

Winter 2019

Separating Families Without Due Process: Hidden Child Removals Closer to Home

Wendy Jennings
wendykjennings@gmail.com

Follow this and additional works at: <https://academicworks.cuny.edu/clr>

Part of the [Law Commons](#)

Recommended Citation

Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. Rev. 1 (2019).
Available at: <https://academicworks.cuny.edu/clr/vol22/iss1/10>

Separating Families Without Due Process: Hidden Child Removals Closer to Home

Acknowledgements

Ms. Jennings thanks Erin Cloud, Esq., Professor Chris Gottlieb, Amy Mulzer, Esq., Emma Ketteringham, Esq., Mary Anne Mendenhall, Esq., Keith Baumann, Esq., David Shalleck-Klein, Esq., Caitlin Becker, MSW, Noemi Cotto, MSW, and Professor Kara Wallis for their encouragement and indispensable feedback; the CUNY Law Review editors and staff for their commitment to this Note; and the many friends and family who provided thoughtful comments throughout the drafting process. This Note is dedicated to the families who fight for their children every day, unnoticed, and their enduring resilience in the face of incredible opposition.

SEPARATING FAMILIES WITHOUT DUE PROCESS: HIDDEN CHILD REMOVALS CLOSER TO HOME

Wendy Jennings[†]

INTRODUCTION.....	3
I. FAMILY SEPARATION TRAUMATIZES CHILDREN AND THEIR PARENTS.....	8
A. <i>Removing a Child from Her Parent Harms the Child...</i>	8
B. <i>Removing a Child from His Parent Has Long-Term Consequences for Families and Impacted Communities.....</i>	9
II. THE BASIC PATH OF NEW YORK CHILD ABUSE AND NEGLECT CASES.....	10
A. <i>How Does an Abuse or Neglect Case Begin?</i>	11
B. <i>A Parent’s Rights When the Government Removes Her Child Before Trial Is Complete</i>	13
C. <i>What Occurs at a Trial in an Abuse or Neglect Case .</i>	14
D. <i>Disposition: The Plan for the Rest of the Case.....</i>	15
1. <i>The Court May Order the Parent to Participate in Services or Be Supervised</i>	16
2. <i>The Child’s Legal Status: A Release Versus a Trial Discharge</i>	16
E. <i>While a Child Is in Foster Care, a Permanency Hearing Is Held Every Six Months.....</i>	19
III. TRIAL DISCHARGE: A CHILD IN FOSTER CARE IS HOME ON A TRIAL BASIS	19
A. <i>What is a Trial Discharge?</i>	19
B. <i>How and Why the Government Removes a Child During a Trial Discharge.....</i>	21

[†] J.D. Candidate ‘19, City University of New York (CUNY) School of Law; B.A. ‘12, Wheaton College (IL). Ms. Jennings thanks Erin Cloud, Esq., Professor Chris Gottlieb, Amy Mulzer, Esq., Emma Ketteringham, Esq., Mary Anne Mendenhall, Esq., Keith Baumann, Esq., David Shalleck-Klein, Esq., Caitlin Becker, MSW, Noemi Cotto, MSW, and Professor Kara Wallis for their encouragement and indispensable feedback; the CUNY Law Review editors and staff for their commitment to this Note; and the many friends and family who provided thoughtful comments throughout the drafting process. This Note is dedicated to the families who fight for their children every day, unnoticed, and their enduring resilience in the face of incredible opposition.

C. <i>Children and Parents Are Particularly Vulnerable to Trauma When a Child Is Removed During a Trial Discharge</i>	22
D. <i>A Parent's Lack of Rights When the Government Removes Her Child During a Trial Discharge</i>	24
E. <i>Christina's Story: The Devastating Impact of Losing One's Child During a Trial Discharge</i>	25
IV. THERE MUST BE AN EMERGENCY HEARING TO REVIEW ALL CHILD REMOVALS DURING TRIAL DISCHARGE	29
A. <i>Due Process Requires a Prompt Hearing</i>	29
1. A Protected Constitutional Interest Is Implicated When a Child Is Removed	30
2. The Supreme Court's <i>Mathews</i> Test Requires a Hearing Upon Removal	31
3. The Supreme Court Has Ruled That Parents Are Still Entitled to Due Process After a Finding of Neglect	33
4. People Facing Parole Revocation Are Entitled to a Hearing; Similarly, Parents Whose Children Are Removed During a Trial Discharge Are Entitled to a Hearing	34
B. <i>A Hearing Will Maintain the Balance of Powers Between the Executive and Judicial Branches</i>	35
C. <i>The Standard at an Emergency Hearing to Review a Trial Discharge Removal Should Be the Imminent Risk Standard</i>	36
1. There Is Precedent for Use of the Imminent Risk Standard Outside of a Pre-Trial Emergency Hearing	37
2. The Imminent Risk Standard Decreases the Impact of Racial Bias	37
3. A Higher Standard Will Focus the Hearing on the Child's Safety	39
4. The Imminent Risk Standard Furthers the Rehabilitative Purpose of the Family Court Act ...	39
CONCLUSION	39

INTRODUCTION

“Thousands Take to Streets Across the Country to Protest Family Separation at Border;”¹ “A Week of Questions, Tears and Finger-pointing on Immigrant Family Separations;”² “Federal Judge: Separating Families at Border May Violate Due Process Rights;”³ “Family Separations at the Border: How Did We Get Here?”⁴

In the summer of 2018, a united and forceful public outcry mounted in response to the United States government’s family separation policy at the U.S.-Mexico border.⁵ Americans across the political spectrum protested as pictures, videos, and audio recordings of children being forcibly separated from their parents were circulated nationwide.⁶ The mainstream media, in its coverage of this disaster, reported on the devastating consequences of removing children from their parents.⁷ Medical groups were outraged about the impact on children,⁸ describing the separations as

¹ Daniel Politi, *Thousands Take to Streets Across the Country to Protest Family Separation at Border*, SLATE (June 23, 2018, 8:04 PM), <https://perma.cc/3T44-EPDN>.

² Faith Karimi, *A Week of Questions, Tears and Finger-pointing on Immigrant Family Separations*, CNN POLITICS (June 24, 2018, 1:14 PM), <https://perma.cc/6UWA-RGF6>.

³ Christopher Coble, *Federal Judge: Separating Families at Border May Violate Due Process Rights*, FINDLAW: LAW & DAILY LIFE (June 11, 2018, 6:57 AM), <https://perma.cc/A2ZA-7VGE>.

⁴ David Lauter & Jazmine Ulloa, *Family Separations at the Border: How Did We Get Here?*, L.A. TIMES (June 19, 2018, 10:30 AM), <https://perma.cc/UC7E-LD2A>.

⁵ See, e.g., Julie Hirschfeld Davis & Michael D. Shear, *How Trump Came to Enforce a Practice of Separating Migrant Families*, N.Y. TIMES (June 16, 2018), <https://perma.cc/P32V-GC5D>; Salvador Rizzo, *The Facts About Trump’s Policy of Separating Families at the Border*, WASH. POST (June 19, 2018), <https://perma.cc/J8Z5-UH8W>; *The Family Separation Crisis at the U.S. Border*, VOX, <https://perma.cc/7V72-X7KT> (last visited Sept. 27, 2018).

⁶ See, e.g., Adam Shaw, *Republican Pressure Intensifies to End Family Separations at Border*, FOX NEWS (June 19, 2018), <https://perma.cc/J9F2-EVJ6>; David Smith & Tom Phillips, *Child Separations: Trump Faces Extreme Backlash from Public and His Own Party*, GUARDIAN (June 19, 2018, 2:23 PM), <https://perma.cc/3BP6-952U>; Ginger Thompson, *Listen to Children Who’ve Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018, 3:51 PM), <https://perma.cc/5XFK-MASS> (displaying a video of separated children crying); Li Zhou, *These Photos Were the Trump Administration’s Attempt to Quiet Criticism. They’re Only Increasing Critics’ Horror*, VOX (June 18, 2018, 3:20 PM), <http://perma.cc/2PRU-L363>.

⁷ See, e.g., Melissa Healy, *‘Children Must Not Be Abused for Political Purposes’: What Health Groups Say About Family Separation*, L.A. TIMES (June 20, 2018, 2:55 PM), <https://perma.cc/QA6M-MT8W> (listing the health consequences of adversity in childhood); Thompson, *supra* note 6 (describing that separated children in detention facilities were wailing and sobbing); William Wan, *What Separation from Parents Does to Children: ‘The Effect is Catastrophic’*, WASH. POST (June 18, 2018), <https://perma.cc/AKM4-98XA>.

⁸ See Healy, *supra* note 7; Devin Miller, *AAP a Leading Voice Against Separating Children, Parents at Border*, AAP NEWS (June 14, 2018), <https://perma.cc/D97S-HLUE> (arguing that family separations can cause “irreparable harm” to children). The American Public Health

“child abuse.”⁹ Due process and judicial oversight for the separated families seemed to be non-existent.¹⁰

The strong reactions to the family separations at the border were, and continue to be, warranted. The children’s plight and their parents’ suffering cannot be overstated. The atrocious policies that legalized the border family separations do not exist in a vacuum, however. The justified public anger about the border separations provides an opportunity for a deeper critique of government policies that allow children to be removed from their parents in the United States.

Family separation is a government tool of oppression that has a deeply rooted history in the United States, tracing back to the colonization of indigenous people and to chattel slavery.¹¹ The U.S. government’s disregard for the families at the border, while upsetting, was not surprising to poor, Black, and Brown communities in the U.S., who have been tar-

Association has cited consistent research findings that, “family structure, stability and environment are key social determinants of a child’s and a community’s health.” Press Release, Am. Pub. Health Ass’n & Trust for America’s Health, *Separating Parents and Children at US Border is Inhumane and Sets the Stage for a Public Health Crisis* (June 15, 2018), <https://perma.cc/2QB2-L8VA>.

⁹ Justin Wise, *American Academy of Pediatrics President: Trump Family Separation Policy is ‘Child Abuse’*, HILL (June 18, 2018, 12:56 PM), <https://perma.cc/7D9Y-NXQX>.

¹⁰ See, e.g., Susan Ferriss, *How Border Migration is Testing the Public’s Grasp of Due Process and U.S. Asylum Obligations*, CTR. FOR PUB. INTEGRITY, <https://perma.cc/XQR2-TGPK> (last updated July 26, 2018, 5:18 PM); *Fact Sheet: Family Separation at the U.S.-Mexico Border*, NAT’L IMMIGRATION FORUM (July 27, 2018), <https://perma.cc/6ZCC-3APV>; *The Facts Behind the Headlines: Family Separation at the Border*, AMS. FOR IMMIGRANT JUSTICE, <https://perma.cc/U44V-MSSH> (last visited Dec. 20, 2018). In early 2019, a government watchdog report stated that thousands more children had been forcibly separated from their parents than previously reported, but that the total number is unknown due to the government failing to keep track of children it had taken. See generally U.S. DEP’T OF HEALTH & HUMAN SERVS., OFFICE OF INSPECTOR GEN., *SEPARATED CHILDREN PLACED IN OFFICE OF REFUGEE RESETTLEMENT CARE* (2019).

¹¹ See ELISA MINOFF, CTR. FOR THE STUDY OF SOC. POL’Y, *ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES* 17-18 (2018) (citations omitted) (discussing the colonization and the forced assimilation of Native American children to European culture through family separations); Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ L. REV. 215, 235-36 (2013) (summarizing, briefly, the history of Native American persecution in the United States, from European colonization up to removing and placing high numbers of Native American children with white families); Gloria Ann Whittico, *If “Past Is Prologue”: Toward the Development of a New “Freedom Suit” for the Remediation of Foster Care Disproportionalities Among African-American Children*, 43 CAP. U. L. REV. 407, 411-13 (2015) (examining the effects of chattel slavery on Black families); Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 168-70 (2003) (recounting the destruction of Black families through the American slavery system). For more information on how slavery disrupted Black families, see Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 178-79 (2003).

geted by a multitude of policies that weaken their families. Policies targeting these groups have been carried out in the housing, criminal, immigration, public benefits, and child welfare systems, among others.¹² For marginalized people in this country, the piercing cries of children being ripped from parents' arms are an all-too-familiar horror.¹³

Forced family separations traumatize children and their parents; nevertheless, forced family separations in the U.S. child welfare system have not garnered the same media attention as the recent border separations.¹⁴ One explanation for this difference is that the U.S. child welfare system presents itself as noble, well-intentioned, and in service of families in

¹² See generally MINOFF, *supra* note 11, for a description of U.S. government policies separating families in the immigration, criminal justice, and child welfare systems; WALTER A. EWING ET AL., AM. IMMIGRATION COUNSEL, *THE CRIMINALIZATION OF IMMIGRATION IN THE UNITED STATES* (2015), for an analysis of using the ever-broadening criminal justice system as a tool to deport increasing numbers of immigrants; MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016), for stories of poor families in Milwaukee caught in the cycle of home evictions; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2010), for an exploration of how the U.S. government continues to incarcerate and target communities of color through policies repackaged as colorblind; KATHRYN J. EDIN & H. LUKE SHAEFER, *\$2.00 A DAY: LIVING ON ALMOST NOTHING IN AMERICA* (2015), for a study finding that modern welfare policies fail to adequately support poor families; and KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* (2017), for an examination of the U.S. government's destruction of poor women's privacy rights.

¹³ See Erin Cloud et al., *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. 68, 69 (2017) (explaining that the child welfare system routinely targets and destroys the bonds between Black children and their families); Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1487 (2012) (citing Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 131-32 (2008) [hereinafter Roberts, *Racial Geography*]) ("The spatial concentration of child welfare supervision [in Black neighborhoods] creates an environment in which state custody of children is a realistic expectation, if not the norm."); see generally TINA LEE, *CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM* (2016) (documenting the punitive nature of the child welfare system, which punishes parents for their poverty and removes children instead of providing families with the necessary support for the children to remain at home); DOROTHY E. ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002).

¹⁴ Chris Gottlieb, *Child Separations, Here at Home: We Remove Far, Far Too Many Kids from Their Families in the Name of Saving Them*, N.Y. DAILY NEWS (Dec. 2, 2018, 5:00 AM), <https://perma.cc/S6N7-H9QD>. For example, there has been relatively little media attention given to the fact that the Administration for Children's Services (ACS), New York City's child welfare agency, removed approximately 2,300 children from their homes because of "emergency" circumstances between 2016 and 2018. ABIGAIL KRAMER, *THE NEW SCH.: CTR. FOR N.Y.C. AFFAIRS, CHILD WELFARE SURGE CONTINUES: FAMILY COURT CASES, EMERGENCY CHILD REMOVALS REMAIN UP 3* (2018) [hereinafter KRAMER, *CHILD WELFARE SURGE CONTINUES*], <https://perma.cc/GKK9-KQGB>.

need.¹⁵ There is also a commonly held misconception in U.S. society that children are only removed from their parents and placed in foster care in extreme cases, such as when parents cause intentional physical or sexual harm to their children.¹⁶ In truth, the majority of families investigated by child protective services are scrutinized because of poverty-related neglect instead of abuse.¹⁷ The correlation between child welfare involvement and poverty also contributes to the overrepresentation of Black and Brown children in foster care, as they are more likely than white children to experience poverty.¹⁸ The harsh reality is that the child welfare system often does more to hurt children than to protect them.

With the same urgency and call to action with which the American public responded to the family separations at the border, this Note examines the lack of due process, the injustice, and the trauma caused by the

¹⁵ See Matthew I. Fraidin, *Stories Told and Untold: Confidentiality Laws and the Master Narrative of Child Welfare*, 63 ME. L. REV. 1, 8-16 (2010) (describing the meta-narrative about child welfare, including the view that all children are innocent child victims needing protection from bad parents).

¹⁶ *Id.* at 8-9 (discussing that the “master narrative” of child welfare promotes the perspective that system-involved children have been brutally abused by their parents). Across the country, 78.3% of children were deemed “neglected” rather than subjected to extreme forms of abuse, such as physical or sexual abuse. U.S. DEP’T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN’S BUREAU, CHILD MALTREATMENT 20 (2012).

¹⁷ See, e.g., Radley Balko, *The Ongoing Criminalization of Parenthood (and Poverty)*, WASH. POST: WATCH (Aug. 30, 2017), <https://perma.cc/3DDZ-4MMG> (discussing the all-too-common narrative of children being removed from their home due to poverty related conditions); Rachel Aviv, *Where is Your Mother? A Woman’s Fight to Keep Her Child*, NEW YORKER (Dec. 2, 2013), <https://perma.cc/7FXR-93WS> (telling the story of a single mother who left her son home while she went to work, and lost custody as a result). Statistically, families living below the poverty line are twenty times more likely to be forced into the child welfare system than families living slightly above the poverty line. MARTIN GUGGENHEIM, GENERAL OVERVIEW OF CHILD PROTECTION LAWS IN THE UNITED STATES, *IN REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS* 17 (Martin Guggenheim & Vivek S. Sankaran eds., 2015) (citation omitted). See Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb-to-Foster-Care-Pipeline,”* 20 CUNY L. REV. 77, 86-87 (2016) [hereinafter Ketteringham et al., *Healthy Mothers, Healthy Babies*], for additional theories as to why low-income families are particularly vulnerable to child protective involvement.

¹⁸ See Stephanie Smith Ledesma, *The Vanishing of the African-American Family: “Reasonable Efforts” and its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 47 (2014); TRINA SHANK ET AL., INSIGHT CTR. FOR CMTY. ECON. DEV., DIVERGING PATHWAYS: HOW WEALTH SHAPES OPPORTUNITIES FOR CHILDREN 2 (2011), <https://perma.cc/T7W5-5EHS>; Amy Mulzer & Tara Urs, *However Kindly Intended: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 27 (2016) (citations omitted) (“[F]amilies with financial means and white families are far more likely to be left alone by the system despite experiencing the very same concerns that lead to child welfare intervention for low-income families of color, such as mental illness, alcoholism, recreational or habitual drug use, or domestic violence.”).

child welfare system. It specifically focuses on the common practice of removing children from their parents while home on “trial discharge,” when families reunite after children were in foster care.¹⁹ Presently, New York State law requires some sort of hearing whenever a child is removed from her home, except for when a child is removed on trial discharge status.²⁰ The government can remove a child on trial discharge without *any* judicial oversight. This lack of due process is unconstitutional and is contrary to the New York Legislature’s commitment to keep families together, except when a child’s safety is at risk.²¹ This Note fills a gap in legal scholarship on the child welfare system, as child removals during trial discharge have been overlooked.

Focusing on New York, this Note asserts that a parent is entitled to a hearing whenever the government removes her child from her care, even when her child is home on trial discharge status. Part I of this Note describes the harm that children experience when the government removes them from their families. Part II explains the basic path of a child neglect or abuse case in New York State, focusing on the varying levels of due process protections given to parents. Part III examines trial discharges, why the government removes children who are home on trial discharge, and what protections, or lack thereof, are available to families during a trial discharge. Finally, Part IV argues that the U.S. Constitution and New York State policy require an expedited hearing, based on imminent risk, whenever the government removes children on trial discharge.

A change is urgently needed to stop the unnecessary trauma that the government inflicts on families, and to provide parents with recourse when the government removes a child during a trial discharge. Recently, a Bronx Family Court judge reunited two children with their father after they were removed from him during a trial discharge and separated for around eight months, during which time one child was crying and wetting the bed every night.²² The judge reinstated the trial discharge, demonstrating that the children should not have been removed in the first place.²³ Without the right to a hearing, the family was unable to reunite until

¹⁹ Trial discharge is a legal status where children in foster care are living at home with their parents on a trial basis, with the hope of remaining home permanently. See N.Y. FAM. CT. ACT §§ 1055(b)(i)(E), 1089(d)(2)(viii)(C) (McKinney 2018).

²⁰ See *infra* Part II.B. for an example of one type of pre-trial removal hearing. See *infra* Part III.D. for a discussion of a parent’s legal rights when her child is removed during a trial discharge.

²¹ *Matter of Marino S. Jr.*, 100 N.Y.2d 361, 372 (2003) (“It has long been the public policy of this State to keep biological families together . . .”). See *infra* Part IV.A. for this Note’s argument for increased due process protections.

²² *Matter of W.* at *6 (N.Y. Family Ct. Bronx Cty. 2018) (on file with author).

²³ See *id.* at *7.

months after the children were removed from the home. Hidden family separations, like this one, continue to occur without judicial oversight—courts should afford the maximum amount of judicial review to any removal of a child from her mother, her father, her neighborhood, her school, and everything that is familiar to her.

I. FAMILY SEPARATION TRAUMATIZES CHILDREN AND THEIR PARENTS

A. *Removing a Child from Her Parent Harms the Child*

A removal deprives a child of stable connections to her parent, her family, and her other community contacts.²⁴ In fact, research overwhelmingly demonstrates the harmful and emotionally damaging effects of removing children from their parents or primary caregivers.²⁵ The scope of trauma is even more expansive if a child's extended family is unavailable to care for her, since she is then placed into foster care with strangers.²⁶ In another case in the Bronx, police and child welfare workers arrived at a mother's home in the middle of the night to take her five children away.²⁷ All five children, who had been previously taken into foster care, grabbed onto their mother's body to resist being taken from her.²⁸ One of the children was taken to the hospital and medicated to be calmed down.²⁹ This snapshot of a child removal demonstrates how family separations traumatize children.

²⁴ Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016).

²⁵ See, e.g., Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 459 (2003) (“Members of affected families may suffer enduring harm psychologically, financially, and in countless other ways from the stresses of removal and its aftermath (leading to divorce, job loss, etc.)”); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES (July 21, 2017), <https://perma.cc/6A3T-WPLH> (discussing research that children removed and sent to foster care had higher delinquency rates, higher teen birthrates, a higher likelihood of going to prison as an adult, and lower earnings).

²⁶ See generally Nicholas Lovett & Yuhan Xue, *Family First or the Kindness of Strangers? Foster Care Placements and Adult Outcomes* (2018), <https://perma.cc/X99L-2E9F> (finding that foster youth who lived with family have better outcomes in adulthood, as compared to foster youth who lived with strangers). Many people in the child welfare field use the term “non-kinship foster care” to refer to stranger foster care; in contrast, “kinship foster care” is when a child is placed with a relative. Interview with Erin Cloud, Supervising Att’y, Family Def. Practice, The Bronx Defs., in Long Island City, N.Y. (May 3, 2018). The use of “stranger foster care” in this Note is intentional to avoid sugar-coating the reality that many children in foster care are living with people who are complete strangers to them.

²⁷ Crystal Baker-Burr, *When Protection Hurts*, MEDIUM (Sept. 12, 2018), <https://perma.cc/Z475-R8UU>.

²⁸ *Id.*

²⁹ *Id.*

Studies show that children who are raised in institutions, such as foster care, experience decreased gray matter in their brains, exhibit higher incidence of psychosocial disorders, and have more difficulty developing social relationships.³⁰ Notably, researchers have found that the psychological damage inflicted on children who are forcibly removed from their parent is often irreversible.³¹ In addition, children placed in stranger foster care face higher risks of physical abuse than other children, in addition to emotional and medical neglect.³² After exiting foster care, children face higher teen birth rates, lower salaries, and a higher likelihood of homelessness.³³

B. Removing a Child from His Parent Has Long-Term Consequences for Families and Impacted Communities

Child removals cause harm not only to the individual children, but also to their families and their communities. Placing children in foster care, even for a short period of time, damages parent-child relationships.³⁴ For instance, a child may lose respect for her parent, and in turn, a parent may lose the ability to effectively discipline and guide his child.³⁵ In addition, the entire community experiences the system's long-lasting impacts, specifically in neighborhoods where a child welfare agency monitors many families or where families have children in foster care.³⁶ For

³⁰ Nathan A. Fox et al., *The Effects of Psychosocial Deprivation on Attachment: Lessons from the Bucharest Early Intervention Project*, 45 PSYCHODYNAMIC PSYCHIATRY 441, 442 (2017) (citations omitted); see generally Erin Kim Hazen, *Youth in Foster Care: An Examination of Social, Mental, and Physical Risks*, N.Y.U. DEP'T APPLIED PSYCHOLOGY, <https://perma.cc/M7WA-ZSWX> (last visited Nov. 4, 2018) (describing the social, mental health, and physical health risks that foster care youth face).

³¹ See Wan, *supra* note 7.

³² See Kathleen B. Simon, Note, *Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review*, 51 COLUM. J.L. & SOC. PROBS. 347, 364 (2018) (citing Chill, *supra* note 25, at 459); NAT'L COAL. FOR CHILD PROT. REFORM, FOSTER CARE VS. FAMILY PRESERVATION: THE TRACK RECORD ON SAFETY AND WELL-BEING 2 (2015).

³³ Ketteringham et al., *Healthy Mothers, Healthy Babies*, *supra* note 17, at 99 (citing Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1584 (2007) and Patrick J. Fowler et al., *Pathways to and from Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453 (2009)).

³⁴ See Sankaran & Church, *supra* note 24, at 210-13; see also Miriam Jordan, *A Migrant Boy Rejoins His Mother, but He's Not the Same*, N.Y. TIMES (July 31, 2018), <https://perma.cc/3L5R-W328> (describing the challenges of immigrant families who were reunited after being forcibly separated at the U.S.-Mexico border).

³⁵ Ketteringham et al., *Healthy Mothers, Healthy Babies*, *supra* note 17, at 102; Roberts, *Racial Geography*, *supra* note 13, at 133-36.

³⁶ Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 30-31 (2005).

example, participants in a Chicago research study reported that a strong child welfare presence in their neighborhood has created, among other things, distrust among neighbors.³⁷

More broadly, child removals take away family integrity, an essential component of healthy communities, from Black, Brown, and poor communities, since a high number of their children are removed and placed in foster care.³⁸ The high level of child welfare involvement, in turn, weakens Black, Brown, and poor communities' personal identity, as well as their collective economic and political power.³⁹ The result is the perpetuation of institutionalized discrimination against people of color and poor people, and the paternal relationship between the government and marginalized people.⁴⁰

The government inflicts permanent harm whenever it removes a child. Although the trauma may be different in distinct circumstances, every separation of a child from her parent is damaging.⁴¹ The global uproar over the 2018 border separations was due, in part, to a recognition that the children were suffering as a result. We must equally protest the ongoing suffering of children across the United States, who are taken from their parents every single day.⁴²

II. THE BASIC PATH OF NEW YORK CHILD ABUSE AND NEGLECT CASES

To understand the injustice that children face while on trial discharge status, it is necessary to have a basic grasp of the path of an abuse or neglect case in New York State, and of what due process is available to families when a child is removed at other points in a case. Since a trial discharge only occurs after a court finds a parent neglectful, this Part will explain the procedural context leading up to a finding of neglect being entered against a parent.

³⁷ Roberts, *Racial Geography*, *supra* note 13, at 138-41 (discussing a research study with twenty-five Black women in Woodlawn, a neighborhood with one of the highest rates of foster care placements in Chicago).

³⁸ See Roberts, *Child Welfare and Civil Rights*, *supra* note 11, at 179 ("Family integrity is crucial to group welfare because of the role parents and other relatives play in transmitting survival skills, values, and self-esteem to the next generation."); see *infra* note 179 & 180 for findings regarding racial disproportionality in the foster care system.

³⁹ See Roberts, *Child Welfare and Civil Rights*, *supra* note 11, at 179.

⁴⁰ See *id.*

⁴¹ See, e.g., Doyle, *supra* note 33, at 1602 (presenting research findings that suggest that children who were "on the margin" of either being removed to foster care or remaining at home fared better when they remained home).

⁴² Paul Chill, *Hundreds of U.S. Children Taken From Home*, HARTFORD COURANT (June 25, 2018, 4:50 PM), (stating that 700 to 800 child removals occur throughout the United States every day).

The Administration for Children's Services (ACS), New York City's child protective agency, has a broad reach, performing over 57,000 investigations in 2016 and over 55,000 investigations in 2017.⁴³ Private foster care agencies contract with ACS and New York State to provide care for children in foster care.⁴⁴ Foster care agencies must work towards reunification of the family, if possible, and are responsible for caring for the child until reunification, adoption, or another permanent plan comes to fruition.⁴⁵

A. *How Does an Abuse or Neglect Case Begin?*

Anyone can call the State Central Register (SCR) abuse and neglect hotline to report a concern and to initiate a case,⁴⁶ allowing people to easily manipulate the process.⁴⁷ ACS will investigate the report and then decide whether the family needs court intervention.⁴⁸ Whether or not court intervention is needed depends on the ACS worker's judgment of the seriousness and the credibility of the allegations, and the parent's willingness to agree to services (e.g., drug treatment, mental health services) to

⁴³ JILL RIVERA GREENE ET AL., CASEY FAMILY PROGRAMS, ASSESSMENT OF NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES SAFETY PRACTICE AND INITIATIVES: KEY FINDINGS AND RECOMMENDATIONS 7 (2017) (2016 statistics); N.Y.C. ADMIN. FOR CHILDREN'S SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 9 (2017) (2017 statistics).

⁴⁴ N.Y. OFFICE OF THE STATE COMPTROLLER, REPORT 2016-N-2, HEALTH & SAFETY OF CHILDREN IN FOSTER CARE 5 (2018).

⁴⁵ See Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 403-08 (2008) (describing federal law's development in requiring foster care agencies to make reasonable efforts to keep families together).

⁴⁶ *The Statewide Central Register of Child Abuse and Maltreatment*, OFFICE OF CHILD. & FAMILY SERVS., <https://perma.cc/4ARK-TFPG> (last visited Dec. 30, 2018) (stating that the SCR receives calls 24 hours a day from mandated reporters and non-mandated reporters, including the public).

⁴⁷ See Roberts, *Racial Geography*, *supra* note 13, at 140 (describing how some participants in the study discussed community members using the child abuse reporting process as retaliation against their neighbors); Rebecca Klein & Caroline Preston, *When Schools Use Child Protective Services as a Weapon Against Parents*, HECHINGER REP., <https://perma.cc/M3L6-TZP4> (describing how school officials threaten to report parents to child welfare services as a way to coerce parents into following the school's advice).

⁴⁸ Once a report of suspected child neglect or abuse is received, ACS must investigate the allegations pursuant to N.Y. SOC. SERV. LAW § 424(6) (McKinney 2018) and deem the report "indicated" or "unfounded" within 60 days. *Id.* § 424(7). Racial disparities permeate this initial stage of the reporting process. For example, in New York State, twice as many Black children as white children were reported to the State Central Register in 2009. See N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., OVERVIEW: DISPROPORTIONATE MINORITY REPRESENTATION (DMR) IN OCFS SERVICE DELIVERY 1 (2009), <https://perma.cc/XC29-CEJG>.

improve the alleged concerns.⁴⁹ If ACS workers decide that court intervention is needed, they meet with ACS lawyers to file a petition against the parent in family court.⁵⁰ Article 10 of the Family Court Act is the governing law and defines abuse and neglect.⁵¹ This set of laws intends to be rehabilitative instead of punitive, as a family court case aims to promote the best outcomes for the families involved.⁵²

Unfortunately, what constitutes neglect is subjective and has a broad definition.⁵³ Judges often make disparate findings of neglect; the system overlooks the behavior of middle-class parents, but scrutinizes the same behavior of low-income parents.⁵⁴ Additionally, family court judges, who hold the power to decide the outcomes of a case, overwhelmingly come from different backgrounds than the parents to whom they are assigned.⁵⁵

⁴⁹ See Mulzer & Urs, *supra* note 18, at 30 (explaining how child welfare workers use the threat of filing a case in court to pressure parents to agree to participate in service programs); see also SOC. SERV. § 424(11).

⁵⁰ See N.Y. FAM. CT. ACT § 1032(a) (McKinney 2018).

⁵¹ “[A] ‘[n]eglected child’ [is] a child less than eighteen years of age whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care in supplying the child with adequate food, clothing, shelter or education . . . or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so” *Id.* § 1012(f)(i)(A). “[An] ‘[a]bused child’ [is] a child less than eighteen years of age whose parent or other person legally responsible or his care inflicts or allows to be inflicted upon such child actual injury by other than accidental means which causes or creates a substantial risk of death . . . [or] creates or allows to be created a substantial risk of injury to such child by other than accidental means which would be likely to cause death or serious protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ” *Id.* § 1012(e)(i)(ii).

⁵² See *People v. Roselle*, 84 N.Y.2d 350, 355 (1994) (“The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child, as distinct from the penal nature of a criminal action which aims to assess blame for a wrongful act and punish the offender.”); Jane M. Spinak, *Judicial Leadership in Family Court: A Cautionary Tale*, 10 TENN. J.L. & POL’Y 47, 78-79 (2014) (stating that therapeutic court intervention improves the outcomes for families). Whether the coercive nature of family court proceedings lend themselves to “rehabilitation” is a matter for debate, however. See *id.* at 78-82.

⁵³ See Candra Bullock, Comment, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL’Y & L. 1023, 1042 (2003) (arguing that federal, state, and local child abuse and neglect definitions are ambiguous, resulting in unnecessary removals of children in poor families).

⁵⁴ See ABIGAIL KRAMER, THE NEW SCH.: CTR. FOR N.Y.C. AFFAIRS, IS REFORM FINALLY COMING TO NEW YORK CITY FAMILY COURT? 3 [hereinafter KRAMER, IS REFORM FINALLY COMING] (describing that many child protective cases in family court involve behaviors that likely go unnoticed in middle-class families who have less contact with public institutions); see also Emma S. Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), <https://perma.cc/RKH2-TLKT>.

⁵⁵ Family court judges are typically white and/or upper middle class, while the families before them are disproportionately from underserved communities of color. Cloud et al., *supra*

Furthermore, the New York City Mayor appoints the family court judges.⁵⁶ Since the people do not elect the family court judges, it is less likely that a parent will be assigned a judge from her own community. As such, what many judges perceive to be neglect, based on their own experiences, is completely different in light of the complex challenges that the parents in their courtrooms face every day.

B. A Parent's Rights When the Government Removes Her Child Before Trial Is Complete

When ACS files a petition against a parent, it can ask the family court judge to approve removing a child from her home.⁵⁷ ACS also has the power to remove a child from her home in emergencies, even before filing a petition in family court.⁵⁸ In fact, ACS can remove a child from her home at any stage of a court proceeding without prior judicial approval.⁵⁹ Whenever ACS removes a child without judicial approval before a trial is completed, however, it must come to court on the next business day for a post-removal review.⁶⁰

The procedural posture of a case at the time of a removal—essentially, whether or not a judge has found the parent neglectful—will inform what type of judicial review the removal will receive, the timing of that judicial review, and the legal standards that the judge will apply when reviewing ACS's removal decision. Although the child, her family, and the wider community will always experience trauma from her removal, the posture of a family court case traditionally determines the amount of due process that a parent and a child subsequently receive to challenge the removal.

note 13, at 83 (citation omitted) (stating that mainly white judges oversee family court cases); OFFICE OF THE DEPUTY CHIEF ADMIN. JUDGE FOR JUST. INITIATIVES, SELF-REPRESENTED LITIGANTS IN THE N.Y.C. FAMILY COURT AND N.Y.C. HOUSING COURT, SERVICES FOR THE SELF-REPRESENTED IN THE TOWN AND VILLAGE COURTS 3-5 (2005) (describing the results of an informal survey about self-represented litigants in Family Court; none of the users identified themselves as white, and 83% reported household incomes under \$30,000 annually); see Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J.L. & FEMINISM* 339, 352 (1999) (noting that the majority of the actors in the child welfare system are well-educated, middle-class, and white, while most of the accused parents are members of poor communities of color).

⁵⁶ See FAM. CT. § 123.

⁵⁷ *Id.* § 1027(a)(iii).

⁵⁸ *Id.* § 1024(a).

⁵⁹ *Id.*

⁶⁰ *Id.* § 1027(a)(i). At any point in the proceeding, judges can also order a hearing on their own accord to determine whether a child should be removed from their home, where certain findings have been made. *Id.* § 1027(a)(iii).

The current practice dictates that a family receives the highest level of due process at the beginning stages of a case—a parent has a statutory right to an emergency hearing when his child is removed.⁶¹ A parent has the right to hold an emergency hearing consecutively, on a daily basis, until a judge can determine whether or not there is an imminent risk of harm.⁶² In family court, due to overcrowded court calendars, a case typically appears in front of a judge for only 30 minutes.⁶³ Therefore, a hearing with three witnesses—that might take only three or four hours to complete—will be spread out over several weeks, or even several months. In an emergency hearing, ACS must show that the child would be in imminent risk of harm if she remained with her parent.⁶⁴ In determining whether imminent risk exists, a judge will consider ways to mitigate the risk of harm and the harmful impact that the removal would have on the child.⁶⁵

In contrast to the beginning of a case, a parent does not have the same right to a hearing, let alone an emergency hearing, when ACS removes his child during a trial discharge.⁶⁶

C. *What Occurs at a Trial in an Abuse or Neglect Case*

A parent's due process rights when the government takes her child are dependent on whether or not a trial on the allegations in the petition is completed. A parent only has a right to challenge a removal in an emergency hearing, as described above, *before* a judge makes a finding of

⁶¹ See FAM. CT. §§ 1027(a)-(b), 1028(a). A child also has the right to an emergency hearing when she is removed from home, prior to her parent being adjudicated as neglectful. See *id.* § 1027(a)(ii).

⁶² *Id.* §§ 1027, 1028(a).

⁶³ See KRAMER, IS REFORM FINALLY COMING, *supra* note 54, at 3 (describing that high caseloads in family courts often mean judges have multiple hearings scheduled for the same 30-minute time slot).

⁶⁴ See FAM. CT. § 1027(b)(i) (“[I]f the court finds that removal is necessary to avoid imminent risk to the child’s life or health, it shall remove or continue the removal of the child.”); *Id.* § 1028(a) (“[T]he court shall hold a hearing to determine whether the child should be returned [home] . . . Upon such hearing, the court shall grant the application [for return], unless it finds that the return presents an imminent risk to the child’s life or health.”).

⁶⁵ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378-79 (2004) (explaining that the court must determine, in the factual setting before it, whether the imminent risk of harm to the child can be eliminated by other means, such as issuing an order of protection for the child or for one parent against another parent).

⁶⁶ See *infra* Part III.D. for a discussion about a parent’s lack of due process rights after a child is removed from her home while on trial discharge.

abuse or neglect against the parent.⁶⁷ A judge is the fact-finder and conducts all trials in family court, through a bench trial.⁶⁸ ACS has the burden to prove their allegations against the parent at trial.⁶⁹ If ACS presents sufficient evidence at trial, the judge will make a finding of neglect against the parent.⁷⁰

D. Disposition: The Plan for the Rest of the Case

If a judge makes a finding of abuse or neglect against a parent, the judge must then hold a hearing to determine what the dispositional order should be.⁷¹ The parties can either contest the hearing or agree to it.⁷² At a dispositional hearing, the standard of review shifts from the imminent risk standard to the lower best interest of the child standard, which remains the standard for the duration of the case.⁷³ The best interest of the child standard is not clearly defined and lacks concrete guidance, giving the judge broad discretion in her decisions.⁷⁴ The vagueness and the subjectivity of the standard inevitably results in racial and class bias permeating what is deemed to be in the child's best interests.⁷⁵

⁶⁷ MERRIL SOBIE, SUPPLEMENTARY PRACTICE COMMENTARIES, McKinney's Cons. Laws of N.Y., Book 29A, N.Y. FAM. CT. ACT § 1028 (2010) (“[A § 1028 hearing] may be requested up to the time the issue of abuse or neglect has been adjudicated . . .”) (alterations in original).

⁶⁸ Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 16 (2010).

⁶⁹ *Nicholson*, 3 N.Y.3d at 368 (citations omitted) (“[A] party seeking to establish neglect must show, by a preponderance of the evidence, first, that a child’s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired and second, that the actual or threatened harm to the child is a consequence of the failure of the parent or caretaker to exercise a minimum degree of care in providing the child with proper supervision or guardianship.”).

⁷⁰ Unfortunately, judges admit making findings of neglect against parents even when ACS has not presented sufficient evidence. SPECIAL WELFARE ADVISORY PANEL, ANNIE E. CASEY FOUND., ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 48 (2000) (describing a researcher’s discussions with family court judges who described failing to rule against ACS even when it presented weak cases, out of fear of being blamed for a later harm to the child).

⁷¹ See N.Y. FAM. CT. ACT §§ 1047(a), 1052(a)(i)-(vii) (McKinney 2018).

⁷² Interview with Erin Cloud, *supra* note 26.

⁷³ Telephone Interview with Keith Baumann, Supervising Att’y, Family Def. Practice, The Bronx Defs. (Aug. 2, 2018); FAM. CT. § 1052(b)(i)(A) (stating that a dispositional order regarding a child’s placement must determine whether continuation in the home would be contrary to the child’s best interests).

⁷⁴ See John Thomas Halloran, *Families First: Reframing Parental Rights as Familial Rights in Termination of Parental Rights Proceedings*, 18 U.C. DAVIS J. JUV. L. & POL’Y 51, 67-68 (2014) (discussing a prominent critique of the subjective best interest of the child standard); Sinden, *supra* note 55, at 354 (“[T]he ‘best interests of the child’ . . . is an extremely malleable and subjective standard.”).

⁷⁵ Sinden, *supra* note 55, at 384 (citations omitted). See *infra* note 179 & 180 for scholarship on how racism impacts a child protective proceeding.

1. The Court May Order the Parent to Participate in Services or Be Supervised

One purpose of the dispositional order is to articulate the steps that a parent must take to “fix” the problem that led to the neglect.⁷⁶ For example, if ACS alleges that a parent has neglected his child by using drugs, a judge would consider whether the parent is involved in a drug treatment program when crafting the dispositional order. The parent is expected to complete these rehabilitative steps within the specified period of supervision.⁷⁷

2. The Child’s Legal Status: A Release Versus a Trial Discharge

The second purpose of the dispositional order is to determine where the child will live,⁷⁸ which will dictate whether or not a judge will review the government’s decision to remove a child from her home. New York law strongly presumes that remaining with or returning to her parent is in a child’s best interest.⁷⁹ There are two main possibilities for where a child will live: foster care or “release” to the parent.⁸⁰ A release means that a

⁷⁶ See 22 N.Y. COMP. CODES R. & REGS. tit. 22, § 205.83 (2018), for possible conditions that can be included in a dispositional order. A family court judge’s capacity to craft dispositional orders that respond to an individual family’s needs fits with the rehabilitative purpose of the Family Court Act. See Jane M. Spinak, *Family Defense and the Disappearing Problem-Solving Court*, 20 CUNY L. REV. 171, 174-75 (2016) (outlining the family court’s development as an alternative to the punitive criminal court system, and adopting a problem-solving approach to meet an individual family’s needs); see also *People v. Roselle*, 84 N.Y.2d 350, 354-55 (1994) (“The orientation of Family Court is rehabilitative, directed at protecting the vulnerable child . . .”).

⁷⁷ See FAM. CT. § 1057(d) (“The duration of any period of . . . supervision of the respondent or respondents . . . shall be for an initial period of no more than one year.”). The outcome of a case is often conditioned on a parent’s involvement and compliance with services. See Mulzer & Urs, *supra* note 18, at 33 (“[P]arents can agree to participate in any services, even without a finding of abuse or neglect, as part of an agreement to keep or bring their child home or to improve the likelihood of a favorable resolution.”). Thus, even before an abuse or neglect determination is ever made, the state can exercise a high level of control over families through the child welfare system. Interview with Erin Cloud, *supra* note 26.

⁷⁸ FAM. CT. § 1052 (listing possible placement options that a judge can order for the child at disposition).

⁷⁹ N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (McKinney 2018) (“[I]t is generally desirable for the child to remain with or be returned to the birth parent because the child’s need for a normal family life will usually best be met in the home of its birth parent . . .”); *Matter of Michael B.*, 80 N.Y.2d 299, 309 (1992) (quoting SOC. SERV. § 384-b(1)(a)(i)-(ii)) (“[T]he Legislature has found and declared that a child’s need to grow up with a ‘normal family life in a permanent home’ is ordinarily best met in the child’s ‘natural home.’”).

⁸⁰ Technically, the dispositional options for a child’s status are more complicated: the judge could release a child to a respondent parent pursuant to FAM. CT. § 1057(a), release a child to a non-respondent parent pursuant to FAM. CT. § 1054(a), place a child with a relative pursuant to FAM. CT. § 1055(a) (called a ‘direct placement’ in practice), place a child in foster

child will live with her parent while ACS supervises the family; there is no foster care.⁸¹ If a child is removed while on release to the parent, the government must seek judicial approval.⁸² By contrast, if the dispositional order places a child in foster care, the foster care agency supervises the family.⁸³ A child in foster care usually comes home via a trial discharge, rather than a direct release to the parent.⁸⁴ If the government removes a child on trial discharge status, it does not need to seek judicial approval. Therefore, parents currently have different due process rights depending on the legal status of their child after disposition—release or trial discharge. Regardless of a child’s dispositional status, however, the trauma remains the same whenever a child is removed. A comparison of two hypothetical family court cases will help illustrate these options.

In one hypothetical case, ACS removes Jonathan from his mother Melissa, and places him in foster care.⁸⁵ ACS removed Jonathan, in part, because Melissa was homeless. Melissa’s case drags on, but she is ultimately found guilty of neglect, and her dispositional hearing is held on May 1st. In the time between Jonathan’s initial removal and her dispositional hearing, Melissa manages to secure stable housing with space for

care pursuant to FAM. CT. ACT § 1055(a), or grant custody to a respondent parent or another relative or suitable person pursuant to FAM. CT. § 1055-b(a).

⁸¹ FAM. CT. §§ 1054, 1057.

⁸² Removal would change the child’s legal status, as determined in the dispositional order; thus, the government would need to modify that court order. *Id.* § 1061 (allowing the court, or any party, by motion, to modify or to vacate a court order with good cause).

⁸³ *See id.* § 1055(a)(ii).

⁸⁴ Telephone Interview with Keith Baumann, *supra* note 73. In some cases, a child may return home from foster care through a final discharge, which requires court permission and skips a trial discharge altogether; this is less common. *Id.*; *see* FAM. CT. §§ 1055(b)(i)(E), 1089(d)(2)(viii)(C).

⁸⁵ Jonathan’s placement in foster care starts the clock for the foster care agency to seek termination of Melissa’s parental rights to Jonathan under the Adoption and Safe Families Act (“ASFA”) of 1997, Pub. L. 105-89, 111 Stat. 2115, 2118 (codified as amended in scattered sections of 42 U.S.C.). Under federal law, a foster care agency may file to terminate a parent’s rights (often called the “civil death penalty”) once his child has been in foster care for 15 of the most recent 22 months. 42 U.S.C. § 675(5)(E) (2018); *see* Elizabeth Mills Viney, Comment, *The Right to Counsel in Parental-Rights Termination Cases: How a Clear and Consistent Legal Standard Would Better Protect Indigent Families*, 63 SMU L. REV. 1403, 1406 (2010) (“[P]arental rights termination—often called ‘the civil death penalty’ due to its permanence.”) (citation omitted). For more information on the critiques of ASFA, *see* Chris Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, AMSTERDAM NEWS (Feb. 1, 2018, 9:28 AM), <http://perma.cc/Y5XV-ZUGN> (asserting that, under ASFA, the United States is the only country that forces adoptions of children whose biological parents desperately want to care for them) and Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303, 303 (2006) (“With black children representing an overwhelming percentage of the foster care population, the ASFA represents federally mandated destruction of black families.”).

Jonathan. At the dispositional hearing, the judge enters Jonathan's dispositional status as a release, allowing Jonathan to go home with his mother Melissa. Five months later, when Melissa is evicted from her home, ACS seeks to remove Jonathan from his mother again. Since Jonathan's legal status is a release, ACS would need to seek a court order to modify the dispositional order for the removal.⁸⁶ This scenario provides Melissa with some judicial process to argue that her son Jonathan should stay at home with her. The judge would be able to examine ACS's reasons for removing Jonathan from Melissa and to determine whether there are any supportive options available that would allow Jonathan to stay home with his mother.

In another hypothetical case involving similar facts, ACS removes Jonathan from Melissa, and places him in foster care. Melissa's assigned family court judge happens to have a light calendar, and, after a short trial, finds her guilty of neglect. Her dispositional hearing is held on February 1st. Melissa has not yet been able to secure stable housing, so the judge decides that Jonathan must temporarily remain in foster care. Three months later, on May 1st, after working with the foster care agency to find a home where she and Jonathan can live, the foster care agency allows Jonathan to go home to Melissa on a trial discharge. Five months later, Melissa is evicted from her home. The foster care agency removes Jonathan from Melissa through a "failed" trial discharge, without notice, a court order, or a subsequent hearing.⁸⁷ As a result, unless Melissa's lawyer files creative motions to request some sort of a hearing to review this removal, and a judge grants such request, Melissa and Jonathan will need to wait until the next scheduled permanency hearing (discussed in the next section) to ask the judge to return Jonathan home.

As these hypothetical situations illustrate, a variety of factors contribute to determining a child's legal status at disposition. In spite of this, the amount of due process that a parent receives to challenge the removal of her child is drastically different simply based on her child's legal status at disposition. A judge should be required to review every decision to remove a child from her parent, regardless of the child's legal status at disposition.

⁸⁶ FAM. CT. § 1061 (allowing the court or any party, by motion, to modify or vacate a court order showing good cause).

⁸⁷ See *infra* note 100 for further detail.

E. While a Child Is in Foster Care, a Permanency Hearing Is Held Every Six Months

After a judge enters a dispositional order, the case will come back for a review every six months if a child is placed in foster care.⁸⁸ This six-month review is called a “permanency hearing.”⁸⁹ At this hearing, a judge must decide, among other things, whether it is safe for a child to return home to her parent or whether there are ongoing safety concerns that necessitate a child to remain in foster care.⁹⁰ Permanency hearings continue until a child reaches “permanency,” whether that means returning to her parent, being adopted, or attaining other forms of permanency.⁹¹

III. TRIAL DISCHARGE: A CHILD IN FOSTER CARE IS HOME ON A TRIAL BASIS

A. What is a Trial Discharge?

Now that the basic process of an abuse or neglect case has been explained, this Part will focus on the Note’s central argument: that parents of children removed on trial discharge should receive the same protections as they do when their children are removed pre-disposition. The Family Court Act defines a trial discharge as when “the child is physically returned to the parent while the child remains in the care and custody of the local social services district.”⁹² The statute contains little else regarding what this definition means.⁹³ Nevertheless, the distinction between the

⁸⁸ FAM. CT. § 1089(a).

⁸⁹ *Id.* § 1086 (“The purpose of this article is to establish uniform procedures for permanency hearings for all children who are placed in foster care It is meant to provide children placed out of their homes timely and effective judicial review that promotes permanency, safety and well-being in their lives.”).

⁹⁰ *See id.* § 1089(d) (requiring the court, at the conclusion of a permanency hearing, to make findings in accordance with the best interests and the safety of the child, including whether the child would be at risk of abuse or neglect if returned to his parent). At a permanency hearing, a foster care agency must also show what “reasonable efforts” it has made to facilitate the family’s reunification, usually focusing on what service referrals it has made for the parent. *See id.* § 1089(d)(2)(iii). Whether judges hold foster care agencies responsible for their duty to make reasonable efforts to reunify families is questionable. *See Sankaran & Church, supra* note 24, at 227 (summarizing various reports that judges rarely find that a foster care agency did not make reasonable efforts).

⁹¹ FAM. CT. § 1088 (“[Once a child is placed in foster care] the case shall remain on the court’s calendar and the court shall maintain jurisdiction over the case until the child is discharged from placement . . .”).

⁹² *Id.* §§ 1055(b)(i)(E), 1089(d)(2)(viii)(C).

⁹³ The legislative history for the statutory sections defining a trial discharge provides little insight. *See, e.g.,* S.B. 5805, 2005-2006 Reg. Sess. (N.Y. 2005); N.Y. Bill Jacket, Budget Report on Bills, S.B. 8435, ch. 437, 2006 Reg. Sess. (N.Y. 2006) (“[P]rovide clarification that a district maintains custody of the child during the trial discharge period.”). Courts that cite

foster care agency's legal custody and the parent's physical custody of a child results in parents having no recourse when their child is removed during a trial discharge.⁹⁴

When a foster care agency is satisfied that a parent has progressed, that agency may decide that it is in the child's best interests to trial discharge her back home.⁹⁵ The foster care agency exercises wide discretion over when, and how, to trial discharge a child home.⁹⁶ A trial discharge allows children to return home on a trial basis, while the foster care agency continues to supervise and service the family.⁹⁷ Therefore, the family can reunite, while being monitored by the foster care agency without disruption.

A foster care agency will set conditions that a parent must agree to follow to keep her child at home on a trial discharge status. These conditions may or may not be relevant to the safety of the child, and may include: completing certain services (such as therapy or parenting classes), ensuring that the child attends school regularly, staying up to date with the child's medical needs, and maintaining regular contact with the foster care agency.⁹⁸ Although these conditions are undeniably important for a

this definition of a trial discharge do not further explain the definition's meaning. *See, e.g.*, *Matter of Nicole A.*, 40 Misc. 3d 254, 260 (N.Y. Fam. Ct. Bronx. Cty. 2013); *Matter of Christopher G.*, 82 A.D.3d 1549, 1551 n.2 (N.Y. App. Div. 2011) (citations omitted).

⁹⁴ *See Matter of Nicole A.*, 40 Misc. 3d at 260 ("With a trial discharge, the agency can remove the children from their mother's physical custody at any time cause warrants it, without [granting a parent] the full degree of legal process required if she were to have legal custody."). The court's language indicates that a parent's lack of legal custody over her child permits the foster care agency to remove a child on trial discharge status without judicial approval; the foster care agency has legal custody over the child, irrespective of the child physically residing at home.

⁹⁵ Foster care agencies have discretion to return a child home on trial discharge, unless the family court has prohibited it. FAM. CT. § 1089(d)(2)(viii)(C); *Matter of Christopher G.*, 82 A.D.3d at 1551. There are no set time frames for a trial discharge, but six to eight months is typical. E-mail from Noemi Cotto, Soc. Work Supervisor, Family Def. Practice, The Bronx Defs., to author (Sept. 13, 2018, 3:27 PM) (on file with author).

⁹⁶ *See* FAM. CT. §§ 1055(b)(i)(E), 1089(d)(2)(viii)(C). What happens when a judge believes a child should be trial discharged home but a foster care agency disagrees? The answer is not so clear. Currently, judges interpret their power to order a trial discharge differently. Telephone Interview with Keith Baumann, *supra* note 73; *see Matter of Nicole A.*, 40 Misc. 3d at 262 ("[T]he agency nevertheless argues that the court does not have the authority to order a trial discharge . . ."). In *Matter of Nicole A.*, the judge determined that "the Family Court has implicit and inherent authority to direct a trial discharge." *Id.* at 264.

⁹⁷ *See Matter of Nicole A.*, 40 Misc. 3d at 260.

⁹⁸ E-mail from Noemi Cotto, *supra* note 95; *see, e.g.*, *Matter of Admin. for Children's Servs. v. Sonia R.*, 30 Misc. 3d 1211(A), at *6 (N.Y. Fam. Ct. Bronx. Cty. 2010) (outlining the family court judge's ordered trial discharge conditions, including requiring the parents to take random alcohol and drug tests, and test negative, to attend family therapy, to allow the agency to make random home visits, and to ensure the children regularly attend school and their medical appointments).

child's well-being, in most cases, removing a child from his parent causes an even greater harm to the child than failing to fulfill a condition.

B. How and Why the Government Removes a Child During a Trial Discharge

If all goes well, eventually, with a judge's permission, the foster care agency will "final discharge" the child home, ending the agency's legal custody of the child and a court's jurisdiction over the family.⁹⁹ A final discharge is the most desirable end for a family; however, the foster care agency may also remove the child from home, ending the trial discharge and foreclosing the possibility of a final discharge. This could occur if a parent does not follow the conditions of the trial discharge, or if the foster care agency has other concerns. The foster care agency can remove the child from her home without *any* judicial review.¹⁰⁰ In other words, the foster care agency can remove a child without ever proving in court why the removal was needed, purely based on the agency's independent feelings or concerns. Judges, foster care agencies, and many practitioners refer to this removal as a "failed trial discharge."¹⁰¹

The common reasons as to why foster care agencies remove children during trial discharge generally do not justify the trauma that a removal inflicts on children, and, thus, highlight the need for judicial review. Although foster care agencies will almost always tie their reasoning to issues

⁹⁹ *Matter of Christopher G.*, 82 A.D.3d at 1551 (explaining that there is no statutory provision providing the agency with the discretion to end the trial discharge through a final discharge without family court authorization).

¹⁰⁰ Interview with Erin Cloud, *supra* note 26. ACS internal policies seem to indicate that foster care agencies are not required to provide notice to assigned counsel on the case when agencies have removed a child during a trial discharge. See N.Y.C. ADMIN. FOR CHILDREN'S SERVS., CHILD WELFARE PROGRAMS' INTEGRATED FAMILY TEAM CONFERENCE POLICY 14-16 (2016) [hereinafter ACS, TEAM CONFERENCE POLICY]. ACS staff are required to notify an ACS lawyer when a Child Safety Conference ("CSC") is held. *Id.* at 16. The policy specifies that an initial CSC meeting will be held "[w]hen a trial discharge fails" and when a new report is made to the State Central Register. *Id.* at 15. However, assigned counsel are often not notified when foster care agencies remove a child during a trial discharge. Interview with Erin Cloud, *supra* note 26. It is unclear whether ACS fails to notify counsel because a trial discharge removal frequently does not coincide with a new SCR report and therefore a CSC would not be held, or because ACS is not following its own policy requirements. See ACS, TEAM CONFERENCE POLICY, *supra*, at 15-16.

¹⁰¹ See, e.g., *Matter of Amarnie T.T.*, 140 A.D.3d 452, 452 (N.Y. App. Div. 2016); *Matter of Pauline Ameesha L.*, 291 A.D.2d 299, 299 (N.Y. App. Div. 2002); *Matter of Leake & Watts Services, Inc.*, 51 Misc. 3d 1207(A), at *4 (N.Y. Fam. Ct. Bronx Cty. 2016); *Sonia R.*, 30 Misc. 3d 1211(A), at *6. Although a trial discharge is stated within the Family Court Act, a "failed" trial discharge is not mentioned in the statute; the statute does not identify a procedure to follow when a foster care agency removes a child during a trial discharge. See generally N.Y. FAM CT. ACT §§ 1055(b)(i)(E), 1089(d)(2)(viii)(C) (McKinney 2018).

of the child's safety, in many cases, the agency's claims about safety are debatable.¹⁰² A child on trial discharge is often removed for reasons related to the parent's "non-compliance" with conditions of the trial discharge, such as making the child's medical appointments or maintaining stable housing, regardless of any actual safety concerns to the child.¹⁰³ In fact, some foster care agency workers mistakenly believe that they are legally obligated to remove a child home on trial discharge if every condition of a court order is not perfectly followed.¹⁰⁴ The removal of a child solely because a parent did not follow one trial discharge condition conflicts with New York State's own mandate to keep a child with his parent, except when the child is in danger,¹⁰⁵ and causes irrevocable harm to a child.¹⁰⁶

In addition, some child removals occur because the agency has genuine concerns about a child's safety during a trial discharge. Even then, what foster care agency workers consider to be threatening to a child in the home often does not involve immediate danger to justify the trauma of removing a child from her home. Ultimately, due to the absence of judicial review under the current practice, there is no opportunity to determine whether the reasons for removing a child are justified, regardless of the foster care agency's concerns.

C. *Children and Parents Are Particularly Vulnerable to Trauma When a Child Is Removed During a Trial Discharge*

The inevitable harm that results from a removal during a trial discharge necessitates a hearing. In addition to the consequences of family separation discussed in Part I, a child and her family are particularly vulnerable to the trauma from removal during a trial discharge.¹⁰⁷ Multiple

¹⁰² As a non-lawyer advocate representing parents in family court at a New York City law firm, I discussed with agency caseworkers their rationale for removing children who were home on trial discharge. More often than not, the reasons for removal were connected to the parent's alleged divergence from the services that the agency had determined the parent needed, such as therapy or parenting classes; there were rarely, if ever, substantive concerns about the parent's ability to care for his child.

¹⁰³ E-mail from Noemi Cotto, *supra* note 95.

¹⁰⁴ Misunderstandings among child welfare workers of their own legal obligations, as related to when they must remove a child, are rife among foster care agencies and ACS offices, and have devastating consequences for the families involved with these agencies.

¹⁰⁵ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 374 (2004) (citing *Matter of Marino S. Jr.*, 100 N.Y.2d 361, 372 (2003)) (describing New York's long-time commitment to keep families together unless a child's best interests are endangered).

¹⁰⁶ See *infra* Part III.C. for a discussion on how children and their families are vulnerable to trauma from a child's removal while on trial discharge.

¹⁰⁷ See Anna S. Lau et al., *Going Home: The Complex Effects of Reunification on Internalizing Problems Among Children in Foster Care*, 31 J. ABNORMAL CHILD PSYCHOL. 345,

changes in a child's physical residence increase a child's likelihood to experience behavioral problems¹⁰⁸ and decrease a child's probability of finding a permanent home.¹⁰⁹ As a result, more children languish in foster care, where they may face continued abuse and neglect, among other challenges.¹¹⁰

When a child returns home on trial discharge, that child has, at a minimum, experienced two drastic changes in where she is living.¹¹¹ Changes in foster care placement negatively impact a child's ability to form emotional relationships.¹¹² As a result, it becomes more difficult for a family to rebuild their bonds during a trial discharge.¹¹³ A subsequent removal of a child further hampers the family's efforts to restore their relationship.¹¹⁴ It is in the government's interest, and in society's interest,

347 (2003) (stating, based upon a study of 90 children, that the children's experiences depicted a progression of traumatic events from their initial removal and continued throughout the placement process); see also William Wan, *The Trauma of Separation Lingers Long After Children Are Reunited With Parents*, WASH. POST. (June 20, 2018), <https://perma.cc/8AJK-7FDZ> (describing that children who are separated from their parents are vulnerable to further trauma, focusing on the immigration context).

¹⁰⁸ David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 PEDIATRICS 336, 337 (2007) (finding that children with unstable placements were twice as likely to experience behavioral problems at 36 months compared to children with stable, long-lasting placements); Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors and Number of Placements*, 24 CHILD ABUSE & NEGLECT 1363, 1371 (2000) (“[The] number of placement changes is the only variable to play a statistically significant role in the prediction of behavioral problems.”).

¹⁰⁹ See Sara E. Kimberlin et al., *Re-entering Foster Care: Trends, Evidence, and Implications*, 31 CHILD & YOUTH SERVS. REV. 471, 473 (2009) (citations omitted) (describing several child welfare studies that found a correlation between the number of foster care placements and an increased likelihood of re-entering the foster care system after returning home to their parents). Alarming, these significant changes in a child's placement often occur because of administrative needs, instead of a child's particular needs. Sigrid James, *Why Do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 SOC. SERV. REV. 601, 611 (2004).

¹¹⁰ See *supra* Part I.A.

¹¹¹ As discussed *supra* Part II.B., the government may remove a child at any point in a proceeding and, therefore, may return her home multiple times during a case.

¹¹² See Sara E. Kimberlin et al., *supra* note 109, at 473 (citation omitted) (“[A] child must move to a new home and form a relationship with a new caregiver . . . Like any unplanned change in placement and loss of permanency, such disruption is likely to be detrimental to children's psychological well-being.”).

¹¹³ See *id.* at 472 (citation omitted) (“Repeated changes in caregiver relationships during a young child's first few years of life can result in long-term impairment in forming meaningful interpersonal relationships.”); Roberts, *Racial Geography*, *supra* note 13, at 137 (describing study participants' accounts that children who had been in foster care had trouble forming healthy social relationships later in life).

¹¹⁴ Unfortunately, even when families use the trial discharge period to rebuild their bonds, “a . . . child welfare service characteristic associated with an increased risk of foster care re-

to hold a hearing and to ensure that the long-term effects of removal are imposed only when absolutely necessary.

D. A Parent's Lack of Rights When the Government Removes Her Child During a Trial Discharge

Currently, a parent does not have the right to a hearing when her child is removed on a trial discharge.¹¹⁵ This dilemma is in stark contrast to the beginning of a case, when a parent has a right to an emergency hearing, where a judge must decide whether a child is at imminent risk of harm at home with her parent.¹¹⁶

Since parents do not have a right to a hearing, attorneys use creative advocacy to secure judicial review of the government's decision to remove a child on trial discharge.¹¹⁷ One way to do this is by filing a motion to modify the dispositional order and asking the judge to release the child to the parent's custody.¹¹⁸ However, an attorney's request for judicial review places the burden on the parent or the child, rather than the government—who would otherwise need to seek judicial review of any child removal.¹¹⁹

A recent Bronx Family Court decision illustrates the challenges that parents face when a foster care agency removes their child on a trial discharge. In this particular case, a father's two children were living at home on trial discharge basis for almost a year.¹²⁰ Things were going well and the family was preparing for a final discharge until the foster care agency removed the children in the middle of the night.¹²¹ The father filed a motion seeking an emergency hearing to review the removal and asking the

entry [is] prior involvement with the child welfare system" Kimberlin et al., *supra* note 109, at 473.

¹¹⁵ See *supra* note 94.

¹¹⁶ See *supra* Part II.B. for a discussion of pre-trial emergency hearings pursuant to N.Y. FAM. CT. ACT §§ 1027, 1028 (McKinney 2018). If a judge orders a trial discharge, as opposed to a foster care agency using its discretion, then the foster care agency may need to move pursuant to FAM. CT. § 1061 to modify the order to remove a child during a trial discharge.

¹¹⁷ Interview with Erin Cloud, *supra* note 26.

¹¹⁸ *Id.*

¹¹⁹ See, e.g., *Duchesne v. Sugarman*, 566 F.2d 817, 828 (2d Cir. 1977) ("The burden of initiating judicial review must be shouldered by the government. We deal here with an uneven situation in which the government has a far greater familiarity with the legal procedures available for testing its action. In such a case, the state cannot be allowed to take action depriving individuals of a most basic and essential liberty interest which those uneducated and uninformed in legal intricacies may allow to go unchallenged for a long period of time."); see *supra* note 94.

¹²⁰ *Matter of W.* at *1 (N.Y. Fam. Ct. Bronx Cty. 2018) (on file with author).

¹²¹ See *id.* at *5.

judge to return his children to his care.¹²² A protracted hearing was eventually held, involving multiple witnesses and conflicting statements from various agency workers, the police officer, the foster parent, and the children.¹²³ The police officer disagreed with the caseworker's description of events that had led to the removal.¹²⁴ Several months later, the judge ruled that the children should not have been removed and that it was in their best interest to return to their father, and reinstated the trial discharge.¹²⁵ The decision was issued around eight months after the children were taken from their father.

A hearing allowed the judge, an impartial fact-finder, to determine whether the agency should have removed the children. While determining that these children had been unnecessarily separated from their father for eight months, however, the judge disagreed that the father had a right to an emergency hearing to review the removal.¹²⁶ In fact, this hearing may not have occurred but for the creative advocacy by the father's lawyer, illustrating that the burden to seek judicial review of trial discharge removals is improperly placed on parents.¹²⁷ This result is unacceptable and contrary to New York's stated commitment to keep families together whenever possible.¹²⁸

E. Christina's Story: The Devastating Impact of Losing One's Child During a Trial Discharge

The real-life experiences of families may get lost in the mechanics explained above. However, it is critical to understand how child removals affect parents and children during a trial discharge. The following is an example of what a family may experience from this process.¹²⁹

Christina was a single-mother in Manhattan; she was a proud native New Yorker. Christina and her five-year-old daughter, Jessica, lived in a homeless shelter. Even with Christina working overnight shifts at a nearby Burger King, it was difficult to make ends meet with the rising rents and a high cost of living.

¹²² *Id.* at *1.

¹²³ *Id.* at *5-7.

¹²⁴ *Id.*

¹²⁵ *Id.* at *4, *7.

¹²⁶ *Id.* at *1.

¹²⁷ *Id.*

¹²⁸ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 374 (2004) (citing *Matter of Marino S. Jr.*, 100 N.Y.2d 361, 372 (2003)) (describing New York's long commitment to keep families together unless a child's best interests are endangered).

¹²⁹ This illustration is based on several cases that I am familiar with from working at a New York City law firm that represents parents in family court.

Christina became entangled in the child welfare system after a shelter worker noticed that there was little food in their kitchen cabinets, and that Christina appeared depressed. Christina came home late from work tired, and would sometimes be irritable towards the shelter staff. The shelter worker called in a report to ACS. ACS then filed a neglect case against Christina in family court. At the beginning of the case, Jessica was removed and placed in foster care because the judge was worried about the lack of food in Christina's home and Christina's behavior towards the shelter staff.

Christina worked hard to get Jessica back home. She started seeing a therapist, and she sought help with stocking her cabinets from local food banks and charities. Christina also decided to allow the judge to enter a finding of neglect against her, rather than face months of prolonged trial and further separation from Jessica.¹³⁰ Soon after the judge entered a finding of neglect against Christina, the foster care agency sent Jessica home on trial discharge.

Christina and Jessica were very close, and Jessica's time in foster care thankfully did not change that. By all accounts, Jessica was a happy and thriving young girl when she was home with her mother. They were both excited and relieved to be reunited, and, eventually, returned to a period of normalcy and routine as mother and daughter.

Christina's mother watched Jessica when Christina went to work. However, when Christina's mother moved to Pennsylvania, Christina struggled to find childcare for Jessica. She did not make enough money at work to afford an overnight babysitter and did not have friends or family, other than her mother, whom she trusted to watch Jessica. As a result of missing many shifts to stay with Jessica, Christina lost her job at Burger King. Christina did her best to eliminate unnecessary expenses, including cancelling her phone plan. While money was tight, Christina worked hard to ensure that Jessica had enough food to eat, a safe place to sleep, and a loving home.

Christina still had the foster care agency worker in her life. After the ups and downs of the case, they had a difficult relationship. In particular, Christina felt that her foster care worker did not listen to her or support her—she only felt judged. For example, Christina continued to struggle to have enough money for groceries and clothes for Jessica, so she asked her foster care worker for help. But, rather than provide assistance with

¹³⁰ See N.Y. FAM. CT. ACT § 1051(a) (McKinney 2018), which allows a parent to consent to a finding of neglect or abuse without admitting fault, similar to a no-contest plea in criminal proceedings; in practice, this is called a "submission." Telephone Interview with Keith Baumann, *supra* note 73.

food or school supplies, the foster care worker referred her to a financial budgeting class.

Since Christina no longer had a phone plan, she could only make and accept calls when her phone was connected to WiFi. The homeless shelter did not have WiFi, so communication with the foster care worker became difficult. Christina would not receive her missed phone calls or be able to reach the worker when she did have access to WiFi. Christina also missed three appointments at the foster care agency, which were for periodic case conference meetings that the foster care worker scheduled. Still, Jessica was healthy, happy, and well cared for.

After Christina missed the fourth scheduled home visit with the worker, the foster care agency decided to hold a meeting with Christina to discuss her case. At this point, Jessica had been home on trial discharge for nine months. Christina brought Jessica along to the foster care agency, as she did not have anyone to watch her. Christina walked into the room and was surprised to see the director of the agency there with her foster care worker and a supervisor. Within minutes, the director informed Christina that the foster care agency was failing Jessica's trial discharge that day. The director said that they had decided to remove Jessica based on Christina's infrequent communication with her foster care worker and the four missed appointments for a home visit. The director did not mention any safety concerns for Jessica, as there were none. This meant that Christina had to leave the agency that day without her daughter, and Jessica would go straight to a foster home.¹³¹

Christina was shocked; she had no idea that the foster care agency was planning to remove Jessica from her care at all, let alone on that day. Christina begged the foster care agency to give her some time to get back on top of her communication and appointments. She explained that, since her mother had moved away, she had lost her job due to lack of childcare and needed to cut her phone plan. The foster care agency staff listened, but insisted that Jessica needed to be removed as the trial discharge was not "working out."

At the end of the meeting, Christina asked for a few minutes to say goodbye to Jessica. She went outside the room to tearfully hug Jessica goodbye and try to explain to her what was happening. Jessica screamed the entire length of the hallway that she wanted to stay with her mom, as the foster care worker carried Jessica away. Christina went into the bathroom and sat on the floor sobbing. After working so hard to get Jessica

¹³¹ There is no right to counsel for parents in meetings with foster care workers and child protective agencies, such as ACS. ACS, TEAM CONFERENCE POLICY, *supra* note 100, at 12. The foster care agency is not even required to provide notice to the lawyers on the case that such a meeting is being held. *Id.*

home, Christina could not imagine going through that process again. She felt completely powerless.

The next day, Christina's lawyer tried to get the case before the family court judge to argue that Jessica should be returned to Christina. The next permanency hearing was not scheduled for several months, so her lawyer filed a motion to review Jessica's removal.¹³² The judge declined to hear the motion, saying that taking Jessica from her mother was within the foster care agency's discretion. All Christina wanted was a chance for the judge to hear her. She felt that her opinion, as Jessica's mother, and whatever was happening to her daughter in foster care, did not matter to the judge.

As the months passed, Christina became more and more withdrawn, despairing that she would never be reunited with Jessica. The foster care agency only allowed her visits with Jessica in the foster care agency's visiting room, where Jessica and Christina were supervised by foster care workers. Christina also had a hard time getting to visits, as she was working at a new job bagging groceries far away from home in the Bronx. It took Christina nearly two hours to get from her job in the Bronx to the foster care agency in Queens.

When the next court date finally came, three months later, the judge finally heard the reasons why Jessica was taken from her mother. The judge was appalled, but was also worried by the foster care agency's reports about Christina missing visits and her depressed mood since the agency removed Jessica. The judge said that the foster care agency should not have removed Jessica from her mother three months before. However, ultimately, the judge decided that it was in Jessica's best interest to stay in her stranger foster home until Christina began visiting consistently with Jessica and did a better job at communicating with her foster care worker.

Christina was deeply upset and became further withdrawn. She felt crushed by the injustice of the situation and helpless to change it. Christina had done everything the judge had previously asked of her to get Jessica back, and had still lost her again. Eventually the foster care agency began proceedings to terminate Christina's parental rights to Jessica. The foster care agency counted the time Jessica had been home with Christina on trial discharge as time Jessica had been in foster care to prove their termination case.

Despite being a loving mother and doing her best to provide for Jessica in the face of poverty and a lack of support, Christina had initially lost Jessica at the beginning of her family court case. Regardless of that unfairness, Christina worked really hard to jump through all of the hoops that the judge and the foster care agency asked of her to get Jessica home.

¹³² This would likely be a motion under FAM. CT. § 1061.

Once Jessica came home on trial discharge, she and Christina had spent months settling back into their life as a family. Christina’s mother moving away caused an unexpected setback, but Christina continued to persist in the face of the new challenges. Still, the foster care agency took Jessica away again, instead of working with Christina to find childcare and to keep her job. A judge refused to review Jessica’s removal until months later, when Christina’s situation had become even more difficult due to the lack of support. Now, Christina will have to fight to keep her parental rights to Jessica—if she loses, she will be erased from Jessica’s life entirely.¹³³

IV. THERE MUST BE AN EMERGENCY HEARING TO REVIEW ALL CHILD REMOVALS DURING TRIAL DISCHARGE

Although a failed trial discharge sounds like a harmless administrative procedure, it is the state’s forced separation of children and parents. Through this forced separation, the government immediately deprives a child of living with his parent and deprives a parent of the physical care and custody of her child.¹³⁴

A. *Due Process Requires a Prompt Hearing*

Due process requires a hearing prior to the deprivation of a parent’s fundamental liberty interest in the care and custody of a child, or as soon as possible thereafter.¹³⁵ This hearing should be an emergency hearing, conducted in court on a daily, consecutive basis. Every day that goes by without judicial review of a child’s removal is more time that a family may be unnecessarily separated. When a child is removed during a trial discharge, she will most likely be forced to hurriedly pack her belongings, abruptly change schools, live in a new and unfamiliar neighborhood, and only see her parent two or three times a week.¹³⁶ Given the aggravated

¹³³ Only a few states currently allow for the restoration of parental rights; in the vast majority of states, the severing of a parent’s rights to her child is irreversible. See Randi J. O’Donnell, Note, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362, 364 (2010). See generally *Facing Termination of Parental Rights*, RISE MAG. (Spring 2010), <https://perma.cc/6ERT-QQDQ> (sharing a collection of stories written by parents whose parental rights were terminated).

¹³⁴ See *infra* Part IV.A.1.

¹³⁵ See *Duchesne v. Sugarman*, 566 F.2d 817, 826 (2d Cir. 1977) (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (“[I]n those ‘extraordinary situations’ where deprivation of a protected interest is permitted without prior process, the constitutional requirements of notice and an opportunity to be heard are not eliminated, but merely postponed.”).

¹³⁶ See Chill, *supra* note 25, at 457 (describing common experiences from the government’s removal of children).

harm that a child will experience when removed during a trial discharge,¹³⁷ time is of the essence to determine whether the removal should have occurred. Every additional minute that a child spends away from her parent increases the long-term impact of the removal; only an emergency hearing will appropriately take this potential harm into account.

1. A Protected Constitutional Interest Is Implicated When a Child Is Removed

A parent must have a procedural due process right to judicial review when a child is removed while home on a trial discharge.¹³⁸ Procedural due process applies when the government deprives an individual of a constitutionally protected liberty or property interest.¹³⁹ The right to family integrity is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution,¹⁴⁰ and is “perhaps the oldest of the fundamental liberty interests recognized by th[e] Court” and protected by the U.S. Constitution.¹⁴¹ This right encompasses a child and a parent’s reciprocal rights to stay together without government interference: a parent’s right to the care, custody, and control of her child, and the child’s right to remain with his parent.¹⁴²

The Supreme Court has affirmed that a parent’s fundamental right to the care and custody of her child continues even after she has been found neglectful.¹⁴³ A parent’s right to care for her child, at a minimum, entitles her to a hearing when her right to parent is taken away.¹⁴⁴ Therefore, the analysis next turns to whether the government’s failure to obtain court approval for removals through a failed trial discharge violates the Due Process Clause.

¹³⁷ See *supra* Part III.C. for a discussion of the particular fragility of a child who is removed during trial discharge.

¹³⁸ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569-70 (1972) (“When protected interests are implicated, the right to some kind of prior hearing is paramount.”).

¹³⁹ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

¹⁴⁰ See *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000) (discussing the long history of the Supreme Court’s recognition of parents’ fundamental liberty interest in the care, custody, and control of their children).

¹⁴¹ *Id.* at 65.

¹⁴² *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) and *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977)) (“[The] right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.”).

¹⁴³ See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). See *infra* Part IV.A.3. for a discussion of the Supreme Court’s findings in *Santosky*, 455 U.S. 745.

¹⁴⁴ See *Duchesne*, 566 F.2d at 826 (citing *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)).

2. The Supreme Court's *Mathews* Test Requires a Hearing Upon Removal

Applying the *Mathews* factors, it is clear that due process requires family courts to hold a prompt hearing to review any decision to remove a child home on trial discharge. The level of procedural protections required to satisfy due process is dependent on the specific protected interest that is implicated. Therefore, the Supreme Court has laid out a three factor balancing test to determine what procedural protections are required in a particular case.¹⁴⁵ First, a court must consider the nature of the private interest at stake.¹⁴⁶ Second, a court must determine the risk of erroneous deprivation of the interest from the procedures used and the value of additional procedural safeguards.¹⁴⁷ Third, a court must analyze the government's interest and the administrative burden that the additional requirements would create.¹⁴⁸

First, the private interest at stake here is one of the most precious interests of our society,¹⁴⁹ but the family court's current treatment of this fundamental right does not reflect its importance. Every day that a parent is separated from his child places a severe burden on his right to parent his child.

Second, the analysis considers the risk of the government's wrongful deprivation of a parent's rights under the current procedures used to remove children home on trial discharge. The risk of error is extremely high, so much so that the New York State Legislature included statutory protections in the Family Court Act to challenge child removals at the beginning of a case, before a finding of parental unfitness.¹⁵⁰ However, foster care agencies often improperly decide to remove children home on trial discharge based on factors that are not related to the safety of the child or even to the best interest of the child.¹⁵¹ Such decisions, if incorrect, increase the need and the value of a hearing to review a removal during a trial discharge as an additional procedural safeguard.

¹⁴⁵ *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *supra* Part IV.A.1. for further discussion of the fundamental liberty interest in family integrity.

¹⁵⁰ See N.Y. FAM. CT. ACT §§ 1027, 1028 (McKinney 2018). Even with the best intentions, child welfare workers do not often have all of the information necessary when they decide to separate a family. It is not uncommon for child welfare workers to later receive information that shows the removal was unnecessary. See Sankaran & Church, *supra* note 24, at 212-13 (arguing that errors in child removal will continue to occur so long as child welfare agencies remain overburdened and susceptible to biases).

¹⁵¹ See *supra* Part III.B. for discussion of the various reasons why foster care agencies remove children during a trial discharge.

Importantly, a judge can act as an objective third party by reviewing all of the information available and determining whether it was the correct decision to separate the family. This process was carried out in the recent Bronx Family Court decision, where the judge reviewed a removal of two children home on trial discharge and subsequently returned the children to their father.¹⁵² The judge determined that the removal was inappropriate and not in the children's best interests, which means that the children were unnecessarily separated from their father.¹⁵³ The New York Court of Appeals and the New York State Legislature have recognized the serious harm that parents and children suffer when families are unnecessarily separated.¹⁵⁴ As a result, the additional safeguard of a hearing could significantly reduce the number of unnecessary and mistaken removals of children home on trial discharge.

Third, the analysis examines the government's interest in its current process and how difficult it would be to have additional procedures in place. Here, the government has no valid justification for failing to hold an emergency hearing to review a removal during a trial discharge. The government does not have an interest in separating children from their parents when there are no safety risks.¹⁵⁵ In fact, New York State has consistently affirmed that its interest is in keeping families together.¹⁵⁶

The government might assert that foster care agencies, with their alleged expertise, should have the discretion to begin and to end trial discharges when they deem it appropriate, without judicial review. That argument is similar to justifications of administrative convenience, which courts have not found persuasive in the past.¹⁵⁷ Foster care agencies can still assist the judge with their expertise in the context of a hearing. Further, family courts regularly hold hearings to review child removals—therefore, there is already a process of implementing emergency hearings

¹⁵² Matter of W. (N.Y. Fam. Ct. Bronx Cty. 2018) (on file with author).

¹⁵³ *Id.* at *4.

¹⁵⁴ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004) (reiterating the necessity of balancing the potential imminent risk of harm to the child with the trauma of removal, and discussing the New York Legislature's stated goal of avoiding unnecessary removals of children). Commentators and researchers have found that even short removals of children from their parents cause long-lasting damage. *See Sankaran & Church, supra* note 24, at 212 (citation omitted).

¹⁵⁵ *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) (finding the government interest in separating children from their parents, absent a finding of unfitness, to be de minimis).

¹⁵⁶ N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (McKinney 2018) (“[T]he state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home . . .”); *Nicholson*, 3 N.Y.3d at 374-75 (citing *Matter of Marino S. Jr.*, 100 N.Y.2d 361, 372 (2003)) (describing New York’s long commitment to keep families together unless a child’s best interests are endangered).

¹⁵⁷ *See, e.g., Stanley*, 405 U.S. at 657 (discussing *Bell v. Burson*, 402 U.S. 535 (1971), in which the court held that administrative convenience was insufficient to deprive an individual’s driver’s license without notice and an opportunity to be heard at a hearing).

within family courts. The burdens of increased cost and time from additional hearings do not outweigh the value of protecting parental rights and avoiding erroneous child removals.

All three of the *Mathews* factors weigh in favor of increasing procedural protections when the government removes a child on trial discharge. The private interest implicated from such a removal is incredibly important, and there is a high risk of the government erroneously taking away a parent's fundamental right. The harm caused by removals, whether the removal was a mistake or not, demonstrates that additional procedural safeguards are extremely valuable. Finally, the government interest in keeping families together when possible also supports a hearing requirement. Therefore, procedural due process will only be satisfied if a court promptly reviews all removals of children home on trial discharge.

3. The Supreme Court Has Ruled That Parents Are Still Entitled to Due Process After a Finding of Neglect

A finding of neglect does not eliminate a parent's due process protections. In fact, the Supreme Court has held that parents with past neglect findings are entitled to heightened procedural safeguards:

The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.¹⁵⁸

As the Supreme Court discussed in *Santosky*, a parent facing the permanent severing of her parental rights deserves heightened due process protections.¹⁵⁹ A parent is particularly vulnerable in the context of a trial discharge, as her child is technically in foster care and, therefore, the clock continues to run for when the foster care agency must file to terminate her

¹⁵⁸ *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982). Just as a parent's due process protections continue after a finding of neglect, a child's due process rights unquestionably should continue after such finding has been entered against her parent; this principle aligns with the Second Circuit's recognition of a parent and a child's "reciprocal rights" to remain together. *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977).

¹⁵⁹ *Santosky*, 455 U.S. at 753-54.

parental rights.¹⁶⁰ It is in everyone's interest to avoid erroneous terminations of parental rights.¹⁶¹

A prior neglect finding should not eliminate a parent's right to challenge a removal through an expedited hearing. As previously discussed, before trial, a parent has a right to an emergency hearing, held daily, when the government takes her child from her.¹⁶² However, a parent is stripped of this same right to judicial review post-trial when her child is home on trial discharge. This denial of a fundamental parental right is inconsistent with due process, and not dependent on the Supreme Court's extolled legal analysis and procedural safeguards.

4. People Facing Parole Revocation Are Entitled to a Hearing; Similarly, Parents Whose Children Are Removed During a Trial Discharge Are Entitled to a Hearing

Revocations of parole are a helpful analogy to child removals during a trial discharge. Those facing parole and probation revocation proceedings—physical deprivations of liberty that occur after a judge has determined that they committed crimes—must be afforded due process protections.¹⁶³ Just as people on parole are entitled to a hearing if their parole is revoked, a parent should similarly be entitled to judicial review of her child's removal during a trial discharge.

As discussed above, foster care agencies often remove a child during a trial discharge because a parent allegedly violated a condition of the trial discharge.¹⁶⁴ Similarly, many parole revocations are based on technical violations.¹⁶⁵ Technical violations are non-criminal and occur when a person on parole does not meet one of the conditions of supervision, which may include: violating curfew, testing positive for an illegal substance, not meeting with a parole officer, and struggling to obtain or to maintain

¹⁶⁰ See *supra* note 85.

¹⁶¹ See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT 1 (2016) [hereinafter CHILDREN'S BUREAU, THE AFCARS REPORT] (stating that there were 117,794 children in foster care waiting to be adopted by September 2016).

¹⁶² See *supra* Part II.B. for discussion of pre-trial emergency hearings.

¹⁶³ *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) ("Even though the revocation of parole is not a part of the criminal prosecution . . . the loss of liberty entailed is a serious deprivation requiring that the parolee be accorded due process."); see also *Overton v. Bazzetta*, 539 U.S. 126, 138 (2003) (Stevens, J., concurring) ("[P]arole revocation is a deprivation of liberty within the meaning of the Due Process Clause of the Fourteenth Amendment . . .").

¹⁶⁴ See *supra* Part III.B.

¹⁶⁵ For more information on parole violations, see JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST., JUST. POL'Y CTR., *BEYOND THE PRISON GATES: THE STATE OF PAROLE IN AMERICA* (2002).

employment.¹⁶⁶ In 2017, it was estimated that around 61,000 people were in prison because of a technical parole violation.¹⁶⁷

There are many similarities between parole revocation and removals of children home on trial discharge. Both parole and a trial discharge take place after a finding of guilt, either of a crime or of parental unfitness. In both cases, someone has returned home from state custody (foster care or prison) on a trial basis, and is at risk of returning to state custody. The government is closely scrutinizing and surveilling someone's life in both situations. In addition, both can occur because of conditions that are completely removed from the original reason for the court involvement—the carrying out of a criminal offense or the neglecting of a child. Finally, both a parole revocation and a child removal during a trial discharge result in serious infringements of a constitutionally protected liberty interest.¹⁶⁸

The Supreme Court has ruled that those facing parole revocations are entitled to prompt judicial review to ensure that people on parole do not improperly lose their liberty.¹⁶⁹ Given the similarities between parole and trial discharge, requiring an emergency hearing to review any decision to remove a child during a trial discharge is consistent with Supreme Court precedent.

B. A Hearing Will Maintain the Balance of Powers Between the Executive and Judicial Branches

Requiring judicial review of a child removal during a trial discharge also aligns with separation of powers principles. The New York State Constitution has a system of three independent and separate branches of

¹⁶⁶ Jeremy Travis & Kirsten Christiansen, *Failed Reentry: The Unique Challenges of Back-End Sentencing*, 13 GEO. J. ON POVERTY L. & POL'Y 249, 251 (2006); Christine S. Scott-Hayward, *The Failure of Parole: Rethinking the Role of the State in Reentry*, 41 N.M. L. REV. 421, 422 (2011).

¹⁶⁷ Eli Hager, *At Least 61,000 Nationwide Are in Prison for Minor Parole Violations*, MARSHALL PROJECT (Apr. 23, 2017, 10:00 PM), <https://perma.cc/6N2D-S3AG> (discussing a survey of state jails and prisons, which found that there were more than 61,000 people in 42 state prison systems for technical parole violations); see also Travis & Christiansen, *supra* note 166, at 251 (stating that national estimates show that around two-thirds of parole violations, used to force people back into prison, were for technical violations).

¹⁶⁸ A parole revocation results in a person's loss of physical liberty, and a child removal during a trial discharge results in a parent and a child's loss of their family integrity. See *supra* note 163 for parole revocation case law, and see *supra* Part IV.A.1. for a discussion of how a child removal infringes on the right to family integrity.

¹⁶⁹ See *Gagnon v. Scarpelli*, 411 U.S. 778, 781 (1973) (“[A] [person on parole] is entitled to . . . a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole . . .”).

government (legislative, executive, judicial) acting as checks and balances on each other.¹⁷⁰ The New York State executive branch oversees private foster care agencies.¹⁷¹ The lack of judicial review of foster care agency decisions to remove children on trial discharge gives the executive branch unchecked, unilateral power to strip a parent of an important constitutional right to parent his child. To fulfill the purposes of the separation of powers doctrine, the judicial branch should exercise its review power to check the executive's power.

C. The Standard at an Emergency Hearing to Review a Trial Discharge Removal Should Be the Imminent Risk Standard

The standard at this emergency hearing should be the same imminent risk standard that judges use when a child is first taken from his parent.¹⁷² This standard is particularly significant to a child who is home on trial discharge and re-adjusting after being previously removed from his parent. After all, a child home on trial discharge is continuing to recover from a traumatic separation from his parent and from subsequent adjustment to living somewhere else, which usually entails a complete change in his school, neighborhood, and other familiar parts of daily living.¹⁷³ In this context, the potential of harm to the child and to the family unit from another removal is very high,¹⁷⁴ and the more demanding imminent risk standard is warranted.

¹⁷⁰ See *Matter of Maron v. Silver*, 14 N.Y.3d 230, 258 (2010) (citations omitted) (“The concept of the separation of powers is the bedrock of the system of government adopted by this State in establishing three coordinate and coequal branches of government, each charged with performing particular functions.”).

¹⁷¹ Press release, Thomas P. DiNapoli, Office of the N.Y. State Comptroller (July 21, 2017), <http://perma.cc/J8ET-76VQ> (“[The state Office of Children and Family Services] regulates and supervises child welfare services, including foster care and adoption.”).

¹⁷² As discussed in *supra* Part II.D., the standard shifts to a best interest of the child standard at the dispositional hearing. Since trial discharges only occur after a dispositional hearing, the default standard would be a best interest of the child standard. When the dispositional order places a child in foster care as a continuation of the child's removal from her parent, it is more understandable why a best interest standard would apply (presumably an imminent risk analysis would have been done when the initial removal took place pre-disposition). By contrast, all decisions to remove a child who is at home with her parent should be evaluated within the imminent risk framework, as the potential harm from a mistaken removal is so high. Therefore, an imminent risk standard should also be used in the rare cases where a judge removes a child at disposition and places her in foster care, as a part of the dispositional order. See, e.g., *Matter of Telsa Z.*, 71 A.D.3d 1246 (N.Y. App. Div. 2010). This would entail a fundamental change in the statutory scheme, but it is necessary to satisfy due process and to ensure that a child is only removed from her parent when absolutely necessary.

¹⁷³ See Chill, *supra* note 25, at 457.

¹⁷⁴ See *supra* Part III.C.

1. There Is Precedent for Use of the Imminent Risk Standard Outside of a Pre-Trial Emergency Hearing

At least one New York family court decision has recognized that the *Nicholson* imminent risk analysis applies to requests for children to return to their parents, even when the applications are not made in pre-trial emergency hearings.¹⁷⁵ In *Matter of Samuel W.*, the Family Court released the child to his mother, before the trial was completed, pursuant to the mother's section 1061 application to modify the prior court order.¹⁷⁶ In the judge's analysis of whether to release the child, Samuel, to his mother's care, the Family Court conducted a *Nicholson* analysis of imminent risk.¹⁷⁷ The imminent risk standard allowed the judge to weigh the risk of harm from Samuel's continued placement in foster care against the risk of harm from Samuel's return to his mother's care. Similarly, the imminent risk standard would give proper weight to the potential harm of a child on trial discharge being removed from her parent again, in addition to considering the imminent risk of harm to the child from remaining home with her parent.

2. The Imminent Risk Standard Decreases the Impact of Racial Bias

A higher standard allows less room for implicit bias to affect the outcome, acting as a check on racial bias that infiltrates the child welfare system.¹⁷⁸ Research has documented racial disparities (especially harming Black children) at every decision-making stage of a child welfare

¹⁷⁵ In current practice, the imminent risk standard is only applied in pre-trial emergency hearings pursuant to N.Y. FAM. CT. ACT §§ 1027, 1028 (McKinney 2018).

¹⁷⁶ *Matter of Samuel W.*, No. NA09331/14, 2015 WL 5311117, at *1 (N.Y. Fam. Ct. Kings Cty. 2016). The mother had previously lost an emergency hearing pursuant to FAM. CT. § 1027 and, therefore, was not entitled to another emergency hearing pursuant to *Id.* § 1028. *Matter of Samuel W.*, 2015 WL 5311117, at *1. The fact that the case was mid-trial also meant that the standard had not yet shifted to a best interest standard, which occurs at disposition. *Id.*

¹⁷⁷ *Matter of Samuel W.*, 2015 WL 5311117, at *1 (noting the fact that the young child, Samuel, had already been moved five times since the beginning of the case). Section 1061 hearings are guided by a "good cause" directive in the statute, meaning the judge here was not required to apply the imminent risk standard. FAM. CT. § 1061.

¹⁷⁸ See Ledesma, *supra* note 18, at 51-56 (describing how subjective standards allow internal biases of judges and workers to affect outcomes in child welfare cases); CHILDREN'S BUREAU, THE AFCARS REPORT, *supra* note 161, at 2 (citing government data on national foster care statistics, finding that 56% of children in foster care were not white as of October 20, 2017); see generally ROBERTS, SHATTERED BONDS, *supra* note 13.

case.¹⁷⁹ In particular, Black children are often removed from their families, more frequently than other children, for reasons that are unconnected to imminent risk concerns.¹⁸⁰ Further, Black families are less likely to be offered supportive in-home services, which could prevent the need for a child's removal.¹⁸¹

Although there are a vast array of factors that may play a role in a child removal decision, racial bias is highly likely to influence the determination. Racism has been shown to impact removal decisions on an emergency basis at the beginning of a case—there is no reason to suggest that race would not also impact removal decisions made during trial discharge.¹⁸² Allowing for less discretion in the decision-making process, through the higher imminent risk standard, could act as a check on the inevitable racial influence in child welfare workers' decisions, including the foster care workers' decisions to remove children on trial discharge.¹⁸³

¹⁷⁹ See, e.g., JINA LEE ET AL., NAT'L CTR. FOR YOUTH LAW, *IMPLICIT BIAS IN THE CHILD WELFARE, EDUCATION, AND MENTAL HEALTH SYSTEMS 2-4* (2015) (discussing racial disproportionality at various stages of a child welfare case, disfavoring Black children in particular, including the initial reporting and the investigation stage, the case substantiation, the child removal, and the length of time a child is forced to stay in foster care); Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1634-35 (2011) (explaining study results that demonstrate how racial bias impacts decision-making at the case substantiation stage); CTR FOR THE STUDY OF SOC. POLICY, *THE RACE + CHILD WELFARE PROJECT, FACT SHEET 1: BASIC FACTS ON DISPROPORTIONATE REPRESENTATION OF AFRICAN AMERICANS IN THE FOSTER CARE SYSTEM* (2004), <http://cssp.org/uploadFiles/factSheet1.pdf>. Dangerously, some argue that racial disproportionality in foster care is not a result of racism, but is instead reflective of higher rates of actual maltreatment in Black families. See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 871 (2009).

¹⁸⁰ See U.S. GOV'T ACCOUNTABILITY OFFICE, *AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 20-25* (2007) (summarizing findings regarding various factors that increase the impact of racial bias and contribute to Black children being unnecessarily removed); Dettlaff et al., *supra* note 179, at 1635 (explaining that child welfare workers perceived a greater risk of abuse and neglect in Black families, as compared to other families).

¹⁸¹ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 180, at 21-22.

¹⁸² See Simon, *supra* note 32, at 359-62 (exploring how racial bias infiltrates decisions to remove children without prior judicial review or court order).

¹⁸³ Of course, this does not always happen in practice because racial bias also permeates the judiciary. See sources cited *supra* note 55 (discussing racial disparities between family court judges and families forced into court, and how that negatively impacts accused parents).

3. A Higher Standard Will Focus the Hearing on the Child's Safety

The imminent risk standard would allow a judge to focus all removal decisions on the child's safety. Under the current practice, there are myriad conditions in place for a trial discharge that, if "violated," could prompt a child's removal.¹⁸⁴ The legal standard for a removal is not the violation of a court order or a foster care agency plan, however.¹⁸⁵ Foster care agency workers often misunderstand their legal obligations and confuse how court orders should impact a decision to remove a child from her home, which divorces a decision to remove a child on trial discharge from any concrete safety concerns for the child.¹⁸⁶ The imminent risk standard would clarify the actual reason for the removal, determine whether there are active safety concerns for the child, and hold the foster care agency accountable to keep a child at home, except when there are concrete safety concerns. Judges must ensure that a child and her parent are not unnecessarily separated and traumatized.

4. The Imminent Risk Standard Furthers the Rehabilitative Purpose of the Family Court Act

Finally, applying the imminent risk standard to review a child removal during a trial discharge aligns with the Family Court Act's purpose to "rehabilitate" and to reunify families.¹⁸⁷ A family court proceeding's goal is not to punish a parent for wrongdoing, but to address the underlying problems that initially brought the family into court.¹⁸⁸ In light of the governing rehabilitative law and the disruption in family reunification caused by a child removal, there should be a higher burden on the government to justify all decisions to remove children from their homes. An imminent risk standard would appropriately ensure that the government's decision to remove a child is justified.

CONCLUSION

A shared recognition of injustice may explain why people across the United States experienced such visceral reactions in response to the images and the sounds of the children at the border being dragged away

¹⁸⁴ Email interview with Noemi Cotto, *supra* note 95.

¹⁸⁵ See Part II.B. for an explanation of the imminent risk standard, which applies in an emergency hearing when a child is removed pre-disposition. At the least, the best interest of the child standard should govern post-disposition removals, although this Note argues for an imminent risk standard to review all removals. See *supra* note 172.

¹⁸⁶ See *supra* note 104.

¹⁸⁷ See *supra* note 52.

¹⁸⁸ *Id.*

screaming from their parents. Yet, this same painful scene is occurring to our neighbors every day, with parents fighting simply for a hearing to evaluate the government's removal of their child. While parents advocate for some form of judicial review, children struggle to deal with the trauma of being removed from their parents, trauma that will continue to affect them for the rest of their lives. Legislation that will guarantee an emergency hearing to review the government's decision to remove a child during a trial discharge is urgently needed. Such legislation will provide parents with the due process that they are entitled to under the U.S. Constitution and will reflect New York State's commitment to keep families together.