Council and approved by the Norwegian Data Protection Official for Research. Legal procedures unite argumentation and decision-making, which make written court judgments a valuable data source. The study is an analysis of parents' written claims as presented in all appealed care order judgments tried through a full hearing in one of the 64 Norwegian district courts in 2012, catering to several hundred thousand inhabitants (Domstoladministrasjonen, 2016). We have collaborated with the respective district court on confidential data processing upon gaining access to all written 2012 child welfare judgments (n = 50). The focus is on appeal cases subject to § 4–12, the main care order paragraph of the Child Welfare Act (and also § 4–8, Section 1 in three of these cases, as the cases are joint decisions regarding a care order and ban on removal from the foster home; n = 15).[2] Figure 1 illustrates the case selection, and further case characteristics can be found as Supporting Material online. The cases are given nonidentifiable names ranging from C1 to C15.

A minority of the 15 cases have clearly defined problem areas. In two cases (C2–3) the parent(s) have (had recent) extensive drug or alcohol problems, and in two cases (C11, C13), use of corporal punishment is the central issue. In two cases (C1, C6) the violent conflict between the parents is the issue, and the consequences of this. In three of the cases (C4, C10, C12), the parents' mental illness is directly linked to neglect. In one case (C10), the mother has a mental disability, and also lacks the capacity to follow up her child's special needs. The remaining five cases (C7–9, C14–15) are multifaceted; a core problem is general personality issues and functioning. This results in degrees of noncompliance, avoidance, and lack of insight (C8), not utilizing parental guidance counselling (C9), self-prioritization (C14), lack of motivation (C15), and general capacity to follow up children with special physical needs (C7, C10).

The judgments under analysis are on average between 10 and 20 pages long, with a relatively fixed structure. The parents' written claims range from a half to four pages, and are articulated by the parents' lawyers after conversation with the parents, and are incorporated in the written judgement by the court after the hearing. The written court judgments thus include both the written claims presented by the parents and their lawyers before the hearing, and statements made in the hearing. This is why the judgments decided without a hearing are not included in the study. I only analyse the parents' written claims, even though the Court's assessment and the background section have been read for descriptive purposes. The written claims are structured by the three care order criteria mentioned earlier. Following the care order arguments are subsidiary claims on visitation, should a care order be decided. When parents disagree or present separate claims, I have focused on the argument of the appellate, the parent who has parental authority and is claiming custody.

5.2 | Analytical approach

When reading and rereading the written claims, relevant phenomena and examples were collected in order to find thematic commonalities,

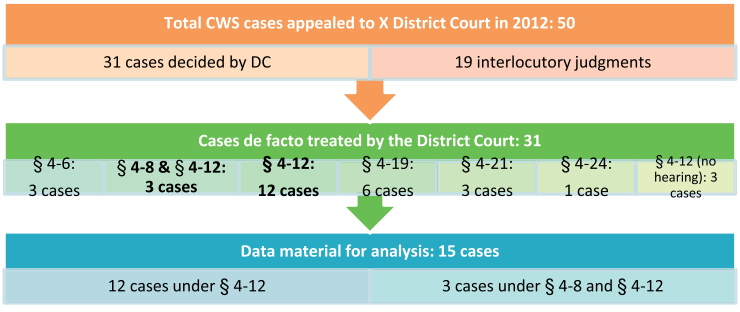

FIGURE 1 Overview of data selection [Colour figure can be viewed at wileyonlinelibrary.com]

differences, and patterns in the texts (Coffey & Atkinson, 1996). Parents made it fairly explicit whether they *justified* certain actions or behaviour, either accepting accusations but seeing nothing morally wrong with them, or *excused* their behaviour by alleviating responsibility. As such, the arguments were first sorted by strategy. Most claims included both types. However, some arguments were difficult to categorize as either, and a third type of strategy emerged; *normalization*. Here, the parents neither overtly excused nor justified the alleged neglect or abuse, but rather attempted to normalize either care conditions or expressions.

Although the preliminary sorting identified the intent with the argument, the discourse analysis aimed to reveal its normative basis. Several discourses were found in the arguments, and were labelled accordingly. Arguments focusing on empirical evidence or contesting established facts, such as how to interpret an expert assessment, were categorized as *pragmatic*. Arguments posed as value judgments about, for example, what the parents viewed as a good life for the specific child were labelled *ethical*, and arguments with moral or rights-based foundation, such as rights that had not been upheld, or emphasizing "unacceptable" procedures, were labelled *moral*. Arguments focused on various concrete themes, which structure the presentation of the findings. Direct references to child welfare legislation is not included in the analysis, as these references are natural in this context. They do not provide any further rationale, and were often unsubstantiated. The categories were reliability tested by a project supervisor. In the findings, I present quotes that were typical.

There are several limitations to the study that need mentioning. The written judgments include what the court deems relevant in order to substantiate the decision (Lundeberg, 2009; Tvisteloven, 2005). Thus, not all presented arguments or facts are included. The arguments are called "parents' arguments" in the study, as the parents are the formal party in the proceedings, and it is impossible to know in detail how closely the parents and lawyers in reality have cooperated. As such, analysing parents' argumentation in written court judgments will never provide a complete picture of the parents' fundamental wishes or feelings. The judgments function as representations of the parents' official statements and display the legal argumentation provided for their case, through their lawyers.

6 | FINDINGS - PARENTS' JUSTIFICATIONS AND EXCUSES

The overall finding of this study is that both strategies and several discourses are the norm in arguing for custody in care proceedings. In 11 cases, the parents *primarily* excuse the previous care situation, and claim to have sufficiently improved their care abilities. Four cases (C4, C9, C11, C15) *primarily* provide justifications, and allege that a care order should never have taken place. C11 stands out, as the parents only emphasize one pragmatic justification; the children have lied about corporal punishment, and as such, the parents deny all allegations and present alternative empirical facts. The 14 remaining cases are more diverse, and include both pragmatic and ethical argumentation. Table 1 illustrates how the arguments in the 15 cases fall within the main strategies, the discourses present, and the central theme in the argument. Following this summary, I elaborate on the strategies, discourses, and themes that were identified.

6.1 | Justifications

When parents justified their parenthood and care situation, they applied moral, pragmatic, and ethical arguments in defending their performances as caregivers. Responsibility for action was admitted, but wrongfulness was contested, rooted in experiences of faulty legal procedures, diverging interpretations of empirical facts, and arguments stressing the importance of biology and the child(ren)'s wishes.

TABLE 1 Summary results table of strategies, discourses, and themes

Strategy/discourse	Theme	Cases
Justifications		C1–15
Moral	Lack of adequate in-home services	C1, C4, C7, C9, C12, C14–15
	Lack of assessment of adequate in-home services	C4, C7, C12, C15
	Lack of special needs assessment	C5, C7
	Incredible witness	C5
Pragmatic	Parents' interpretation of CWS evidence/casework	C4–7, C9–10, C11
	Parents' interpretation of expert assessments	C2, C4, C5–6, C10, C12
	Contradicting expert assessments	C1, C6, C9, C13
	Poor conditions in alternative care	C4, C6, C8, C13, C15
Ethical	Emphasis on importance of biology	C3, C5–7, C9–10, C13–14
	Child wishes to come home/misses family	C2–4, C8, C13–15
Excuses		C1–3, C5–8, C10, C12–14
Pragmatic	Partner change	C1–2, C5–6
	Family network change	C1, C3, C5–6, C14
	Improved health/addiction situation	C2–3, C6–8, C12
	Blaming work	C13
	Acquired housing	C10
Ethical	Own CWS background	C1, C5
	Age/maturity	C1, C14
Normalization		C3, C5–6, C9
Ethical	Normalizing conditions	C3, C5, C9
	Normalizing expressions of care	C6

Note. *N* = 15 (C1–15). Layout inspired by typology form Arluke and Vaca-Guzman (2005).

6.1.1 | Moral justifications—Lack of due process

When applying moral justifications, parents pointed directly to the casework done and the services experienced, and argued that it was not due process in line with the Child Welfare Act and other relevant legislation. Eight cases apply moral justifications arguing that the parents had not had their rights upheld in the decision-making process. A central theme was the utilization and assessment of adequate in-home services. Seven of the cases emphasized how there had been a lack of provided adequate in-home services in their case, which is one of the care order criteria that need to be fulfilled, exemplified by the following quote:

> *Mother said no to a family home because she could not stand the thought of being in a situation with constant surveillance. This is the only specified service Mother has been offered. C14*

In C14, the mother questions the provision of services, and the lack of adequate alternatives provided for her family. This criterion is however twofold, because adequate in-home services do not need to be implemented, but only assessed, and as such, can be deemed useless without being attempted. The parents in four cases argued that in-home services had not even been adequately assessed, let alone implemented. Furthermore, two of the cases concerned children with physical impairments. These children have special rights and needs, and the father in C7 emphasized that legislation was violated by CWS in their casework:

> *As is also explicit in the premises for the County Board decision, we are talking about a boy with special needs grounded in his impairment (….) That great challenges are tied to Boy's care needs is not related to Father's care abilities. Boy is a boy in need of help, and has a legal right to it, ref. amongst other the Anti-Discrimination Act. C7*

The father insinuateds that society at large has accepted and enacted certain legislation relevant to his situation, and it is such morally wrong to not grant his family the services they are entitled to. The mother in C5 objected to a witness statement in the appeal proceedings. The witness had changed its opinion from the County Board to the District Court hearing, and thus the mother doubted the credibility of the witness:

> *In Appellant's opinion, the people who are talking negatively about her are not being objective. Witness X (Appellant's ex-partner) has changed his opinion since the County Board hearing. Appellant finds this peculiar. C5*

This statement indicates that the mother experiences subjectivity in the care proceedings, and not a fair trial.

6.1.2 | Pragmatic justifications—Contesting interpretations and placement

Twelve cases included pragmatic justifications. Here, parents in essence deny the conclusions presented by CWS. In six cases, the parents disagree with interpretations of evidence presented by CWS, such as visitation case notes, reports from health and service workers, and the children's statements. This theme is exemplified by the following quote, where the parents aim to establish a different empirical truth:

> *The fact that Daughter was described as adequate in all areas except communication, shortly after put in emergency placement, shows that the claims from the CWS were blown out of proportion. C9*

The parents describe a different empirical reality that does not mirror the one presented by CWS. As such, they have not acted poorly as parents. In six cases, parents also contested the expert statement interpretations used as evidence, like this father in C10:

> *There are several weaknesses in the assessment made by psychologist XX, amongst others it is argued that the results of the psychological tests are falsely interpreted, and given too much weight. There are no findings in the tests that singularly or overall indicate worrisome deviations from what is normal. C10*

Here, the father also aims to establish a different empirical truth about his mental health, and how it does not affect his parenting capacities. Parents in four cases emphasized contradictory expert or professional assessments, or at least emphasized aspects they saw as under-communicated, such as the argument presented by this father:

> *Out of the registered witnesses it is solely Sons physical therapist—CC—whom has observed him over time, and she has stressed that Son has had significant progress since he was little, and that the father has contributed strongly towards this. C7*

Here, the father contradicts CWS arguments about his parenting skills, and provides alternative expert knowledge to reflect a different version of the truth, and as such, justify his adequate parenting.

Pragmatic justifications also focused on the poor quality of the alternative care provided by CWS. In five cases, the parents emphasized the inadequacy of the alternative placement (foster home in four cases, institution in one case) in which their children were placed, and how this compromised the justification of the care order decision:

> *Foster Mother (the boy's paternal grandmother) explained that she was tired and did not have energy. She lacked the skills in reflecting on why the boy acted as he did. Mother is initially positive towards Father's family, but Foster Mother seems like a very poor alternative for the boy. C6*

The mother in C6 admitted that home conditions had been problematic, but nonetheless justified her parenthood, as CWS was not able to provide superior alternative placement.

6.1.3 | Ethical justifications—Importance of biology and the children's wishes

Ethical justifications were identified in 12 cases. These arguments were mainly tied to biology and the child(ren)'s wishes to come home. In eight cases, the parents mentioned the biological principle. One father was explicit in what he saw as a good life for his daughter:

> *Besides, one must acknowledge that growing up in the care of someone other than its biological parents is unfortunate for a child. It is in the child's best interest to grow up with her biological father. C10*

The parents varied in their emphasis on biology. One father mentioned the biological principle only briefly:

> *The ECHR, the Child Welfare Act and the biological principle state that Son has a right to grow up in his father's care, alongside his twin sister. C7*

In seven of the claims, the parents stated that the child(ren) wished to come home, or that he or she missed their family. This argument was applied to justify the return of the child to the home, as exemplified by the parents in C13:

> *The children are now 11 and 13 years old, and they both wish to come home to their parents. It is hard to establish a successful placement of children who are so intent on going home. C13*

6.2 | Excuses

The parents' excuses mainly included pragmatically emphasizing empirical evidence and interpretations of changes from past deviances. Some parents also applied ethical excuses, explaining how issues of their own tragic histories and young age excused their untoward behavior and should be enough to grant them a second chance, as they still could provide good lives for their children.

6.2.1 | Pragmatic excuses—Circumstantial changes

Twelve cases presented pragmatic excuses for their parenthood, followed by claims that adequate change has occurred. Pragmatic excuses admitted that circumstances had been bad, but focused on empirical, measurable changes that had taken place since the County Board hearing, or changes that had not been adequately assessed previously. In six cases, the parents presented a significant improvement in their health or drug addiction, and arguments often took this form:

> *Mother has now stayed drug free for over a year, and is receiving treatment at Facility X. Mother and her treater mean that Mother will be able to stay away from alcohol also in the future. C3*

According to this mother, the recovery from the addiction has gone well, and this suggested that the child should be returned home. Pragmatic excuses were often linked to agents outside the immediate family, and were both resources and nuisances that the parents had now added to or eliminated from the care situation. In five cases, these were extended family or friends, and in four cases, the mothers' partners (none of the single fathers seeking custody emphasized the biological mother in any significant regard). The following quote exemplifies a combination of this type of argument:

> *The situation from now on is that Mother has broken up with Father, and she will move in with her own mother, whom the children are strongly attached to. The mother's sister, (Mother's aunt), will also move to X, to be of utter support for Mother and the children. C1*

Here, the mother has separated from the father, who was deemed harmful in the case, as well as relocated to a new town. Partners were not only argued as negative elements, but also framed as resources meant to change the care situation for the better:

> *In addition, Mother's family situation has now changed. She has moved in with her boyfriend. He is oriented towards the child's best interests, and helps in strengthening Mother's care situation. C5*

Here, the mother's new boyfriend is added to the family constellation, perhaps meant to excuse the previous lack of two caregivers in the family. Finally, one father (C10) referred to his newly acquired apartment where he could now raise his daughter, and one mother (C13) argued that it was in part her past problematic work conflict that made parenting difficult.

6.2.2 | Ethical excuses—Own background and age

Three cases included ethical excuses, and these took two forms; the mothers' own CWS background and young age. Two mothers pointed to their backgrounds, in order to explain their difficulties in cooperating with CWS:

> *However, one needs to understand Mother's somewhat strained relationship with CWS, in light of her personal experiences with CWS as a child. C5*

Here, the ethically right thing to do is to be accepting, and see that the mother indeed can provide a good care situation. Two mothers also, to some extent, blame their young age and immaturity for their lacking parenting and cooperation skills. These appear as forces beyond the mothers' control, in which the mothers place blame:

> *Mother has the potential to change. She is young and immature. With adequate help she will however be able to strengthen her parenting skills. C14*

The mothers' argumentation in these two cases requests acceptance and tolerance for being young, and also to be granted a second chance at parenting.

6.3 | Normalization—circumstances and expressions

Some arguments were challenging to categorize as either justifications or excuses, and as such, a third type of account emerged; *normalization*. Some parents would in part admit responsibility for the neglect, but not make an effort to justify it. In their claims, parents rather requested normalization of care *circumstances* and *expressions*, as their claim was that they too could provide good enough care for their children. An example of parents aiming to normalize circumstances was evident in C9, where the parents claimed that the CWS were not lenient enough in acknowledging the difficulties of newly becoming parents, arguing that insecurity should be normal under the present conditions:

> *The parents have been insecure, but must be granted leeway like other first time parents. C9*

One mother attempted to normalize challenges of caring for two children born prematurely, claiming that these conditions could indeed be valuable even though not optimal:

> *Mother should not be measured against the ideal situation. Children grow up under different circumstances. C5*

Normalization was also requested for families with children having clutter around the house, and parents being allowed to drink alcohol in the house even though children lived there:

> *Mother cannot be considered to keep a messier apartment before the care order than what is normal for a family with children (…) The boy has seen beer cans at home, but this is normal. C3*

The physical expression of care was another normalization issue. The mother in C6 described her relationship with her son in the following way, as she had been criticized by CWS of not displaying enough physical affection, but rather being "cold" with her son:

> *… the boy is nine years old. That the boy should sit on Mother's lap and hug and cuddle is not a point in itself. C6*

She disagreed with CWS's image of a cold and unstable attachment between herself and her son, because in her understanding, the family defined and experienced attachment in different terms, but equally caring.

Finally, Table 2 sums up the findings by occurrence of type of account across the 15 cases.

7 | DISCUSSION

The analysis shows that parents' argumentation in appealed care order proceedings take the form of three different but distinct defence strategies, *justifications*, *excuses*, and *normalization*, anchored in different practical discourses serving different purposes. All the cases apply pragmatic argumentation, and the cases seem to quantitatively focus more on disputing events and facts, and significantly less on value judgments, even though ethical justifications are present in 13 cases. In 11 out of 15 cases, the parents apply at least two different strategies and two different discourses. This appears natural, as the cases are complex, and often unlike criminal cases, questions regard the totality of parenthoods and lived lives, both specific events and more permanent traits and trajectories. But what empirical "truths," facts, values, and norms do parents deem appropriate in defending their parenthood?

TABLE 2 Discourses across cases

Case	Moral justification	Prag. justification	Ethical justification	Prag. excuse	Ethical excuse	Normalization
C1	x	x		x	x	
C2		x	x	x		
C3			x	x		x
C4	x	x	x			
C5	x	x	x	x	x	x
C6		x	x	x		x
C7	x	x	x	x		
C8		x	x	x		
C9	x	x	x			x
C10		x	x	x		
C11		x				
C12	x	x	x			
C13		x	x	x		
C14	x		x	x	x	
C15	x	x	x			
In sum	8	13	13	10	3	4

Note. $N = 15$.

7.1 | Justifications—moral, pragmatic, and ethical adversarialism

Parents justify parts of their parenthood, or accept responsibility for the alleged neglect but do not see it as wrongful, in all but one case. The arguments nonetheless display different standards to which they should be evaluated. Moral justifications mainly emphasize lack of due process. The parents claim that assessments by CWS and the County Board have been insufficient, such as lacking services they are entitled to by legislation, and subjective testimonies in Court. In the parents' view, they have parented adequately, because their rights and entitlements have been infringed prior to the care order decision. This appears as rationalization of their parenthoods, and appeals to universalistic claims of unfair and unacceptable treatment. Society has agreed upon a certain child welfare legislation, and when CWS do not fulfil their end of the contract, the parents cannot be held accountable. Pragmatic justifications are also evident, but take the form of adversarial disputes about facts, or empirical interpretations of them. C14, providing solely a pragmatic justification, denying that any harm to the children took place, was indeed overturned, and the children reunited with their parents. Even though these surely are the parents' perspectives on unfair procedures and pragmatics, they should be taken seriously looking at the harsh media critique the Norwegian child welfare system has received nationally and internationally in recent years. Looking at the number of cases from Norway currently under communication in the European Court of Human Rights (Søvig, 2017) clearly underlines the conflicting perspectives in balancing and ensuring children's rights and parents' rights.

Ethical justifications concern the value and importance attached to growing up in one's biological family, and the children's wishes to reunite with their family. The tense relation between biology and attachment (see NOU 2012:5, 2012) comes to show, as one of the core disputes in the "battle of ideas" that is child welfare decision-making (Broadhurst, 2017). Even though one would expect most parents to advocate biology, only eight cases do. Parents primarily spend their efforts contesting pragmatic interpretations of reports, incidents, and conclusions. This may indicate the general role of the court in these cases, which I will return to below.

7.2 | Excuses—pragmatic and ethical pleas for a second chance

The parents applying excuses, which count 11 of the 15 cases, agree that the care order decision may have been right at some point, but refuse to take responsibility for the alleged neglect. If they were to be blamed, they have now significantly changed. Within the excuses, we also find various evaluative standards to which the argument should be judged. Pragmatic excuses are often linked to concrete agents and elements outside the family, such as partners, family, friends, work, and geography. The arguments concern how they empirically have affected the care situation, and how the situation has now changed. Because most of the cases are confirmed, the way in which significant change is measured by the Court does not match the parents', revealing a problematic interpretational gap.

Three mothers in three cases applied ethical excuses. They focus on their own child welfare backgrounds, and see themselves as "victims of the system" (Arluke & Vaca-Guzman, 2005) who were doomed to fail in some sense, and this may also explain their young age when becoming parents. The young age is an excuse in itself, and used as argumentation to indicate that given time they will mature. The ethically right thing to do is to give them a second chance, both at achieving a good life for themselves and a good life for their children. This argument can be linked to a moral line of justification as well, as it may indicate the idea that society at large would indeed grant them a second chance. These arguments reveal a thin line between ethical and moral arguments, but they are clearly excuses, as the parents attempt to conform to CWS' expectations.

7.3 | Normalization—an alternative defense strategy?

Justifications and excuses have been applied as a common dichotomy of legal defences in criminal cases, as mentioned, but they also work as social defences. They aim to bridge the gap between actions and expectations when these are being questioned (Arluke & Vaca-Guzman, 2005; Scott & Lyman, 1968). Researchers Arluke and Vaca-Guzman have studied the latter, and look at the justifications and excuses animal hoarders present when confronted by animal control and other services, through news articles reporting on the cases (Arluke & Vaca-Guzman, 2005). The authors identify several types of justifications and excuses provided by animal hoarders, and explain that these in sum are used "to construct a more positive image of themselves," and to "normalize their behaviour" (ibid). Here, normalization is intended by the sender to inspire or affect the audience, to hopefully be perceived in a more favourable light, and labels both justifications and excuses as "neutralizing techniques" (ibid). I argue that normalization emerges as a separate type of defense strategy. When attempting to normalize, the parents in my study did not justify behaviour directly, but neither overtly excused poor conditions. Rather, normalization appeared as ethical pleas to widen the scope of normality, and question the threshold that CWS has set for adequate parenting, such as, for example, how much and what type of insecurity first time parents can display (C9), how to show affection towards your 11-year old (C6), or how tidy a house where children live should be (C3).

Normalization was however not a very common type of argument, as it was evident in only four cases. This may be because questioning the underlying values and norms of CWS can come across as strategically unwise, as CWS carry the burden of proof in the case. It appears that the County Board and Courts are more oriented towards empirical and pragmatic evaluations rather than ethical and moral ones. Normalization can therefore be a subtle, but satisfying, way for parents to address these issues.

8 | CONCLUDING REMARKS

Using the analytic frame of legal strategies and discourse ethics, the types of arguments and normative discourse that parents, represented by their lawyers, apply in appealed care proceedings have been mapped out and discussed. These cases seem most often to be

pragmatic disputes about (interpretations of) facts, and much less ethical or moral debates about the good life for a child and its family. This is a paradox in child welfare decision-making, because these decisions are to be normative judgements about what is "in the best interest of the child" (Barnevernloven, 1992: § 4–1).

Only 2 of the 15 cases in this study are reversed in favour of the parents, which also reflects the national numbers (NOU 2012:5, 2012). As such, the strategies the parents pursue are unsatisfactory in 86% of the cases in the sample. Vogt Grinde (2000) asks if there are alternative ways to safeguard the parents' reactions to care orders besides appealing, because most are not reversed. This study investigates the differing moral bases in which parents' argumentation rests, as well as parents' intents with appealing. Looking at how parents defend their case reflects their general perception of norms of parenthood, and how these often collide with the CWS, County Boards, and the Courts. If the parties do agree about empirical facts and truths, parents' interpretation of adequate change is not sufficient and their excuses ultimately not satisfactory. Although the analysis does not reveal what parents feel on a personal level, or what strategies prove more successful and which do not, it highlights the argumentative complexity of care proceedings, and the dire need for more research.

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ENDNOTES

[1] http://www.uib.no/admorg/38063/legitimacy-and-fallibility-child-welfare-services

[2] Judgments regarding emergency placements (§ 4–6), visitation (§ 4–19), reunification (§ 4–21), and behavioural cases about teenagers (§ 4–24) are omitted from the sample, as well as three care order cases (§ 4–12) that were decided on written grounds only, after consent of both parties.

ORCID

Ida Benedicte Juhasz http://orcid.org/0000-0002-3260-4138

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Title

Asserting the right to care - birth parents' arguments in newborn care orders

Author

Ida Benedicte Juhasz

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Introduction

Defining when it is acceptable to intervene into the private life of families to safeguard a child is a long-standing debate and challenge (Freeman, 1997, 1983). State interventions involve inherent tensions between parents' strong legal rights on the one hand, child welfare services' (CWS) responsibility for child welfare on the other, as well as individual children's rights to welfare and their own family lives (Lov om barneverntjenester, 1992; ECHR, 2010). Criticism has come recently through several judgments from the European Court of Human Rights (ECtHR) against Norway and the Norwegian child welfare system, brought before the Court by Norwegian parents. These parents have exhausted their possibilities in the national legal system and have approached the ECtHR because they believe the state has violated their human rights to respect for family life. Little research exists on how parents in child welfare proceedings argue their case. Examining parents' argumentation both with child welfare agencies and subsequent legal proceedings is vital both with regards to understanding parents' interests and viewpoints, as well as providing knowledge about the basis for child welfare interventions. With access to all decisions about newborn care orders over five years (N=177), this study is in a unique position to investigate birth parents' substantive engagement with a serious child welfare intervention in Norway. [1] Subjected to analysis are parents' perspectives and arguments when CWS has applied for a care order of a newborn to the County Social Welfare Board (County Board). As CWS carries the

[1] In Norway, the intervention typically includes specifications about placement type and contact visits (Skivenes & Søvig, 2017). Birth parents still retain parental rights.

burden of proof in the case, the analysis approaches parents' argumentative responses to the accusation that they are not able to care for their newborn baby. Do they deny, comply or present new evidence or arguments in support of their case? Does their focus align with that of CWS? Furthermore, I examine if there are types of parental argumentation that are correlated with the type of parental health or disability risk in the case, such as a substance abuse problem or other types of problems causing concern.

An analysis of parents' perspectives captures how parents understand and view child welfare services and engagement, their experiences with caseworkers, as well as how they view sufficient parenting. With this knowledge, it becomes possible to target, evaluate and improve child welfare services and service provision (Alpert, 2005; Bouma et al., 2020; Lundahl et al., 2020). It also provides necessary input as to what is already known about decision-making behavior and justifications in assessing parents and their capacities in newborn care orders, both in Norway and internationally (Broadhurst et al., 2018; Author, 2020; Krutzinna & Skivenes, 2020; Luhamaa et al., 2021). The analysis finally sheds light on what legitimate state intervention consists of for this group of citizens. The structure of the paper is as follows; in the next section, context will be provided for particularities concerning assessments and decision-making in newborn care orders in Norway, as well as existing knowledge on parents' participation in care proceedings. After this, ways to understand parents' legal argumentation will be laid out. The data material and methodology will then be presented, followed by the findings, grouped by argumentation type. The findings will be discussed, and the paper ends with some reflections on limitations, as well as concluding remarks.

Assessing and deciding newborn care orders

A triangle of risk

Research on child welfare decision-making emphasizes the significance of central aspects of a case, or case factors, for the decision outcome (Christiansen & Kojan, 2016; Gambrill & Shlonsky, 2000; Graham et al., 2015; Lauritzen et al., 2018; Vis & Fossum, 2015). Case factors are typically organized into three main domains, namely the *parents*' capacities, the developing *child*, and finally the *family* and *environmental* context (Department of Health, 2000). These domains are widely accepted and work as

professional guides when child welfare assesses child and family contexts and needs. [2] As newborn cases concern a potentially short-lived family and infant life, it is natural to assume that the cases primarily focus on the *parents*. Norwegian legal scholars Ofstad and Skar (2015, p. 103) emphasize central parental concerns that are in effect in the newborn context: "Drug use in utero or other circumstances for parents that may impact parenting, such as intellectual disabilities or severe mental illness will (…) be of importance". From previous international research on risk and reasoning in care orders of newborns, we know that the aforementioned risks, as well as personality disorders or problematics, are often central, overlapping, and cumulative, in the overall considerations of risk to sufficient parenting (Barlow et al., 2014; Broadhurst et al., 2018; Author, 2020; Krutzinna & Skivenes, 2020; Luhamaa et al., 2021; Ward et al., 2012). The centrality of parents' ability to make changes and utilize services and aid is also a central aspect of the care order context, especially for newborns (Juhasz, 2020; XX & YY, In press; Lushey et al., 2018). These mentioned concerns, mental illness, substance abuse, intellectual disabilities, and personality disorders, come with varying capacities to change behavior and utilize help. As such, exploring the arguments parents use to assert their care rights, along with what specific health or disability risks they face is of vital interest for this study.

Despite the focus on parents both in the newborn context in general, as well as in this study, the two other domains in the triangle are also necessary to map out. Concerning the *child*, a newborn baby is in general vulnerable and in need of immediate emotional and physical care. The existing knowledge base on the situation of newborns subjected to care orders informs that many of them experience maltreatment in utero both through substance misuse and domestic violence (Ward et al., 2012), some are born prematurely as a result of this, and in Norway, legal data informs that approximately 31 % are born explicitly without a birth abnormality (Juhasz, in preparations). Finally, the *family* and *environmental* context are also of importance. Factors known to affect the likelihood of harm to newborns include the (non-)presence of a family and social

[2] English social workers and decision-makers utilize The Common Assessment Framework as a professional tool in order to analyze, understand and record essential factors when there is concern for a child's safety, health and/or wellbeing. This framework covers three inter-related domains with following critical dimensions for each domain. The framework has both been translated to a pre-birth and newborn context (Barlow et al., 2014), as well as transferred to amongst other contexts, a Scandinavian one (*Barns behov i centrum, BBIC*, n.d.)

network, level of family isolation, and employment or educational situation (Putnam-Hornstein & Needell, 2011; Ward et al., 2012). As these three domains in sum are central to how child welfare workers assess risk in a case, the main aim of the analysis is to examine how parents argue across these domains, and whether parents' focus on what is essential to consider aligns with how the CWS frames and County Board decides, the case.

A fourth domain – the duties of CWS and County Board decision-making

All child welfare cases involving serious and/or involuntary interventions in Norway are presented to the County Board (Skivenes & Søvig 2017). Through one legal member, one expert member (most often a psychologist) as well as a lay member, the County Board is indented to provide the necessary legal competence and knowledge about children's health, development, and needs, as well as represent legitimacy and knowledge from the public, as such securing due process in serious child welfare decisions (Falck & Havik, 2000; Hultman et al., 2020; Skivenes & Tonheim, 2017). In newborn care orders, the task of the County Board decision-makers is to decide whether a *high probability of a situation or risk for the child* (§4–8, section 2*)* will occur if the child were to move home with its parents (Lov om barneverntjenester, 1992). The County Board assesses the fulfillment of three legal criteria, resting in the ordinary care order provision §4–12 of the CWA. [3] There needs to be (a) a situation where harm or neglect has occurred or was likely to occur, (b) in-home or help services have been unable or assessed as unable to facilitate satisfactory care, and (c) the care order is in the best interest of the child (Juhasz, 2020; cf. Skivenes & Søvig, 2017). Due to the severity of the intervention and vulnerabilities of the parties, strong formal and legal rights come into play for parents in care proceedings (Lov om barneverntjenester, 1992; ECHR, 2010; Lov om mekling og rettergang i sivile tvister, 2005). Procedural rights are central in this regard and are established to varying degrees internationally and across child welfare systems (Burns et al., 2017; O'Mahony et al., 2016). The three legal

[3] A care order application is to be filed to the Board within 6 weeks of an interim care order made at the hospital after birth, and typically the ordinary proceedings take place and final decision is made some months later. The average age of the infant at the ordinary care proceedings is 4 months.

criteria (risk assessment against threshold; assessment of in-home (less intrusive) services; child´s best interest) are likely to shape the parents' arguments, focusing on the actual assessment of the risk, what help has been provided and what is best for the child. As such, arguments focusing on thresholds, procedures, and aid from CWS becomes an additional domain for the analysis, complementing the triangle.

Parents' engagement with child welfare services and legal proceedings

National and international research on parents' experiences of CWS involvement reveals that they are both positive and negative, as well as vary in which factors as vital to service satisfaction (Bouma et al., 2020). At the agency level, characteristics of the child welfare workers, the quality of the relationship, the help offered, and the parents' feelings of insecurity and fear all affect the perceptions of contact with CWS (Lundahl et al., 2020; Studsrød et al., 2012). When a case moves over to the legal level, Norwegian parents do have a right to free legal aid. Drawing on Lindley's (2001) mapping of welfare rights advocacy, the lawyers provide and interpret legal information, advise based on the facts of the case, provide support, negotiate and advocate before the County Board. Advocacy for parents is presumed to be challenging, however, as the child welfare cases in Court usually involve more conflict, greater harm or risk, and parents who are harder to help than those that remain at the agency level (Masson, 2012). Both the nature of the proceedings and the relationship between parents and their legal counsel are essential to grasp parents' engagement in Court, and the context for written judgments and decisions. Research from American, British, Irish, and Australian child welfare contexts illustrates that parents often disengage from the legal process, and the mentioned experiences of fear, confusion, and being overwhelmed at the agency level also characterize engagement with the legal process (Sankaran & Lander, 2007; Lens, 2017; Sankaran, 2010; Thomson et al., 2017; O'Mahony et al., 2016; Masson, 2012; Cleveland & Quas, 2020).

As a general observation, however, research on the content of parents' actual engagement and communication in legal proceedings remains understudied. A valuable exception from Finland explains that parents oppose (the continuation) of child placements due to changes in conditions or behaviors, an original wrongful decision,

and biased and wrong expert statements (Pösö et al., 2019). Assumingly, these and similar arguments will be visible in the Norwegian newborn material.

Analyzing parents' arguments

As the CWS carries the burden of proof in the case, meaning they are required to submit adequate evidence of suspected (future) risk, the structure of the care proceedings arguably puts parents in a defense position. The literature on criminal law distinguishes two main types of defenses that a defendant can assume - *justifications* or *excuses* (Smith, 1989). "A justification claim … seeks to show that the act was not wrongful, an excuse … tries to show that the actor is not morally culpable for his wrongful conduct" (Dressler, 2006; cf. Husak, 2005: 558). These legal defenses are also identified as broader social defenses, or accounts, aiming to bridge the gap between actions and expectations when these are being questioned (Scott & Lyman, 1968). As social defenses, justifications similarly assume responsibility for the action in question but deny the illegality or immorality associated with it, underlining the necessity of the action (Scott and Lyman, 1968: 47). Excuses, on the other hand, are socially approved vocabularies for accepting the negativity of performance but mitigating or relieving responsibility for it (Scott & Lyman, 1968, pp. 47–50, see pp. 51-52 for substantive descriptions of each account). This approach has been applied to a sample of ordinary care order cases, exploring parents' legal arguments as justifications and excuses in appeal cases before a Norwegian District Court (Juhasz, 2018). It is important to emphasize that what distinguishes newborn care orders is that they can be increasingly uncertain in facts and circumstances, as they often lack a "*track record* against which parenting performance can be predicted" (Campbell et al., 2003). Newborn care proceedings are therefore not merely a question of identifying guilt for past grievances, assigning responsibilities, and measuring a proper response. The analysis must therefore open up to alternative arguments. Apart from, or as part of, the clear defense dichotomy, normalization has been identified as an argument for wrongful conduct (Juhasz, 2018; Vaca-Guzman & Arluke, 2015), where, in a child welfare context, parents explicitly aim to widen the scope of parental normality and adequacy. Furthermore, legislation requires considerations of whether non-intervention "will lead to a future situation or risk for the child" (CWA, 1992). This normative and prognostic instruction highlights the cruciality

of *procedural justice* in child welfare that the County Board proceedings adhere to (Eriksen & Skivenes, 1998). In sum, the point of departure is that parents' engagement in newborn care proceedings will counter CWS argumentation with varying degrees and constellations of *three* types of arguments - *justifications, excuses,* and *rationalizations.*

Methods

Data material and case characteristics

The study of parents' arguments in care orders of newborns uses data material from a total pool of all (n=177) care order decisions from the Norwegian County Board about newborns made between the years 2012-2016, rooted in §4-12 as well as §4-8, second section of the CWS.[4] The analysis rests on the final written judgments. In 45 of these cases, the parent(s) consented to the actual placement, and these cases are thus omitted from the analysis. Subjected to analysis were the remaining 132 cases where at least one parent opposed the care order decision and provided claims against it.[5] Access to the data was granted by the Norwegian Data Protection Authority as well as the Data Protection Officer at the University of Bergen, and several agencies were involved in granting access to and working with confidential material.[6] The written decisions (n=132) were between 5-25 pages in length. Chronologically they included procedural information about the parties and structure of the legal process, undisputed background information and facts, the claims presented by CWS about the care situation, the claims presented by the parents, and finally the County Board assessment and final decision. 123 of the cases resulted in a care order, placement in foster home and between 0-24 annual contact visits. The parents' claims were articulated by their lawyers and incorporated into the written judgement by the court after the hearing and final counsel meeting with the decision-makers. Regarding the constellation of parents involved, both parents had parental rights in 83 cases and sought joint care in 60 of these. The mother

[4] All cases originate in an interim newborn care order from the hospital, §4-8, section 2 and §4-9 of the CWA.
[5] In two cases, the father consents to the care order decision, but suggests foster placement with him, thus in reality not 'withdrawing' care for the child. These two claims have been included in the sample, as argumentation centers around keeping the child with the birth parent. Five cases opposing, but not providing contradictory arguments, against the care order/placement were omitted.
[6] The following website provides information about data protection ethics and data access: https://www.discretion.uib.no/wp-content/uploads/2019/12/INFORMATION-ABOUT-DATA-PROTECTION-ETHICS-AND-DATA-ACCESS.pdf

had parental rights alone in 49 cases and sought sole care in 64 cases, and in eight cases the father sought sole care of the infant(s). In no cases did the father have sole parental rights. The analysis focused on the claims of the parent(s) with parental authority, claiming de facto care for the child. In 57 cases the claim represents the mother alone, 53 cases one joint claim represents both parents, 15 cases include separate claims from both parents making one case having two parental claims, and 7 of the claims represents the father alone. As such, 147 separate claims were identified within the 132 cases. They were structured by the three care order criteria mentioned above, and across the written decisions, ranged from approximately 5 sentences to 4 pages.

Analysis

Each case was read fully in order to become familiarized with it. The background section and final decision section informed coding for the County Board's assessment of risk factors, case outcome as well as parent constellations. To identify parents' arguments, the section on parents claims across the 132 written judgements were analyzed. The text was approached through qualitative analysis based on reading and rereading the claims several times, followed by axial and theoretical coding (Coffey & Atkinson, 1996). The coding scheme departed from a defense argumentation framework but was open to the presence of arguments outside this dichotomy, allowing for a flexibility in line with abductive analysis and theorization (Timmermans & Tavory, 2012).

Parents argument types were identified and captured through three meticulous coding rounds, focusing on 1) types of main argument, 2) subcategories of arguments and 3) case factors in arguments (see figure 1 below).[7] Three argument types made up the main argument categories - *justifications, excuses* and *rationalizations.* Firstly, justifications consisted of four subcategories. These were *denial of harm* (arguments where parents claimed that no damage or wrongdoing has occurred, either harm to the

[7]The following text in the claims was omitted; all general text paraphrasing and reiterating the relevant law and legal principles, as well as intent and duties of the parties and definitions of thresholds as paraphrased in law and policy. Also omitted was text more schematically stating that the parents were accepting of in-home services in line with the legal criteria. Some text did not appear as being an argument for care rights and was rather coded into *facts or other procedural descriptions* (where parents paraphrased CWS arguments or presented uncontested background information) and *help, visitation, and final statement* (subsidiary arguments about the placement and amount of contact following placement).

child or oneself as a parent*), whataboutism* (condemning CWS or others for equally negative behavior or contexts*), and appeal to loyalties* (serving some particular allegiance, to co-parents or wider family). Arguments focusing on CWS casework, and experiences of *undue process*, were coded as such. Secondly, excuses were also made up by four subcategories. These were *blaming* (blaming a person or entity for outcomes or circumstances), *defeasibility* (typically lack of information, knowledge, will or capacity due to for example a mental illness or being under the influence of substances, equating to exceptional circumstances where the law cannot be applied at all or must be softened and *biological drives* (a bodily or biological explanation outside human control, such as references to own parents' behavior, or being part of a substance abuse community). Some arguments were clearly formulated as excuses, but not oriented towards past or current risks or problems. As such, the last subcategory of excuses was claims of *change*, where parents explicitly focused on a new care situation. Lastly, the arguments outside the defense dichotomy, labeled *rationalizations*, consisted of four subcategories. *Normalization* was one subcategory, and also included arguments concerning *new parenting* uncertainties as being normal. Arguments where parents echoed the concerns of CWS (*legitimate concerns* subcategory) were coded, as well as normative elements of *deservingness.* This subcategory included arguments based the particular wording of 'deserving a chance', and also where parents in such a respect declared 'love for the child', as well as claiming to deserve a chance based on the motivation put into changing course due to the pregnancy. Arguments where the general lack of information or clarity in the case was argued for made up the *case uncertainties* subcategory. Finally, a small number of arguments labeled *engagement/participation* included parents wanting to shape the help they were to receive, and who had clear perceptions as to what help and services would be necessary, and an equally large group, labeled *severity of intervention*, argued that care orders in general are (too) invasive and consequential.

The analysis finally aimed to capture the particular domains the arguments were anchored in. The domains in focus were identified and coded, as either *parent, child, environment,* or the fourth domain, that of *CWS* (see appendix 1 for case factor coding scheme). It became evident throughout the coding that the rationalization arguments

were unsuitable for this type of coding, either naturally being too vague or very explicit in their focus, and as such, only the justifications and excuses were subjected to case factor coding. Figure 1 below provides an overview of the coding process and analysis.

[Insert Figure 1]

Following the coding rounds, the parents' arguments were broken down by the different health or disability risks the parents faced, which had been coded previously as part of a larger study. The premise for this categorization was that the County Board has put emphasis on said risk as a central concern in the final decision. Significant differences between the risk groups were investigated, using the Zigne Signifikans software. Differences between risk groups were tested applying a one-tailed, single randomized sample test at both a 5% and 1% significance level. Nvivo v. 12 was used both for variable registration and all stages of the coding process.

A total of 121 cases had claims consisting of both justifications and excuses. Four cases (14-C27, 14-C42, 14-C5, 16-C2) only included excuses and rationalizations, three cases (12-C15, 15-C31, 15-C8) only provided justifications, two cases (13-C2, 13-C3) provided only excuses, while two cases (13-C34, 15-C3) included justifications and rationalizations. Each case ranged from having 0-14 *excuse* arguments, 0-15 *justification* arguments and 0-9 *rationalization* arguments.[8] Roughly, the average was 4.7 *excuse* arguments across the cases including excuses, 3.9 *justification* arguments across the cases with excuses, and 2.4 *rationalization* arguments in the cases where those arguments were present. As such, a case most likely appeared in several argument categories, and summation in the tables in the findings is by column. Categories representing less than 10 % of cases are not included in the findings, and individual findings under 10 % are not commented upon. The illustrative quotes in the findings are selected as typical representations of the respective categories and have been translated from Norwegian by the author. The claims are given names corresponding to their unique, non-identifiable case identifier, sorted by year and case number (13-C1 being

[8] These were mapped using Nvivo's count of 'references' as measure of individual arguments.

case number one from 2013). Each claim is referred to as part of the case to which it belongs.

Findings

Out of the 132 cases in the analysis, 93.2 % (123) were ruled as care orders, in favor of the municipality. Nine cases were ruled in favor of the biological parents, reunifying them and their infant(s).[9] Six cases included the revoking of parental rights as well as placement of the child, and three of these six were finalized as adoptions. Regarding the constellation of parents involved, both parents had parental rights in 62.9 % (83) of cases and sought joint care in 45.5 % (60) of these. The mother had parental rights alone in 49 cases and sought sole care in 64 cases, and in eight cases the father sought sole care of the infant(s). In no cases did the father have sole parental rights.

The findings reveal that the three main argument types – justifications (N=127, 96.2 %), excuses (N=126, 95.4%) and rationalizations (N=93, 70.4%), are very much and simultaneously present in parents' response to the allegations put forward by CWS. The content of the argumentative strategies is outlined below, starting with justifications, followed by excuses, and finally rationalizations.

Parents' justifications of care rights

Starting with the claims where parents justified their care rights, the analysis revealed 127 cases where parents claimed that all or parts of their parenting capacities in question and past behavior were justified and not wrongful. Three types of justifications were prevalent (table 1). In 94.5 % of the cases with justifications *denial of harm* arguments were used, either as related to an action or behavior, or to the infant or previous children, claiming that no harm was done. The parents rejected concerns raised by CWS, and rather emphasized positive descriptions of themselves and their situation, as this quote illustrates: "*Mother is a well-functioning woman and has the possibility to be a good mother. She has no problems related to substance misuse or violence."* (16-C36).

[9] The arguments by parents that were ultimately successful (the 9 non-removal cases) did not represent any clear patterns deviating from the general trends. They all included *denial of harm* arguments, were mostly parent-centered, and none included *legitimate concerns* arguments.

Approximately 42 % of cases included arguments claiming *undue process* - that the CWS had not provided services or aid as mandated, as the following quote is an example of: "*Child Welfare Services in X have not done any investigation in relation to Mother, they have only had one meeting with her.*" (13-C8). In 10 % of cases parents compared their parenting capacities and circumstances as equal or equally deviant to those of others through *whataboutism*-arguments. This served as an attempt to justify their care rights through comparisons, such as the following statement illustrates: "*Foster placement is not always beneficial, and there will be risk of further uprooting*" (16-C31).

[Table 1 here]

The analysis also explored the two most prevalent justifications and their distribution across the four case factor domains (parent, CWS, external environment or child). Starting with *denial of harm* arguments, it was evident that most denials of harm concerned the *parents* themselves (89.2 %), seeing a situation, diagnosis, or certain risk as unproblematic. In 55 % of cases harm was denied with a focus on case work(ers) and evidence, claiming that CWS documentation or evidence did not align with proof of harm or inadequacy. Approximately 32 % of cases denied harm towards extended family and environmental factors, arguing that these posed no threat or harm to the care situation, while approximately 20 % of cases denied harm towards the child, as posed either during pregnancy, at the hospital, or during contact visits. Looking at arguments about *undue process*, 94 % of cases claimed undue process directed at CWS casework, meaning that the casework, service provision, and assessments had not been assessed or provided fairly, thus equaling the situation with sufficiency. Finally, *whataboutism* arguments mostly focused on CWS (77 %) - that the CWS was an equal or worse alternative, and 23 % of cases using *whataboutism* arguments compared themselves to a generalized young parent or substance misuser.

Table 2 illustrates the connection between justifications and the type of parental risk factor groups ultimately emphasized by the County Board. Overall, there were few differences across the risk groups. No significant differences were identified in what

justifications parents invoked in their claims across the groups. However, less frequent use of *denial of harm* and *due process* arguments was evident by parents where substance abuse was an explicit risk factor.

[Table 2 here]

Parents' excuses for care rights

126 cases included arguments that either excused previous situations, conditions, and behavior, or focused on recent changes enabling security for the child (table 3). Firstly, the analysis revealed that 89.7 % (113) of cases included *change* arguments, in extension excusing past conditions and circumstances, illustrated by this quote: "*Mother is in better shape now, she is more energetic and motivated to receive help*" (13-C19). Secondly, 77 % (97) of cases included *blaming* arguments, where parents located the source of their problems in other actors, as this statement is an example of: "*It was the children's father who was the problem, but he represents no risk to mother or child today*"(16-C25). Third, in almost 50 % (62) of cases, the parents claimed *defeasibility*, that the parenting task or preparations for parenthood were unmanageable due to lack of information or cognitive or physical capacity. Case 13-C31 illustrates this type of argument: "*The observations at the hospital were brief, and mother was sick.*"

[Table 3 here]

As with the justifications, the analysis explored the specific excuses and their distribution across the four case factor domains. Like the justifications, *change* arguments were in most cases related to the parents themselves (89.4 %), and most commonly focused on improvements in health, addiction patterns, insights, and compliance. Secondly, change was claimed with regards to the external environment in approximately 41 % (46) of cases, while change was claimed towards the basis for documentation and casework by CWS in roughly 29 % (33) of cases. Moving over to *blaming,* 63 % (61) of cases included placing blame on CWS, acknowledging parental insufficiency but locating the reason for it with lacking or poor services and service

provision. In approximately the same number of cases, 62 % (60), parents blamed aspects of their own functioning, such as a diagnosis, or about past experiences or own upbringing. Concerning the child, parents blamed the child's special needs as complicating the care task in 13.4 % (13) of cases. Finally, parents also invoked arguments rooted in defeasibility. These were in 85.5 % of cases about themselves, that their dispositions made the care task or situation unmanageable, but this was also related to standards or situations set up by CWS in 37 % (23) of the cases.

When exploring the excuses across the risk factor groups, we see the same pattern as with the justifications; that parents' defense types were not in large connected to the type of risk factors found important in the final decision. However, significant differences existed between the substance abuse group and the personality disorder group, where the latter to a significantly larger degree applied blaming arguments, as evident in table 4.

[Table 4 here]

Parents' rationalizations of care rights

Rationalization arguments were identified in 93 cases, as displayed in table 5, making out 70.5 % of the whole sample. These took the form of four main types of claims: *normalization, legitimate concerns, deservingness* and *uncertainty*. Normalization arguments were most prevalent (approx. 61 % of the rationalization cases) and came in two forms across 57 cases.

Rationalizations firstly acknowledged that the parenting capacities and situation in question could be probed, but still should be seen as *normal* or within a discourse of adequate parenting. These arguments were visible in 48 cases and were typically formulated such as this: "*Requirements of ideality should not be placed on the parents, and they should not be compared to the foster parents*" (16-C2). Secondly, in 13 cases, new parents explicitly asked to be granted leeway, and claimed that their concerns and insufficiencies were normal, as evident in case 15-C4: "*That he [Father] has needed and accepted guidance during visitation with Daughter must not be assigned much weight. All first-time parents need guidance*". In 42 cases (approx. 45 %), parents

admitted that concerns posed by CWS were legitimate, without any form of defense attached to it, as the following quote displays: "*The parents have not covered up the fact that they have challenges and need help in handling the parenting role*" (16-C37). In 31 cases (approximately 33 %), parents claimed to deserve to parent, explicitly stating such, or stating love for the child as well as the baby being a turning point in their lives as legitimizing reasons for retaining care of the child. Case 14-C14 illustrates this type of argument: "*The parents now have a strong wish to be allowed to try, and to show that they are good enough*." In this, acknowledgment of insufficiencies was often visible, but deservingness aimed to counter this. In 22 cases (approx. 24 %), parents claimed that there was too much *uncertainty* in the case, as to allow for a care order, as this quote displays: *"One does not know how Mother would function with her daughter. There is no empirical evidence, only assumptions*" (16-C26).

[Table 5 here]

When breaking the rationalizations down by risk groups (table 6), we see that parents who were assessed with substance misuse and intellectual risks to a larger extent applied normalization arguments when compared to the personality disorder risk group. When looking specifically at the two groups' application of *new parenting* arguments, the intellectual risk group used this type of argument significantly more. Moving on, parents with personality disorder risks to a lesser degree echoed concerns raised by CWS, and parents with substance abuse risks to a lesser degree claimed case uncertainties. All four risk groups were roughly equal in claims of deservingness.

[Table 6 here]

Discussion

This study explored birth parents' responses to accusations of insufficient parenting at the outset of (a new) family life. Did they deny accusations, comply with risk assessments, or bring completely new arguments to the proceedings? Through the analysis, it became clear that overall, parents' claims for care rights were surprisingly

multifaceted. Parents applied both justifications and excuses in over 90 % of the cases, and rationalized in over 70 % when affirming their adequacy and worthiness as new parents. Parents both aligned with and opposed the CWS and County Board in their perceptions of risk and division of responsibility, as well as countered with broader arguments about normalizing and deservingness. The analysis revealed significant patterns and variations in how parents with differing health and disability risks asserted their care rights, while ultimately being subjected to the same outcome – placement of their infant in alternative care. How can this critical, yet most often insufficient legal engagement be understood?

Looking closer at each type of argument, almost all cases with justifications were focused on *denying alleged harm or risk*, and parents rather emphasizing positive traits and descriptions of their capacities and circumstances. They did indeed agree to a certain description of behavior or situation but appeared to "deny the pejorative quality associated with it" (Scott & Lyman, 1968, p. 47). Justifications focusing on *undue processes* were evident in 41 % of cases. Parents focused on the lack of service provision and aid from CWS leading up to the care order, thus contesting procedures. Both these types of justifications can be linked to what Jennifer Sykes calls *institutional distancing,* where parents involved in child welfare proceedings inherently object to parenting standards set by CWS, "questioning both the standards and enforcement procedures of the institution" as a way to negotiate stigma (Sykes, 2011, p. 455). These types of arguments can reveal differences in substantial and normative perceptions of family life and thresholds for intervention but may also be an alternative way to deal with feelings of shame towards the intervention and accusations. However, arguments about undue process can also be expressions related to findings from a British newborn context as well as the mentioned research on parents' engagement in section 2.3 above, where limited or poor communication between professionals and birth parents results in birth mothers' lacking understanding of the child welfare and family justice processes in the pre-birth period (Klee et al., 2002; Marsh, 2016; Broadhurst et al., 2017; Marsh et al., 2018, cf. Mason et al., 2019). As this type of argument is present in almost half of the case sample, a need for further knowledge about parents' actual perceptions, understandings, and benefit of services, as well as the quality of communication and

feedback between parents and CWS in the service provision phase and during pregnancy is evident.

However, parents also expressed alignment in perceptions of risk, as excuses similarly dominated parents' claims for care rights. The three main excuses were *change, blaming,* and *defeasibility*, and were evident in approximately 93 %, 74 %, and 48 % of the cases, respectively. These types of arguments expressed parents' acceptance of the negativity of situations or behavior, as such acknowledging past insufficiencies. Norwegian policy stated decades ago, and keeps on being iterated, that newborn cases "may prove to be extremely difficult if the parents have not cared for the child or a previous child, or time has passed since their previous care task, and it is alleged that sufficient changes have taken place (NOU 1985:18, 1985). As such, it was unsurprising that claims of *change* were central excuses, as they seem to be arguments of significant importance for the County Board. However, when the parents excused, they did not assume responsibility for their situation. This was especially evident in the approximately 77 % of cases invoking *blaming*. Most blaming was oriented towards CWS, unsurprisingly. However, many parents also blamed elements related to themselves, such as their own background, illness, or other aspects affecting their functioning. Defeasibility arguments were evident across half of the excuses and somewhat overlap with blaming. Here, parents also acknowledged negativity, but contested manageability, due to for example the lack of information and willpower that comes with mental illness or substance abuse. Bridging this to change capacity, these parents can be viewed as *reforming parents,* "eager to improve (…) parenting by embracing services" which caseworkers see as "best suited to work within the CPS system" (Sykes, 2011, p. 453).

Care orders of newborns nonetheless draw upon broader sets of responses from parents, outside the defense dichotomy. Rationalizations were evident in 70 % of the cases, comprised of *normalization, legitimate concerns*, *deservingness,* and *uncertainty* as the subtypes, in descending order of prevalence. Normalization consisted of claims that the risk or situation in question should be seen as normal, as well as arguments claiming leeway and understanding for new parents. Almost one-third of the whole sample included parents echoing and confirming *legitimate concerns* from CWS,

appearing to align in full with CWS' definitions as well as assigning of responsibilities. Rationalizations are especially interesting when comparing this study to a previous analysis of parents' legal defenses in general care orders appealed to the District Court (Juhasz, 2018). Based on the increased use of rationalization arguments, it is clear that parents' arguments in care proceedings of newborns differ from those of older children. The magnitude of rationalizations in newborn cases also reminds us that care proceedings are not criminal proceedings, where the defense dichotomy is primarily situated. Beyond (lack of) parental and care histories, the infant's ongoing development, the birth parents' future functioning, and developments, as well as assessments of the future relationship between birth parents and their infant are all necessary and challenging, to consider.

The study also aimed to capture the location of, or domains within, the parents' arguments. Parents seemed to at least in part mirror how CWS assesses risk. This can be illustrated by a valuable study by Tefre of child welfare workers' risk assessment in a newborn intellectual disability context (Tefre, 2017). In this study, social workers primarily emphasize parental (cognitive, health and capacity) factors, followed by child and finally environmental factors when assessing risk in a suspected infant neglect case. This reasoning of risk aligns with parents' arguments in a primary *parental* focus but differed in parents putting a lesser focus on the *external* environment, and least on the *child*, which is the opposite order of the social workers' emphasis (Tefre, 2017). Off the bat, this seems natural as the child is still in his or her infancy, more information may be available about the external environment, and the CWS is mandated to assess the specific child's best interest. More concerning is that this correlates with research showing that children in these cases appear to be invisible, even though their best interests are the nexus for decision-making (Križ et al., accepted for publication). As research speaks clearly to the lack of child participation in child welfare (Falch-Eriksen et al., 2021), and evidence is emerging on infant brain development and early consciousness (Braarud, 2012; Filippa et al., 2017), the child-centeredness of newborn removals should not be downplayed.

The study finally aimed to identify whether the parents' risks or problems impacted what types of arguments were invoked. Both differences and similarities were

revealed. Parents with drug or substance misuse risks invoked significantly less *blaming* when compared to those with personality disorder risks. This gives the impression that parents facing such risks defend their care rights differently, perhaps assuming more responsibility or at least aligning more with the concerns raised by the County Board. Or perhaps they find such risks harder to defend? This aligns with research informing both that substance misuse is understood to be both a significant and undisputed reason for child maltreatment and care orders, well as decreasing the hazard rate of children returning to their families (Wittenstrom et al., 2015). A significant difference was also evident in the use of *new parenting* arguments. The intellectual disability risk group used this argument significantly more than the group with personality problematics or disorders. This may be connected to the risks and potential prejudice associated with parents with intellectual disabilities in the child welfare system, and the critical timing of the newborn intervention (LaLiberte et al., 2017; McConnell & Llewellyn, 2000, 2002). However, the lack of other significant differences tells us that the risk groups in large appear to use the same arguments, despite their potential differences in actual compliance or capacity to change, for example. This can divert the attention to the role of the lawyer in care proceedings (Masson, 2012), in shaping arguments and applying strategies for parents.

In Norway, a shift from adversarialism to the incorporation of Alternative Dispute Resolution measures in legal care proceedings is ongoing. The mentioned experiences of disengagement and insecurity when involved with child welfare services, both at the agency and legal levels, as well as a heightened focus on child participation, can serve as backdrops for this change. This can affect how parents assert their care rights to a more direct and unfiltered dialogue with CWS and the County Board (Prop. 84 L 2019–2020, (Andersen, 2020). However, less formal decision-making environments have also been argued to disadvantage vulnerable children and parents by coercing the weaker party to comply with CWS (Porter et al., 2019). The alternative format could nonetheless contribute to altering parents' perception of engagement and participation, with less adversity perhaps softening the overall experience of the process, and thus facilitating more acceptance of the outcome.

Limitations of the study

The study has limitations. Firstly, written legal judgments and decisions will never fully represent and capture the full 'story' of a case, from casework at the agency level, as well as the progression through the County Board pre-proceedings, hearing, and final deliberations between the decision-makers. However, the written decisions do include all necessary and relevant arguments for the justification, and as such represent the arguments legitimizing the intervention[10]. Secondly, the written claims are not direct, unfiltered claims from parents throughout the case as a whole. They are authored by the parents' lawyers in some form of collaborative effort and incorporated into the final written decision by the County Board Chair, following the legal requirements for care proceedings (Lov om barneverntjenester, 1992; Lov om mekling og rettergang i sivile tvister, 2005). Knowing in detail the quality and proximity of cooperation between the parents and their appointed or selected lawyers is impossible within this research design. This is a critical issue, as it is impossible to discern whether the parents' arguments reflect a 'strategy' proposed by the lawyer, and to what extent they are amended and changed to fit a legal discourse. However, the written County Board decisions are approached as representing the parents' official statements and display the legal arguments provided in support of their care rights.

Thirdly, some reflections on the case selection for analysis are necessary. Out of the sample of 132 cases where parents oppose the placement, 19 cases ultimately did not fit within any of the four parental risk groups. As such, the between-risk-group analysis of arguments is based on 85.6 % (113) of the cases. The 19 omitted cases emphasize other factors, both risk and protective, such as previous parenting, domestic violence, the parents' marginal childhood, compliance, parental dynamics, the child's special needs, family/social network as well as socio-economic risks. This group could facilitate an interesting comparison or analysis in its own right. However, the cases have for this study been excluded, both due to limits in scope and size for the study, and variation in arguments between the health and disability risk groups being the primary research interest.

[10] For an extensive overview of the formal requirements for written care orders in Norway, see the following website: https://discretion.uib.no/resources/requirements-for-judgments-in-care-order-decisions-in-8-countries/#1588242680256-00a159db-e96f

Concluding remarks

Parents' accounts in child welfare emerge as critical in that they help explain how they make meaning and sense of their social world and can help identify culturally embedded normative explanations (Orbuch, 1997). When facing legal proceedings initiated by CWS, parents reflect on insufficient service provision and also argue for different views on what is sufficient parenting, risk, and harm. Parents' accounts thus provide important perspectives for child welfare workers to build on and to be equipped with, when working with serious child welfare cases, assessing risk, and communicating with parents. That both justifications and excuses "are likely to be invoked when a person is accused of having done something that is "bad, wrong, inept, unwelcome, or in some other of the numerous possible ways, untoward" (Austin, 1956, p. 2), resonates with the findings of this study. Furthermore, it is stated that "excuses rarely provide the opportunity to completely escape responsibility and in fact, may at times backfire" (Greenberg, 1996, cf. Tyler & Feldman, 2007, p. 47). This mirrors the lack of 'success' of parents' argumentation before the County Board, as in 93 % of cases it remains unconvinced.

Ethical considerations

Ethical approval for this project was given by the Norwegian Data Protection Authority as well as the Data Protection Officer at the University of Bergen.

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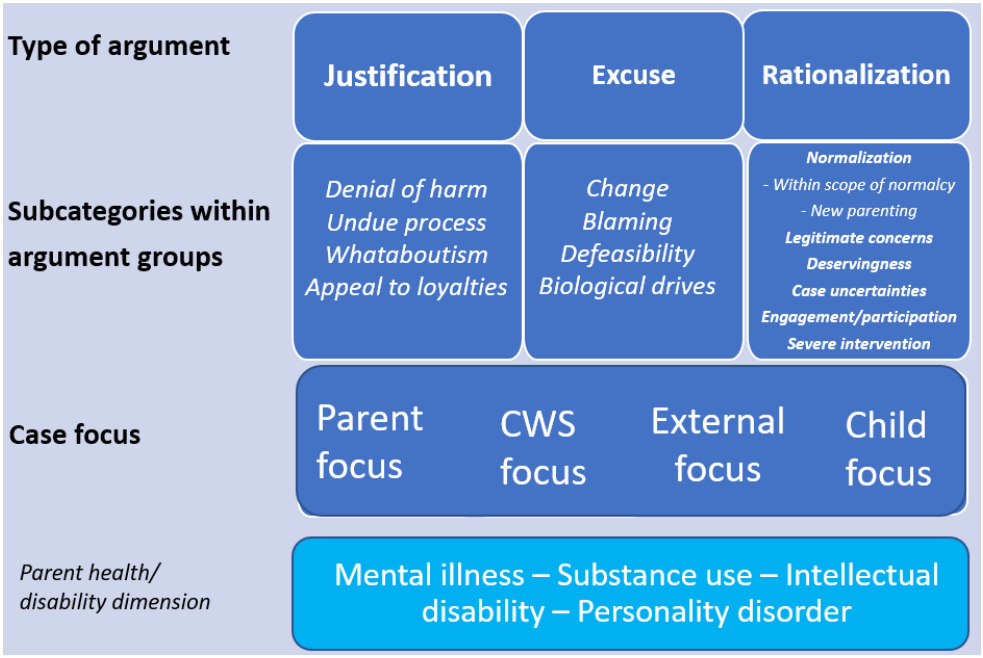
Figure

Figure 1. Overview of coding process and analysis.



Tables

Table 1. Justifications across case factors in parents' claims.

JUSTIFICATIONS (N=127)			
	Denial of harm	***Undue process***	***Whataboutism***
Total	**94.5 %**	**41.7 %**	**10.2 %**
	(120)	(53)	(13)
Parent justifications	89.2 %	7.6 %	23.1 %
(N=108)	(107)	(4)	(3)
CWS casework justifications	55 %	94.3 %	76.9 %
(N=89)	(66)	(50)	(10)
External justifications	31.7 %	0	0
(N=38)	(38)		
Child justifications	19.2 %	7.6 %	0
(N=26)	(23)	(4)	

Table 2. Justifications across health/disability risks.

JUSTIFICATIONS	**HEALTH/DISABILITY RISKS**				
	Total cases (N=109)	Parental mental illness (N=68)	Parental severe learning/ intellectual disability (N=50)	Parental drug, substance misuse (N=40)	Parental personality disorder, problematics (N=33)
Denial of harm	**95.4 %** (104)	94.1 % (64)	96 % (48)	90 % (36)	97 % (32)
Undue process	**37.6 %** (41)	41.2 % (28)	40 % (20)	30 % (12)	39.4 (13)

Table 3. Excuses across case factors in parents' claims.

EXCUSES (N=126)			
	Change	***Blaming***	***Defeasibility***
Total	**89.7 %** (113)	**77 %** (97)	**49.2 %** (62)
Parent excuses (N=117)	89.4 % (101)	61.9 % (60)	85.5 % (53)
CWS casework excuses (N=82)	29.2 % (33)	62.9 % (61)	37.1 % (23)
External excuses (N=68)	40.7 % (46)	37.1 % (36)	6.5 % (4)
Child excuses (N=14)	0	13.4 % (13)	1.6 % (1)

Table 4. Parents' excuse arguments across health/disability risks.

EXCUSES	**HEALTH/DISABILITY RISKS**				
	Total (N=110)	Parental mental illness (N=69)	Parental severe learning/ intellectual disability (N=50)	Parental drug, substance misuse (N=41)	Parental personality disorder, problematics (N=32)
Change	**92.7 %** (102)	89.9 % (62)	94 % (47)	97. 5 % (40)	87.5 (28)
Blaming	**73.6 %** (81)	76.8 % (53)	74 % (37)	68.3 % ** (28)	87.5** (28)
Defeasibility	**48.2 %** (53)	52.2 % (36)	48 % (24)	41.5 % (17)	50 % (16)

**Significant difference at .05 % significance level.

Table 5. Overview of parents' rationalization arguments.

	Total *rationalization* arguments (N=93)	Whole sample (N=132)
Normalization	**61.3 %** (57)	43.2 % (57)
Within range of normalcy, ideality	*51.6 % (48)*	*36.4 % (48)*
New parenting	*14 % (13)*	*9.9 %13*
Legitimate concerns	**45.2 %** (42)	31.8 % (42)
Deservingness	**33.3 %** (31**)**	23.5 % (31)
Case uncertainties	**23.7 %** (22)	16.7 % (22)

Table 6. Parents' rationalization arguments across risks as identified by County Board.

RATIONALIZATIONS	**HEALTH/DISABILITY RISKS**				
	Total (N=82)	Parental mental illness (N=53)	Parental severe learning/ intellectual disability (N=39)	Parental drug, substance misuse (N=32)	Parental personality disorder, problematics (N=21)
Normalization	**59.8 %** (49)	54.7 % (29)	61.5 % (24)	62.5 % (20)	42.9 % (9)
Within range of normalcy, ideality	***48.8 %*** *(40)*	*47.2 % (25)*	*46.6 % (18)*	*56.3 % (18)*	*38.1 % (8)*
New parenting	***15.9 %*** *(13)*	*11.3 % (6)*	*23.1 %** (9)*	*6.3 % (2)*	*4.8 %** (1)*
Legitimate concerns	**45.1 %** (37)	41.5 % (22)	46.6 % (18)	43.8 % (14)	33.3 % (7)
Deservingness	**35.4 %** (29)	32.1 % (17)	38.5 % (15)	34.4 % (11)	38.1 % (8)
Uncertainty	**24.4 %** (20)	26.4 % (14)	28.2 % (11)	15.6 % (5)	28.6 % (6)

**Significant difference at .05 % significance level.

Appendix for article 4: Case domain coding scheme

Arguments within case domains	
EXCUSES	***Code description***
CWS casework excuses	Arguments where parents emphasize he correctness in CWS' observations and conclusions, but blame the circumstances, casework, caseworkers, expert reports, and assessments for affecting, misinterpreting, and shaping the poor or insufficient outcomes and observations. Includes claiming broadly and generally that the situation is new/changed, and that CWS has not countered this into their case presentation/understanding.
External excuses	
Media influence	Arguments claiming that negative descriptions of CWS in media affects their will to cooperate or share information.
Partner, social network	Arguments either blaming (previous) partner, extended family or social network for the challenging situation, behavior, or condition description, or emphasizing such actors as new contributions to the family unit, securing the care conditions.
Welfare, service engagement	Arguments where parents blame and/or praise health treatment, welfare services or incarceration, either as causing problems, not providing treatment or help, or doing just that, adding to an improved care situation.
Parent excuses	
Case, pregnancy as burden	Arguments relating to the challenges and vulnerabilities of pregnancy, childbirth, and subsequent and ongoing

	CWS proceedings experienced and embodied by the parents.
Compliance, help measures will suffice	Arguments where parents state that there is and/or will be compliance with CWS and other related services, and that help will secure the situation.
Cultural background	Arguments where parents refer to their cultural/migrant background as excuses for not knowing or being informed of Norwegian parenting practices.
Housing, food, practicalities, work, finances	Arguments excusing the parents' practical lives related to housing, finances, the logistics of everyday chores, maintaining employment or education, blaming these, but also emphasis on a change related to the aforementioned areas.
Own upbringing, CWS involvement	Arguments excusing the parents' behavior, conditions or potential as rooted in their insufficient childhoods, or interaction with CWS as children, conditioning them negatively.
Parent personality, capacity, behavior	Arguments acknowledging deficits in the parents own past behavior, personalities, characteristics, physical, cognitive, and mental health, related to age and maturity, and rooted both in their own perceptions, as well as referenced by health professionals and social network. Also including parents' emphasis on improvement of these aspects and change for the better.
Previous parenting, older children	Arguments acknowledging past insufficient parenting of older siblings, but focusing on the task as challenging, such as child with special needs or circumstances, challenging home life, cultural elements, language, or being a young parent.
Child excuses	Arguments blaming or putting focus on the child's physical/cognitive/emotional

	condition/vulnerability/needs, or the child's situation in placement/since birth, making caring/visitation difficult. Also includes emphasis on any negative effect placement has on the child, warranting a return to birth parents.
JUSTIFICATIONS	
Child justifications	Arguments focusing on the child's resilience, robustness, or the child's need to maintain cultural identity.
CWS casework justifications	Arguments disagreeing, contesting, or opposing assessments, conclusions and interpretations made by CWS and appointed experts, witnesses, family center assessments and evaluations.
Parent justifications	
Broader welfare, service engagement	Arguments focusing on broader welfare engagements such as police, army, health services either confirming adequacy, or presenting incorrect information into the case.
Housing, food, practicalities, work, finances	Arguments emphasizing the sufficiency of the parents' practical lives related to housing, finances, the logistics of everyday chores, maintaining employment or education.
Parent personality, capacity, behavior	Arguments emphasizing the parents' own sufficient behavior, personalities, own physical, cognitive, mental health, and sufficient parenting and care skills, both rooted in their own perceptions, as well as referenced by health professionals and social network.
Parental dynamics	Arguments emphasizing the parents well-functioning relationship and dynamic as a couple, and how they together provide a sufficient parenting base.

Practical, emotional, care, interaction	Arguments emphasizing sufficient care and interaction between infant and birth parents at hospital and during visitation, both practical, psychological, and emotional aspects of interaction.
Previous parenting	Arguments referencing sufficient parenting of older children, their positive outcomes, good health, attendance in school and other practical circumstances.
Proxy parenting	Arguments where parents use proxies of parenting, such as caretaking of children in extended network, employment in daycare and other caretaking roles as well as reading up on parenting literature, as measures indicating sufficient parenting.
Compliance	Arguments where parents emphasize ongoing cooperation and collaboration with CWS, and suggested treatment related to own health and wellbeing, being in treatment programs etc.
Social network justifications	Arguments where parents emphasize the continuous presence of extended family and social network adding to a secure parenting base.

Datatilsynet

Universitetet i Bergen
Det samfunnsvitenskapelige fakultet
Postboks 7800
5020 BERGEN

Att.: Ida B. Juhasz

Deres referanse	Vår referanse	Dato
53649 / 4 / AMS	17/00605-2/CDG	19.07.2017

Innvilget konsesjon til å behandle personopplysninger – «Godt nok foreldreskap - vurderinger og begrunnelser ved omsorgsovertakelser av nyfødte i Norge og England»

Vi viser til søknaden om konsesjon dere sendte 03.05.2017. Søknaden gjelder behandling av personopplysninger i forskningsprosjektet «Godt nok foreldreskap – vurdering og begrunnelser ved omsorgsovertakelser av nyfødte i Norge og England». Søknaden er innsendt via personvernombudet for forskning hos NSD. Vi viser også til tilleggsinformasjon sendt i e-post 18.07.2017.

Vedtak om konsesjon
Datatilsynet gir Universitetet i Bergen konsesjon til å behandle personopplysninger i forskningsprosjektet «Godt nok foreldreskap – vurderinger og begrunnelser ved omsorgsovertakelse av nyfødte i Norge og England. Premissene for konsesjonen følger i punkt 3. Det er stilt følgende vilkår for konsesjonen:

1. Vedtakene skal slettes så snart variablene er registrerte.

Konsesjonen utløper **31.12.2020**. Opplysninger som kan knyttes til enkeltpersoner må etter dette slettes eller anonymiseres. Dersom dere ønsker å gjøre endringer som har betydning for behandlingen av personopplysninger, må dere søke om dette.

Konsesjonen er gitt med hjemmel i personopplysningsloven § 33, jf. § 34. Vilkårene er satt med hjemmel i § 35.

Nærmere begrunnelse for vedtaket

1. Sakens faktiske forhold

Formål
Prosjektet skal undersøke hvordan barnevernet fatter beslutninger om omsorgsovertakelse av nyfødte. Dette skal gjøres ved å undersøke Fylkesnemndene for barnevern og sosiale sakers avgjørelser om omsorgsovertakelse av nyfødte.

Utvalg og data
Prosjektet skal gjennomgå alle fylkesnemndsaker om barnevernloven § 4-8 jf. § 4-9 og § 4-8 jf. §4-12 i perioden 01.01.2012-31.12.2016. Det er anslått at det dreier seg om ca. 350 saker.

Utvalget vil omfatte de omtalte barna, deres biologiske foreldre, fosterforeldre og eventuell annen familie. Det er anslått at sakene omtaler ca. 4000 personer.

Avgjørelsene fra fylkesnemndene skal utleveres med direkte identifiserbare personopplysninger. Bufdir har innvilget dispensasjon fra taushetsplikt, etter positiv uttalelse fra Rådet for taushetsplikt og forskning. Krav om anonymisering av vedtakene vil påføre Fylkesnemndene en uforholdsmessig stor arbeidsbelastning.

Det er planlagt en lignende analyse for saker fra England, men denne konsesjonssøknaden gjelder kun den norske delen.

Prosjektdeltakere
Prosjektet er en del av doktorgradsprosjektet til Ida B. Juhasz. I tillegg skal veileder Marit Skivenes ha tilgang til datamaterialet.

Behandlingsgrunnlag
Prosjektet anfører personopplysningsloven § 9 bokstav h jf. § 8 bokstav d som behandlingsgrunnlag. Det er vist til at hensynet til å styrke kunnskapen om omsorgsovertakelse av nyfødte barn overstyrer ulempene det kan medføre for den enkelte. Vi viser til redegjørelse i søknaden.

Unntak fra plikten til å informere
Prosjektet anfører at det vil være utilrådelig å gi informasjon til utvalget, jf. personopplysningsloven § 23 første ledd bokstav c. Det er også anført at varsling vil være tilnærmet umulig for en stor del av utvalget, jf. personopplysningsloven § 20 andre ledd bokstav b. Vi viser til redegjørelse i søknaden.

Informasjonssikkerhet
Sentralenheten for fylkesnemndene skal skrive ut vedtakene på papir. Prosjektmedarbeiderne skal hente vedtakene hos Fylkesnemnda i Hordaland og Sogn og Fjordane. Deretter skal prosjektet skanne dokumentene over på en minnepinne. Dette gjøres på en kopimaskin som er sikret av IT-avdelingen til UiB og som ikke er tilkoblet Internett. Dokumentene skal deretter overføres til SAFE og lagres i en kryptert folder. Minnepinne og papirdokumenter blir makulert.

Opplysningene som skal registreres i analysematerialet skal samles i hovedkategorier som alders- og kjønnsfordeling, hovedproblematikk (rus, psykisk helse, kognitive vansker, alder/modenhet), involverte tjenester i svangerskap og tidligere, om det har vært sakkyndige eksperter involvert, hvilke argumenter som anvendes for at et vedtak er til barnets beste, osv. Det er opplyst at indirekte identifiserbare personopplysninger på ingen måte skal kunne tilbakeføres til enkeltpersoner. Analysematerialet skal lagres på SAFE.

Prosjektslutt og anonymisering
Datamaterialet skal anonymiseres senest 31.12.2020, ved at direkte identifiserbare personopplysninger slettes og at indirekte identifiserbare personopplysninger slettes eller kategoriseres på en slik at måte at opplysningene ikke kan føres tilbake til en enkeltperson.

2. Rettslig grunnlag

2.1. Behandlingsgrunnlag og konsesjon

Behandling av sensitive personopplysninger krever behandlingsgrunnlag[1] og konsesjon fra Datatilsynet[2].

Vilkårene for å gi konsesjon følger av personopplysningsloven § 34. Ved avgjørelsen av om det kan gis konsesjon, skal det klarlegges om behandlingen av personopplysninger kan volde ulemper for den enkelte som ikke avhjelpes gjennom bestemmelsene i kapitlene II-V og vilkår etter § 35. I så tilfelle må det vurderes om ulempene blir oppveid av hensyn som taler for behandlingen. Det må foretas en helhetlig vurdering av behandlingen, hvilke opplysninger som er omfattet og hvilke tiltak som er gjort for å begrense personvernulempene.

Det kan stilles vilkår etter § 35 når det er nødvendig for å begrense ulempene som behandlingen ellers ville medføre for den registrerte.

2.2. Informasjonsplikt

En behandlingsansvarlig som samler inn personopplysninger fra andre enn dem registrerte selv, skal informere den registrerte om hvilke opplysninger som er samlet så snart opplysningene er samlet inn[3]. Den behandlingsansvarlige skal også gi informasjon om bl.a. formålet med behandlingen og kontaktinformasjon til den behandlingsansvarlige.

Det finnes ulike hjemmelsgrunnlag for å gjøre unntak fra informasjonsplikten. Et av alternativene er at det vil være «umulig» å gi informasjon[4]. Forarbeidene gir ingen tolkningsbidrag for å avklare når det er «umulig» å gi informasjon. Ordlyden i seg selv tilsier imidlertid at terskelen må være høy og at unntaket kun kan komme til anvendelse i de tilfellene hvor det faktisk ikke er mulig å komme i kontakt med de registrerte. Dette vil for eksempel være når registrerte ikke har kjent bostedsadresse i Folkeregisteret.

Et annet alternativ er personopplysningsloven § 23 første ledd bokstav c. Denne bestemmelsen slår fast at informasjonsplikten ikke gjelder når det må anses som «utilrådelig» at den registrerte får kjennskap til opplysningene, enten av hensyn til den registrertes «helse» eller «forholdet til personer som står vedkommende nær».

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[1] jf. personopplysningsloven § 9 jf. § 8.
[2] jf. personopplysningsloven § 33.
[3] jf. personopplysningsloven § 20 første ledd.
[4] jf. personopplysningsloven § 20 andre ledd bokstav b.

Ordlyden «utilrådelig» tilsier at terskelen for å anvende unntaksbestemmelsen er høy[5]. Det følger av forarbeidene[6] til personopplysningsloven at bestemmelsen tilsvarer og skal forstås på samme måte som forvaltningsloven § 19 bokstav c om partsinnsyn[7]. Begge bestemmelsene bestemmer at informasjonen kan gjøres kjent for en representant, med mindre «særlige grunner» taler mot det.

Når det gjelder unntak av hensyn til den registrertes helse, uttales det i kommentarutgaven til personopplysningsloven[8] at unntak må grunnes på et «faglig skjønn i det konkrete tilfellet», mens det for unntak av hensyn til forholdet mellom den registrerte og en som står den registrerte nær heter at unntak må baseres på en «konkret vurdering i den enkelte tilfellet».

Både ordlyden i personopplysningsloven § 23 bokstav c og henvisningen til forvaltningslovens bestemmelse om partsinnsyn tilsier at unntak fra informasjonsplikten må vurderes konkret for hver enkelt registrert og at unntaksbestemmelsen ikke kan hjemle et generelt unntak fra informasjonsplikten for et helt utvalg i et forskningsprosjekt.

3. Vår vurdering

3.1. Behandlingsgrunnlag og vurdering av om det kan gis konsesjon

Datatilsynet legger til grunn personvernombudets vurdering av samfunnsnytten til prosjektet. Spørsmålet er om samfunnsnytten veier opp for ulempene som behandlingen av personopplysningene medfører for enkeltpersonene som er omtalt i fylkesnemndsvedtakene.

Det medfører en klar personvernulempe at forskere gis tilgang til vedtak som inneholder sensitive personopplysninger om enkeltpersoner som er omtalt ved navn og med fødselsnummer. Fylkesnemndas vedtak i saker om omsorgsovertakelse inneholder opplysninger som ikke bare er sensitive etter personopplysningsloven, men som også oppfattes som særlig private av dem de omhandler. Det er lite trolig at partene i et vedtak om omsorgsovertakelse er klar over at saken kan bli gjenstand for forskning. Det er derfor også en ulempe at samtykke ikke skal være behandlingsgrunnlag for prosjektet.

Ulempene for barn og foreldre ville blitt vesentlig redusert dersom prosjektet kun skulle motta anonymiserte vedtak. Datatilsynet finner likevel at prosjektets begrunnelse for at vedtakene ikke kan anonymiseres som tilfredsstillende.

Informasjonssikkerhet er svært viktig for å ivareta den enkeltes personvern, herunder integritet og konfidensialitet. Datatilsynet kommer til at løsningen for overføring og oppbevaring av vedtak og analysemateriale som prosjektleder presenterte i e-post 18.07.17 ivaretar informasjonssikkerheter på en tilstrekkelig måte. Vi legger til grunn at kopimaskinen

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[5] Se også *«Personopplysningsloven. Kommentarutgave»*, Johansen, Kaspersen og Skullerud, 2001, s. 177-178, hvor det uttales at bestemmelsen skal brukes med varsomhet.
[6] Ot. prp. nr. 92 (1998-1999) s. 121.
[7] Forvaltningsloven § 19 bokstav c er i dag § 19 bokstav d.
[8] *«Personopplysningsloven. Kommentarutgave»*, Johansen, Kaspersen og Skullerud, 2001, s. 177-178.

er innrettet slik at den ikke lagrer en kopi av alt skannet materiale, eventuelt at det sørges for at kopi slettes umiddelbart.

Det er opplyst at det ikke skal være mulig å tilbakeføre opplysninger i analysematerialet til enkeltpersoner. Datatilsynet legger til grunn at dette også innebærer at det ikke skal opprettes noen form for kobling mellom vedtakene og variablene som inngår i analysematerialet. Dette begrenser ulempene for de registrerte.

I prosjektet «Adopsjon som barneverntiltak» vektla Datatilsynet det som et personvernfremmende tiltak at vedtakene skulle slettes fortløpende etter hvert som variablene er registrerte, ettersom dette vil medføre at tilgangen til direkte identifiserbare personopplysninger er så kortvarig som mulig. Tilsvarende løsning er ikke beskrevet for inneværende prosjekt. Datatilsynet mener at prosjektene og datamaterialet har så store likhetstrekk at det er nødvendig å oppstille vilkår etter personopplysningsloven § 35 om at vedtakene slettes fortløpende etter at variablene er registrerte.

Til slutt legger vi vekt på at det kun er to navngitte personer som skal ha tilgang til personopplysningene og at prosjektet er kortvarig.

Vi er etter en samlet vurdering kommet til at samfunnsnytten overstiger ulempene som behandlingen vil medføre for den enkelte dersom ovenstående forutsetninger og vilkår oppfylles.

3.2. Informasjonsplikt

Basert på våre erfaringer med tidligere saker hvor forskningsprosjekter skal bruke opplysninger fra fylkesnemndsvedtak, legger vi til grunn at vedtakene inneholder navn og fødselsnummer til barna og foreldrene (både biologiske foreldre og fosterforeldre). Vi presiserer også at prosjektet som behandles i vedtaket omfatter barn som er født i perioden 2012-2016, og at disse barna fremdeles er så små at det ikke vil være aktuelt å gi informasjonen til barna. Vi mener at det derfor ikke er relevant for vurderingen av om det er umulig å gi informasjon at barna kan ha skiftet navn.

Navn og fødselsnummer gjør det mulig å få utlevert opplysninger om bostedsadresse fra Folkeregisteret. Det er dermed ikke umulig å gi informasjon til biologiske og fosterforeldre. Datatilsynet presiserer at informasjonsplikten vil være oppfylt når det er sendt informasjon til siste kjente bostedsadresse. Det er derfor ikke noe krav om å oppnå kontakt med de registrerte. Dersom registrerte ikke er oppført med kjent bostedsadresse, vil det være umulig å oppfylle informasjonsplikten. Disse personene vil derfor være unntatt fra informasjonsplikten.

Når det gjelder andre familiemedlemmer enn barn og foreldre og saksbehandlere i barnevernet, vil mangel på fødselsnummer gjøre det vanskeligere å få utlevert kontaktinformasjon. Det vil derfor være uforholdsmessig vanskelig å informere disse familiemedlemmene, jf. personopplysningsloven § 20 andre ledd bokstav b. Det gjøres derfor unntak fra informasjonsplikten for disse gruppene av registrerte.

Prosjektet har også anført unntak fra informasjonsplikten etter personopplysningsloven § 23 første ledd bokstav c. Bestemmelsen kan ikke brukes for å gjøre unntak fra informasjonsplikten for et helt utvalg. Datatilsynet legger til grunn at prosjektet ikke har tilstrekkelig kunnskap om barna og foreldrene til å foreta individuelle vurderinger i hver sak.

Datatilsynet har forståelse for at informasjon om prosjektet kan føles vanskelig for noen av foreldrene. Vi kan likevel ikke se at det er godtgjort at det foreligger forhold som tilsier at det kan gjøres unntak fra informasjonsplikten basert på de anførte unntakshjemlene. Informasjonsplikten kan oppfylles ved at det sendes et kortfattet informasjonsskriv til foreldrene (biologiske og foster- og adoptivforeldre). Informasjonsskrivet bør presentere prosjektets formål og hvordan forskerne skal behandle opplysninger om dem.

At det ikke gjøres unntak fra informasjonsplikten er i samsvar med tidligere sammenlignbar praksis, inkludert prosjektet «Adopsjon som barnevernstiltak».

Klageadgang
Dere kan klage på vedtaket. En eventuell klage må sendes til oss **innen tre uker** etter at dette brevet er mottatt (jf. forvaltningsloven §§ 28 og 29). Dersom vi opprettholder vårt vedtak vil vi sende saken videre til Personvernnemnda for klagebehandling.

Med vennlig hilsen

Camilla Nervik
seniorrådgiver

Christine Dalebø Gjerdevik
rådgiver

NSD - Norsk senter for forskningsdata AS, Harald Hårfagres gate 29, 5007 BERGEN

RÅDET FOR TAUSHETSPLIKT OG FORSKNING
c/o Helga Bysting
Den norske legeforening
Postboks 1152 Sentrum
0107 Oslo

Barne-, ungdoms- og familiedirektoratet
Postboks 2233
3103 Tønsberg
ref.: 2016/56088-5

6. februar 2017

SAK 2017/1 – Søknad om dispensasjon fra taushetsplikten – doktorgradsprosjekt om barnevernsplassering av nyfødte

Vi viser til brev fra Barne-, ungdoms- og familiedirektoratet (Bufdir) 6. desember 2016 med anmodning om en uttalelse fra Rådet for taushetsplikt og forskning.

Bakgrunnen for henvendelsen er en søknad Bufdir har mottatt fra Ida B. Juhasz, stipendiat ved Institutt for Administrasjon og Organisasjonsvitenskap ved Universitetet i Bergen, i forbindelse med et doktorgradsprosjekt om barnevernsplassering av nyfødte. Det søkes om tilgang til alle vedtak i Fylkesnemndene for perioden 2012-2016 som vedrører nyfødtplasseringer (etter § 4-8 i lov om barneverntjenester). Veileder for doktorgradsprosjektet er professor Marit Skivenes ved samme institutt. PhD-prosjektet skal utføres i tidsrommet september 2016-september 2020.

Prosjektet skal sette søkelys på økningen i antall omsorgsovertakelser av nyfødte de siste årene, og det er ønskelig å analysere hvordan beslutningene om omsorgsovertakelse fattes. Den overordnede problemstillingen for prosjektet er: "Hvordan vurderes og legitimeres barnets beste ved plasseringer av nyfødte i Norge og England?".

Prosjektet er meldt inn til NSD, men Rådet er ikke kjent med utfallet her. Materialet som skal inngå i analysen vil anonymiseres ved hjelp av kodenøkler som oppbevares separat fra det originale materialet, innelåst i et skap. Det vil kun være Ida B. Juhasz og veileder Marit Skivenes som vil ha tilgang til materialet. Analysearbeidet skal formidles i tre artikler som skal inngå i den endelige avhandlingen.

Det rettslige grunnlaget søknaden til Bufdir må vurderes opp mot er forvaltningsloven (fvl.) § 13 d. En vurdering av om Bufdir bør gi fritak for taushetsplikten, må blant annet ta utgangspunkt i en forståelse av hvilke type taushetsbelagte opplysninger det er tale om.

De sentrale vilkårene i forvaltningsloven 13 d er at innsynet i de taushetsbelagte opplysningene må være til bruk for «forskning» og at innsyn «finnes rimelig og ikke medfører uforholdsmessig ulempe for andre interesser». Når det gjelder vilkåret om "forskning" viser Rådet til at doktorgradsprosjektet er veiledet av professor Marit Skivenes og Rådet anser vilkåret om «forskning» for å være oppfylt.

Med hensyn til kravet til rimelighet mv. bemerker Rådet at søknaden gjelder direkte personidentifiserende opplysninger av svært sensitiv karakter og at det dreier seg om innsyn i et omfattende datamateriale (i e-post fra søker til Bufdir den 9. november er det anslått at det vil dreie seg om ca. 350 vedtak totalt). Dette taler mot å gi dispensasjon fra taushetsplikten. Samtidig viser Rådet til søkers beskrivelse av at forskningsprosjektet vil kunne gi viktig kunnskap om hvilke vurderinger som gjøres i denne type saker, herunder om skjønnsutøvelse, og hvordan staten setter grenser for foreldreskap, samt hvordan sikringen av barns rettigheter foregår i praksis. Dette vil kunne bidra til å underbygge legitimiteten i beslutningene om

omsorgsovertakelse spesielt, og legitimiteten i statens tvangsinngripen i familiers liv generelt. Også Bufdir legger til grunn at prosjektet vil kunne gi nyttig kunnskap om status på arbeidet med barnevernsplassering av nyfødte, som igjen kan bidra til å styrke kvaliteten på dette arbeidet. Rådet legger også dette til grunn, og viser i den forbindelse til søkers henvisning til at denne type omsorgsovertakelser er en invaderende inngripen i den private sfære, noe som forsterker behovet for konkrete og mest mulig "riktige" vurderinger.

Søker har forklart at det ikke er aktuelt å få tilgang til opplysningene i anonymisert form da dette vil innebære en stor arbeidsbyrde for Sentralenheten/de respektive Fylkesnemndene, samt at det har betydning å få studere vedtakene i sin helhet. Søker har opplyst om at det offentlige tilgjengelige antallet saker er for lavt og skjevt til å kunne gjennomføre analyser av innholdet i sakene, og foreta en substansiell kartlegging av deskriptive saksfaktorer. Søker viser videre til at det heller ikke er alle Fylkesnemnder og nemnds ledere som publiserer vedtak, og at det dermed blir problematisk å identifisere lokale/regionale variasjoner i tilbud, praksis og beslutninger i saker om omsorgsovertakelse av nyfødte, og tilbud frem mot dette.

Rådet har i rimelighetsvurderingen lagt avgjørende vekt på samfunnsnytten av prosjektet. Videre har Rådet lagt vekt på at det er angitt betryggende rutiner for oppbevaring og behandling av opplysningene, og at søker fremstår som bevisst sin taushetsplikt og sitt ansvar for å sikre anonymitet og kildevern i samsvar med god forskningsskikk.

Rådet samtykker etter dette til at Bufdir gir fritak fra taushetsplikten i samsvar med søknaden.

Rådet forutsetter at forholdet til personopplysningslovens melde- og konsesjonsplikt vil bli ivaretatt gjennom melding til NSD og at all innsamling, oppbevaring og bruk av taushetsbelagte opplysninger vil foregå på en faglig forsvarlig måte, samt at alle personidentifiserende opplysninger anonymiseres ved eventuelle publikasjoner. Videre forutsettes det at søker og andre som får tilgang til opplysningene undertegner en taushetserklæring. Rådet forutsetter avslutningsvis at Bufdir orienterer søkeren om rekkevidden av de lovbestemte reglene om forskeres taushetsplikt, jf. forvaltningsloven § 13 e.

På vegne av Rådet for taushetsplikt og forskning,

Sunniva Cristina Bragdø-Ellenes
leder

Helga Bysting
sekretær

Bergen, 24.10.2018

Søknad om godkjenning til behandling av personopplysninger

I forbindelse med doktorgradsprosjektet «Godt nok foreldreskap» (ved stipendiat Ida Juhasz, veiledet av Marit Skivenes) er det samlet inn 398 vedtak fra Fylkesnemndene for barnevern og sosiale saker i saker som omhandler omsorgsovertakelse av nyfødte i perioden 2012-2016. Juhasz sitt prosjekt ble gitt konsesjon fra Datatilsynet frem til 31.12.2020.

Vi ber nå om tilgang til å behandle 76 av disse sakene for følgende to forskningsprosjekter frem til 31.05.22:

- Discretion and the Child's Best Interest in Child Protection (DISCRETION)
  - Prosjektleder: Marit Skivenes
  - Cristin-prosjekt-ID: 550576
  - Prosjektperiode: 01.07.17-31.05.22
- The Acceptability of Child Protection Interventions: A Cross-Country Analysis (ACCEPTABILITY)
  - Prosjektleder: Marit Skivenes
  - Cristin-prosjekt-ID: 550211
  - Prosjektperiode: 01.08.17-31.07.21

Vi ber også om utvidelse av tidsperioden for Ida Juhasz sitt prosjekt til 31.12.2021 grunnet avvikling av fødselspermisjon i 2018/2019.

Bakgrunn og status

06.02.2017 innvilget Bufdir etter vedtak i Rådet for taushetsplikt og forskning innsyn i taushetsbelagte opplysninger og fritak fra taushetsplikt for forskning for Ida Juhasz og Marit Skivenes for alle vedtak i Fylkesnemda vedrørende nyfødtplasseringer for perioden 2012-2016, knyttet til forskningsprosjektet «Godt nok foreldreskap» (vedlegg 1).

19.07.2017 innvilget Datatilsynet konsesjon til å behandle personopplysninger for Ida Juhasz og Marit Skivenes knyttet til prosjektet «Godt nok foreldreskap» (vedlegg 2).

02.03.2018 ble det søkt NSD om utvidelse av konsesjon til å behandle personopplysninger til å også omfatte prosjektene «Discretion and the Child's Best Interest in Child Protection» og «The Acceptability of Child Protection Interventions». NSD ønsket ikke å behandle søknaden i påvente av lovendringer i forbindelse med EUs personvernforordning (GDPR).

30.04.2018 innvilget Datatilsynet endring av konsesjon for prosjektet «Godt nok foreldreskap». To ekstra personer (Siri H. Pedersen og Amy McEwan-Strand) ble gitt adgang til å behandle personopplysninger, i forbindelse med at doktorgradsstudent Juhasz skulle ut i foreldrepermisjon (vedlegg 3).

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University of Bergen
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Director: *Professor Marit Skivenes*
E-mail: *Marit.Skivenes@uib.no*
Phone: *+ 47 959 24 979 / 55 58 25 87*
Web: www.discretion.uib.no

08.05.2018 innvilget Bufdir utvidelse av fritak for taushetsplikt for nyfødtplasseringssakene for ytterligere to prosjekter: «Discretion and the Child's Best Interest in Child Protection» og «The Acceptability of Child Protection Interventions». Følgende seks navngitte personer ble gitt fritak fra taushetsplikt: Karl Harald Søvig, Sveinung H. Nygård, Hege S. Helland, Siri H. Pedersen, Audun Løvlie og Amy McEwan-Strand (vedlegg 4).

Om prosjektene

DISCRETION er et komparativt forskningsprosjekt som sammenligner skjønnsutøvelse i barnevernssystemer i Estland, Irland, Norge, Spania og Østerrike. Prosjektets mål er å forklare hvordan og hvorfor beslutninger basert på skjønn varierer i saker om statens inngrep i familien. Prosjektet er finansiert av det europeiske forskningsrådet, med startdato 01. juni 2017 og sluttdato 31. mai 2022.

ACCEPTABILIY studerer det normative prinsippet om barnets beste og beskyttelse av familiens privatliv i befolkningene og domstolene i Norge, England, Finland og Tyskland. Særskilt undersøkes det om det er systematiske forskjeller i hvordan migrasjonsfamilier blir behandlet. Prosjektet er finansiert av Norges forskningsråd, med startdato 01. august 2017 og sluttdato 31. juli 2021.

De to prosjektene er tilknyttet Centre for Research on Discretion and Paternalism. Begge prosjektene ledes av Marit Skivenes, professor ved Institutt for Administrasjon og Organisasjonsvitenskap ved Universitetet i Bergen. Marit Skivenes er faglig ansvarlig for prosjektet, herunder ansvarlig for medarbeiderens bruk og håndtering av datamaterialet.

Prosjektene har fellestrekk, ved at de søker å utforske og videreutvikle begrepet om skjønn i barnevernsystemets beslutninger, og studerer hvordan beslutningsorganer fatter og begrunner sine avgjørelser. Prosjektene deler fire overordnede forskningsspørsmål skal studeres:

1. Avdekke variasjon i skjønnsutøvelse innad og på tvers av systemer.
2. Identifisere variasjon i begrunnelser for beslutninger som fattes i barnets beste, innad og på tvers av systemer.
3. Forstå og forklare variasjon i skjønnsutøvelse.
4. Forstå og forklare ulike perspektiver på barnets beste og tiltak iverksatt av barnevernet.

Personene

Vi ber om at det gis tilgang til å behandle personopplysninger for følgende seks navngitte personer. Samtlige er allerede godkjent av Rådet for taushetsplikt/Bufdir, og to av dem (Hansen og McEwan-Strand) er også inkludert i Datatilsynets konsesjon.

- *Karl Harald Søvig* er professor ved Det juridiske fakultet ved Universitetet i Bergen. Prof. Søvig er en del av den rådgivende ekspertgruppen ved Centre for Research on Discretion and Paternalism, og hans juridiske ekspertise vil være svært nyttig for oss. Søvig har vært fylkesnemndsleder i flere perioder og er godt kjent med de personvernhensyn som disse sakene og dette prosjektet innebærer.

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- *Sveinung Hellesen Nygård* er psykologspesialist og forsker ved Centre for Research on Discretion and Paternalism. Nygård har vært fagkyndig i Fylkesnemnda i flere år, og er godt kjent med de personvernhensyn som disse sakene og dette prosjektet innebærer. Nygård sin faglige kompetanse vil styrke analysene i prosjektet, og han vil bidra med særlig relevant kunnskap for å forstå og analysere avgjørelsesprosessene som har blitt gjort i fylkesnemnda.
- *Hege S. Helland* er sosiolog og stipendiat ved Centre for Research on Discretion and Paternalism på ACCEPTABILITY-prosjektet. Hun har tidligere arbeidet som forsker på prosjektet «Adopsjon som barnevernstiltak». Hege har gjennom arbeidet som forsker god innsikt i forskningsetikk og erfaring med behandling av sensitivt materiale.
- *Audun Løvlie* er sosiolog og stipendiat ved Centre for Research on Discretion and Paternalism på ACCEPTABILITY-prosjektet. Han skal skrive en doktoravhandling som ser på beslutninger i barnevernet. Løvlie har svært god kjennskap til forskningsetiske problemstillinger knyttet til personvern, samt til nasjonale og internasjonale forskningsetiske regler, gjennom sin tidligere jobb som rådgiver ved Personvernombudet (NSD).
- *Siri H. Pedersen* er statsviter og vitenskapelig assistent ved Centre for Research on Discretion and Paternalism tilknyttet ACCEPTABILITY-prosjektet. Pedersen har en mastergrad i sammenlignende politikk, og har fått tilsagn på stipendiatstilling for å gjennomføre doktorgrad. Hun har fått opplæring i forskningsetikk og behandling av sensitivt materiale.
- *Amy McEwan-Strand* er jurist og vitenskapelig assistent ved Centre for Research on Discretion and Paternalism tilknyttet DISCRETION prosjektet. McEwan-Strand har en mastergrad i menneskerettigheter, og har ambisjoner om å ta en doktorgrad. Hun har fått opplæring i forskningsetikk og behandling av sensitivt materiale.

I tillegg ber vi om at det gis tilgang til å behandle personopplysninger for en ikke navngitt person.

- *Ny vitenskapelig assistent.* I forbindelse med at Siri H. Pedersen går over i en ny stilling ved Institutt for sammenlignende politikk fra 01.01.2019, arbeides det med å rekruttere en ny vitenskapelig assistent. Kandidaten som ansettes vil ha mastergrad i statsvitenskap, sosiologi, økonomi rettsvitenskap eller andre samfunnsvitenskapelige fag. Kandidaten vil få opplæring i forskningsetikk og behandling av sensitivt materiale.

Vi ønsker at disse 7 personene skal ha tilgang på datamaterialet slik at de kan være med i forskningsarbeidet tilknyttet prosjektene DISCRETION og ACCPETABILITY. Prof. Marit Skivenes vil veilede de vitenskapelig ansatte som blir gitt innsyn i håndtering av datamaterialet. Alle de navngitte personene det søkes om fritak for har kompetanse og erfaring med håndtering av konfidensielt materiale, samt forskningserfaring og/eller arbeidserfaring fra barnevernsfeltet.

Vitenskapelig behandling av datamaterialet

Analysene som skal gjøres av de 76 vedtakene medfører registrering av sensitive personopplysninger/ særlige kategorier:

- Hvilke typer situasjoner og sakskomplekser slike saker gjelder (herunder rus, psykisk helse, kognitive vansker, alder/modenhet)

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- Karakteristika ved foreldrene (herunder alder, kjønn og risikotrekk).
- Karakteristika ved barna (herunder alder, kjønn og risikotrekk)
- Trekk ved saken (herunder tjenester i svangerskap og tidligere, om det har vært sakkyndige eksperter involvert)
- Hva som er vurderingen av foreldrene
- Hva som er beskrivelsen av barna som er involverte
- Hvilke grunner som oppgis av fylkesnemnda for at vilkårene om plassering av spedbarn er oppfylt eller ikke
- Hvilke argumenter som anføres for at et vedtak er til barnets beste
- Nemndas begrunnelser for å vedta barnevernsplassering

I analysene av sakene er det også viktig å undersøke om det er likheter og forskjeller mellom sakene, og hva det er som kan ligge til grunn for dette. Vi ønsker å studere om det i saker som grovt sett er ganske like, også den samme type argumentasjon og vekt som tillegges ulike hensyn.

Funn fra analysene, samt utvalgte anonymiserte vedtak, skal også inngå i komparative analyser med tilsvarende datamateriale fra de øvrige landene i prosjektene.

Behandlingsgrunnlag

Vi argumenterer for at behandling av personopplysninger har behandlingsgrunnlag i Personvernforordningens artikkel 9, 2j: «Behandlingen er nødvendig for arkivformål i allmennhetens interesse, for formål knyttet til vitenskapelig eller historisk forskning(...)», med supplerende rettsgrunnlag i Personopplysningsloven § 9: «Personopplysninger som nevnt i personvernforordningen artikkel 9 nr. 1 kan behandles uten samtykke fra den registrerte dersom behandlingen er nødvendig for arkivformål i allmennhetens interesse, formål knyttet til vitenskapelig eller historisk forskning eller statistiske formål og samfunnets interesse i at behandlingen finner sted, klart overstiger ulempene for den enkelte.».

Formålet med behandling av personopplysninger er vitenskapelig forskning, og vi vurderer at hensynet til å styrke kunnskapen omsorgsovertakelser av nyfødte barn klart overstiger ulempene det kan medføre for den enkelte.

- Det er et stort behov for mer kunnskap om omsorgsovertakelser av nyfødte, som i dag er et område hvor det er gjort lite forskning. Omsorgsovertakelser av nyfødte representerer et svært inngripende tiltak som blant annet utfordrer retten til privat- og familieliv, prinsippet om biologi og mildeste inngreps prinsipp. Kunnskap om omsorgsovertakelser er viktig både for de barna som det er sannsynliggjort vil vokse opp under offentlig omsorg, for de foreldrene som opplever et av de mest invaderende statlige inngrepene som finnes, og for barnevernssystemet som skal fatte beslutninger i tilsvarende akutte og kritiske saker i fremtiden.
- Det er behov for bedre kunnskap om statens maktbruk gjennom vedtak som har stor betydning for enkeltindivider som ikke kan anses å være de sterkeste i samfunnet.

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Omsorgsovertakelser av nyfødte representerer et eksempel på slik maktbruk, innenfor et felt av staten som har vært svært omdiskutert og kritisert i den offentlige debatten. Forskning på statlig maktbruk innenfor barnevernssystemet bidrar til gjennomsiktighet og kontroll, noe som er viktig for å sikre demokratiets og rettsstatens legitimitet.

Videre vil vi påpeke at tilgang til å behandle sakene om nyfødtplasseringer i de internasjonale prosjektene DISCRETION og ACCEPTABILITY muliggjør at datamaterialet kan inngå i systematiske, komparative analyser av hvilken rolle institusjonelle, organisatoriske og individuelle faktorer spiller i utøvelse av skjønn og begrunnelse av beslutninger i barnevernet. Dette er kritisk kunnskap med stor samfunnsmessig nytte.

Garantier for forsvarlig behandling av personopplysninger

Vedtakene vi ber om å analysere er allerede innsamlet gjennom prosjektet «Godt nok foreldreskap». Det er ikke behov for å innhente annen type informasjon fra de involverte personene i vedtakene i forbindelse med de to aktuelle forskningsprosjektene.

Vi vil behandle og oppbevare all informasjon vi innhenter fra vedtaksdokumentene som konfidensielt materiale. Alt innsamlet datamateriale vil kun være tilgjengelig for prosjektansvarlig og de her navngitte forskere tilknyttet prosjektene. Materialet oppbevares og behandles i SAFE (Sikker Adgang til Forskningsdata og E-infrastruktur) som er Universitetet i Bergen sin løsning for informasjonssikkerhet i helse-og omsorgstjenestene. SAFE sikrer at informasjonssikkerheten med hensyn til konfidensialitet, integritet og tilgjengelighet blir ivaretatt ved behandling av sensitive personopplysninger. SAFE innebærer at deltagere i forskningsprosjektet får du tilgang til et sikkert skrivebord, hvor prosjektleder styrer tilgang til og har oversikt over hvilke data som overføres. Vedtaksdokumentene slettes/destrueres senest ved prosjektslutt av DISCRETION 31.05.2022.

Et lite utvalg vedtak vil bli oversatt og bli brukt i komparativ analyse opp mot tilsvarende utvalgte vedtak fra andre land. Disse vedtakene vil bli grundig anonymisert før de oversettes og gjøres tilgjengelig for de øvrige forskere i prosjektet. De oversatte vedtakene vil ikke kunne knyttes tilbake til enkeltpersoner. Utover dette er det utelukkende indirekte personopplysninger som vil benyttes i de komparative analysene, og kategoriseringen vil være slik at indirekte personopplysninger på ingen måter kan tilbakeføres til enkeltpersoner.

Funn fra forskingsprosjektene vil bli presentert i vitenskapelige artikler og rapporter, samt på vitenskapelige møter. Enkeltpersoner vil ikke på noen måte kunne identifiseres i disse publikasjonene fra forskingsprosjektet.

Marit Skivenes (sign.)
Professor ved Institutt for administrasjon og organisasjonsvitenskap
Universitetet i Bergen

Centre for Research on Discretion and Paternalism
Dept. of Administration and Organization Theory
University of Bergen
Postboks 7802, N-5007 Bergen, Norway

Director: *Professor Marit Skivenes*
E-mail: *Marit.Skivenes@uib.no*
Phone: *+ 47 959 24 979 / 55 58 25 87*
Web: www.discretion.uib.no

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