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EMERGENCY REMOVALS WITHOUT A COURT ORDER: USING THE LANGUAGE OF EMERGENCY TO DUCK DUE PROCESS

Jane Brennan[*]

For a brief moment during the recent September democratic presidential debate, the ugly underbelly of the child welfare system unexpectedly took center stage. When asked about what responsibility Americans need to take to repair the legacy of slavery, the former vice president responded by propagating a myth that Black parents do not know how to parent.[1] *Former Vice President Joe Biden said "[w]e bring social workers into homes and parents to help them deal with how to raise their children. It's not that they don't want to help. They don't—they don't know quite what to do."*[2] *What exactly is it that these Black parents do not know to do? More importantly, why is this a justification for interference with a family? This statement and sentiment highlights the ways in which the child welfare system was designed, and the racist assumptions and myths that allow it to continue operating.*[3] *Dorothy Roberts, a*

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[*] J.D., Brooklyn Law School, 2020; B.A., Columbia University, 2010. Many thanks to the members of the Journal of Law and Policy for your thoughtful editing and guidance.

[1] Charles M. Blow, *Joe Biden Is Problematic*, N.Y. TIMES (Sept. 15, 2019), https://www.nytimes.com/2019/09/15/opinion/joe-biden.html.

[2] *Id.*

[3] "One hundred years from now, today's child welfare system will surely be condemned as a racist institution. . . . School children will marvel that so many scholars and politicians defended this devastation of Black families in the name of protecting Black children. The color of America's child welfare system is the reason Americans have tolerated its destructiveness." DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE IX-X (2002); *see also* Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL (Mar. 26, 2018), https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/.

law professor who has studied foster care systems in the United States and its effects on Black family notes, "[i]f you go into dependency court in Chicago, New York, or Los Angeles without any preconceptions, you might conclude that the child welfare system is designed to monitor, regulate and punish Black mothers."[4] *Given the widespread inequities built into state organized child welfare systems, revising existing federal law is the most efficient, short-term solution to ensure that children are not unnecessarily removed from their families.*

INTRODUCTION

Imagine it is the middle of the night and you are fast asleep in your bed. Suddenly, you are jolted awake by a loud knock on your front door. Half asleep and slightly disoriented, you roll out of bed and make your way to the source of the noise. Cautiously, you open the door to find a child protective worker standing before you. You are confused.[5]

The child protective worker explains that she has arrived to investigate a report of child abuse and neglect. Someone—she will not tell you who—made a report about you to the Statewide Central Register.[6] She inspects your apartment for food, sleeping arrangements, cleanliness, smoke detectors, and window guards. She questions your children. She then removes their clothes to

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[4] Dorothy E. Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 56 UCLA L. REV. 1474, 1483 (2012).

[5] This hypothetical fact pattern is presented for purposes of illustration. It is a practice that occurs in New York City. While state agencies differ across geographical areas, the process of emergency removals looks similar across the country. *See generally* Kathryn Joyce, *The Crime of Parenting While Poor*, THE NEW REPUBLIC (Feb. 25, 2019), https://newrepublic.com/article/153062/crime-parenting-poor-new-york-city-child-welfare-agency-reform.

[6] The Statewide Central Register of Child Abuse and Maltreatment receives telephone calls 24 hours a day for reports alleging child abuse or maltreatment within New York State. Information reported to the Statewide Central Register is given to the local child protective agency for investigation. Both mandated reporters and the public can call in to report allegations. *The Statewide Central Register of Child Abuse and Mistreatment*, OFF. OF CHILD. AND FAM. SERVS., https://ocfs.ny.gov/main/cps/ (last visited Oct. 3, 2020).

examine them for marks and bruises.[7] She asks you questions about your mental health, drug use, and your intimate relationships.[8] You are still confused and unsure about what is happening, when the next thing you know, your child is being led away, taken from your custody by a stranger—who happens to be a state agency official. The child protective worker tells you something about coming to court the following day, a child safety conference,[9] and parenting classes.[10] Unceremoniously, she gives you some paperwork and quickly departs.

This is not an uncommon situation, especially in poor communities of color.[11] There is ample research documenting the

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[7] *See What You Need to Know About ACS: Parents Rights when Dealing with the NYC Administration for Children's Services*, CTR. FOR URB. PEDAGOGY, http://welcometocup.org/file_columns/0000/1747/cup_mpp_acs_finalmech_20190412_fromcup_webready.pdf (last visited Oct. 3, 2020) (describing what an Administration for Children's Services' ("ACS") investigation may look like and what questions ACS will ask during an investigation).

[8] ACS investigators often do not look official but do need to carry an ID. You do not have to open the door for an ACS investigator unless she or he has a warrant. You can also refuse to speak to the ACS investigator. However, few people understand that anything they say or their reaction to an ACS investigation may later be used in court or even as a basis for the petition asking for the removal of a child. *See id.*

[9] A child safety conference is a meeting facilitated by the child protective agent and the parents where important decisions are made about the children. Lawyers cannot attend child safety conferences, but a social worker or parent advocate may attend if a parent has the resources to contact someone prior to the conference. Although a social worker or parent advocate may attend a child safety conference if a parent has the resources to contact someone prior to the conference, lawyers cannot attend. This leaves parents to attend these child safety conferences without legal representation. Anything said or observed at the conferences, as well as the child protective agency's investigation, can be used against a parent in court and as a basis for removal of the children from the home. *See id.* (explaining a child safety conference).

[10] A service plan responds to the issues that caused ACS to file the case, and completion of a service plan is an important factor in concluding a case in family court either by trial or settlement. Service plans may include anger management classes, parenting classes, drug tests, etc. *See id.* (explaining a service plan).

[11] Yasmeen Khan, *Family Separations in Our Midst*, WYNC (Apr. 17, 2019), https://www.wnyc.org/story/child-removals-emergency-powers/.

racial disproportionality and disparity in the child welfare system.[12] When children are removed on an emergency basis, they are often taken from their families with no warning and subjected to extensive questioning, medical exams, and strip searches.[13] These emergency removals, which are often conducted in the middle of the night,[14] are typically based on the report of a mandated reporter, such as a school teacher.[15] However, any member of the public can report allegations of child mistreatment to prompt an investigation.[16] The number of reports that do not rise to the level of abuse or neglect is staggering.[17] There is little protection against malicious reporting,[18] despite the fact that removal of a child from his or her home—and family—is a traumatic experience for children, parents, and the family unit.[19]

The effects of child abuse can be devastating. By and large, however, the current child welfare system does not adequately help—or even identify—children who have been abused, and instead inflicts harm onto the families it should be assisting. Ultimately, the child welfare system fails to protect children because it fails to support families.[20]

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[12] *See generally Racial Disproportionality and Disparity in Child Welfare*, CHILDS. BUREAU (Nov. 2016), https://www.childwelfare.gov/pubpdfs/racial_disproportionality.pdf (summarizing research documenting the overrepresentation of African Americans and Native Americans in the child welfare system).

[13] *See* Conor Friedersdorf, *In a Year, Child-Protective Services Checked Up on 3.2 Million Children*, THE ATLANTIC (July 22, 2014), https://www.theatlantic.com/national/archive/2014/07/in-a-year-child-protective-services-conducted-32-million-investigations/374809.

[14] *See* Joyce, *supra* note 5.

[15] *Child Maltreatment 2018: Summary of Key Findings*, CHILDS. BUREAU, https://www.childwelfare.gov/pubPDFs/canstats.pdf (last visited Oct. 4, 2020).

[16] *Id.*

[17] *See Child Maltreatment 2017*, U.S. DEP'T OF HEALTH & HUM. SERVS. 6–8, https://www.acf.hhs.gov/sites/default/files/cb/cm2017.pdf (last visited Oct. 4, 2020).

[18] Rachel Blustain, *False Abuse Reports Trouble Child Welfare Advocates*, CITY LIMITS (Oct. 4, 2013), https://citylimits.org/2013/10/04/false-abuse-reports-trouble-child-welfare-advocates/.

[19] *See* Friedersdorf, *supra* note 13.

[20] Tom Morton, *The Pernicious Failure of Child Welfare Reform*, THE IMPRINT (Nov. 21, 2017), https://chronicleofsocialchange.org/child-welfare-2/pernicious-failure-child-welfare-reform/28708.

Nationwide, child welfare agencies lack evidence-based policies and procedures, provide inadequate training, and require insufficient professional qualifications from the caseworkers empowered to decide whether or not to remove a child.[21] These shortcomings have paved the way for paternalist viewpoints, like those expressed by the former vice president on the debate stage,[22] structuring a racist and oppressive child welfare system.[23] Insidious biases give rise to the presumption that Black and Brown people are bad parents and that their children are safer in the hands of the state.[24] Subsequently, shortcomings in child welfare agencies have set up the system to fail.[25] Frequently, the child welfare system does not serve a family's or a child's best interests because far too often it relies on the unnecessary emergency removal of children from their families.[26] Despite the deployment of well-meaning rhetoric about the need to prioritize keeping families together, unauthorized and unnecessary emergency removals continue to happen daily.[27]

Overzealous removals harm children and the family unit alike, and are far too often the default policy when a child's welfare is threatened.[28] The Department of Health and Human Services typically publishes annual statistics on the work of child protective service agencies, but notably, there is little data concerning the number of kids removed from their parents, even temporarily, who are then returned after investigators find no evidence of maltreatment.[29] "Maltreatment" refers to the four predominate

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[21] *Id.*

[22] Blow, *supra* note 1.

[23] Asia Piña, *Defending Families Facing Child Removal*, DOIN' THE WORK (Sept. 2, 2019), https://dointhework.podbean.com/e/defending-families-facing-child-removal-asia-pina-msw.

[24] *Id.*

[25] Morton, *supra* note 20.

[26] Khan, *supra* note 11.

[27] *About ACS*, NYC CHILDREN, https://www1.nyc.gov/site/acs/about/about.page (last visited Oct. 3, 2020).

[28] *See* Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213, 276 (2003) (describing a lawsuit challenging ACS's policy of automatically removing children from homes where domestic violence had occurred).

[29] *See* Friedersdorf, *supra* note 13; *see* U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 17.

categories recognized by the majority of states: neglect, physical abuse, sexual abuse, and a catch-all "other" category, which can include "threatened abuse or neglect, drug/alcohol addiction," "lack of supervision," or any other form of maltreatment a state wishes to include.[30] The most recent statistic, released in 2012, showed that more than 100,000 children who were removed in 2001 were subsequently found not to have been maltreated.[31] The number accounts for one in three children who were removed from their families in 2001.[32] Nationally, an average of about 700 children every day are removed from the custody of their parents based on allegations of abuse or neglect.[33] The vast percentage of cases prompting removal allege neglect rather than abuse,[34] and many of those cases are complicated by issues related to poverty.[35]

What constitutes an acceptable justification for an emergency removal depends entirely on jurisdiction. The circuit courts are divided on the question of whether or not child protective services, where it is shown the agency could reasonably have obtained an order prior to removal, may remove a child from their home without such a court order.[36]Additionally, even in states where emergency removals are permitted by law to be employed only in response to emergency situations, in practice, this is not the case.[37] This is due

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[30] U.S. DEP'T OF HEALTH & HUM. SERVS., *supra* note 17, at vii.

[31] Friedersdorf, *supra* note 13.

[32] *Id.*

[33] *Id.*

[34] While national data is not available, small samplings of data show this to be true. *See* Lauren Shapiro, Dir. of the Fam. Def. Prac., Brooklyn Def. Servs., Remarks before the N.Y.C. Council on Removals from Parents and Caretakers in Child Welfare Cases (Nov. 27, 2018) (transcript available on the Brooklyn Defender Service's webpage) ("Over 90 percent of [BDS] clients are charged with allegations of neglect, rather than abuse.").

[35] *Id.*

[36] *See Tenenbaum v. Williams*, 193 F.3d 581, 594-5 (2d Cir. 1999) (holding that if there is time to seek a court order, child protective services must do so prior to removal); *c.f.* Doe v. Kearney, 329 F.3d 1286, 1295–96 (11th Cir. 2003) (rejecting the Second Circuit's holding that the focus should be on whether or not there is time to obtain a court order).

[37] *See* Shapiro, *supra* note 34. (noting that in Brooklyn, New York, where the law permits child protective services to remove children without a court order, only in an emergency situation—when the danger to a child is so serious and so

in large part to vague child neglect and abuse statutes that grant wide swaths of discretion to social workers, which in turn invites bias and imprecise, inconsistent determinations of what constitutes an "emergency."[38] Though the government's interest in removing children is ostensibly rooted in protecting them from harm, the strategy often has the opposite impact, generating traumatic experiences due to unnecessary removals. [39] Thus, states should consider the undisputed harm of removing a child from his or her natural home against the harm it invokes as a rationale for removal.[40]

Part I of this Note examines the longstanding reciprocal right of parents and children to maintain their family integrity as a fundamental liberty interest protected under the Due Process Clause of the Fourteenth Amendment. Part I also discusses the qualified nature of this fundamental liberty; particularly, how the states' interest in protecting children from abuse and neglect allows for certain regulations and intrusions on this right. Emergency removals, for example, are one of the most direct manifestations of the states' *parens patriae* power.[41] Part II describes the current laws regulating emergency removals, examining interactions between state and federal statutory law as well as constitutional issues raised by these proceedings. Part II then analyzes the current circuit split regarding when emergency removals are constitutionally authorized, and in particular, when removals are permitted without a court order. Part III considers the harm children suffer when

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immediate that there is no time to go to court—is it "common for Family Court Judges to refuse to decide an application for removal, instead scheduling the case for a hearing the next day and telling the parties that "[child protective services] has its emergency removal powers").

[38] *See* Michelle Goldberg, *Has Child Protective Services Gone Too Far?*, THE NATION (Sept. 30, 2015), https://www.thenation.com/article/has-child-protective-services-gone-too-far/.

[39] *See infra* part III (addressing the harms of removal).

[40] Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care*, 19 U. PA. J. L. & SOC. CHANGE 207, 237 (2016) ("[T]he federal government must acknowledge the problem of short stayers by utilizing data related to children who may unnecessarily enter foster care in the Child and Family Services Review, the accountability process used to assess state compliance with federal child welfare requirements.").

[41] *See infra* part I (addressing the state's *parens patriae* power).

removed from their parents and homes, synthesizing social science research and the realities of the child welfare system to demonstrate the grave damage unnecessary removals and intrusions on family integrity cause. Finally, Part IV proposes codifying the narrowest emergency removal exception as federal law. This section provides an overview of the unique ways federal funding of the child welfare system allows the federal government to influence nationwide policy changes within state child protective agencies. The proposed narrow emergency removal exception will appropriately restrict state child protective practices, authorizing caseworkers to make removals only in truly exigent circumstances. This change in the law would counteract the harmful trends and tendencies of the child welfare system primarily by minimizing individual caseworker discretion, thus ensuring children and families are not harmed by emergency removals—a drastic form of family intervention that is too frequently employed without justification.

I. THE RIGHT TO FAMILY INTEGRITY IS A FUNDAMENTAL CONSTITUTIONAL RIGHT UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT

A. History of the Right to Family Integrity

The Fourteenth Amendment's Due Process Clause provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[42] Beginning in the early 1900s, the Supreme Court started incorporating specific provisions enumerated in the Bill of Rights into the "liberties" protected by the Due Process Clause of the Fourteenth Amendment.[43] But this incorporation was merely a starting point. In *Griswold v. Connecticut,* the Supreme Court recognized that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help

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[42] U.S. CONST. amend. XIV, § 1.

[43] *See generally* Lochner v. N.Y., 198 U.S. 45 (1905) (locating the right to contract and economic liberates in the fourteenth amendment's due process clause); Adkins v. Childs. Hosp., 261 U.S. 525 (1923) (striking down a minimum wage law as an infringement on economic liberties protected by the Fourteenth Amendment).

give them life and substance."[44] These rights located in the "penumbras" also enjoyed protection under the Fourteenth Amendment.[45] Over time, the Supreme Court has also located and incorporated a number of fundamental liberty interests beyond those specifically enumerated in the Bill of Rights, within the Fourteenth Amendment's due process clause, including the right to privacy, as recognized in *Roe v. Wade*.[46]

The right to family integrity is one of the oldest and perhaps strongest fundamental liberty interests protected in American jurisprudence under the Due Process Clause of the Fourteenth Amendment.[47] The Supreme Court reaffirmed, in *M.L.B. v. S.L.J.*, that "[c]hoices about family life," and the rights of parents to raise their children, are rights of "basic importance in our society."[48] These rights, the court wrote, are to be protected from "the State's unwarranted usurpation, disregard, or disrespect."[49] Similarly, family unity,[50] and the "private realm of family life,"[51] have also long been protected from the encroachment of the state by the

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[44] Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

[45] *Id.* at 484.

[46] *See generally id.* (protecting the possession and use of contraception under the due process clause); Roe v. Wade, 410 U.S. 113 (1973) (protecting the right to abortion under the due process clause); Moore v. City of E. Cleveland, Ohio, 431 U.S. 494 (1977) (protecting the right to live as an untraditional family under the due process clause); Lawrence v. Texas, 539 U.S. 558 (2003) (protecting the right to sexual intimacy under the due process clause); Obergefell v. Hodges, 576 U.S. 644 (2015) (protecting the right to same sex marriage under the due process clause).

[47] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); *see* Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

[48] M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996).

[49] *Id.*

[50] *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.").

[51] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

Fourteenth Amendment's due process clause.[52] In 1923, the Supreme Court held in *Meyer v. State of Nebraska* that there was a constitutionally protected right of parents to "establish a home and bring up children."[53] *Meyer* overturned a Nebraska law that made it a crime for a teacher to "teach any subject to any person in any language other than the English language."[54] In reversing the conviction of a teacher who violated the law, the court held that the Due Process Clause protected "the power of parents to control the education of their own [children]."[55] Two years later, in *Pierce v. Society of Sisters*, the court similarly upheld a parent's right to provide their children with religious schooling, thereby striking down an Oregon state law mandating attendance in public school.[56] In 1977, in *Moore v. City of E. Cleveland*, Justice Powell located the constitutional protection of the "sanctity of the family," finding that the family unit is "deeply rooted" in the United States' history and is the institution through which our country's morals, cultures, and traditions are passed down to subsequent generations.[57]

Most recently, in 2000, the Supreme Court reaffirmed these rights in *Troxel v. Granville*, holding that, "[i]n light of this extensive precedent, it cannot now be doubted that the Due Process

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[52] *Troxel,* 530 U.S. at 65–66; Meyer v. State of Nebraska, 262 U.S. 390, 399 (1923) (establishing the rights "to marry, establish a home and bring up children . . . as essential to the orderly pursuit of happiness by free men"); *see, e.g.*, Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984) ("[B]because the Bill of Rights is designed to secure individual liberty, it must afford the formation and preservation of [the family] a substantial measure of sanctuary from unjustified interference by the State."); Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (stating that the Ninth Amendment protects "fundamental personal rights" such as the right to raise a family, even "though [it is] not specifically mentioned in the Constitution").

[53] *Meyer*, 262 U.S. at 399.

[54] *Id.* at 397.

[55] *Id.* at 401.

[56] Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.").

[57] Moore v. City of E. Cleveland, 431 U.S. 494, 503–04 (1977) ("[T]he institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[58]

The right to family integrity should be conceptualized as a dual right of parents and children[59]—that is, a parent's right to "the care, custody, and nurture" of their children,[60] and a child's right to be raised by their parent at home.[61] The 1989 Convention on the Rights of the Child describes the family "as the fundamental group of society," maintaining that the family best promotes the "growth and well-being" of all members of society, especially children.[62] The Convention boasts 196 member-states, evidencing the international community's recognition of the central role of family integrity in promoting healthy children.[63]

Even when the bonds between child and parents are strained, the parents retain a natural interest in their family structure.[64] The long-established right to family integrity recognizes the intrinsic value of family bonds and relationships.[65] Social science has also documented the importance of the family unit on a child's

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[58] Troxel v. Granville, 530 U.S. 57, 66 (2000).

[59] Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.").

[60] Stanley v. Illinois, 405 U.S. 645, 651 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

[61] United Nations Convention on the Rights of the Child art. 7, Nov. 20, 1989, 1577 U.N.T.S. 3.

[62] United Nations Convention on the Rights of the Child preamble, Nov. 20, 1989, 1577 U.N.T.S. 3 (recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding).

[63] *Id.* (noting that, currently, 196 countries are party to the Convention, including every member of the United Nations except the United States).

[64] Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.").

[65] *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("[N]atural bonds of affection lead parents to act in the best interests of their children.").

wellbeing,[66] as well as the profound harm caused by removing children from their parents—even when the separation is only temporarily.[67]

The strong liberty interests of the family unit are not absolute and this Note does not endeavor to make that argument.[68] The Courts have never held that the family unit is beyond state regulation when there exists a compelling government interest for such regulation.[69] There are situations where the state may exercise regulatory power, acting as a so-called *parens patriae*,[70] to take custody of children who have been abused or neglected.[71] This power arises when the circumstances are deemed too dangerous for a child to remain at home.[72] However, these extreme intrusions into the family unit, especially when children are removed from their parents, should be the exception, not routine practice.[73]

The reality, however, is that the fundamental right to family integrity is routinely violated.[74] Far too frequently, a state seeks removal—the most extreme and damaging of solutions—only to

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[66] *See Parenting Matters: Supporting Parents of Children Ages 0–8*, NAT'L ACAD. PRESS, https://www.nap.edu/read/21868/chapter/2 (last visited Oct. 7, 2020).

[67] Children's Rights Litigation Committee of the American Bar Association Section of Litigation, *Trauma Caused by Separation of Children from Parents A Tool to Help Lawyers*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf (last visited Oct. 5, 2020); *see also* discussion *infra* Part III.

[68] Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that a state power may limit parental freedom when the welfare of a child is affected).

[69] *Id.*

[70] *Parens Patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The state regarded as a sovereign; the state in its capacity as provider of protection to those unable to care for themselves.").

[71] *See Prince* 321 U.S. at 166 ("But the family itself is not beyond regulation in the public interest, as against a claim of religious liberty. . . . And neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as parens patriae, may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.").

[72] Khan, *supra* note 11.

[73] *Id.*

[74] *Id.*

correct this overreach a few weeks, or even months, later.[75] This trend is made even more troubling by the long, racist history of family separations, unrelated to the safeguarding of children, that has shaped this nation's child protective services.[76] The rhetoric of saving children has often been the rallying cry of those seeking to justify harmful practices that society routinely condemns in retrospect.[77] Accordingly, the need to scrutinize the reasons for state intrusion into the family structure has a strong historical basis.[78]

B. Protections Afforded Parents Under the Fourteenth Amendment

Fundamental liberty interests, such as the right to family integrity, are afforded both substantive and procedural due process protections under the Fourteenth Amendment.[79] Any law enacted that encroaches on the fundamental right to family integrity would likely need to be anchored by a compelling government interest.[80] As mentioned, the state has a recognized interest in protecting the health and safety of children.[81] The right to family integrity and a parent's custody of their children has never been free from

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[75] Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow'*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html.

[76] Jeffery Robinson, *America Was in the Business of Separating Families Long Before Trump*, AM. CIV. LIBERTIES UNION (July 6, 2018), https://www.aclu.org/blog/racial-justice/america-was-business-separating-families-long-trump.

[77] Harmeet Kaur, *Actually, the US Has a Long History of Separating Families*, CNN (June 24, 2018, 9:06 PM), https://www.cnn.com/2018/06/24/us/us-long-history-of-separating-families-trnd/index.html.

[78] *Id.*

[79] *See* Tenenbaum v. Williams, 193 F.3d 581, 588 (2d Cir. 1999) (analyzing parents' claims against a child protective agency alleging an illegal removal from school on both procedural and substantive due process grounds).

[80] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (Thomas, C., concurring) ("The opinions of the plurality . . . recognize such a [fundamental] right [of parents to direct the upbringing of their children], but curiously none of them articulates the appropriate standard of review. I would apply strict scrutiny to infringements of fundamental rights.").

[81] *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1994).

government regulation particularly with regard to allegations of abuse or neglect.[82] State child welfare agencies may interfere, regulate, and, when necessary, temporarily remove children from the custody of their parents.[83] In the most severe situations, such agencies may seek to terminate a parent's rights.[84] However, a natural parent's liberty interest "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."[85] The law recognizes that parents owe a "high duty" to their children, but also presumes that the "natural bond" that exists between parent and child causes parents to make decisions in accordance with the best interests of their children.[86] This "best interests of a child" standard is subjective, and thus any state seeking to remove a child from his or her parent should be prevented from doing so until there is a finding that a parent is unfit.[87] The constitutional cases discussing the presumption in favor of parents' determinations of what is in the best interest of their children makes this clear.[88]

Procedurally speaking, due process typically requires that a parent be provided with notice and an opportunity to be heard before the state is permitted to deprive them of their right to the "care,

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[82] *Id.* (noting that the "rights of parenthood" are not "beyond limitation").

[83] *See generally* Santosky v. Kramer, 455 U.S. 745 (1982) (discussing the appropriate standard of proof for termination of parental rights proceedings).

[84] *Id.* at 747.

[85] *Id.* at 753.

[86] Parham v. J.R., 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children."); *see* Troxel v. Granville, 530 U.S. 57, 68 (2000) ("[T]here is a presumption that fit parents act in the best interests of their children.").

[87] Vivek Sankaran, *Let's Be Honest: "Best Interest" Is in the Eye of the Beholder*, THE IMPRINT (Sept. 25, 2019, 4:31AM), https://imprintnews.org /opinion/lets-be-honest-best-interest-is-in-the-eye-of-the-beholder/37784.

[88] *See Parham*, 442 U.S. at 604; Troxel v. Granville, 530 U.S. 57, 86 (2000); *see also* Sankaran, *supra* note 87 (arguing that the best interest of the child standard is not an objective measure of truth but rather about who gets to make decisions for the child—and that until proven unfit, a parent gets to decide).

custody, and management of their children."[89] Thus generally, when a state agency takes custody of a child, even temporarily, without the consent of the child's parents, a hearing before the court must be held.[90] Regardless, most states provide that caseworkers may immediately remove a child, prior to any hearing, under emergency circumstances.[91] What constitutes emergency circumstances is subject to debate between different states and different circuits.[92] However, if a child protective agency has conducted an emergency removal without a hearing, they must subsequently file a petition with the court after the removal.[93] The family court judge then reviews the petition and circumstances around the emergency removal and determines whether or not the child should be returned to their parents.[94]

II. CURRENT LAWS CONCERNING EMERGENCY REMOVALS

Child welfare services and policies differ in each state. [95] However, since states largely rely on federal funding to maintain

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[89] Stanley v. Illinois, 405 U.S. 645, 649–51 (1972); *see also* Robinson v. Via, 821 F.2d 913, 921 (2d Cir. 1987) (holding that due process "would generally require a predeprivation hearing").

[90] *See id.* at 649 ("[A]ll Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.").

[91] *Child Abuse and Neglect*, HELP GUIDE, https://www.helpguide.org /articles/abuse/child-abuse-and-neglect.htm (last visited Oct. 7, 2020).

[92] *See* Doe v. Kearney, 329 F.3d 1286, 1295–96 (11th Cir. 2003) (disagreeing with the Second Circuit's holding that the focus should be on whether or not there is time to obtain a court order).

[93] *See, e.g.*, *id.* (holding that Florida law requires a hearing within 24 hours of state's removal of children).

[94] *See* Nicholson v. Scoppetta, 820 N.E.2d 840, 850 (N.Y. 2004) ("In any case involving abuse—or in any case where the child has already been removed without a court order—the Family Court must hold a hearing as soon as practicable after the filing of a petition, to determine whether the child's interests require protection pending a final order of disposition."); *Kearney*, 329 F.3d at 1293 (likening a child's removal to pretrial detention).

[95] *See How Federal Legislation Impacts Child Welfare Service Delivery*, CHILDS. BUREAU 1, 4 (July 2015), https://www.childwelfare.gov/pubPDFs /impacts.pdf ("The delivery of child protection and child welfare services to individual citizens is primarily governed by State laws, regulations, and policies/procedures.").

and operate their child welfare systems, federal legislative mandates tied to that funding play a significant role in shaping state policies and setting countrywide standards.[96] Congress has enacted a series of laws that have widely dictated the services and practices of state child welfare agencies. For instance, the Child Abuse Prevention and Treatment Act (CAPTA), enacted on January 31, 1974, provides funding for states to prevent, investigate, and prosecute child abuse and neglect.[97] States must follow mandatory guidelines under CAPTA to receive federal funding,[98] including those that prescribe how they may respond to child abuse and neglect.[99] CAPTA has since been modified by a number of amendments in the 1990s and 2000s to reflect changing federal policies and priorities.[100]

The Adoption and Safe Families Act (ASFA), first enacted in 1997, lays out the current federal standard for removing a child from his or her family.[101] Under the Act, removal is permitted only when "continuation in the home is contrary to the child's welfare."[102] Child protective agencies are also required to make "reasonable efforts" to prevent the unnecessary removal of children from their homes, and to promote reunification.[103] Acknowledging the harm to children caused by removal, some states also require judges to balance the harm of removal against the imminent risk to the child remaining in the home, when deciding whether or not to remove a child.[104]

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[96] *Id.*

[97] *About CAPTA: A Legislative History*, CHILDS. BUREAU, https://www.childwelfare.gov/pubPDFs/about.pdf#page=2&view=Summary%20of%20legislative%20history (last visited Oct. 5, 2020).

[98] *Child Welfare Legislation*, CFSR INFORMATION PORTAL, https://training.cfsrportal.acf.hhs.gov/section-2-understanding-child-welfare-system/2992 (last visited Dec. 1, 2019).

[99] Caroline T. Trost, Note, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183, 201 (1998).

[100] CHILDS. BUREAU, *supra* note 97.

[101] *See* U.S. H. OF REP. COMM. ON WAYS AND MEANS, GREEN BOOK, CH. 11 CHILD WELFARE LEGISLATIVE HISTORY (2011).

[102] Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

[103] H.R. REP. NO. 96-900 at 4 (1980).

[104] Nicholson v. Scoppetta, 820 N.E.2d 840, 852 (N.Y. 2004) ("[A] court must weigh, in the factual setting before it, whether the imminent risk to the child

The "reasonable efforts" standard underwent significant reform in 1997 with the passage of the ASFA.[105] Responding to critiques that the prior federal standard for reasonable efforts, provided for by the Adoption Assistance and Child Welfare Act (AACWA) in 1980, did not adequately give guidance to state agencies about what reasonable efforts were required, Congress revised this provision.[106] While much of the language of the AACWA remained intact,[107] the reasonable efforts requirement was diluted by the addition of a number of situations that excuse states from having to make "reasonable efforts."[108] Thus, despite the revisions, the litany of exceptions added under AFSA did little to provide uniform guidance to courts or agencies in their application of the reasonable efforts standard.[109] Subsequent reforms continue to fail to adequately guide state practice in promoting family integrity.[110]

Given the fundamental liberty interests involved with family integrity, multiple constitutional issues arise when the state removes a child from their parents.[111] The Circuit Courts have all found that the removal of a child suspected to be a victim of abuse or neglect constitutes a seizure under the Fourth Amendment and is subject to protections under the Amendment's Due Process clause.[112]

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can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.").

[105] Adoption and Safe Families Act of 1997, Pub. L. 105–89, 111 Stat. 2115 (1997)

[106] Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 277 (2003).

[107] *See* State Plan for Foster Care and Adoption Assistance, 42 U.S.C.A. §§ 671(a)(15)(B), (E) (mirroring language enacted in AFSA).

[108] Crossley, *supra* note 106, at 257–58.

[109] *Id.* at 282.

[110] *See id.* (chronicling how child welfare legislation enacted at the federal level affects state policy).

[111] Doe v. Heck, 327 F.3d 492, 509–10 (7th Cir. 2003); Tenenbaum v. Williams, 193 F.3d 581, 602 (2d Cir. 1999); Rogers v. Cty. of San Joaquin., 487 F.3d 1288, 1294 (9th Cir. 2007); Wallis v. Spencer, 202 F.3d 1126, 1142 (9th Cir. 2000).

[112] *Heck*, 327 F.3d at 509–10; *Tenenbaum*, 193 F.3d at 588; *Rogers*, 487 F.3d at 1294; *Wallis*, 202 F.3d at 1136.

However, there is disagreement amongst the Circuits as to the appropriate level of due process protections that should apply during emergency removals.

A. The Current Circuit Split Regarding Emergency Removals Without a Court Order

The Supreme Court has made it clear that when a state intervenes in the family unit and seeks to remove a child from the custody of their natural parent, even temporarily, the Constitution requires the family be heard at a pre-deprivation hearing.[113] However, courts have also acknowledged that there are circumstances where the danger to a child may be immediate, where a state agency may proceed prior to an *ex parte* order to effectuate a removal.[114] This practice is referred to as an "emergency" removal. Both federal and state laws appear to authorize child protective staff, without a court order (ex parte or otherwise), to effectuate the emergency removal of a child from their home when a danger to that child is imminent.[115] There is conflict regarding when it is permissible for a state agency to effectuate an emergency removal without a court order.[116] How and when this is allowed is entirely dependent on

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[113] Stanley v. Illinois, 405 U.S. 645, 649 (1972); *see also* Robison v. Via, 821 F.2d 913, 921 (2d Cir.1987) (holding that due process "would generally require a predeprivation hearing").

[114] *Tenenbaum*, 193 F.3d at 606; Roska v. Peterson, 328 F.3d 1230, 1240 (10th Cir. 2003); *Rogers*, 487 F.3d at 1294; Doe v. Kearney, 329 F.3d 1286, 1294 (11th Cir. 2003).

[115] Crossley, *supra* note 106, at 275.

[116] *See Tenenbaum*, 193 F.3d at 594–95 (holding that if there is time to seek a court order, child protective services must do so prior to removal); *Roska*, 328 F.3d at 1240–41 (holding that without "exigent" circumstances that the delay in seeking a court order might have cost the child his life; the parents were deprived of their pre-deprivation procedures); *Rogers*, 487 F.3d at 1297 (holding that child protective services should have sought a court order before removing a child where "the lack of exigency would have been apparent to any reasonable social worker" and it would have only taken a short amount of time to seek a court order); *but see Kearney*, 329 F.3d at 1298 (affording child protective services wide discretion regarding when it is appropriate to execute an emergency removal).

which federal circuit governs the jurisdiction in question.[117] Some jurisdictions limit the emergency removal power to situations where an imminent danger allows no time to seek a judicial order.[118] Alternatively, other jurisdictions permit child protective agencies a broadened emergency removal power.[119]

The U.S. Supreme Court has also highlighted the tension that exists between a state's interest in having an efficient procedure in place to intervene when a child is endangered, and the importance of preserving the liberty interests of families to be free from unwanted state regulation and interference in their family unit.[120] In *Stanley v. Illinois*, the Supreme Court affirmed the importance of preserving the rights of parents to raise their children how they see fit, overturning an Illinois law that required children of unwed fathers to become wards of the state after the passing of their mother.[121] The state argued that the law avoided unnecessary administrative procedures because unwed fathers are seldom fit parents.[122] In holding that, after the death of a child's mother, and before his children could be taken from him, a father was entitled to a hearing regarding his fitness as a parent under the Due Process Clause, Justice White wrote:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Procedure by

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[117] *Id.*

[118] *See* sources cited *supra* note 116.

[119] *See Kearney*, 329 F.3d at 1295 (imparting great discretion to child protective workers to determine when a removal could proceed without a court order); *see also* Tower v. Leslie-Brown, 326 F.3d 290, 299 (1st Cir. 2003) (conferring considerable discretion upon child protective workers in evaluating when it is necessary to remove a child prior to court order).

[120] Stanley v. Illinois, 405 U.S. 645, 656–57 (1972).

[121] *Id.* at 657.

[122] *Id.* at 647.

presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.[123]

This tension between individual protections and efficient procedure is apparent from the differing Circuit Court opinions on the constitutionality of emergency removals without a judicial order. The Second, Ninth, and Tenth Circuits find a narrow exception, allowing emergency removals only when the exigency of the circumstances are such that judicial review is not possible prior to the child's removal.[124] A more discretionary approach, followed by the First and Eleventh Circuits, grants child protective workers far more leniency and flexibility in conducting emergency removals, so long as they then come to court for a hearing within a reasonable time after the removal has occurred.[125] Current state laws also vary widely, either defining the scope of emergency removals narrowly or taking a more lenient approach.[126]

i. The Narrow Emergency Removal Exception

In *Tenenbaum v. Williams*, the Second Circuit reviewed whether New York State's unilateral removal of a child from her school for medical examinations, based upon allegations of sexual abuse, violated her parents' due process rights.[127] A caseworker had removed the child from her kindergarten class without a court order and without notifying or receiving consent from her parents.[128] Despite the child protective agency's knowledge, and supposed concern, about the allegations of sexual abuse for at least several

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[123] *Id.* at 656–57.

[124] Mark Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. 913, 914 (2004).

[125] *Id.*

[126] *Id.* at 917–18.

[127] *See* Tenenbaum v. Williams, 193 F.3d 581, 587 (2d Cir. 1999).

[128] *Id.* at 591.

business days prior, the removal occurred midday on a Tuesday without court authorization.[129]

Given the allegations of sexual abuse, the court in *Tenenbaum v. Williams* acknowledged that there are emergency situations where removals must be conducted before seeking a court order to prevent imminent harm to the child.[130] The court stressed that this harm must be *imminent*, and that the "mere possibility of danger is not enough."[131] However, the court also held that if "there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise, for the child's removal, then the circumstances are not emergent."[132] It noted that the child protective agency had ample time to obtain an order before effecting the removal, and that it provided no rationale for not doing so.[133]

Tenenbaum is important, because if the court had held that emergency removals were permitted even in situations where there was time to obtain a judicial order, then state agencies could effectuate all removals on an "emergency" basis, and parents would be denied their due process right to a pre-deprivation hearing.[134] Broadening the definition of "emergency" to allow for unilateral removal without process essentially eviscerates the strong constitutional right to family integrity protected under the Due Process Clause.[135]

In dicta, the *Tenenbaum* Court acknowledged that a balance must be struck so that the state may act promptly and efficiently to protect children in "urgent situations," but clarified that there is an important difference between "necessary latitude and infinite license."[136] It reasoned that if child protective workers were left to believe that they could unilaterally remove children from their homes without judicial review, it would inevitably lead to state agencies inflicting harm on the children and families they are

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[129] *Id.* at 590–91.

[130] *Id.* at 594.

[131] *Id.* at 594 (quoting Hurlman v. Rice, 927 F.2d 74, 81 (2d Cir. 1991)).

[132] *Id.*

[133] *Id.* at 595.

[134] *Id.* at 594–95.

[135] *Id.*

[136] *Id.* at 595.

charged to protect.[137] Thus, the Second Circuit defined a narrow exception, only allowing emergency removal without prior court order when there is not enough time to obtain a court order *and* there exists an imminent danger to the child's health or life.[138] The standard sets a high bar, intended to make effectuating an emergency removal without due process rare, at least on its face.[139]

Both the Ninth and Tenth Circuits also seemingly follow the central holding of *Tenenbaum*, holding that removal of a child without judicial authorization is only permitted in cases where the danger posed to the child's life or health is so imminent that it does not allow time to obtain a court order or warrant.[140] In *Roska v. Peterson*, the Tenth Circuit heard arguments from the parents of twelve year old Rusty, alleging that Utah's Division of Child and Family Services deprived them of their right to due process by removing Rusty from their care without a pre-deprivation hearing.[141] In reaching its decision, the court applied the same standard it used for pre-deprivation hearings in termination of parental rights proceedings, borrowed from *Santosky v. Kamer*,[142] to the temporary removal of children from custody.[143] It acknowledged that there are emergency circumstances that pose an immediate

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[137] *Id.* ("And as this case may demonstrate, if officers of the State come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is inevitable that they will eventually inflict harm on the parents, the State, *and* the child." (emphasis in original)).

[138] *See id.* at 596 ("[W]here there is reasonable time consistent with the safety of the child to obtain a judicial order, the emergency removal of a child is unwarranted.").

[139] Doe v. Kearney, 329 F.3d 1286, 1296 (11th Cir. 2003) (explaining that *Tenenbaum* held that "a social worker could not temporarily remove a child from her parents' custody without prior judicial authorization unless there was probable cause to believe the child was in imminent danger of abuse and the social worker reasonably determined there was insufficient time to obtain a court order before removing the child from danger.").

[140] *Tenenbaum*, 193 F.3d at 594.

[141] Roska v. Peterson, 328 F.3d 1230, 1239–40 (10th Cir. 2003).

[142] Santosky v. Kramer, 455 U.S. 745, 748 (1982) (holding that the state must prove its allegations by at least clear and convincing evidence to comply with due process standards).

[143] *Roska*, 328 F.3d at 1245.

threat to the safety of a child and that "might justify the absence of pre-deprivation procedures."[144] However, there were no "exigent" circumstances where the state's evidence[145] did not sufficiently lead the court to believe that a delay to obtain a court order might have cost the child his life.[146] Thus, there were not "sufficient exigent circumstances" to relieve Utah of its burden to obtain a court order before carrying out the removal.[147]

About four years later, the Ninth Circuit decided *Rogers v. City. of San Joaquin*, which similarly held that, absent conditions presenting an "imminent risk of serious bodily harm," removing children from their home without obtaining judicial authorization is a violation of a parent's established Fourth and Fourteenth Amendment rights.[148] It found that the evidence presented after the child's removal[149] to justify the caseworker's failure to obtain a warrant prior to the removal to be insufficient.[150] Accepting San Joaquin County's version of the facts, the court acknowledged that the children were in danger of long term harm if the parents did not

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[144] *Id.* at 1250.

[145] *Id.* at 1240–41 ("After examining the record, we conclude that it contains no evidence that could lead a reasonable state actor to conclude that there were exigent circumstances. Although defendants at times assert that a delay to obtain a warrant might have cost [the child] his life, the evidence shows otherwise. Defendants were aware that various doctors had suspected that [the child] was a victim of MSBP for quite some time, and the record indicates that there was nothing particularly unusual about [the child's] condition at the time he was removed. [The child's] attending physician stated on the phone that it would be a mistake to remove him from the home.").

[146] *Id.*

[147] *Id.* at 1241.

[148] Rogers v. Cty. of San Joaquin, 487 F.3d 1288, 1297–98 (9th Cir. 2007).

[149] However, [the caseworker] does not assert that she believed that his condition would worsen if she delayed taking him into custody in order to obtain a warrant. [The child's] teeth may have hurt, but, if so, he had likely been experiencing such pain for a considerable period of time and the pain was not so serious that he ceased to be playful and alert. Under such circumstances, any pain [the child] may have experienced cannot justify a failure to obtain a warrant or the peremptory removal of the children from their parents' custody.

Id. at 1295.

[150] *Id.*

modify their conduct within a "reasonable period of time."[151] However, in weighing the safety needs of the children against the fundamental liberty interests of the parents, the *Rogers* Court ultimately held that "the lack of exigency would have been apparent to any reasonable social worker," and that it would have only taken a few hours to obtain a court order to remove the children should it have been necessary.[152]

ii. The Discretionary Emergency Removal Exception

Some circuits maintain that a due process standard for emergency removals without prior court approval should be one that affords case planners more discretion in removing children from homes.[153] The Eleventh Circuit made such a determination in *Doe v. Kearney. Kearney* arose after the Florida Department of Children and Family Services executed an "emergency" removal of the Doe children without the parents' permission and without a court order.[154] In reaching its decision, Eleventh Circuit explicitly rejected the standard articulated by the Second Circuit in *Tenenbaum*.[155] Instead, it found that the state's interest in protecting vulnerable children allowed child protective workers more sweeping removal powers,[156] concluding that a parent's due process rights were not

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[151] *Id.* at 1297.

[152] *Id.* at 1298.

[153] *See Jordan v. Jackson,* 15 F.3d 333, 348 (4th Cir.1994) ("[C]onsiderable deference must be accorded the delicate judgments made by responsible state officials. Perhaps in no context is this truer than where the state is acting as *parens patriae* to protect children from imminent danger."); *see also* Wilkinson v. Russel, 182 F.3d 89, 104 (2d Cir. 1999) (discussing the "compelling governmental interest in the protection of minor children, particularly in circumstances where the protection is considered necessary as against the parents themselves.").

[154] Doe v. Kearney, 329 F.3d 1286, 1289 (11th Cir. 2003).

[155] *Id.* at 1296–97.

[156] *Id.* at 1295 ("[D]ue process is a flexible concept, and what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.").

violated as long as a child protective worker has "reasonable cause"[157] to believe their child is in imminent danger.[158]

In its reasoning, the *Kearney* Court cited concerns about the potential burdens of administrative procedures that would require child welfare agencies to seek out a court order before removal. [159] It found that merely asking whether a child protective agency had enough time to obtain a warrant was too simple an inquiry to fully evaluate the liberty and safety interests at stake.[160] Rather, the court insisted that due process was a "flexible concept" that required a careful balancing of those interests, including the fundamental liberty interests of family integrity and the state's interest in protecting children.[161] These interests "may be implicated to varying degrees," the court wrote, "depending on the facts of an individual case, which will necessarily affect the degree of procedural due process required."[162] In other words, the court imparted great discretion to child protective workers to determine when a removal could proceed without a court order.

The outcome in *Kearney* is unfortunate. After all, obtaining a court order prior to removal will always require more administrative work. The governmental interest in reducing that administrative burden should always be outweighed when balanced against the

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[157] Here, the Court held that the following facts were sufficient to establish reasonable cause of imminent harm:

> [T]he record demonstrates that [the caseworker] responded reasonably and swiftly as soon as she became aware of the possible danger to the Doe children. . . . Here, [the caseworker] investigated diligently and acted almost immediately after the relevant facts came to her attention. At the same time, she did not rush to judgment or react impulsively. Rather, she consulted with both her supervisor and DCF legal counsel before taking steps toward removing the Doe children. Even then, [the caseworker] did not remove the children until after she interviewed both the parents and children and determined the children were unsafe.

Id. at 1298–99.

[158] *Id.* at 1295.

[159] *Id.* at 1297.

[160] *Id.* at 1297–98.

[161] *Id.* at 1297.

[162] *Id.*

fundamental liberty interests of family integrity.[163] Further, this discretionary approach essentially allows any reasonable risk of harm to satisfy grounds for an emergency removal, thus gutting the long-standing constitutional requirement of a pre-deprivation hearing when the state seeks to intrude on family integrity.[164] This discretionary approach erases the defining aspects of the emergency exception, instead rendering it moot and dismantling a parent's due process protections.[165]

The First Circuit also broadened the discretion of child protective agents in *Tower v. Leslie-Brown*.[166] In *Tower*, children were removed from a mother's care after their father was arrested.[167] In justifying the removal, Maine's Department of Human Services alleged that the children's mother would be unable to protect them.[168] The *Tower* Court acknowledged that, under ordinary circumstances, due process entitled the family to notice and an opportunity to be heard.[169] However, the court held that removal without a court order was permissible where there was a "reasonable suspicion that abuse had occurred or that a threat of abuse was imminent at the time of removal."[170] In such "extra-ordinary situations," the court wrote, "deprivation of a protected interest is permitted without prior process."[171] The court went on to hold that in "extra-ordinary situations," adequate post-removal procedures, such as holding a post-deprivation hearing three days after a

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[163] *See* Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999) (quoting Stanley v. Illinois, 405 U.S. 645, 656 (1972)) ("The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency.").

[164] *See id.* (holding that emergency removals can be effectuated without a court order irrespective of whether there was time to seek a court order first).

[165] *See id.* (locating a parent's due process rights in the discretion of child protective services rather than the courts).

[166] Tower v. Leslie-Brown, 326 F.3d 290 (1st Cir. 2003).

[167] *Id.* at 293–95.

[168] *Id.* at 295.

[169] *Id.* at 298.

[170] *Id.*

[171] *Id.* (quoting Suboh v. Dist. Att'y Off. of Suffolk, 298 F.3d 81, 92 (1st Cir. 2002)).

removal, satisfied the Due Process requirements.[172] What the First Circuit failed to explain, is what it meant by "extra-ordinary situations." By not defining this critical term, the decision in *Tower* conferred considerable discretion upon child protective workers, rendering its "reasonable suspicion" standard much broader than the narrow exception for warrantless removals announced in *Tenenbaum v. Williams.*[173]

III. THE HARM REMOVALS INFLICT ON CHILDREN

The psychological harm suffered by children separated from their parents is well documented by social scientists.[174] Over the past few years, this harm has been acknowledged and articulated by many Americans as an outrage, as President Trump's immigration practices and policies at the border have captured national attention and widespread condemnation.[175] However, the same concern and attention about the harms children face when they are separated from their families by the child welfare system remains largely absent.[176]

The American Academy of Pediatrics warns that family separations cause "irreparable harm" to children.[177] Young children who are exposed to traumatic events, such as separation from their families and foster care, can suffer lasting impacts to their physical, social, and psychological development into adulthood.[178] The harm of removal has lifelong impacts not just on those children

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[172] *Id.* at 299.

[173] *Id.* at 298; Tenenbaum v. Williams, 193 F.3d 581, 595 (2d Cir. 1999).

[174] AM. BAR ASS'N, *supra* note 67.

[175] Ginger Thompson, *Listen to Children Who've Just Been Separated from Their Parents at the Border*, PROPUBLICA (June 18, 2018), https://www.propublica.org/article/children-separated-from-parents-border-patrol-cbp-trump-immigration-policy.

[176] *See* Khan, *supra* note 11 (detailing the policy and practice of family separations in New York City).

[177] Thompson, *supra* note 166.

[178] Stephanie Carnes, *The Trauma of Family Separation Will Haunt Children for Decades*, HUFFINGTON POST (June 22, 2018), https://www.huffingtonpost.com/entry/opinion-carnes-family-separation-trauma_us_5b2bf535e4b00295f15a96b2.

permanently separated from their parents, but those children temporarily separated.[179] Clinical research shows that children who are removed suffer adverse emotional effects such as "feelings of abandonment, rejection, worthlessness, guilt, and helplessness."[180] Separations cause the release of stress hormones throughout the brain and body that can lead to increased health risks such as heart disease, hypertension, depression, obesity, and diabetes, and increased likeliness of suicide attempts.[181] In addition, children who have been removed often suffer worse outcomes throughout their life compared to those who were allowed to remain in a "marginal" home.[182] Separated children suffer a two to three times higher

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[179] *See* Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk,* J. CHILD & ADOLESCENT PSYCHIATRIC NURSING 70, 70 (2008) (synthesizing foster care outcomes); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEVELOPMENT & PSYCHOPATHOLOGY 57, 57–59 (2006) (finding that children placed into stranger foster care showed higher levels of internalizing problems compared with children reared by maltreating caregivers).

[180] Rosalind D. Folman, "*I Was Tooken": How Children Experience Removal from Their Parents Preliminary to Placement in Foster Care*, 2 ADOPTION QUARTERLY 7, 11 (1998).

[181] *See* Sara Goydarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AM. (June 2018), https://www.scientificamerican.com /article/separating-families-may-cause-lifelong-health-damage/ (documenting the potential long term effects of family separations); *see* William Wan, *What Separation from Parents Does to Children: 'The Effect is Catastrophic'*, WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html (discussing the research on the effect of family separations on children in the context of separations at the U.S.-Mexico border); *see* Carnes, *supra* note 178 (noting that exposure to traumatic events in childhood is strongly correlated with increased risk of suicide attempts, drug addiction, depression, chronic obstructive pulmonary disease, heart disease and liver disease); *see* Allison Eck, *Psychological Damage Inflicted by Parent-Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), http://www.pbs.org/wgbh/nova/next /body/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting.

[182] *See generally* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (looking at removal decisions that were "on the margins" and finding that children had better long-term well-being outcomes if they remained at home).

delinquency rate,[183] are six times more likely to have behavioral problems,[184] and have higher teen birth rates.[185] These adverse effects continue into adulthood. Compared to children alleged to have been maltreated who remain in the home, children who are removed are more likely to have lower earnings as adults,[186] are more likely to have substance-related disorders and mental health disorders,[187] and are more likely to be arrested and have criminal convictions for violent offenses.[188] Given the irreparable harm caused by separating families, child protective service ought to prioritize minimizing removals of children and instead focus on services that allow children to remain in the home.[189]

The effects of short term stays in foster care should be enough to convince most that unnecessary emergency removals typically do little more than magnify harm to children.[190] One should consider that the harm a child suffers as the result of being removed from their natural home are usually compounded by the very real harms that occur in an inadequate and substandard foster care system.[191]

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[183] Joseph P. Ryan & Mark F. Testa, *Child Maltreatment and Juvenile Delinquency: Investigating the Role of Placement and Placement Instability*, 27 CHILD. & YOUTH SERVS. REV. 227, 243–44 (2005).

[184] Kate Lowenstein, *Shutting Down the Trauma to Prison Pipeline: Early, Appropriate Care for Child-Welfare Involved Youth*, CITIZENS FOR JUV. JUST. (2018).

[185] Doyle, Jr., *supra* note 182, at 1583.

[186] *Id.*

[187] Sylvana M. Côté et al., *Out-of-Home Placement in Early Childhood and Psychiatric Diagnoses and Criminal Convictions in Young Adulthood: A Population-Based Propensity Score-Matched Study*, THE LANCET (July 26, 2018), https://www.researchgate.net/profile/Sylvana_Cote/publication/326652825_Out-of-home_placement_in_early_childhood_and_psychiatric_diagnoses_and_criminal_convictions_in_young_adulthood_a_population-based_propensity_score-matched_study.

[188] *Id.*

[189] *See* Sankaran & Church, *supra* note 40 (arguing that child welfare policy should be one of "primum non nocere" or do no harm).

[190] *See id.* (examining the long-term detrimental effects to children as a result of short stays in foster care).

[191] *See id.* The foster care system is designed to provide short-term care to vulnerable children until the child can be returned to their home or placed permanently with an adoptive family. In reality, children often remain in foster care for prolonged periods of time. The longer a child remains in foster care the

Many children are funneled into these systems, notwithstanding statements like that of Arkansas's state welfare agency, for example, which admitted in a 2003 report that most fostered children in the state "should have never come into care and instead should have been served in the family home."[192]

Despite the clear risks, some still argue that when it comes to protecting a child, it is always better to err on the side of caution; in other words, remove first, and ask questions later.[193] But this argument fails to address the realities of family courts. Families separated by state intervention do not garner similar procedural protections enjoyed by the criminal system.[194] Once children are removed, or a child welfare system is involved with a family, it may take years to resolve a case. Mistakes are rarely corrected quickly and can, in turn, retraumatize a child.[195] Without stringent laws that protect the right to family integrity, child welfare systems continue to traumatize the very children they are charged to protect.[196]

Critics should also consider that the vast majority of child protective cases arise out of circumstances of neglect, and although it may be difficult to accept, it is the reality that the risk of psychological harm due to removal almost always outweighs the

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more likely she or he is to experience placement changes. These disruptions impair a child's, especially young children's, social and emotional development. This often results in long-term behavioral, mental health and educational problems. Further, every placement change decreases the likelihood that a child will achieve some type of permanency. Instead, many children get "stuck" in the system and are discharged from foster care as young adults. These young adults suffer disproportionally adverse outcomes when compared to other young adults. *See* Lenette Azzi-Lessing, *The Hidden Harms of the US Foster-Care System*, THE CONVERSATION (Jan. 22, 2016, 6:02 AM), https://theconversation.com/the-hidden-harms-of-the-us-foster-care-system-49700 (discussing the "threats to the safety and wellbeing of vulnerable children" in foster care).

[192] Josh Gupta-Kagan, *Towards a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 916 (2014).

[193] *See* Goldberg, *supra* note 38.

[194] Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L. J. 13 (2010) (describing the lack of procedural protections afforded parents during trial and the impact on a family's ability to reunify successfully).

[195] *Id.*

[196] *See id.*

risk of remaining in a parent's care—even when that care is sub-standard.[197] Many child welfare experts argue that most cases of neglect can be best served by preventive services, rather than removals.[198] In response to the growing awareness and research associated with the harms of removal, federal policy must continue to shift toward promoting preventative services and strengthening families as ways to prevent unnecessary removals and thus mitigate the harm to children and families.[199]

IV. REFORMING FEDERAL CHILD WELFARE LAWS TO ADOPT THE *TENENBAUM* HOLDING PROVIDES THE BEST SOLUTION TO REMEDY THE CIRCUIT SPLIT.

Revising existing federal law is the most effective and efficient solution to ensure that children are not unnecessarily removed from their families. The Circuit Courts remain divided on the issue of emergency removals absent a court order—a split that the Supreme Court likely will not resolve anytime soon.[200] Codifying the

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[197] AM. BAR ASS'N, *supra* note 67.

[198] *See* Doyle, Jr., *supra* note 182, at 1583 (looking at removal decisions that were "on the margins" and finding that children had better long-term well-being outcomes if they remained at home); *see* The Family First Prevention Services Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children, CHILDS. DEF. FUND 1, 1–2 (Feb. 2018), https://www.childrensdefense.org/wp-content/uploads/2018/08/family-first-detailed-summary.pdf (lauding the passage of the Family First Prevention Service Act for its reforms to help keep children safe with their families and minimizing the traumas of entering foster care);

[199] *See* U.S. DEP'T OF HEALTH AND HUM. SERVS., ADMIN. FOR CHILD. AND FAMS., Information Memorandum, 18-05, at 1–3 ("The purpose of this Information Memorandum (IM) is to strongly encourage all child welfare agencies and Children's Bureau (CB) grantees to work together with the courts and other appropriate public and private agencies and partners to plan, implement and maintain integrated primary prevention networks and approaches to strengthen families and prevent maltreatment and the unnecessary removal of children from their families.").

[200] The Supreme Court has denied certiorari to both *Doe v. Kearney* and *Tenenbaum v. Williams*. City of New York v. Tenenbaum, 529 U.S. 1098 (2000) (certiorari denied); Doe v. Reiger, 124 S. Ct. 389 (2003) (certiorari denied).

Tenenbaum holding of the Second Circuit[201] in a federal statute advances both existing federal policy and ensures state practice conforms to constitutional law designed to protect the liberty interest of family integrity under the Fourteenth Amendment.[202]

Generally, child welfare services and policies can vary from state to state.[203] State legislatures enact state specific statutes and state child welfare agencies create programs and policies tailored to their specific jurisdictions and needs.[204] Each state, however, relies on federal dollars to help fund the care of a child while he or she is in its custody, and while that child awaits a permanency plan.[205] In order to receive federal funds, a state and its child welfare agencies must comply with federal child welfare requirements and policies.[206] In response to newly enacted Congressional legislation, federal agencies such as the Children's Bureau frequently enact new, or update existing, federal mandates and regulations, and advise individual state legislatures how to stay compliant with changing federal laws by modifying their own laws and agency policies.[207] State child welfare agencies have been structured to be responsive to federal mandates that are tied to funding.[208] As such, the federal government has a powerful ability to enact sweeping

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[201] *Tenenbaum*, 193 F.3d at 594–95 (holding that removal of a child without judicial authorization is only permitted in cases where the danger posed to the child's life or health is so imminent that it does not allow time to obtain a court order or warrant).

[202] *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest . . . of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by [the] Court.").

[203] *See* CHILDS. BUREAU, *supra* note 89 ("The delivery of child protection and child welfare services to individual citizens is primarily governed by State laws, regulations, and policies/procedures.").

[204] *Id.*

[205] *See Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption*, CHILDS. BUREAU 1, 2, https://www.childwelfare.gov/pubPDFs/majorfedlegis.pdf (last visited Oct. 6, 2020) (stating that permanency usually results in either reunification with the child's family or a permanent placement in an adoptive family).

[206] CHILDS. BUREAU, *supra* note 95.

[207] *Id.*

[208] *See id.* (detailing how federal funds influence child welfare systems and service delivery).

policy controlling how abuse and neglect allegations are dealt with in every state.[209]

A great deal of federal funding supporting state child welfare programs is authorized through Title IV-E and Title IV-B of the Social Security Act (SSA).[210] Title IV-B provides funding for the prevention of, and response to, child abuse and neglect,[211] while Title IV-E provides funding, known as foster care maintenance payments, for children who are in foster care until they are able to be returned to their home or placed with a permanent adoptive family.[212]

In 1980, when Congress passed the AACWA,[213] Title IV-E dollars were directed to support the foster care placement of a child removed from his or her home only where a state agency had made "reasonable efforts" to prevent the unnecessary removal of the child from their home, and to promote reunification.[214] In order to receive federal Title IV-E funds, an agency had to meet two conditions. [215] First, a court had to determine that any removal was justified by a finding that a child's remaining in the home was contrary to the welfare of that child.[216] Second, the law required a state to make "reasonable efforts" to prevent or eliminate the need for removing a child from his or her home and family.[217] A judge was required to make a finding that "reasonable efforts" had been made by a state agency in order for that state to receive Title IV-E funding for that child.

In 1997, with the passage of the AFSA, the reasonable efforts requirement was diluted by the addition of a number of specific circumstances that excused states from having to make "reasonable

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[209] *See* CHILDS. BUREAU, *supra* note 205 (noting that states are required to comply with certain federal requirements and policies in order to be eligible for designated federal funding).

[210] *See id.* (noting that Title IV-E and Title IV-B of the Social Security Act are the largest federally funded programs that support child welfare programs).

[211] 42 U.S.C.A. § 621.

[212] *Id.* § 672.

[213] H.R. Rep No. 96-900 (1980).

[214] *Id.*

[215] 42 U.S.C.A. § 672(a)(2)(A)(ii).

[216] *Id.*

[217] *Id.* § 671(a)(15).

efforts."[218] Nonetheless, courts are still required to make a finding regarding the second prong—whether the state made "reasonable efforts" to prevent or eliminate the need for removing a child from the home.[219] The discretion given to courts—first under AACWA, and continued under AFSA—in making the "reasonable efforts" finding is potentially one of the most powerful tools to ensure that child protective agencies first attempt to prevent a child's removal from their home before effectuating a removal.[220]

Linking Title IV-E federal funding to compliance with the narrow exception for warrantless emergency removals, as articulated in *Tenenbaum*, would help ensure that critical constitutional protections for families and children are upheld in every state.[221] Furthermore, codifying specific "reasonable efforts" factors to be considered by judges also addresses critiques that the federal "reasonable efforts" provision is not a helpful guide for state practice.[222] This solution provides a necessary statutory floor to prevent unnecessary removals. The reliance on federal funding to advance policy goals and guidelines is undoubtedly limited.[223] However, in the case where an emergency removal occurred without a court order, a funding requirement that requires a court to make a finding in each individual case has the potential to be a powerful tool.[224] In order for this incentive to be effective, courts will have to

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[218] *Id.* § 671(a)(15)(D).

[219] *Id.* § 672.

[220] Judge Leonard Edwards, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, THE IMPRINT (Dec. 5, 2018), https://imprintnews.org/top-stories/ignoring-reasonable-efforts-why-court-system-fail-promote-prevention/32974.

[221] *See* CHILDS. BUREAU, *supra* note 205 (demonstrating how new federal legislation also prompts responses at the state level, including enactment of state legislation, development or revision of state agency policy and regulations, and implementation of new programs).

[222] *See* Crossley, *supra* note 106, at 277–78.

[223] Vivek Sankaran, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed,* 73 SMU L. Rev. 12 (2020) (describing the lack of "meaningful return" on federal funding to advance child welfare policy).

[224] *See* Edwards *supra* note 220 ("[T]he reasonable efforts/no reasonable efforts findings are the most powerful tools given to the courts by the federal legislation.").

engage in a meaningful analysis when making a finding—and that will require parent advocates to litigate.[225]

Obviously, a full hearing before a judge, where each party is competently represented, provides the highest level of protection against unnecessary removals.[226] However, there are times when the danger to a child is known, but not so immediate that a state agency must remove a child without a warrant. In these situations, state agencies may seek an *ex parte* authorization for an emergency removal.[227] Although the parent in an *ex parte* proceeding is deprived the protections of counsel and an opportunity to immediately challenge a removal, judicial review—even in an *ex parte* setting—provides some means of supervision of a state agency's discretion.[228]

Accordingly, in keeping with the "reasonable efforts" requirement for federal Title IV-E funding, Congress should enact language that requires judges to make a finding that there was no time or ability for the state to seek a court order prior to removal of the child. If a judge finds that a child protective agency could have sought a court order—*ex parte* or otherwise—prior to removal, then a court should find that case ineligible for Title IV-E funds because no "reasonable efforts" were made.[229] Additionally, given the imbalance of information in court between a parent and the state after a state agency effectuates an emergency removal, it should be the child protective agency's burden to affirmatively demonstrate facts and circumstances that the narrow emergency removal exception was met and that the imminent risk to the child was so immediate that there was no time to seek judicial review.

The solutions proposed herein would also help protect children and ensure that their reciprocal rights to family integrity are upheld. Federal mandates that heighten the burden on child welfare agencies seeking to conduct an emergency removal without a court order

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[225] *Id.* (arguing that advocates must litigate the issue of reasonable efforts for the tool to be effective).

[226] *See* Claire Chiamulera, *Representing Parents in Child Welfare Cases—Inside the Book with Martin Guggenheim and Vivek Sankaran*, 35 CHILDS. L. PRAC. 14 (2016) (discussing how effective parental representation helps children).

[227] *See* discussion *supra* Part II.

[228] *See* discussion *supra* Part II.

[229] 42 U.S.C. § 671(a)(15).

comport with current federal child welfare policy goals of preventing unnecessary removals.[230] Past federal legislation has recognized that preventative services and alternatives to removal often can protect a child without putting a child through the trauma of removal from the home.[231] The federal government has also acknowledged many of the criticisms and potential harms leveled at the child welfare system, including racial biases, the punishing of poor parents, and a general lack of training and expertise among caseworkers armed with wide discretion.[232] Codifying an emergency removal exception that minimizes the discretion of caseworkers would be a meaningful and useful next step in reforming the child welfare system to support families and better protect children.

A determination that reasonable efforts have been made to prevent the removal of a child is essential to prevent unnecessary family separations.[233] A court's determination about reasonable efforts, coupled with the financial incentive tied to that finding, provides a critical opportunity to check state agency decision making.[234] Ensuring that emergency removals without a court order only occur in truly exigent circumstances, where a state has made meaningful reasonable efforts to avoid the removal, is not only essential in protecting a family's constitutional right to be free from unnecessary state intervention—it is a productive step in carrying out the federal goal of promoting family support and unity.

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[230] *See* U.S. DEP'T OF HEALTH AND HUM. SERVS., *supra* note 190 at 1–6.

[231] *See* Family First Prevention Services Act, Pub. L. No. 115-123, 132 Stat. 232 (2018) (codified as amended at 42 U.S.C. § 671(e)(1)) (enabling Title IV-E funds to also go towards preventative services that help "candidates for foster care" stay with parents or other kin where previously they could only be used to pay foster care costs).

[232] *See AFCARS Report #24*, CHILDS. BUREAU (Nov. 30, 2017), https://www.acf.hhs.gov/cb/resource/afcars-report-24 (finding that for vulnerable families, common problems such as limited or loss of income, inadequate housing, or civil legal issues, if left unattended, can escalate to crisis and lead to formal child welfare system involvement. Neglect was present at the time of removal for over 60 percent of children who entered foster care in 2016).

[233] *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children*, CHILDS. BUREAU (Mar. 2016), https://www.childwelfare.gov/pubPDFs/reunify.pdf.

[234] *Id.*

CONCLUSION

The unchecked discretion of child protective agencies, vaguely written laws, and a woeful lack of procedural protections in family proceedings have kept innocent families in and out of court and subject to monitoring by state agencies for years.[235] Indeed, child welfare systems' disproportionate and rampant punishment of poor families of color in the United States have earned them the scathing nickname "Jane Crow."[236] Emergency removals without a court order represent the apex of state power to intrude on family integrity.[237] Without a federal standard to resolve a split among the circuits that reaffirms the rights and due process protections that families deserve, inconsistencies in practices across states continue. As long as state child welfare agencies go unchecked, unnecessary removals will continue to harm parents, children, and the family unit alike.[238] The threat of unchecked state power in this area has been thoroughly researched and documented.[239] Now it must be addressed.

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[235] Clifford & Silver-Greenberg, *supra* note 75.

[236] *Id.*

[237] *See* Diane Redleaf, *When the Child Protective Services System Gets Child Removal Wrong*, CATO UNBOUND (Nov. 9, 2018), https://www.cato-unbound.org/2018/11/09/diane-redleaf/when-child-protective-services-system-gets-child-removal-wrong (discussing the policies and methods of family separations in the United States).

[238] *See* discussion *supra* Part III.

[239] *See* Friedersdorf, *supra* note 13.