

REDUCING FAMILY SEPARATIONS IN NEW YORK CITY:
THE COVID-19 EXPERIMENT AND A CALL FOR CHANGE

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Child welfare agencies and family courts have long removed children from allegedly abusive or neglectful parents as an ultimate means of ensuring a child's safety. The theory that high numbers of removals are necessary to keep children safe, however, had never been tested—there was no mechanism or political will to do so until the onset of the COVID-19 pandemic in March 2020. With the near-complete shutdown of New York City, the child welfare apparatus had no choice but to remove fewer children from their homes. Catastrophe did not ensue. Rather, the numbers tell a different story. Children remained safe across a range of metrics, avoided the trauma of removal from their homes during a global pandemic, and experienced sustained safety as the City began to reopen.

This Piece argues that New York's child welfare system must learn from COVID-19 and significantly curtail its drastic measure of removing children from their families, which can cause substantial, often irreparable trauma to children. It uses the COVID-19 pandemic as a case study to demonstrate the safety and soundness of reserving removals (also known as remands) for only the most extreme circumstances. This Piece focuses on the dramatic reduction of removals specifically during the pandemic; examines the traumatic, racially biased, and overused practice of family separation from a child's perspective; and calls for specific reforms within the existing system to reduce remands while protecting children's safety.

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INTRODUCTION

In March 2020, COVID-19 overtook New York City, and life ground to a halt.¹ The effect on New York City's children was profound as schools closed and families retreated inside. The impact was particularly acute for children surveilled by New York City's child welfare system. Child welfare workers drastically limited home visits, and New York City's Family Courts ceased all but emergency operations.² The number of children removed from their homes due to allegations of abuse or neglect fell by over 50%.³ This once-in-a-century pandemic revealed a striking truth: Keeping children at home with their families provided them with equal, if not greater, safety than removing them for placement in the child welfare system.

Child welfare agencies have long employed removal, or remand,⁴ as a tool to ensure a child's safety. The theory that high numbers of removals are necessary to keep children safe, however, had never been tested—there was no mechanism or political will to do so. That changed in March 2020. Without as many eyes on these children, and with fewer removals, the media and local officials feared the worst: Children would suffer abuse or neglect at sky-high rates while shielded from traditional modes of monitoring. This fear proved unfounded, and catastrophe for the safety of the City's children did not ensue. To the contrary, amid this drop in removals, there was no spike in child deaths, no surge of abuse or neglect, nor any other disaster.⁵ New York City's children stayed home, safely, in more ways than one—avoiding the trauma of removal and experiencing sustained safety as the City began to reopen.

This Piece examines the effect of remands from the child's perspective and argues that, as required by New York law, the child welfare system must significantly curtail its practice of removing children from their families. Removal is a drastic measure that can cause substantial and often irreparable trauma to the child.⁶ The Piece uses the COVID-19 pandemic

1. Governor Cuomo Issues Guidance on Essential Services Under the 'New York State on PAUSE' Executive Order, N.Y. State (Mar. 20, 2020), <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order> [<https://perma.cc/YTB3-23W2>].

2. See *infra* section II.C.

3. Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 *Colum. J. Race & L. Forum* 1, 15 (2022).

4. "Remand" and "removal" are used interchangeably and refer to the government removing a child from a parent's custody due to allegations of abuse or neglect.

5. See *infra* Part II.

6. Professor Anna Arons and Professor Dorothy Roberts have each used the COVID-19 pandemic as a lens through which to argue, primarily from a parental-rights perspective, for the abolition of the existing child welfare system. See Arons, *supra* note 3, at 4; Dorothy Roberts, *How Covid Revealed the Folly of Our Child Protection System*, *Nation* (Apr. 29, 2022), <https://www.thenation.com/article/society/child-foster-care-coronavirus/> [<https://perma.cc/E9BU-87BH>]; see also Kathryn Joyce, *Is Our Child Welfare System "Broken"? Or Is It Ripping Apart Black Families by Design?*, *Salon* (June 3, 2022), <https://www.salon.com/>

as a case study to demonstrate the safety and soundness of reserving remands for only the most extreme circumstances. Part I describes the child welfare apparatus and the legal framework governing removals in New York City. Part II examines the harm that removals cause children and the perils of placing a child in foster care, focusing in particular on the role that race and bias play in the rates of child welfare removals. Part III surveys the extent to which New York City's child welfare apparatus shut down at the start of the COVID-19 pandemic and analyzes data collected by the Administration for Children's Services (ACS), New York City's child welfare agency. The data clearly demonstrates that a marked reduction in removals did not compromise children's safety. Unfortunately, as the City's child welfare apparatus began to return to normal operations, so too did the remand rates without discernible necessity or cause. Consequently, in Part IV, this Piece closes with calls for specific reforms within the existing system to reduce family separation rates.

I. THE CHILD WELFARE PROCESS

A. *The Child Welfare Reporting and Removal Process*

The New York City child welfare process begins when a call is made to the State Central Register (SCR), run by the Office of Children and Family Services (OCFS), a state agency.⁷ Anyone who suspects a child is being abused or neglected can file a report.⁸ Some reports are from mandated reporters—for example, doctors and school officials—while other reports are made by community members, often anonymously.⁹ Once a report is made to the SCR, the Child Protective Services (CPS) unit of the local department of social services—in New York City, ACS—must begin an investigation within twenty-four hours.¹⁰ Within sixty days, ACS must render a determination on the report, deeming it either “unfounded” or

2022/06/03/is-our-child-welfare-system-broken-or-is-it-ripping-apart-black-families-by-design/[https://perma.cc/WWV5-XHQB] (discussing Professor Roberts's research and publications on the child welfare system). This Piece builds on their work but is situated from the child's perspective and specifically targets removals. It does not advocate for abolition. Instead, it focuses on how the empirical evidence from New York City's child welfare system during COVID-19, as well as more recent data covering the period of New York City's reopening, underscores the need to strengthen the thresholds for, and thereby limit the use of, the drastic remedy of child removal.

7. Child Protective Services: The Statewide Central Register of Child Abuse and Maltreatment, Off. of Child. & Fam. Servs., <https://ocfs.ny.gov/programs/cps/> [https://perma.cc/M39S-KJBH] (last visited Oct. 7, 2022).

8. *Id.*

9. *Id.*

10. See Child Protective Services: Child Protective Services FAQ, Off. of Child. & Fam. Servs., <https://ocfs.ny.gov/programs/cps/FAQ.php> [https://perma.cc/7YB3-NJZY] (last visited Oct. 7, 2022) (describing the process that begins after a person makes a report).

“indicated” (founded).¹¹ A case is indicated if it is determined to be more likely than not that a child was maltreated or abused.¹²

If a case is indicated, depending on the child’s level of estimated risk, ACS may offer “voluntary” services to the family outside of the court system, or it may file a petition under Article 10 of the New York Family Court Act and seek court-mandated services.¹³ ACS may even offer services when a case is unfounded.¹⁴ When a family is offered services in any scenario, ACS monitors the family and often contracts with private nonprofit entities to provide the services.¹⁵ These services include mental health, substance abuse, and domestic violence services, among others.¹⁶ Beyond seeking services for the family, ACS can also seek to remove a child from their home, either to be temporarily released to a kinship resource or remanded into foster care.¹⁷ In foster care, nonprofit agencies contract with ACS to recruit individuals to provide foster care services for pay.¹⁸

A family subject to ACS intervention remains involved in the child welfare system until either ACS or the Family Court ends a case, which can take months or even years. This is true even in the case of “voluntary services,” under which the family remains subject to monitoring until ACS deems the services completed—often an extremely lengthy process solely within ACS’s discretion. Or, the Family Court may close a case by dismissing the petition; by determining that court intervention is no longer required; by ordering the child’s return to their parent and the end of supervision; or by ordering custody, guardianship, or adoption of the child.¹⁹

Given ACS’s wide latitude at the investigation phase of a child welfare case, as well as the many ways a family can enter and remain in the child welfare system, children in surveilled populations can spend much of their lives either child welfare-involved or at risk of becoming so.

11. *Id.*

12. N.Y. Soc. Serv. Law § 412(7) (ii) (McKinney 2022); see also Michael Fitzgerald, *New York Limits Access to Parents’ Names on Child Abuse and Neglect Registry*, *Imprint* (Apr. 3, 2020), <https://imprintnews.org/news-2/new-york-access-names-neglect-registry/42044> (on file with the *Columbia Law Review*) [hereinafter Fitzgerald, *New York Limits Access*] (describing 2020 legislation raising the standard for CPS indication determinations from “some credible evidence” to a “fair preponderance”).

13. See N.Y.C. Admin. for Child’s Servs., *A Guide for Parents of Children in Foster Care* 6, 15–16, 49 (2022), https://www1.nyc.gov/assets/acs/pdf/parent_handbook.pdf [<https://perma.cc/P2F6-6XAD>] [hereinafter ACS, *Guide for Parents*].

14. *Id.* at 15.

15. About ACS, N.Y.C. Admin. for Child’s Servs., <https://www1.nyc.gov/site/acs/about/about.page> [<https://perma.cc/3N3Q-PMGX>] (last visited Oct. 28, 2022).

16. ACS, *Guide for Parents*, *supra* note 13, at 55.

17. N.Y. Fam. Ct. Act § 1027(b) (v) (McKinney 2022).

18. See ACS, *Guide for Parents*, *supra* note 13, at 19; New York State Foster Care Boarding Rates 2020, Adoptive & Foster Fam. Coal. of N.Y., <https://affcn.org/fostercare/financial-supports/new-york-state-foster-care-boarding-rates-2020/basic-rate/> [<https://perma.cc/S7X2-EKLG>] (last visited Jan. 19, 2023).

19. N.Y. Fam. Ct. Act §§ 661, 1054, 1055-b.

B. *The Law of Removals*

Children have a constitutionally protected right to be raised by their parents without government interference.²⁰ Children's rights stem from a parent's fundamental right to the care and custody of their child, which is protected by the Due Process Clause of the Fourteenth Amendment.²¹ Any state infringement of these rights is subject to prompt and meaningful judicial review.²²

Under New York child welfare law, ACS can remand a child without a parent's consent in one of three ways. First, if there is insufficient time to seek a court order, ACS can conduct an emergency removal if it has reasonable cause to believe that the child's life or health would be in imminent danger absent a removal.²³ ACS must then file a petition or seek a court order no later than the next court date.²⁴ Second, ACS can seek a removal order from the court before it files an abuse or neglect petition.²⁵ In these cases, ACS must similarly determine that a child's life or health would otherwise be in imminent danger and that there is insufficient time to file a petition. ACS must then file the petition within three days.²⁶ Finally, ACS can seek a removal order simultaneously with its filing of an abuse or neglect petition.²⁷

In the 2004 landmark decision *Nicholson v. Scoppetta*, the New York Court of Appeals issued a sweeping check on the government's use of its removal powers.²⁸ Recognizing that "in many instances removal may do more harm to the child than good," the *Nicholson* court held that the state may remove a child only if there are no reasonable efforts the state could make nor any orders that the court could issue to mitigate risk to the child.²⁹ Moreover, the New York Court of Appeals held that to remove a child, the state must prove that the child would be at *imminent* risk of

20. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he most essential and basic aspect of familial privacy[] [is] the right of the family to remain together without the coercive interference of the awesome power of the state. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children.").

21. *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

22. See *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999).

23. N.Y. Fam. Ct. Act § 1024(a).

24. *Id.* § 1026(c).

25. *Id.* § 1022(a).

26. *Id.* § 1022(b).

27. *Id.* § 1027(a)(iii).

28. See 820 N.E.2d 840, 850, 852 (N.Y. 2004).

29. *Id.* at 852 ("[A] court must weigh . . . whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring Additionally, the court must specifically consider whether imminent risk to the child might be eliminated by other means").

physical or emotional harm if they were to remain in the parent’s care.³⁰ Finally, *Nicholson* held that the state must demonstrate that the risk of harm to the child in a parent’s care outweighs the considerable harm of removal, a harm discussed further in Part II.³¹

In articulating this new standard, the New York Court of Appeals rejected the New York City Family Courts’ prior practice of justifying a removal as the “safer course” of action.³² Instead, family courts are now required to engage in the more rigorous imminent-risk inquiry, requiring a showing of danger to the child’s life or health that is impending, not merely possible.³³

This heightened standard—as well as the strict statutory time frames for conducting a removal hearing³⁴—reflect the gravity of removing a child and the trauma caused by even a temporary removal. For example, ACS must seek court review of any emergency removal no later than the next court day after a petition is filed.³⁵ Or, when a parent requests a hearing seeking the return of their child before the family court adjudicates the abuse or neglect allegations, the law requires that “[e]xcept for good cause shown, such hearing shall be held within three court days of the application.”³⁶

In practice, courts and ACS often fail to meet the legal standard for removal and improperly rely on a vague notion of safety (rather than imminent risk) as a justification for family separation.³⁷ In short, courts and ACS seem to chart a “safer course,” even though the law requires much more. As we demonstrate in Part III, children who remained home with their families under court-ordered supervision during the COVID-19 pandemic, when rates of removal plummeted, were no less safe than children who otherwise would have been removed under ACS’s overly protective approach.

30. *Id.* at 850.

31. *Id.* at 852.

32. *Id.* at 853 (“The term ‘safer course’ should not be used to mask a dearth of evidence or as a watered-down, impermissible presumption.” (citations omitted)).

33. *Id.* at 845, 853.

34. N.Y. Fam. Ct. Act §§ 1027(a)(ii), 1028(a) (McKinney 2022).

35. *Id.* § 1027(a).

36. *Id.* § 1028(a). Despite the strict statutory time frame, in practice, these hearings are often delayed and can take weeks—if not months—to conclude due to the court’s calendar, the attorneys’ schedules, and witnesses’ availability.

37. See, e.g., *Matter of Cameron L.*, 115 N.Y.S.3d 447, 450 (N.Y. App. Div. 2019) (reversing a removal, holding that “[t]he Family Court’s concerns about . . . whether the mother would keep in contact with the petitioner or return to court . . . did not amount to an imminent risk to the child’s life or health that could not be mitigated by reasonable efforts to avoid removal”); *Matter of Chloe-Elizabeth A.T.*, 90 N.Y.S.3d 127, 129 (N.Y. App. Div. 2018) (reversing the Family Court’s removal of a child (Chloe), finding “the petitioner failed to establish that Chloe would be subject to imminent risk if she remained in the father’s care pending the outcome of the neglect proceeding”).

II. THE TRAUMA OF REMOVAL

The science is clear: Remands are harmful to children.³⁸ Often, the trauma of removal is greater than that of the alleged abuse or neglect.³⁹ This section outlines the specific harms children face when removed from their parents.⁴⁰

A. *Family Separation Is Physically, Cognitively, and Emotionally Traumatic to Children, Often More So Than Any Alleged Maltreatment by a Caregiver*

In New York, “the trauma of removal” has become a ubiquitous phrase and a critical element courts must consider in granting a removal.⁴¹ But what *is* the traumatic harm of removal?

Children who are subject to child welfare removals face “complex trauma,” meaning exposure to multiple traumatic events—often of an invasive, interpersonal nature—and the wide-ranging, long-term effects of this exposure.⁴² The consequences of complex trauma include relational and attachment issues, “body dysregulation, difficulty managing emotions, dissociation, poor self-regulation and self-concept, cognitive impairment, and multiple long-term health consequences.”⁴³

The child welfare system produces additional traumas on top of the already difficult life circumstances often experienced by children caught in its reach. In addition to struggles with poverty, minimal access to mental health and educational services, and inadequate housing, these children experience harms imposed directly by the child welfare system, including

38. The majority of the scientific references in this section come from the tireless work of the ABA Children’s Rights Litigation Committee. For the Committee’s complete analysis, see ABA Child.’s Rts. Litig. Comm., *Trauma Caused by Separation of Children From Parents: A Tool to Help Lawyers* 4 (2020), https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf [<https://perma.cc/Q2V5-FFSA>].

39. Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523, 527 (2019) (“The ‘harm of removal’ [means] . . . the multiple ways a child may be negatively impacted by separation from her family It [recognizes] . . . that ‘[r]emoval and placement in foster care may have a worse impact on the child than neglect’ [and that there are] . . . numerous independent and overlapping ‘harms.’” (citations omitted) (quoting Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children*, 18 Colum. J. Gender & L. 175, 196 (2008))).

40. The child welfare system can remove children from their parents or from their legal guardians. For the sake of simplicity, in this Piece we refer to parents, but we acknowledge that there are circumstances in which children are removed from legal guardians who are not parents.

41. *Nicholson v. Scopetta*, 820 N.E.2d 840, 850, 852 (N.Y. 2004).

42. Vivek Sankaran, Christopher Church & Monique Mitchell, *A Cure Worse Than the Disease? The Impact of Removal on Children and Families*, 102 Marq. L. Rev. 1161, 1166–67 (2019).

43. *Id.*

lengthy investigations⁴⁴ and intimidating and confusing court proceedings, which compound any alleged underlying maltreatment.⁴⁵

A child's body chemistry can be permanently altered by a removal. Specifically, separation from a caregiver causes a "monsoon of stress hormones," known as cortisol, to be released into a child's body.⁴⁶ Cortisol at higher levels or for prolonged periods of time can cause long-term damage to brain cells.⁴⁷ As a result, the architecture of a child's brain is forever changed because "most cells in the brain cannot renew or repair themselves."⁴⁸ Alarmingly, evidence suggests that the effects of removal, including stress and trauma, correlate with age, adversely affecting younger children more than older children.⁴⁹ The "monsoon" of stress hormones triggered by removal can increase the risk of lasting, destructive complications like "certain forms of cancer,"⁵⁰ "difficulty sleeping, developmental regression, heart disease, hypertension, obesity, diabetes, and decreased longevity."⁵¹

Other studies underscore the harms that removals cause to children's emotional health: Children who are removed are "overwhelmed with feelings of abandonment, rejection, worthlessness, guilt, and

44. Madison Hunt, 'Weaponizing' Calls to CPS Hotline: New York Legislation Would Deter False Reports, Imprint (May 19, 2022), <https://imprintnews.org/child-welfare-2/new-york-bill-false-hotline-reports/65267> (on file with the *Columbia Law Review*).

45. As practitioners, we observe that children are often frightened by investigations, which can include middle-of-the-night entry by ACS and strip searches. Children frequently present as intimidated by family court and preoccupied as to why a judge has ultimate authority to make decisions about their lives.

46. Sankaran et al., *supra* note 42, at 1167.

47. *Id.* Even brief separations can cause the release of higher levels of stress hormones that begin to damage brain cells. See Allison Eck, Psychological Damage Inflicted by Parent-Child Separation Is Deep, Long-Lasting, Nova Next (June 20, 2018), <https://www.pbs.org/wgbh/nova/article/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting> [<https://perma.cc/U9PV-64TF>] ("The scientific evidence against separating children from families is crystal clear We all know it is bad for children to be separated from caregivers." (internal quotation marks omitted) (quoting Erin C. Dunn, a social and psychiatric epidemiologist at Massachusetts General Hospital)).

48. 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-4b67019f4e4_story.html (on file with the *Columbia Law Review*) (describing studies showing that children separated from parents had lower IQ test scores, higher rates of aggression, and were more likely to be involved in the criminal justice system and suffer from substance abuse issues).

49. Eck, *supra* note 47; Sara Goudarzi, Separating Families May Cause Lifelong Health Damage, *Sci. Am.* (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/> (on file with the *Columbia Law Review*).

50. ABA Child's Rts. Litig. Comm., *supra* note 38, at 6.

51. *Id.* at 4; Stephanie Carnes, Opinion, 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 [<https://perma.cc/H2MM-BCE9>].

helplessness,⁵² experience ambiguity, loss, and trauma, and often equate child removal to kidnapping.⁵³ Over the longer term, children who are subjected to the stress and trauma of removal have higher rates of depression, attempted suicide, alcohol abuse, and gambling addiction.⁵⁴ One study showed that more than half of children subject to removal “had clinical levels of at least one mental health problem,” and 19.9% of the individuals in that study had three or more mental health problems, both of which are substantially higher than those of the general population in the same age range as the sample.⁵⁵ Stunningly, the same study found that rates of PTSD among former foster youth are twice as high as those among U.S. war veterans.⁵⁶

According to experts that study the physiological effects of removal on children, “The scientific evidence against separating children from families is crystal clear No one in the scientific community would dispute it—it’s not like other topics where there is more debate among scientists. We all know it is bad for children to be separated from caregivers.”⁵⁷

B. *Children Who Remain With Their Families Fare Better Than Similarly Situated Children Who Are Removed*

As a group, children who are removed from their families suffer worse outcomes than similarly situated youth who are not. Recent literature addresses “marginal cases,” meaning cases “where the investigators may disagree about the placement recommendation.”⁵⁸ Child welfare investigators are randomly assigned to every suspected child abuse or neglect case.⁵⁹ When investigators disagree about a placement recommendation,

52. Rosalind D. Folman, “I Was Taken”: How Children Experience Removal From Their Parents Preliminary to Placement in Foster Care, 2 *Adoption Q.*, no. 2, 1998, at 7, 11.

53. Monique B. Mitchell & Leon Kuczynski, Does Anyone Know What Is Going On? Examining Children’s Lived Experience of the Transition Into Foster Care, 32 *Child. & Youth Servs. Rev.* 437, 440 (2010).

54. ABA Child’s Rts. Litig. Comm., *supra* note 38, at 4.

55. Peter J. Pecora, Ronald C. Kessler, Jason Williams, Kirk O’Brien, A. Chris Downs, Diana English, James White, Eva Hiripi, Catherine Roller White, Tamera Wiggins & Kate Holmes, *Improving Family Foster Care: Findings From the Northwest Foster Care Alumni Study 1* (2005), https://casefamilypro-wpengine.netdna-ssl.com/media/AlumniStudies_NW_Report_FR.pdf [<https://perma.cc/C7GT-DCPW>].

56. *Id.*

57. Eck, *supra* note 47 (internal quotation marks omitted) (quoting Erin C. Dunn, a social and psychiatric epidemiologist at Massachusetts General Hospital).

58. Joseph J. Doyle, Jr., Causal Effects of Foster Care: An Instrumental-Variables Approach, 35 *Child. & Youth Servs. Rev.* 1143, 1144, 1150 (2013) [hereinafter Doyle, Causal Effects]; Joseph J. Doyle, Jr., Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care, 116 *J. Pol. Econ.* 746, 748 (2008) [hereinafter Doyle, Investigator Assignment]; Joseph J. Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effects of Foster Care, 97 *Am. Econ. Rev.* 1583, 1584 (2007) [hereinafter Doyle, Measuring Foster Care].

59. See Doyle, *Measuring Foster Care*, *supra* note 58, at 1584.

the case is deemed “marginal.”⁶⁰ These cases provide a useful lens through which to examine the effects of removal, because the recommendations are naturally randomized via a rotating roster of investigators.⁶¹ Tracing the long-term outcomes of children in marginal cases provides valuable information about how similarly situated children fare when they are removed (or not).

Findings on these marginal cases are stark. They show that children removed from their caregivers suffer a diverse range of worse outcomes: two to three times greater rates of delinquency,⁶² greater rates of emergency medical care utilization,⁶³ higher rates of teen birth,⁶⁴ twice the rate of learning and developmental delays,⁶⁵ and six times the rates of behavioral problems.⁶⁶ The effects of removal follow children into adulthood. As adults, children who were removed are more likely to manifest substance-related disorders and psychotic, bipolar, depressive, or anxiety disorders.⁶⁷ They report lower earnings,⁶⁸ are two to three times more likely to be involved with the adult criminal system, and are more likely to be convicted for violent offenses.⁶⁹ Perhaps most alarmingly, children who are removed face a 50% greater risk of death between the ages of twenty and fifty-six than children who experienced maltreatment but remained with caregivers.⁷⁰ In marginal cases, children who remain with their caregivers clearly fare better.

60. See *id.*

61. *Id.*

62. Doyle, *Measuring Foster Care*, *supra* note 58, at 1599; 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, 237 (2005).

63. See Doyle, *Causal Effects*, *supra* note 58, at 19.

64. *Id.*

65. Kate Lowenstein, *Citizens for Juv. Just., Shutting Down the Trauma to Prison Pipeline: Early, Appropriate Care for Child-Welfare Involved Youth 10* (2018), <https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5b4761732b6a28f6ea5e94c1/1531404665230/FINAL+TraumaToPrisonReport.pdf> [<https://perma.cc/ELF9-Z6TY>].

66. See *id.*

67. See Sylvana M. Côté, Massimiliano Orri, Mikko Marttila & Tiina Ristikari, *Out-of-Home Placement in Early Childhood and Psychiatric Diagnoses and Criminal Convictions in Young Adulthood: A Population-Based Propensity Score-Matched Study*, 2 *Lancet Child & Adolescent Health* 647, 651 (2018).

68. See Doyle, *Measuring Foster Care*, *supra* note 58, at 1584.

69. See Côté et al., *supra* note 67, at 650 tbl.2; Doyle, *Investigator Assignment*, *supra* note 58, at 766.

70. See Menghan Gao, Lars Brännström & Ylva B. Almquist, *Exposure to Out-of-Home Care in Childhood and Adult All-Cause Mortality: A Cohort Study*, 46 *Int'l J. Epidemiology* 1010, 1014–16 (2017).

C. *The Lived Experience of Foster Care Is Traumatic*

The premise of foster care is that a child will be “safer” away from their caregivers. This assumption overlooks the increasingly well-understood traumatic harm of foster care itself.⁷¹

After a traumatic removal, the tumultuous transition into foster care often causes a child additional harm. In New York, if a child does not have an identified family member, friend, or resource prior to removal, they are temporarily placed in a youth reception center, most often the Children’s Center. The Children’s Center is notorious for conditions of “chaos, physical fighting, and overcrowding,”⁷² as well as unjustifiably long stays before a child is placed in a foster home.⁷³ These extended stays away from family or a consistent caregiver, in a place so manifestly unfit for children, are not only self-evidently traumatic but also leave children more vulnerable to sex trafficking.⁷⁴

Children often face further abuse and neglect once they are placed in foster care. Children in foster homes face rates of sexual abuse that are two to four times higher than in the general population.⁷⁵ Other kinds of reported maltreatment abound: As many as one in three of foster youth report abuse or neglect, and even more report insufficient access to food or appropriate clothing—some of the very same circumstances that lead to a removal in the first place.⁷⁶

Foster care placements are also notoriously unstable, a phenomenon that has been termed “foster care drift.”⁷⁷ While studies find varying numbers, they agree that foster children frequently experience multiple

71. It is important to note that some removals result in placements with kinship resources, as directed by OCFS’s Kin-First Firewall Practice. See N.Y. Off. of Child. & Fam. Servs., Administrative Directive 20-OCFS-ADM-18, at 1–4 (Oct. 14, 2020), https://ocfs.ny.gov/main/policies/external/ocfs_2020/ADM/20-OCFS-ADM-18.pdf [<https://perma.cc/6P8R-5EBD>]. Kinship foster care placements mitigate some, but certainly not all, of the trauma of removal. The authors applaud ACS’s efforts to increase kinship placements; however, kinship placements do not alleviate the need to reevaluate removals.

72. Melissa Russo & Kristina Pavlovic, NYC Moves to Protect Children at Foster Care Intake Center After I-Team Report, NBC N.Y. (Mar. 18, 2019), <https://www.nbcnewyork.com/news/local/nyc-moves-to-protect-children-after-i-team-report-asc-nicholas-scoppetta-childrens-center/1567649/> [<https://perma.cc/C62A-WZE4>].

73. *Id.*; see also Michael Fitzgerald, Is New York State Responsible for Some Long Stayers at the City’s Temporary Foster Home? City Child Welfare Commissioner Thinks So, Imprint (Mar. 28, 2019), <https://imprintnews.org/featured/new-york-childrens-center-child-welfare-commissioner/34364> (on file with the *Columbia Law Review*).

74. Oversight—The Child Welfare System During COVID-19: Hearing Before N.Y.C. Council Comm. on Gen. Welfare 8 (2021) (statement of David Hansell, Comm’r, N.Y.C. Admin. for Child.’s Servs.) [hereinafter 2021 Hearing].

75. See Trivedi, *supra* note 39, at 542–43 (analyzing two studies showing two- and four-fold likelihoods of sexual abuse in foster care).

76. See *id.*

77. See *id.* at 544.

placements.⁷⁸ Averages range from three to six placements, and some children have been placed in as many as fifteen homes in their first year of care.⁷⁹ In 2021, children in New York City's foster care system were moved 1.2 times per 1,000 days of care.⁸⁰

Given the trauma, danger, and instability of foster care, as well as the data demonstrated through marginal cases, removals—currently used in more than one in five New York City child welfare cases⁸¹—should be used only in exceptional circumstances.

D. *Agency and Judicial Removal Decisions Are Racially Biased*

Let there be no mistake: The traumas of the U.S. child welfare system are not evenly distributed. Instead, the child welfare system is infected with racial bias, as numerous local, national, and international organizations have emphasized in recent months.⁸² In the wake of the killings of George

78. See, e.g., Natasha E. Latzman, Deborah A. Gibbs, Rose Feinberg, Marianne N. Kluckman & Sue Aboul-Hosn, *Human Trafficking Victimization Among Youth Who Run Away From Foster Care*, 98 *Child. & Youth Servs. Rev.* 113, 118 tbl.1 (2019) (finding children in Florida's foster care system experience an average of more than six placements); Allison Vreeland, John S. Ebert, Tarah M. Kuhn, Kathy A. Gracey, April M. Shaffer, Kelly H. Watson, Meredith A. Gruhn, Lauren Henry, Lindsay Dickey, Rachel E. Siciliano, Allegra Anderson & Bruce E. Compas, *Predictors of Placement Disruptions in Foster Care*, *Int'l J. Child Abuse & Neglect*, Jan. 2020, at 1, 8–9 (finding children in Tennessee's foster care system experienced an average of three to four placements).

79. See Latzman et al., *supra* note 78, at 118 tbl.1; Trivedi, *supra* note 39, at 544.

80. Mayor's Off. of Operations, *Preliminary Mayor's Management Report 172* (2022), https://www1.nyc.gov/assets/operations/downloads/pdf/pmmr2022/2022_pmmr.pdf [<https://perma.cc/R6QF-FNAR>].

81. N.Y.C. Admin. for Child's Servs., *Flash Monthly Indicator Report: January 2022*, at 9 (2022), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2022/01.pdf> [<https://perma.cc/Z5XU-TZPK>] [hereinafter ACS, January 2022 Report].

82. See U.N. Comm. on the Elimination of Racial Discrimination, *Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America*, ¶ 43, U.N. Doc CERD/C/USA/CO/10-12 (Sept. 21, 2022), <https://www.ecoi.net/en/file/local/2078960/G2249596.pdf> [<https://perma.cc/3SHD-3STP>]; Child's Rts. & Colum. L. Sch. Hum. Rts. Inst., *Racial (In)justice in the U.S. Child Welfare System: Response to the Combined Tenth to Twelfth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination I* (2022), <https://www.childrensrights.org/wp-content/uploads/2022/07/Childrens-Rights-2022-UN-CERD-Report-FINAL.pdf> [<https://perma.cc/TU7K-PG9W>]; Hina Naveed, Hum. Rts. Watch, "If I Wasn't Poor, I Wouldn't Be Unfit": The Family Separation Crisis in the US Child Welfare System 38–46 (2022), https://www.hrw.org/sites/default/files/media_2022/11/us_crd1122web_3.pdf [<https://perma.cc/BS4Q-EHH8>]; Jennifer Andrus, *New York State Bar Association Finds Child Welfare System Replete With Systemic Racism, Pushes for Reforms*, N.Y. State Bar Ass'n (Apr. 2, 2022), <https://nysba.org/new-york-state-bar-association-finds-child-welfare-system-replete-with-systemic-racism-pushes-for-reforms/> [<https://perma.cc/9L9N-LPFU>]; Andy Newman, *Is N.Y.'s Child Welfare System Racist? Some of Its Own Workers Say Yes.*, N.Y. Times (Nov. 22, 2022), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acs-racism-abuse-neglect.html> (on file with the *Columbia Law Review*). At the time of publication, the New York office of the U.S. Commission on Civil Rights is investigating whether New York state child welfare authorities are violating Black families' constitutional rights. Press

Floyd, Breonna Taylor, and Ma'Khia Bryant, and innumerable other race-based tragedies, advocates took aim at the injustices of the criminal justice system. But the child welfare system—an equally racist institution with an equivalent if not greater liberty interest at stake (the fundamental right to family) than the criminal justice system—did not initially garner the same attention.⁸³ We must reconsider the practice of removal in this context by shining light on the racial inequity and bias in the child welfare system.

Walk into any one of New York City's five Family Courts and it becomes immediately apparent that Black and Brown families are disproportionately affected by the child welfare system.⁸⁴ Study after study confirms that fact.⁸⁵ Former ACS Commissioner David Hansell himself testified to the New York City Council that “[w]ithin New York City and nationally, Black/African American and Latinx/Hispanic families have long been overrepresented at key points along child welfare pathways.”⁸⁶

In 2019, an astounding 91.9% of children removed in New York City were either Latinx/Hispanic (36.4%) or Black/African American (55.5%).⁸⁷ Comparatively, Black/African American children make up only 23% of the New York City child population.⁸⁸ As Commissioner Hansell put it:

[T]he data show that Black/African American and Latinx/Hispanic children are disproportionately represented in court-ordered supervision filings (44.4% and 46.2% respectively in CY 2019) and foster care placements (55.5% and 36.4% respectively in CY 2019). We see in particular that the experience of Black/African American children is different from other children. While Black/African American children comprised 42.6% of all substantiated investigations in CY 2019, already a disproportionate amount compared with the overall population, they comprised 55.5% of all foster care placements, and

Release, New York Child Welfare System and Its Impact on Black Children and Families, N.Y.C. Advisory Comm. to U.S. Comm'n on C.R. (Oct. 31, 2022), <https://www.usccr.gov/meetings/2022/11-18-new-york-child-welfare-system-and-its-impact-black-children-and-families> [https://perma.cc/6H62-NQFW].

83. Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, Imprint (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> (on file with the *Columbia Law Review*).

84. See Dorothy Roberts, *Shattered Bonds: The Color of Child Welfare*, at vi (2002) (“The number of Black children in state custody . . . is a startling injustice . . . [I]t should be obvious to anyone who has spent a day . . . visiting a child welfare office . . . or watching who goes in and out of juvenile court.”).

85. See, e.g., *id.* at 7–10; HHS, *Child Welfare Practice to Address Racial Disproportionality and Disparity 2–3* (2021), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [https://perma.cc/LQ8L-ERN8].

86. Oversight—Racial Disparities in the Child Welfare System: Hearing Before N.Y.C. Council Comm. on Gen. Welfare 2–3 (2020) (statement of David Hansell, Comm’r, N.Y.C. Admin. of Child’s Servs.) [hereinafter 2020 Hearing].

87. *Id.* at 3.

88. *Id.* at 5.

remained at 55.6% of the foster care population in that year. This shows us that we have much more work to do to critically examine decisions at each point in a case; and also to look at how we are supporting Black/African American families and addressing the unique challenges and traumas they face not just in the child welfare system, but in our society at large.⁸⁹

A 2020 study commissioned but never released by ACS surveyed Black and Hispanic frontline ACS workers. ACS workers themselves concurred, finding the system they work in to be a “predatory system that specifically targets Black and [B]rown parents” and subjects them to “a different level of scrutiny.”⁹⁰ This disproportionality stems from racial bias and systemic structural issues. The child welfare system is designed to foster and perpetuate bias given that child welfare laws offer wide latitude and discretion to child welfare employees and family court actors.⁹¹ Dr. Jessica Pryce, an expert in child welfare and systemic bias, explains that within the child welfare system, “[i]mplicit bias is an insidious and nearly untraceable result of systemic racism [W]e all work in a system that is inherently racist and being operated by policies that have historically excluded and ostracized poor families of color, especially those who are [B]lack.”⁹²

Further, communities that use public services, live in public housing, require the aid of public benefits, or utilize the assistance of government-funded organizations are consequently subjected to higher levels of surveillance and greater rates of child welfare reports. These populations are more heavily surveilled due to the invasive monitoring and requirements of the services they access—ranging from drug testing to means-eligibility testing. In effect, those in the greatest need are often the most penalized and scrutinized and therefore the most likely to be brought into the child welfare system. For example, an individual who gets in a fight with their partner in a homeless shelter is much more likely to have a report to the SCR called in on them than an individual who gets in a fight with their partner in a brownstone in affluent Park Slope, Brooklyn. Bias, be it individual or systemic, plays a role in every child welfare decision from investigation to removal. The decision to remove a child from a caregiver is never only about objective risk; there is subjective judgment and, consequently, bias inherent in that determination. Bias, even if

89. *Id.* at 15.

90. Newman, *supra* note 82.

91. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 *Stan. L. & Pol’y Rev.* 217, 220 (2022) (“[T]he law grants agencies and family courts wide discretion to regulate and separate families. Second, that wide discretion permits biases (implicit or explicit) to inform decision-making, and the present child protection system has long been criticized for perpetuating racial, class, and other forms of injustice.”).

92. Jessica Pryce, *Opinion, The Case for Race-Blind Foster Care Removal Decisions*, Imprint (Jan. 13, 2020), <https://imprintnews.org/opinion/the-case-for-race-blind-foster-care-removal-decisions> (on file with the *Columbia Law Review*) [hereinafter Pryce, *The Case for Race-Blind Removal*].

inadvertent, leads ACS to seek—and judges to grant—more removals than are necessary to protect children, as evidenced by the data from the pandemic below.⁹³ Commissioner Hansell said it best when testifying to the City Council: “[W]e must look critically at our own attitudes, even when it is painful.”⁹⁴ It is time all child welfare actors recognize bias as a root cause of unnecessary family separation.

III. THE COVID-19 PANDEMIC AND THE EFFECT ON CHILD WELFARE IN NEW YORK CITY

COVID-19 had a profound impact on New York City’s child welfare system. The shutdowns associated with the pandemic drastically changed the child welfare apparatus’s surveillance footprint. Consequently, the system carried out fewer removals. New York City’s children were no less safe, and arguably were safer, as a result.

A. *The City, the Court, and the Child Protective Apparatus Shuts Down*

In March 2020, New York City’s child welfare system and its longstanding removal practices changed. On March 20, 2020, Governor Andrew Cuomo issued New York State on Pause, an executive order closing all non-essential businesses, canceling nonessential gatherings, and limiting the use of public transportation.⁹⁵ By virtue of this order, additional directives from New York City, and the reality of a city overrun by disease, the places where adults and mandated reporters most frequently interact with children largely shut down. Schools and daycares closed, pediatricians canceled routine appointments and shifted predominately to telehealth services, and emergency rooms diverted nearly all resources to treating COVID-19.

At the same time, New York City and New York State both issued guidance dramatically limiting the activity of child protection workers. On March 15, 2020, OCFS directed caseworkers to shift to remote assessments of children when appropriate, as opposed to the traditional course of conducting in-person home visits while investigating allegations of abuse or neglect.⁹⁶ Just five days later, OCFS directed all contracted preventive service agencies to similarly reduce in-person contacts and to keep all visits between caseworkers and families remote when possible.⁹⁷ Finally, on April

93. See *infra* Part III.

94. 2020 Hearing, *supra* note 86, at 20.

95. N.Y. State, *supra* note 1.

96. Letter from Lisa Gharthey Ogundimu, Deputy Comm’r, N.Y. Off. of Child. & Fam. Servs., to N.Y. Comm’rs 2 (Mar. 15, 2020), <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar15-Guidance-for-CPS.pdf> [<https://perma.cc/5Q6Z-Q49H>].

97. Letter from Lisa Gharthey Ogundimu, Deputy Comm’r, N.Y. Off. of Child. & Fam. Servs., to N.Y. Comm’rs and Exec. Dirs. 3 (Mar. 20, 2020), <https://ocfs.ny.gov/main/news/2020/COVID-2020Mar20-Guidance-for-Foster-Care-and-Preventive-Staff.pdf> [<https://perma.cc/LT9J-GCTM>].

2, 2020, ACS's Family Services Unit (FSU)—the unit that supervises families in cases in which children remain in the care of their parent(s) or guardian(s) under court-ordered supervision—limited its in-person operations.⁹⁸ FSU reduced its twice-a-month in-person home visits to once a month for children in the care of a parent charged with abuse or neglect and suspended all in-person visits to children in the care of a nonrespondent parent or guardian.⁹⁹ These three groups of caseworkers—investigative workers, preventive workers, and FSU workers—are major sources of allegations that lead to further court intervention, including requests for removals of children from their homes.¹⁰⁰ With these casework contacts dramatically curtailed in most cases, and completely eliminated in others, March and April 2020 witnessed a historic reduction of in-home surveillance of children and their families.

In addition to significantly cutting back on in-person monitoring of children, the New York City Family Courts themselves essentially shut down in the spring of 2020. By March 25, 2020, all in-person operations ceased, and with limited capacity to hold virtual proceedings, the court could only hear emergency matters.¹⁰¹ In child protective cases, such emergency matters included only requests for orders of protection and applications to remove children from their homes, either before or after an abuse or neglect petition was filed.¹⁰² ACS was no longer permitted to engage in the previously routine practice of filing abuse or neglect petitions when it did not seek a removal of the child but was solely asking for court-ordered supervision of the family. In other words, ACS was permitted to file cases only when it could demonstrate that the risk of harm to the child was so great that it warranted a removal. For the first time, ACS was forced to triage the cases it filed, no longer able to seek court intervention for less severe cases. On every level—reporting, investigation, monitoring, and court intervention—New York City's child welfare apparatus dramatically shrank its footprint in the spring of 2020. This unprecedented reality had far-reaching consequences, particularly on the extent to which it removed children from their homes.

98. Letter from Frank Cresciullo, Chief Operating Officer, Div. of Child Prot., N.Y.C. Admin. for Child.'s Servs., to Div. of Child Prot., N.Y.C. Admin. for Child.'s Servs. 1 (Apr. 2, 2020), <https://www1.nyc.gov/assets/acs/pdf/covid19/fsuguideline.pdf> [<https://perma.cc/V9BA-AJU2>].

99. *Id.*

100. According to the Children's Bureau, 10.3% of all child maltreatment reports nationwide come from social services staff. Child's Bureau, Child Maltreatment 2019: Summary of Key Findings 3 (2021), <https://www.childwelfare.gov/pubpdfs/canstats.pdf> [<https://perma.cc/2MUU-T45W>].

101. See Admin. Order of the Admin. Judge of the N.Y.C. Fam. Ct. AO-(AJ)-03-23-2020 (2020).

102. Memorandum from Jeanette Ruiz, Admin. Judge, N.Y.C. Fam. Ct., to Agency Heads 1 (Mar. 17, 2020) (on file with the *Columbia Law Review*).

B. *The COVID-19 Experiment: Fewer Removals Did Not Compromise Safety*

The COVID-19 pandemic created an unintended, potentially transformative, experiment for the child welfare system's longstanding removal practices. ACS filed over 50% fewer abuse and neglect cases in the first three months of the pandemic, from April to June 2020, than it did during that same period in 2019.¹⁰³ At the same time, it also remanded about half as many children into foster care.¹⁰⁴ This sharp decline was not a function of an unusually aggressive year for ACS in 2019: The remands to foster care were even higher in 2017 and 2018.¹⁰⁵ These 2020 numbers represent nearly a 55% and 45% decrease as compared to 2017 and 2018, respectively. And while the numbers reflect fewer requests for remands by ACS, they also reflect higher rates of judicial denial of ACS's requests. In the two weeks following the courts' closure, judges denied close to 30% of ACS's requests to remand children, as compared to approximately 20% in the months prior.¹⁰⁶

Despite the precipitous drop in removals, children's safety was not compromised. In fact, rates of substantiated allegations of child abuse and neglect did not increase during the first few months of the pandemic. Between April and June 2019, the City received over 41,000 reports of abuse or neglect with a year-to-date substantiation rate of approximately 37.2%.¹⁰⁷ In the same months of 2020, when removals were at their lowest, the rate of substantiation remained steady: The City received approximately 42% fewer reports of abuse and neglect, and the year-to-date rate of substantiation in those months averaged 36.9%.¹⁰⁸ Further, the number

103. See Arons, *supra* note 3, at 15.

104. Between April and June 2020, just 375 children were placed in foster care, compared to 700 children between April and June 2019. See *id.*

105. ACS remanded 817 children to foster care between April and June 2017 and 671 children during the same period in 2018. See N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: August 2017, at 9 (2017), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2017/08.pdf> [<https://perma.cc/PTF5-XJX9>]; N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: September 2018, at 9 (2018), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2018/09.pdf> [<https://perma.cc/F3NX-ABBZ>].

106. See Arons, *supra* note 3, at 17.

107. See N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: July 2019, at 27 (2019), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2019/07.pdf> [<https://perma.cc/NR9J-AGX4>]; N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: August 2020, at 6 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/08.pdf> [<https://perma.cc/6P2S-GBTW>] [hereinafter ACS, August 2020 Report]; N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: September 2020, at 6 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/09.pdf> [<https://perma.cc/9DWR-EA2N>] [hereinafter ACS, September 2020 Report].

108. N.Y.C. Admin. For Child.'s Servs., Flash Monthly Indicator Report: July 2020, at 29 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/07.pdf> [<https://perma.cc/ZL7Y-KC7K>]; ACS, August 2020 Report, *supra* note 107, at 6; ACS, September 2020 Report, *supra* note 107, at 6.

of investigations into child fatalities suspected to be a result of abuse and neglect *dropped* by 25% between February and June 2020 as compared with the same period the year prior.¹⁰⁹ In June 2021, Commissioner Hansell himself noted, “I’m happy to say that we really haven’t seen any indicators of a larger bolus of undetected child abuse” during the pandemic.¹¹⁰ As evidence, he noted that substantiation rates in abuse and neglect investigations remained steady throughout the ongoing pandemic.¹¹¹ This is particularly remarkable because fewer investigations typically lead to more accurate investigations, given that caseworkers have more capacity to thoroughly investigate each allegation.¹¹² Further, Commissioner Hansell stated that there were no “significant changes” in emergency room visits for children, which “you might think would happen if there were more children suffering any kind of serious physical abuse.”¹¹³

These dramatic drops in substantiated abuse investigations and child fatalities do not reflect an underreporting of these cases. The notion that this data does not account for “hidden” cases of abuse is belied by what happened next. On July 31, 2020, New York City Family Courts expanded their virtual capacity, permitting nonemergency matters to be heard for the first time since the closure on March 25, 2020.¹¹⁴ At the same time, New York City was slowly reopening, entering “Phase III” of Governor Cuomo’s phased reopening plan.¹¹⁵ By the fall, most of the City’s students returned to some form of in-person schooling.¹¹⁶

But as New Yorkers increasingly emerged from lockdowns, there was hardly a surge in cases of abuse or neglect. To the contrary: In September,

109. See Arons, *supra* note 3, at 19 n.97 (“[F]rom February 2019 to June 2019, there were sixty-three ‘[c]hildren with fatality SCR allegations (unique children),’ including ‘children with roles in initial and subsequent investigation stages,’ compared to forty-seven children in the same period in 2020[.]” (quoting N.Y.C. Admin. for Child’s Servs., Response to Anna Arons’s Freedom of Information Law Request (Aug. 20, 2020))).

110. 2021 Hearing, *supra* note 74, at 43; Michael Fitzgerald, No Evidence of Pandemic Child Abuse Surge in NYC, But Some See Other Crises for Child Welfare System, Imprint (June 15, 2021), <https://imprintnews.org/top-stories/no-evidence-of-pandemic-child-abuse-surge-in-new-york-city-but-some-see-other-crises-for-child-welfare-system/55991> (on file with the *Columbia Law Review*) [hereinafter Fitzgerald, No Evidence].

111. Fitzgerald, No Evidence, *supra* note 110.

112. See Arons, *supra* note 3, at 14.

113. 2021 Hearing, *supra* note 74, at 43.

114. N.Y.C. Fam. Ct., Covid-19 Phase 4 Operations Summary 1 (2020) (on file with the *Columbia Law Review*).

115. Press Release, Andrew Cuomo, N.Y. Governor, Governor Cuomo Announces New York City Enters Phase III of Reopening Without Indoor Dining and Subject to State Guidance Today (July 6, 2020), <https://www.governor.ny.gov/news/governor-cuomo-announces-new-york-city-enters-phase-iii-reopening-without-indoor-dining-and> [https://perma.cc/8UNT-URRF].

116. Eliza Shapiro & Mihir Zaveri, New York Becomes First Big City in U.S. to Reopen All Its Schools, N.Y. Times (Oct. 1, 2020), <https://www.nytimes.com/2020/10/01/nyregion/nyc-coronavirus-schools-reopen.html> (on file with the *Columbia Law Review*).

October, and November 2020, ACS filed just 14% more abuse or neglect cases than it did in the three months prior to the courts' reopening.¹¹⁷ Moreover, despite the marginal increase in the number of cases that were filed, the substantiation rate of reports to the State Central Register remained steady as the City reopened. In September, October, and November 2020, the substantiation rate averaged between 36% and 38%, a rate nearly identical to that in May, June, and July of that year—the three months prior to the reopening.¹¹⁸ Had there been a backlog of abuse and neglect cases that had gone unnoticed during the pandemic only to come to light as the City reopened, one would expect to have seen a spike in the substantiation rate for new calls to the SCR.¹¹⁹

Substantiation rates remained steady as the months went on. In January and February 2021, these rates averaged between 35% and 36%, as compared with 34% and 37% the year prior.¹²⁰ Perhaps most significantly, rates of abuse and neglect filings in January and February 2021 *dropped* by more than 41% as compared with the same time period the year prior.¹²¹ More than five months after the courts began accepting nonemergency filings and the City entered Phase III of reopening, and four months after many children began attending school in person, ACS was filing *fewer* cases than it did when the closures were in place. Finally, in the 2021 fiscal year (FY), ACS reported fifty-two child fatalities—8% fewer than in FY 2020 and 17% fewer than in FY 2019.¹²² Indeed, these statistics demonstrate not only the absence of any backlog of unseen abuse or neglect but also the sustained safety of New York City's children despite dramatically lower removal rates during the outset of the pandemic.

The data reflects a striking reality: In a system with fewer removals, children are no less safe. In this way, the child welfare system as it currently operates acts too aggressively, unnecessarily separating families and causing children significant—and as the data shows—unnecessary harm.

117. N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: December 2020, at 5 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/12.pdf> [<https://perma.cc/36KP-KBEB>].

118. N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: March 2021, at 6 (2021), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/03.pdf> [<https://perma.cc/DYW3-4DPB>].

119. Arons, *supra* note 3, at 21.

120. N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: May 2021, at 6 (2021), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/05.pdf> [<https://perma.cc/6H7M-9KNF>].

121. Compare *id.* at 9, with N.Y.C. Admin. for Child.'s Servs., Flash Monthly Indicator Report: May 2020, at 9 (2020), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2020/05.pdf> [<https://perma.cc/S752-3PMQ>] (filing 2,072 cases in January and February 2020 compared to just 1,202 cases during the same period in 2021).

122. Ctr. for N.Y.C. Affs., *Watching the Numbers 2022: Covid-19's Effects on Child Welfare System* (2022), <https://static1.squarespace.com/static/53ee4f0be4b015b9c3690d84/t/62585fe68cd4434e46fa79d1/1649958887277/WTN+v52.pdf> [<https://perma.cc/PKQ9-DT2J>].

Despite the sustained safety of New York City’s children in the face of a dramatic reduction in removals, the number of removals slowly began to increase as the City moved further away from the initial phases of the pandemic. Between April and June 2021, 411 children were removed from their homes,¹²³ compared with 379 during the same period the year prior.¹²⁴ Between October and December 2021, the number of removals rose to 500.¹²⁵ Though this increase may appear small, it reflects a gradual upward trend despite steady substantiation rates that continued through the end of FY 2021.¹²⁶ In other words, ACS and the courts slowly began to remove greater numbers of children from their caregivers absent any marked increase in substantiated reports of abuse or neglect. With clear evidence that children remained safe with fewer family separations, New York City’s child welfare apparatus had an opportunity to keep removals low, minimizing the unnecessary harm of removal. Unfortunately, the upward trend suggests that the system failed to learn this critical lesson.

IV. RECOMMENDATIONS

A. *Recommendation 1: Distinguish Poverty From Neglect and Fund Families to Avoid Removals*

Many allegations in abuse, and particularly in neglect, petitions stem from poverty.¹²⁷ Poverty, not neglect, can drive a parent to leave their child alone because they are forced to work and cannot afford childcare. A child whose parent cannot afford sufficient food, clothing, or shelter, is a victim of poverty, not a neglectful parent. Jerry Milner and David Kelly, former officials in the U.S. Children’s Bureau, recently wrote:

We have to be honest that a large part of the problem is the way we see and judge families that make contact with the system. We see poor and vulnerable families as the ‘other.’ The role that poverty plays in child welfare decision-making is a topic that has yet to be meaningfully confronted and addressed. Poverty is a risk factor for neglect, but poverty does not equate to neglect. The presence of poverty alone does not mean a child is unsafe, unloved, or that a parent lacks the capacity to care for his or her

123. ACS, January 2022 Report, *supra* note 81, at 10.

124. N.Y.C. Admin. for Child’s Servs., Flash Report Monthly Indicator: January 2021, at 10 (2021), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2021/01.pdf> [<https://perma.cc/S628-2K6L>].

125. *Id.*

126. See Ctr. for N.Y.C. Affs., *supra* note 122 (showing that 35.2% of reports of abuse and neglect in New York City were substantiated in FY 2021 compared to 36.4% in FY 2020).

127. See, e.g., Naveed, *supra* note 82, at 3 (“The report finds that child welfare systems too often respond to circumstances of poverty with punishment.”); Newman, *supra* note 82 (“For poor families pulled into A.C.S.’s orbit, who are overwhelmingly Black and Latino, symptoms of poverty are frequently punished as signs of neglect, the survey found.”).

child. Poverty can make it more challenging for parents to meet certain of their children's needs. *We must be resoundingly clear that a child should never be removed from his or her family due to poverty alone.* We must also be very clear that poverty is disproportionately present in communities of color and that this fact carries direct implications for child welfare.¹²⁸

Practitioners and judges must consider the circumstances of poverty, critically examine whether poverty's effects in a given case can be mitigated, and eschew classist notions of what is "normal" or "proper." Further, as symptoms of poverty can lead to substance abuse, mental health challenges, or other stressors, support—rather than removal—should be the foundation for addressing child welfare issues stemming from poverty.

Numerous studies have found that public benefits programs lead to fewer maltreatment-caused child fatalities and reduced child welfare system involvement. Per a 2021 report issued by the University of Chicago, "Research suggests poverty is a key driver of child welfare system involvement and preliminary evidence suggests even modest economic supports can stabilize families and alleviate the need for more intensive intervention."¹²⁹ The report also found that "[t]he policy decision to separate economic supports to families from the services available through child welfare programs paired with discretionary reporting mandates and systemic inequities resulted in current pathways to support that are unnecessarily intrusive, punitive, circuitous, and burdensome for families needing financial assistance."¹³⁰

A 2021 study published by the American Academy of Pediatrics came to the same conclusion. It evaluated all fifty states' annual spending on local, state, and federal benefit programs in the context of rates of maltreatment reporting, substantiations, foster care placements, and fatalities. The study found that state spending on benefit programs (specifically, housing, cash, and in-kind assistance; housing infrastructure; childcare assistance; refundable Earned Income Tax Credit, and Medical Assistance Programs) was strongly associated with reductions in child maltreatment.¹³¹ Specifically, the study found that for each additional

128. Jerry Milner & David Kelly, *It's Time to Stop Confusing Poverty With Neglect*, Imprint (Jan 17, 2020), <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222> (on file with the *Columbia Law Review*) (emphasis added).

129. Dana Weiner, Clare Anderson & Krista Thomas, Chapin Hall at Univ. of Chi., *Report: Addressing Economic Hardship Key to Preventing Child Welfare System Involvement* (2021), <https://www.chapinhall.org/research/economic-supports-child-welfare/> [<https://perma.cc/HP5M-VLBU>].

130. *Id.*

131. See Henry T. Puls, Matthew Hall, James D. Anderst, Tami Gurley, James Perrin & Paul J. Chung, *State Spending on Public Benefit Programs and Child Maltreatment*, *Pediatrics*, Nov. 2021, at 1, 1 ("States' total spending was inversely associated with all maltreatment outcomes.").

\$1,000 states spent on benefits programs per person living in poverty, there was a 4.3% reduction in reports of abuse or neglect, a 4% reduction in substantiations, a 2% reduction in foster care placements, and a 7.7% reduction in child fatalities.¹³²

The expanded Federal Child Tax Credit, implemented during the pandemic as part of the American Rescue Plan, is a timely case in point. Between July and December 2021, this program increased the frequency, amount, and reach of cash payments to poor Americans to assist in covering the cost of raising children. In essence, it created a monthly national child allowance of up to \$300,¹³³ which dramatically reduced child poverty. The first Child Tax Credit payment in July 2021 alone reduced the monthly child poverty rate by 25.6%.¹³⁴ Over the first five months of the program, “the total number of children kept from poverty . . . [rose] by 800,000 children, an increase of 27 percent.”¹³⁵ Critically, families used these payments to cover the costs of their children’s basic needs, thereby minimizing the effects of poverty that often lead to removal. In New York, 86% of households with income below \$35,000 used their child tax credit for basic needs, including food, clothing, rent, utilities, and education costs.¹³⁶ This rate was similarly high nationwide.¹³⁷

A June 2022 study by the American Academy of Pediatrics confirmed that poverty-reducing tax credits are associated with declines in reports of child maltreatment.¹³⁸ The study examined data from the IRS on weekly state-level total tax refunds from the Earned Income Tax Credit and the

132. *Id.*

133. See Zachary Parolin, Sophie Collyer, Megan A. Curran & Christopher Wimer, *Ctr. for Poverty & Soc. Pol’y at Columbia Univ., Monthly Poverty Rates Among Children After the Expansion of the Child Tax Credit 2* (2021), <https://static1.squarespace.com/static/610831a16c95260dbd68934a/t/6125831bb2d0cb07e98375b9/1629848348974/Monthly-Poverty-with-CTC-July-CPSP-2021.pdf> [<https://perma.cc/6TLJ-8YJ3>] (“[The expanded Federal Child Tax Credit] pays the benefit out in regular installments: families can now receive monthly installments up to \$250 for each older child and up to \$300 for each younger child.”).

134. *Id.* at 1.

135. Megan A. Curran, *Ctr. for Poverty & Soc. Pol’y at Columbia Univ., Research Roundup of the Expanded Child Tax Credit: The First 6 Months 7* (2021), <https://static1.squarespace.com/static/610831a16c95260dbd68934a/t/61f946b1cb0bb75fd2ca03ad/1643726515657/Child-Tax-Credit-Research-Roundup-CPSP-2021.pdf> [<https://perma.cc/S4Q9-A4AY>].

136. Claire Zippel, *9 in 10 Families With Low Incomes Are Using Child Tax Credits to Pay for Necessities, Education*, *Ctr. on Budget & Pol’y Priorities* (Oct. 21, 2021), <https://www.cbpp.org/blog/9-in-10-families-with-low-incomes-are-using-child-tax-credits-to-pay-for-necessities-education> [<https://perma.cc/6C62-QBV4>].

137. Eighty-eight percent of U.S. households with income below \$35,000 used the tax credit for basic needs, including food, clothing, rent, utilities, and mortgages. Ninety-one percent of families in the same cohort used the credit for the above basic needs, education costs, or both. *Id.*

138. Nicole L. Kovski, Heather D. Hill, Stephen J. Mooney, Frederick P. Rivara & Ali Rowhani-Rahbar, *Short-Term Effects of Tax Credits on Rates of Child Maltreatment Reports in the United States*, *Pediatrics*, July 2022, at 1, 2, 5.

expanded Child Tax Credit programs and tracked child maltreatment reports in the period shortly after families received these credits. It found “a statistically significant reduction in rates of child maltreatment reports associated with higher tax refund amounts during the week of issuance, the week after issuance, and three weeks after issuance.”¹³⁹ For each additional \$1,000 in per-child tax refunds, rates of reported maltreatment dropped by an estimated 5%.¹⁴⁰

Given the clearly established link between public benefits programs and reduced child maltreatment, child welfare involvement, and therefore removals, both the federal government and New York State should increase funding to programs that provide material support for poor families with children. This funding, however small, can help ensure that families receive support to address the effects of poverty that can lead to allegations of abuse or neglect *before* CPS becomes involved and removes a child. Such a removal is not only traumatic but also expensive. This funding will also reduce the need for child welfare services, which will in turn reduce child welfare spending.

B. *Recommendation 2: The Administration for Children’s Services Must Implement Race-Blind Removal Protocols to Lower Removal Rates*

In a race-blind removal, the investigative caseworker conducts an individual assessment and presents facts of the case—including risk factors—to a committee without any identifying demographic information, including race or neighborhood.¹⁴¹ As child welfare expert Dr. Pryce notes, these discussions “focus[] on what has occurred, relevant history, and family capacity and strength.”¹⁴² The committee then decides on removal without information related to race.¹⁴³

Early race-blind removal protocols succeeded. Nassau County’s pilot program led to a nearly 50% drop in removals for Black children.¹⁴⁴ Before implementation of the race-blind process, Black children accounted for 55.5% of removals in Nassau County.¹⁴⁵ By 2015, they accounted for only 29%.¹⁴⁶

139. *Id.* at 4.

140. *Id.* at 5.

141. See Pryce, *The Case for Race-Blind Removal*, *supra* note 92.

142. What Are Blind Removal Meetings?, Jessica Pryce Ph.D., MSW, <https://jessicaprycephd.com/what-are-blind-removal-meetings/> [<https://perma.cc/D4PR-VBSG>] (last visited Oct. 6, 2022).

143. See *id.* (noting that “the committee makes a recommendation regarding whether the children should be removed” based on the caseworker’s presentation, which “never mention[s] demographics or neighborhood”).

144. *Id.*

145. *Id.*

146. Pryce, *The Case for Race-Blind Removal*, *supra* note 92.

With the success of the Nassau County pilot in mind, OCFS—the state agency overseeing New York’s CPS agencies—directed its local agencies to implement race-blind removal processes in October 2020.¹⁴⁷ While some studies question how effectively race-blind removals reduce racial inequities in removal decisions, even those studies indicate that race-blind removal strategies reduce the rates of removal overall.¹⁴⁸ To date, ACS has failed to adhere to this OCFS directive.¹⁴⁹ At a bare minimum, meaningful commitment to child welfare means complying with state directives aimed at reducing the number of children in foster care.

C. *Recommendation 3: To Reduce the Number of Children Improperly Removed by the System, New York State Must Change the Way State Central Register Reports and Investigations Are Carried Out*

While race-blind removals may be a step toward reducing the bias inherent in removal decisions, this measure alone is not enough.¹⁵⁰ Since CPS can only make removal decisions once it identifies and investigates a family, the problem starts much earlier.¹⁵¹ One recent study shows that the overrepresentation of Black children in foster care is primarily “driven by disparities in the initial rates of child maltreatment allegations.”¹⁵²

147. See Press Release, N.Y. State Off. of Child. & Fam. Servs., The New York State Office of Children and Family Services Announces Policies to Promote Racial and Social Equity and Justice in Child Welfare (Oct. 19, 2020), <https://ocfs.ny.gov/main/news/for-release.php?idx=12268> [<https://perma.cc/FR5S-3X6G>] (“OCFS will require the local departments of social services to implement the Blind Removal Process across the state . . . effective immediately.”); see also N.Y. State Off. of Child. & Fam. Servs., Administrative Directive 20-OCFS-ADM-19, at 2–3 (Oct. 14, 2020) (on file with the *Columbia Law Review*) (describing the success of the Nassau County pilot program and its influence on OCFS’s decision to implement race-blind removal processes statewide).

148. See E. Jason Baron, Ezra G. Goldstein & Joseph Ryan, The Push for Racial Equity in Child Welfare: Can Blind Removals Reduce Disproportionality?, *J. Pol’y Analysis & Mgmt.*, Dec. 19, 2022, at 1, 25 (arguing that overrepresentation of Black children in foster care is primarily “driven by disparities in the initial rates of child maltreatment allegations” and that policies targeting removal decisions have limited scope, and finding “suggestive evidence” that blind removals reduced the removal rate for both white and Black children). Irrespective of the ongoing academic debate regarding the efficacy of race-blind removals, the OCFS mandate stands, and ACS has yet to comply.

149. E-mail from Ina Mendez, Deputy Comm’r, Fam. Permanency Servs., N.Y.C. Admin. for Child.’s Servs., to Lisa Freeman, Dir. of Special Litig. & L. Reform, The Legal Aid Soc’y (Oct. 28, 2022) (on file with the *Columbia Law Review*).

150. See Baron et al., *supra* note 148, at 25 (noting that although race-blind removals do seem to reduce overall removal rates, they might not actually reduce racial bias).

151. See Newman, *supra* note 82 (noting that ACS must investigate every allegation of abuse or neglect and that Black families are disproportionately likely to be accused).

152. Baron et al., *supra* note 148, at 25. The authors argue that rates of removal are similar between white and Black children after accounting for initial rates of investigation. See *id.* (“While there exist racial disparities within the child welfare system in both the decision to substantiate and remove, these disparities are much smaller compared to disparities in the initial rates of allegations.”).

Although race-blind removals reduce the rate of unnecessary remand as described in Recommendation 2, they are not sufficient.

To reduce the frequency with which families of color become needlessly entangled with the child welfare system, New York must establish stricter checks on reporting and investigating child maltreatment. Currently, anyone can call the SCR at any time, for any reason, and allege abuse or neglect anonymously.¹⁵³ This leads to overreporting, malicious reporting, and false reporting.¹⁵⁴ The overwhelming majority of child abuse hotline calls do not result in findings. According to the National Child Abuse and Neglect Data System (NCANDS) in 2019, although approximately 4.4 million allegations of child abuse or neglect were reported nationwide, only 656,000 investigations resulted in findings of child maltreatment.¹⁵⁵ Similarly, in 2021, New York found “credible evidence of abuse or neglect” in only 35.2% of its 42,783 investigations.¹⁵⁶ Anonymous reports are even less likely to result in substantiated cases. A March 2022 report from New York’s Adoptive and Foster Family Coalition found that from 2015 to 2019, 7% of calls to the SCR were anonymous and that while an average of 30% of all calls were substantiated, only 3% of anonymous reports were substantiated.¹⁵⁷ Nevertheless, all of these cases must be investigated and children and parents must be interviewed.¹⁵⁸ Unsurprisingly, given the role of implicit bias discussed above, the mismatch between lodged reports and actual findings of maltreatment disproportionately affects Black and Brown families, dragging these marginalized

153. See How to Make a Report, N.Y.C. Admin. for Child’s Servs., <https://www1.nyc.gov/site/acs/child-welfare/how-to-make-report.page> [<https://perma.cc/WC6W-QJUR>] (last visited Oct. 7, 2022) (stating that “[a]nyone can make a report [to SCR] (and may do so anonymously), when they suspect child abuse or neglect”).

154. See Hunt, *supra* note 44 (noting that “[a]nonymous reporters may be more likely to make intentionally false reports as their anonymity protects them from any consequences” (internal quotation marks omitted) (quoting Madelyn Freundlich, Adoptive & Foster Fam. Coal. of N.Y., *Child Abuse or Maltreatment Reports to the Central Register Must Include the Caller’s Name and Contact Information* 4 (2022), <https://affny.org/wp-content/uploads/SCR-Anonymous-vs-Confidential-Madelyn-Freundlich-AFFCNY-March-22.pdf> [<https://perma.cc/HB7H-M8JD>])).

155. Child’s Bureau, HHS, *Child Maltreatment 2019*, at xiv, 7, 18 (2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2019.pdf> [<https://perma.cc/358G-QW2R>]. The NCANDS reported that the 4.4 million referrals alleging child maltreatment included approximately 7.9 million children. *Id.* at xiv, 7. Additionally, nearly 2.85 million investigated allegations of child abuse or neglect uncovered no evidence of child maltreatment, were closed without any determinations or were determined to be unsubstantiated. *Id.* at xiv, 17–18, 30. The NCANDS reported that 16.7% of children who were subjects of reports were classified as “victims” of maltreatment and the remaining 83.3% of children were “not determined to be victims or received an alternative response.” *Id.* at 18.

156. Mayor’s Off. of Operations, *supra* note 80, at 171.

157. Hunt, *supra* note 44.

158. See *id.* (“Child protection workers have up to 60 days to investigate maltreatment reports . . . [C]ity workers are allowed to interview neighbors, family members and any other parties related to the allegation.”).

communities further into the clutches of the child welfare system. Last year, one in fifteen Black children in New York City was the subject of a maltreatment investigation while only one in 111 white children was.¹⁵⁹

While acknowledging the importance and utility of the SCR and subsequent investigations, the state must circumscribe these systems. First, calls to the SCR must be more closely regulated. According to one 2021 study, “[R]esults suggest that policies that target the disparities in the initial rates of allegations are likely to have substantially larger impacts on racial disproportionality.”¹⁶⁰ Government-funded aid programs, such as housing and benefits, should implement clear guidance and regular training, taking into consideration racial and socioeconomic bias, regarding reports to the SCR. Moreover, New York should enact the Anti-Harassment in Reporting Bill (also known as the Confidential Reporting Bill).¹⁶¹ The bill requires all reporters to identify themselves, with the information provided only to the investigator, in an attempt to deter false and malicious reporting. This requirement would reduce unnecessary investigations and intrusion to families and would lessen the strain on child welfare resources.¹⁶² Lastly, given that mandated reporters have broad discretion to make SCR reports, they should receive more extensive training on what constitutes neglect, what happens after a call is made to the SCR, alternative ways of supporting children and families before a report becomes necessary, and ongoing training related to racial and socioeconomic bias.¹⁶³

Second, investigative procedures need to be adjusted to ensure the dignity of the families under investigation and proportionality to the alleged allegations, while at the same time accounting for racial bias in a more meaningful way. Recent SCR reform legislation raising the legal standard for an indicated case is a step in the right direction but does not go far enough.¹⁶⁴ New York should enact regulations to directly address when and how an investigation can be carried out, curtailing the practice

159. Newman, *supra* note 82.

160. Baron et al., *supra* note 148, at 26.

161. Assemb. A7879, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); S. S7326, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); see also N.Y.C. Bar, Report on Legislation by the Children and the Law Committee and the Council on Children: A.7879-A, S.7326-A, at 1 (2022), <https://s3.amazonaws.com/documents.nycbar.org/files/20221012-AntiHarassmentinReporting.pdf> [<https://perma.cc/X7UQ-MV8X>]. This bill was reintroduced by the same sponsors in 2023. Assemb. A2479, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); S. S902, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

162. See N.Y.C. Bar, *supra* note 161, at 4.

163. See Newman, *supra* note 82 (“Mandated reporters, the [ACS] workers complained, often ‘file reports that describe conditions indicating poverty but not neglect.’ Teachers make reports ‘based on the cleanliness of a child’s clothing or whether they bring food to school.’” (quoting the 2020 survey of Black and Hispanic frontline workers for ACS)).

164. N.Y. Soc. Serv. Law § 422 (McKinney 2022); see also Fitzgerald, New York Limits Access, *supra* note 12 (noting that New York’s new law requires that “the evidence must suggest it is more likely than not that child neglect or abuse occurred, instead of only requiring some evidence to add a parent’s name to the register”).

of barging into families' homes in the middle of the night, waking children from sleep, and checking their bodies for bruises unless absolutely essential. ACS Commissioner Jess Dannhauser recently committed to reform these practices in a meeting with one of this Piece's authors, but no concrete document indicating an ACS policy change exists. Such policies must be mandated and codified rather than promised. New York also needs meaningful, ongoing training on racial and socioeconomic bias for those tasked with making emergency removal decisions, including frontline child protective workers. Although these initiatives exist, disproportionate rates of (unnecessary) removals indicate that they remain ineffective.

D. *Recommendation 4: New York Should Pass the Family Miranda Bill, S.5484-A/A.6792 (Brisport/Walker) and Enact Similar Legislation for Children; Empowering Families With Clear Statements of Their Rights Will Stem the Tide of Child Welfare Cases and, Therefore, Removals*

S.5484-A/A.6792 (Brisport/Walker), also known as the Family *Miranda* Bill, would require child protective investigators to inform parents and caretakers of their legal rights at the outset of an investigation.¹⁶⁵ Specifically, the bill requires parents to be notified that unless court ordered, they are not required to permit a child protective investigator into their home; they are entitled to be informed of the allegations against them; they are not required to speak to the child protective investigator, and any statements made to the investigator may be used against them; they are not required to permit the investigator to interview their children; and they are entitled to seek advice of an attorney and have that attorney present during an interview with the child protective investigator.¹⁶⁶ These rights must be conveyed in the parent's preferred language.¹⁶⁷

New York should pass this legislation and enact similar protections for children at the center of these investigations. Safeguarding parents' and children's rights at the investigation stage can protect families against unnecessary, even biased, removals. This is especially true as child protective investigators wield the power to remove a child on an emergency basis without any judicial risk assessment.¹⁶⁸ Consider the rights of the parent and the child like bumpers in a bowling alley—designed to guide the ball to the proper location. Presently, parents and children are

165. S. S5484, 2021–2022 Leg., Reg. Sess. (N.Y. 2021); Assemb. A6792, 2021–2022 Leg., Reg. Sess. (N.Y. 2021). This bill was reintroduced by the same sponsors in 2023. S. S901, 2023–2024 Leg., Reg. Sess. (N.Y. 2023); Assemb. A1980, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

166. N.Y. S. S5484; N.Y. Assemb. A6792.

167. N.Y. Assemb. A6792.

168. Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, ProPublica (Oct. 13, 2022), <https://www.propublica.org/article/child-welfare-search-seizure-without-warrants> [<https://perma.cc/E329-APSH>].

not advised of their rights at the outset of an investigation, unlike in criminal proceedings. But, the liberty interests at risk in child welfare proceedings and the interest in protecting and maintaining family integrity are equally as pressing. Implementing a safeguard to ensure the parties' legal rights are front and center helps ensure the ball goes where it should.

The Family *Miranda* Bill and any accompanying child-centered bill would not create new rights but would animate and give meaning to the existing rights of both parents and children. When the rights of both parties are paramount, removals will be reserved for only the most extreme circumstances.

E. *Recommendation 5: Include Individuals Directly Affected by the Child Welfare System in Child Welfare Training, Policy Creation, and Removal Decisions*

The lived experience of parents and children who have endured the child welfare system is an invaluable tool for ensuring removal procedures are as circumscribed as possible. These individuals can reflect meaningfully on the strengths and weaknesses of the child welfare apparatus as well as the utility of its services and resources. They are best suited to evaluate the system and suggest improvements that could mitigate the need for removals.

Including these individuals in decisionmaking could take many forms. Former child welfare-involved parents and children could take part in the meetings that determine whether ACS will seek a removal, draft ACS guidelines, help issue guidelines and recommendations for how judges should evaluate risk, participate in legislative processes, or design preventative programming to support families and minimize the need for removals. People with lived experience should be funded to train all practitioners in the child welfare system—including caseworkers, judges, and advocates—on how to carry out their roles effectively and with sufficient sensitivity.

While ACS does have a program that incorporates formerly involved parents¹⁶⁹ and parent defense organizations in New York have utilized formerly child welfare-involved Parent Advocates in representation for years,¹⁷⁰ the system at large must work to incorporate these lived experiences into every stage of the decisionmaking process that leads to removals.

169. Press Release, N.Y.C. Admin. for Child's Servs., Administration for Children's Services Announces Groundbreaking 'Parents Supporting Parents' Initiative to Improve Reunification Outcomes for Families in the NYC Foster Care System (Oct. 26, 2020), <https://www1.nyc.gov/assets/acs/pdf/PressReleases/2020/ACSParentAdvocate.pdf> [<https://perma.cc/474Y-M27Z>]. The authors understand that directly affected parents strongly oppose this ACS program. See Telephone Interview with Joyce McMillan, Exec. Dir., JMACForFamilies (June 15, 2022) (expressing her opposition to these programs as a directly involved parent and parent advocate) (on file with the *Columbia Law Review*).

170. See, e.g., Parent Advocate, The Bronx Defs., <https://www.bronxdefenders.org/who-we-are/how-we-work/parent-advocate/> [<https://perma.cc/2E28-6NHN>] (last visited Oct.

In particular, systems should model their parent advocate programs off of those at legal defense organizations, including protections for information shared with parent advocates. As members of the parent's legal team, parent advocates at legal defense organizations can speak freely with parents without fear that these communications—protected by the parent's attorney–client privilege—would be admissible against the parent. But the current ACS parent program does not include similar protections.¹⁷¹ Therefore, if a parent is under investigation or becomes a respondent and makes disclosures to the ACS parent advocate, that information can be used against them. In the words of Joyce McMillan, advocate, organizer, and formerly ACS-involved parent who heads JMACForFamilies and is one of the founders of the Parents Legislative Action Network, ACS parent advocate programs are “window dressing” with very few advocates relative to the number of caseworkers.¹⁷² Further, those advocates “creat[e] a false sense of trust” by encouraging disclosure by parents while simultaneously possessing the power to report on that parent to ACS or a court.¹⁷³ The child welfare system must take affected parents' voices seriously and incorporate them into education and decisionmaking processes without exploiting the power of these advocates or using them to undermine the agency of families under investigation.

F. *Recommendation 6: Pay Child and Parent Defense Providers Sufficient Salaries to Grow and Retain Strong Advocates to Push Back Against Removal Requests*

Balancing the iconic scales of justice requires parties to be equally situated. When defense counsel is underfunded relative to the prosecution, unjust outcomes, including higher numbers of removals, become increasingly likely.

Two current movements in New York underscore the need for fair pay. First, children and parent's counsel are currently fighting for pay parity and full operational funding. As recently as June 2022, The Legal Aid Society and six other major public defense agencies issued public statements demanding greater funding to address recruitment, retention, and administrative costs.¹⁷⁴ In 2019, City Hall committed to supplementing

7, 2022) (“Parent Advocates assist and support parents who have open Family Court cases and are at risk of having, or who have had, their children removed and placed into foster care.”).

171. Telephone Interview with Joyce McMillan, *supra* note 169 (indicating that parent advocates could be called to testify on agency's behalf).

172. *Id.*

173. *Id.*

174. Press Release, The Legal Aid Soc'y, Neighborhood Def. Serv., Brooklyn Def. Servs., The Bronx Defs., N.Y. Cnty. Def. Servs., Queens Defs. & Legal Servs. NYC, Defenders and Legal Services Organizations, Currently Facing Dire Staffing, Operational Funding Needs, Call on Mayor Adams, Speaker Adams and City Council Members for Increased Resources in the Fiscal Year 2023 Budget (June 9, 2022), <https://legalaidnyc.org/wp->

defender organizations' revenue with 'pay parity' supplements for junior attorneys to bring salaries in line with those of the prosecution, namely Corporation Counsel.¹⁷⁵ But fully funding this initiative never came to fruition.¹⁷⁶ Failure to adequately fund public defense leads to understaffing, higher caseloads, and less individual time for each client. These issues result in unjust court outcomes.¹⁷⁷ The Legal Aid Society alone has 500 positions that need to be filled.¹⁷⁸

Second, non-institutional defenders, known as 18-B attorneys or panel attorneys, are also fighting for pay increases as they suffer extreme retention issues given the fact that they have not received a raise since 2004.¹⁷⁹ Until this year, 18-B funding was capped at \$75 per hour, despite a 50% increase in the costs of providing defense services.¹⁸⁰ Proposed legislation attempted to double that figure but failed to be signed into law.¹⁸¹ Underfunding leads to significant issues including insufficient attorneys to represent litigants and hearing delays.¹⁸² This situation is so dire that judges in New York protested by refusing to call assigned counsel cases.¹⁸³ Some estimates show that more than 20% of panel attorneys have left the field due to underfunding, with the largest effects surfacing in family courts, directly affecting child welfare and removal proceedings.¹⁸⁴ On July 25, 2022, a Manhattan trial judge ordered an interim preliminary injunction that included a pay increase to \$158 per hour for assigned counsel dating back to February 2, 2022.¹⁸⁵ While a court-ordered pay

content/uploads/2022/06/06-09-22-Defenders-and-Legal-Services-Organizations-Call-Increased-Resources-in-the-Fiscal-Year-2023-Budget.pdf [https://perma.cc/4HTJ-K7LP]; see also Press Release, Ass'n of Legal Aid Att'ys, ALAA Calls on the City to Fund Equitable Wages for Public Defenders and Legal Services Workers (June 9, 2022), <https://www.alaa.org/media-releases/alaa-calls-on-the-city-to-fund-equitable-wages-for-public-defenders-and-legal-services-workers> [https://perma.cc/3AE6-XDVT] (arguing that certain city officials should "prioritize fully funding the invaluable work and services that [legal services workers] provide to New Yorkers").

175. The Legal Aid Soc'y et al., *supra* note 174.

176. *Id.*

177. *Id.*

178. *Id.*

179. Megan Conn, New York Governor, Lawmakers to Decide if Family Court Attorneys Will Get a Raise After 18 Years, *Imprint* (Apr. 1, 2022), <https://imprintnews.org/child-welfare-2/new-york-family-court-attorneys-raise/63937> (on file with the *Columbia Law Review*) (describing "a statewide mass exodus of qualified assigned counsel").

180. *Id.*

181. *Id.*

182. Gary Craig, Legal Organizations Ask State Judge to Order New York to Raise Pay of Assigned Lawyers, *Democrat & Chron.* (Apr. 22, 2022), <https://www.democratandchronicle.com/story/news/2022/04/22/legal-organizations-ask-judge-order-ny-raise-pay-lawyers/7399443001/> [https://perma.cc/DF8C-MLQY].

183. *Id.*

184. *Id.*

185. Brian Lee, Manhattan Civil Court Judge Orders First Pay Raise for 18-B Lawyers in Nearly 20 Years, *N.Y. L.J.* (July 25, 2022), <https://www.law.com/newyorklawjournal/>

increase is better than nothing, the New York legislature must act now and with regularity to sufficiently fund assigned counsel and ensure families' rights are protected against the most severe deprivation—family separation.¹⁸⁶

New York must fund public defense to ensure justice in all courtrooms, including family courts, and minimize the number of removals that occur across New York.

G. *Recommendation 7: Challenge Current Conceptions of Family Separation and Adjust Removal Practices Accordingly*

The COVID-19 pandemic challenged, and ultimately dispelled, the long-held belief that a high rate of family separation is necessary to ensure children's safety.¹⁸⁷ All decisionmakers in the child welfare system must examine what occurred in New York City during the COVID-19 shutdown and acknowledge that with fewer removals, children remained just as safe, if not safer, living at home with family.

Each player in the child welfare system must turn a critical eye inward and work to integrate this proven reality into their decisionmaking. They must meaningfully reflect on the high legal bar for removal, acknowledge the inherent racial and socioeconomic bias that is ubiquitous in the system, and steadfastly weigh the trauma of removal.

Leaders of child welfare organizations must engage their staff in reflective processes. Practitioners and jurists must adhere to the legal standard and only remove children when there is imminent risk to life or health and no mitigating orders or efforts can be made.¹⁸⁸ In essence, decisionmakers *must* explore all other possibilities and every means of keeping a child at home before resorting to removal. Irrespective of the underlying allegations, a removal should never be used as punishment or as a tool to teach anyone a lesson—a removal is an emergency intervention of absolute last resort.

As discussed in Part II, the child welfare system is inherently biased. Each person within that system carries with them some form of bias. When

2022/07/25/manhattan-civil-court-judge-orders-first-pay-raise-for-18-b-lawyers-in-nearly-20-years/ (on file with the *Columbia Law Review*).

186. New York State's proposed executive budget for fiscal year 2024 includes an unfunded mandate for pay increases for panel attorneys. Div. of the Budget, N.Y. State, FY 2024 New York State Executive Budget: Public Protection and General Government Article VII Legislation 62–65 (2023), <https://www.budget.ny.gov/pubs/archive/fy24/ex/artvii/ppgg-bill.pdf> [<https://perma.cc/H3KG-WNJP>]. At the time of this Piece's publication, the proposed budget has not passed.

187. See *supra* note 3 and accompanying text.

188. *Nicholson v. Scopetta*, 820 N.E.2d 840, 852 (N.Y. 2004) (“The court *must do more* than identify the existence of a risk of serious harm. Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal.”).

evaluating the necessity of a remand, every actor in the system must strive to recognize the biases at play. Bias—both the role it plays and the means to check its influence—must be a paramount consideration when requesting or granting a remand application.

This recommendation might be read as trite—in short, think about what you are doing. But it is a call for the kind of self-critique that all professionals must undertake. A child welfare system that frequently approves child removals unavoidably normalizes what should be an exceptional practice. Practitioners in these systems can only avoid becoming inured to system overreach by regularly reflecting on their own beliefs and practices. We implore all practitioners, especially those with the power to seek, support, or order removal, to take more time with each case and each family, challenge current practices, and consider all available options short of a remand.

CONCLUSION

The data is clear: At the height of the COVID-19 pandemic, when child welfare removals plummeted across the City, children were as safe (if not safer) in their homes than before the pandemic began. This natural experiment in reducing the frequency of removals revealed an unmistakable conclusion. Removals in New York happen far more often than is necessary to protect children's safety and often are sought and ordered on suspicions that fall short of the law's justifiably high standard—risk that is not only imminent (i.e., impending or immediate) but that also cannot be mitigated through any means.

This Piece's recommendations aim to improve the information upon which child welfare policy is promulgated and to aid the deliberations of the system's decisionmakers. By combining careful attention to empirical data with stricter adherence to New York law's high bar for removals, ACS and other child protective services agencies in the state would appropriately limit family separation to its intended purpose—to intervene only when the most extreme and imminent risk exists.