

LEVELING THE PLAYING FIELD IN CUSTODY
PROCEEDINGS IN NEW YORK CITY FAMILY
COURT: ENFORCING THE RIGHTS OF ALL
PARENTS TO NOTICE AND AN UNBIASED
OPPORTUNITY TO ENFORCE THEIR
FUNDAMENTAL RIGHT TO PARENT THEIR
CHILD

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I. INTRODUCTION

The Administration for Children’s Services (hereinafter “ACS”), aims to “protect and promote the safety and well-being of New York City’s children, young people, families, and communities by providing excellent child welfare. . .”¹ The organization seeks to ensure that no child “will be left to struggle with abuse or neglect.”² The majority of the cases brought to Family Court by ACS are not brought because of a risk of serious harm to the child or children.³ Rather, neglect is overwhelmingly the most common form of child maltreatment.⁴ Neglect is fundamentally tied to poverty, and thus disproportionately affects people from racially marginalized backgrounds as “there is a well-known, direct nexus between poverty and race.”⁵

A parent’s right to “make decisions concerning the care, custody, and control of their children,” referred to herein as the right to parent one’s child, is a fundamental right as recognized by the Supreme Court of the United States.⁶ The state is only permitted to infringe on a parent’s fundamental right to parent their child under circumstances that demonstrate the “state’s interest in investigating reports of child abuse . . . [outweigh] the parent’s interest in his familial right of association.”⁷ ACS often infringes upon this right even when the requisite circumstances for them to do so have not been met.⁸ The New York Family Court Act §1017 requires ACS to locate non-respondent parents after a court rules that the child must be removed from the care of the respondent parent.⁹

Although ACS is required by law to inform the child’s family members that the child is going to be removed from their current home, there is a lack

¹ ACS MISSION & ORGANIZATION, <https://www1.nyc.gov/site/acs/about/mission-organization.page> (last visited Feb. 18, 2021).

² ADMINISTRATION FOR CHILDREN’S SERVICES: DESCRIPTION AND HISTORY, https://www.nycservice.org/organizations/index.php?org_id=3707 (last visited Feb. 18, 2021).

³ JUDITH AREEN, MARC SPINDELMAN, PHILOMILA TSOUKALA, & SOLANGEL MALDONADO, FAMILY LAW CASES AND MATERIALS 389 (Saul Levmore et al. eds., 7th ed. 2019).

⁴ Child Welfare Information Gateway, *Child Maltreatment 2019: Summary of Key Findings*, U.S. DEP’T OF HEALTH AND HUM. SER. ADMIN. FOR CHILD. AND FAM. (Apr. 2021), <https://www.childwelfare.gov/pubPDFs/canstats.pdf>.

⁵ AREEN, *supra* note 3, at 381; Martin Guggenheim, *Commentary: The Foster Care Dilemma and What to Do About It: Is the problem that too many children are not being adopted out of foster care or that too many children are entering foster care?* 2 U. PA. J. CONST. L. 141 (1999).

⁶ Margaret Ryznar, *A Curious Parental Right*, 71 SMU L. REV. 127 (2018), <https://scholar.smu.edu/smulr/vol71/iss1/13>.

⁷ Robert J. Frank, *The Constitutional Right to Parent*, THE LAW FIRM OF ROBERT J. FRANK & ASSOC. LLC (2007), <https://www.rjflaw.com/articles/the-constitutional-right-to-parent/>.

⁸ Interview with Emma Ketteringham, Managing Director at The Bronx Defenders, (Oct. 26, 2020)(notes on file).

⁹ N.Y. FAM. CT. ACT § 1017(a).

of consistent practice in reaching out to fathers, especially in a timely manner.¹⁰ This practice of failing to inform fathers of their child's situation can result in a violation of the father's constitutional right to parent their child.¹¹ ACS fails to fulfill this lawful duty more often in cases initiated against families of color than in cases initiated against Caucasian families.¹² This is likely due to a cultural and institutional bias against Black fathers.¹³ There is an assumption that fathers abandon their children, or are not involved in their children's lives, on purpose.¹⁴ Thus, ACS often makes no effort to reach out to find a father and prepare them sufficiently for possible proceedings.¹⁵ The organization essentially fails to plan with a parent who is not present by dismissing them as absentee parents.¹⁶

The legislature amended the New York Family Court Act §1017, evidencing their acknowledgement of the constitutional issues that arise when non-respondent fathers are not properly informed.¹⁷ This note advocates for attention to be brought to ACS's illegal practice of failing to inform fathers that their child is going to be removed from the child's current home in order to prevent any further injustice. Further, this note proposes that a private right of action should be created for fathers who have not been properly notified by ACS of their child's welfare status and that the current laws governing child welfare proceedings be much more stringently enforced.

II) BACKGROUND

The Fundamental Right to Parent Your Child

The 14th amendment of the United States Constitution protects special liberty interests as it states that no person shall be deprived of "life, liberty, or property, without due process of law."¹⁸ The substantive requirement of the 14th amendment "provides heightened protection against government interference with certain fundamental rights and liberty interests."¹⁹ One of these recognized liberty interests is a parent's right to make decisions

¹⁰ Interview with Emma Ketteringham, *supra* note 8.

¹¹ Frank, *supra* note 7.

¹² Interview with Family Court Judge who wishes to not be named, (Sept. 25, 2020) (notes on file with author).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Interview with Emma Ketteringham, *supra* note 8.

¹⁷ N.Y. FAM. CT. ACT § 1017(a).

¹⁸ USCS CONST. AMEND. XIV, §1.

¹⁹ *Washington v. Glucksberg*, 521 U.S. 702, 720 (U.S. 1997).

concerning the care, custody, and control of their children.²⁰ The Supreme Court in *Troxel v. Granville* explained that although the fundamental right to parent is not explicitly provided for by the Constitution, it is “perhaps the oldest of the fundamental liberty interests recognized” by the Supreme Court.²¹ In the Court’s decision, they explained the development of the fundamental right to parent as:

More than 75 years ago, in *Meyer v. Nebraska*, [the Supreme Court] held that the ‘liberty’ protected by the Due Process Clause includes the right of parents to ‘establish a home and bring up children’ and ‘to control the education of their own.’ Two years later, in *Pierce v. Society of Sisters*, [the Supreme Court] again held that the ‘liberty of parents and guardians’ includes the right ‘to direct the upbringing and education of children under their control.’ [The Supreme Court] explained in *Pierce* that ‘the child is not the mere creature of the State’ those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.’ [The Supreme Court returned to the subject in *Prince v. Massachusetts*, and again confirmed that there is a constitutional dimension of the right of parents to direct the upbringing of their children.’ It is cardinal with [the Supreme Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.’ . . . In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.²²

As parenting is a fundamental right, it can only be interfered with in limited circumstances.²³

In determining whether a state has the power to limit fundamental rights, courts will consider whether the regulation is justified by a compelling state interest and legislative enactments must be narrowly tailored to further that interest.²⁴ In cases of child abuse or neglect, the court weighs two factors in making this determination.²⁵ The state’s interest in investigating reports of child abuse are weighed against the parents’ fundamental right to make decisions concerning their child, thus, “a court may intrude on the fundamental right to parent only where the intrusion makes sense on an objective basis.”²⁶ If the state interest is to prevent a child

²⁰ Ryznar, *supra* note 6.

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

²² *Id.*

²³ Frank, *supra* note 7.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

from being harmed, this will always warrant an intrusion into the fundamental right as long as the method of carrying out this state interest is narrowly tailored to serve its purpose.²⁷ The court must then determine whether it is reasonable under the specific facts of each given case by weighing the individual interests to determine “whether the conduct of the governmental actor constituted an undue burden on a parent’s associational rights.”²⁸

The Supreme Court has interpreted the 14th Amendment’s Due Process clause to require ACS to provide a pre-deprivation notice and a hearing except where extraordinary circumstances permit an emergency removal in which case the hearing is postponed until after the removal.²⁹ If the action of the court or governmental actor does not constitute an unreasonable intrusion into the associational right, it will likely be permitted.³⁰

The Procedural and Statistical Background of Child Welfare Cases

The state’s child welfare agency is notified of a child’s situation when someone contacts the police or the agency to report suspected abuse or neglect.³¹ Every state has mandatory child abuse reporting statutes, however, they differ in substance.³² Some states only require those with specific occupations to report, such as school workers and healthcare providers.³³ Other states require “anyone with reason to believe that a child has been abused or neglected to report such suspicions.”³⁴ In 2019, 68.6% of reports in the United States were made by a person who had “contact with the alleged child maltreatment victim as part of his or her job.”³⁵ The remaining 32.4% of reports were made by “friends, neighbors, and relatives, or by unclassified reporters.”³⁶

New York Specific Procedures

New York falls in the former category: requiring mandated reporters to report when they have “reasonable cause to suspect child abuse or maltreatment in a situation where a child, parent, or other person legally responsible for the child is before the mandated reporter when the mandated

²⁷ *Id.*

²⁸ *Id.*

²⁹ Hollingsworth v. Hill, 110 F.3d 733, 739 (10th Cir. 1997).

³⁰ Frank, *supra* note 7.

³¹ AREEN, *supra* note 3, at 389.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ Child Welfare Information Gateway, *supra* note 4.

³⁶ *Id.*

reporter is acting in his or her official or professional capacity.”³⁷ In New York, mandated reporters include, but are not limited to, school officials, day care workers, mental health professionals, substance and alcohol abuse counselors, law enforcement officials, physicians, surgeons, medical examiners, and dentists.³⁸

Once ACS receives a report from the New York State Central Register of Child Abuse and Maltreatment that there is a child who is allegedly being abused or neglected, ACS is required to investigate in order to ensure the safety of the child or children in the report.³⁹ The Administration initiates an investigation to determine whether there is credible evidence of the alleged abuse or neglect.⁴⁰ The Child Protective Specialist (hereinafter “CPS”) investigation includes contacting the person who made the report in order to learn more about the reasons the report was made as well as making an unannounced visit at the child’s place of residence.⁴¹ If no one is home at the time of the visit, the CPS is required to leave a Notice of Home Visit letter explaining that there was a visit.⁴² The CPS is required to see and speak to all children present in the home at the time of the investigation.⁴³ The CPS is also required to speak with all adults or caretakers who reside in the home.⁴⁴ The CPS will provide the potential respondent parent with a notice of existence.⁴⁵ The notice of existence explains that there is an open investigation into the treatment of the children.⁴⁶ The CPS will then search the house to determine whether or not there are hazards, whether or not there are appropriate sleeping arrangements, and whether there is an adequate amount of food.⁴⁷ A CPS may also go to the children’s school, “talk to family members and other people who may know your child, like a neighbor, building superintendent, teacher, doctor, nurse, NYPD, etc.”⁴⁸ The

³⁷ *Summary Guide for Mandated Reporters in New York State*, OFF. OF CHILD. AND FAM. SERV., <https://ocfs.ny.gov/main/publications/Pub1159.pdf>. (last visited Apr. 18, 2022).

³⁸ *Id.*

³⁹ *A Parent’s Guide To A Child Abuse Investigation*, N.Y.C. CHILD., <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> (last visited Apr. 18, 2022).

⁴⁰ Rachel Blustain, *New Push to Provide Legal Advice to Parents Facing Abuse and Neglect Investigations*, CITY LIMITS (Jan. 8, 2019), <https://citylimits.org/2019/01/08/new-push-to-provide-legal-advice-to-parents-facing-abuse-and-neglect-investigations/>.

⁴¹ *A Parent’s Guide to a Child Abuse Investigation*, *supra* note 39.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *A Parent’s Guide to a Child Abuse Investigation*, *supra* note 39.

⁴⁸ *Id.*

investigation helps CPS determine whether a child meets the definition of either an abused child or a neglected child.⁴⁹

C. The New York Family Court Act

Definitions

The New York Family Court Act defines an “abused child” as “a child less than eighteen years of age whose parent or other person legally responsible for his care, inflicts or allows to be inflicted upon,” or “creates a substantial risk of death or serious protracted disfigurement or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ,” or “commits to allows to be committed” specific offenses enumerated in the N.Y. Penal Law.”⁵⁰ Abuse is more narrowly-defined than neglect.⁵¹

The New York Family Court Act defines a “neglected child” as a child “less than eighteen years of age “whose physical, mental, or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care,” either by failing to supply the child “adequate food, clothing, shelter or education . . . medical dental optometrically or surgical care, though financially able to do so or offered financial or other reasonable means to do so.”⁵² What is considered “reasonable” is based on an objective standard, meaning the standard of “reasonableness” does not depend on individual circumstances, but rather what the court considers to be reasonable generally.⁵³ Neglect can also be established if the parent or person legally responsible fails to provide the child with “proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions.”⁵⁴ The statute provides a catch-all standard in that a neglect case can be found if there are “any other acts of a similarly serious nature requiring the aid of the court.”⁵⁵

⁴⁹ *Id.*

⁵⁰ N.Y. FAM. CT. ACT § 1012.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

Possible Results of a Child Protective Specialist Investigation in New York

After a CPS worker investigates, there are two possible outcomes: the case is either determined to be unfounded or indicated.⁵⁶ If the case is labeled unfounded, the investigation has not found any credible evidence that abuse or neglect has occurred.⁵⁷ If the CPS has sufficient evidence that either neglect or abuse is occurring, the respondent will receive a Notice of Indication which explains that the report was indicated.⁵⁸ New York's standard for indication after investigation is a requirement of "some credible evidence."⁵⁹ "Some credible evidence" is the bare minimum amount of evidence worthy of belief to support the allegations against an individual and is essentially the family court equivalent of "probable cause" in a criminal proceeding.⁶⁰ In New York City, 40% of all investigations end with an indication, compared to 20% nationwide.⁶¹

If you are named as a respondent in a CPS report and the report becomes indicated, "your name will appear on the Statewide Central Register of Child Abuse and Maltreatment until the youngest child named in the report turns 28."⁶² A respondent parent's right to counsel is triggered when the case becomes indicated, but not before.⁶³ An ACS action can be indicated against a biological parent, a legal parent, or a person legally responsible for the child.⁶⁴ Legal parents include those who have been granted legal custody through court order such as de facto parents.⁶⁵ The Uniform Parentage Act defines "de facto parents" as those who have resided with the child for a significant period of time, engaged in caretaking of the child; undertook responsibilities of a parent, held the child out as their own, established a bonded and dependent relationship with the child which was fostered by the child's legal custodian.⁶⁶ A "psychological parent" may also obtain legal

⁵⁶ Jessica H. Ressler, *What Happens After Administration of Children's Services (ACS) Or Child Protective Services (CPS) Investigates?*, WESTCHESTER MATRIMONIAL L. (May 24, 2013), <https://westchestermatlaw.com/what-happens-after-acs-or-cps-investigate/>.

⁵⁷ *Id.*

⁵⁸ *A Parent's Guide to a Child Abuse Investigation*, *supra* note 39.

⁵⁹ Blustain, *supra* note 40.

⁶⁰ Christian J. Root, *Child Protective Services Investigations: I've got a indicated report...what do I do?* TULLY RINCKEY PLLC. (Oct. 10, 2019), <https://www.tullylegal.com/resources/articles/child-protective-services-investigations-ive-got-an-indicated-reportwhat-do-i-do/>.

⁶¹ Blustain, *supra* note 40.

⁶² *Understanding CPS and Family Court Neglect Proceedings*, HOGAN WILLIG (Aug. 14, 2012), <https://www.hoganwillig.com/blog/understanding-cps-and-family-court-neglect-proceedings>.

⁶³ Blustain, *supra* note 40.

⁶⁴ N.Y. FAM. CT. ACT § 1012.

⁶⁵ California Department of Social Services, *De Facto Parent*, CAL. DEP'T OF SOC. SERV., <https://www.cdss.ca.gov/inforesources/caregiver-advocacy-network/rights-de-facto-parent> (last visited Feb. 21, 2021).

⁶⁶ UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

custody and is defined as one who the child thinks of as their parent and the parent thinks of the child as their own.⁶⁷

Unlike custody disputes resulting from divorce, child welfare proceedings apply to individuals who are not legal parents of the child.⁶⁸ A legally responsible person owes a duty to the child to prevent them from being abused or neglected and thus can be named as a respondent.⁶⁹ “Person legally responsible” refers to those who are the child’s “custodian, guardian, any other person responsible for the child’s care at the relevant time.”⁷⁰ This includes anyone who is “continually or at regular intervals found in the same household as the child when the conduct of such persons causes or contributes to the abuse or neglect of the child.”⁷¹ As long as the person acts as the “functional equivalent of a parent in a familial or household setting,” they qualify as a person legally responsible.⁷² This is true even if the individual only assumes “temporary care or custody of the child, so long as the circumstances of the case otherwise warrant such a determination.”⁷³ Courts look at factors such as “the frequency and nature of the contact between the child and respondent, the nature and extent of the control exercised by the respondent of the child’s environment, the duration of the respondent’s contact with the child, and the respondent’s relationship to the child’s parent(s).”⁷⁴

Except in emergency removal proceedings, a court cannot order the removal of a child immediately after the case has been indicated.⁷⁵ Before removal, reasonable efforts must be made by ACS to prevent or eliminate the need for removal of the child from the home.⁷⁶ “Reasonable efforts” include services agencies provide that aim to assist, preserve, and reunify families, both prior to the placement of a child in foster care and allow a child to safely return to their home.⁷⁷

Before a lawyer is appointed to the parent or guardian, ACS is permitted under specific circumstances to conduct an emergency removal.⁷⁸ ACS is

⁶⁷ *Edwards v. Edwards*, 777 N.W.2d 606 (N.D. 2010).

⁶⁸ N.Y. FAM. CT. ACT § 1012.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Matter of Yolanda D.*, 88 N.Y.2d 790, 796 (N.Y. 1996).

⁷³ *People v. Carroll*, 93 N.Y.2d 564, 570 (N.Y. 1996).

⁷⁴ *Matter of Yolanda D.*, 88 N.Y.2d at 796.

⁷⁵ N.Y. FAM. CT. ACT § 1027(b)(ii).

⁷⁶ *Id.*

⁷⁷ Child Welfare Information Gateway, *Reasonable Efforts to Preserve of Reunify Families and Achieve Permanency for Children*, CHILDWELFARE.GOV (Sept. 2019), <https://www.childwelfare.gov/pubPDFs/reunify.pdf>.

⁷⁸ N.Y. FAM. CT. ACT § 1024.

permitted to remove a child from their custodian's home temporarily if "the parent or other person legally responsible for the child's care is absent or, though present, was asked and refused to consent to the temporary removal of the child."⁷⁹ The court must consider whether the removal is "necessary to avoid imminent risk to the child's life or health," whether the removal would be "contrary to the best interests of the child," and whether "reasonable efforts were made prior to the date of application or the ordering of such temporary removal to prevent or eliminate the need for removal of the child from the home."⁸⁰

The emergency removal provision of the Family Court Act, although necessary to prevent serious harm in certain instances, provides the court a high level of discretion and can deprive the parent or guardian of a proper investigation.⁸¹ For example, a mother's children ages eight and seventeen, were removed from her care after "she was kidnapped by her ex-boyfriend and held for eleven days."⁸² During these eleven days, "child protective services 'indicated' a case of neglect against her."⁸³ This mother was deprived of the fundamental right to parent her children for four months.⁸⁴ After her children were eventually returned to her, her case remained indicated until recently, when she appealed the finding.⁸⁵ This indigent mother was only provided counsel after her children were taken from her and ACS indicated a case against her.⁸⁶

When the requisite efforts have been taken and the court determines that removal is necessary to prevent imminent risk to the child, ACS is required to make "thorough efforts to locate relatives of the child and notify them of the child's removal."⁸⁷ This includes biological fathers who thus far have not been involved in their children's lives.⁸⁸ ACS does not only inform nuclear family members, rather they "must notify grandparents, other relatives, and persons identified by a child five years of age or older as playing or having played a significant role in her life."⁸⁹ The family members must be informed

⁷⁹ N.Y. FAM. CT. ACT § 1022.

⁸⁰ *Id.*

⁸¹ Blustain, *supra* note 41.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Introduction to ACS, Court Proceedings and Your Legal Options*, MOBILIZATION FOR JUSTICE (2016), <https://mobilizationforjustice.org/wp-content/uploads/Introduction-to-ACS-Court-Proceedings-and-Your-Legal-Options.pdf>.

⁸⁸ N.Y. FAM. CT. ACT § 1017(a).

⁸⁹ *Introduction to ACS, Court Proceedings and Your Legal Options*, *supra* note 87.

that they have the option to be a placement resource for the child and what steps must be taken to do so.⁹⁰

D. Amendments Evidencing the Legislature's Advocacy for Non-Respondent Parents

The Family Court Act § 1017(a) states that “when a court determines that a child must be removed from his or her home . . . the court shall direct the local commissioner of social services to conduct an immediate investigation to locate any non-respondent part of the child and any relatives of the child.”⁹¹ The commission shall provide notice “in writing of the pendency of the proceeding and of the opportunity for non-respondent parents to seek temporary release of the child . . . or custody . . . or for relatives to seek to become foster parents.”⁹² The term “non-respondent parent” includes a “non-custodial parent entitled to notice and the right to enforce visitation rights.”⁹³ The court has the duty to determine whether there is a “non-respondent with whom such child may appropriately reside.”⁹⁴

The Family Court Act § 1017(c) was amended in 2016 to require the court to determine “whether there is a non-respondent parent with whom such child may appropriately reside,” whereas the statute previously required the court to determine whether there is a “suitable non-respondent parent with whom such child may appropriately reside.”⁹⁵ Family Court Act § 1012 was amended in 2016 to explain that “suitable person” means “any person who plays or has played a significant positive role in the child’s life or in the life of the child’s family.”⁹⁶ The recognition of the fundamental right to parent a child has influenced the legislature to amend this statute in this way, as the non-respondent parent no longer has to be considered “suitable” by the court because this requirement would infringe on this right by making a parent’s ability to care for their child conditional on the parents previous involvement in the child’s life.⁹⁷

After the amendment passed both houses of the New York Legislature, Helene E. Weinstein, Chair of the Assembly Judiciary Committee, provided

⁹⁰ *Id.*

⁹¹ N.Y. FAM. CT. ACT § 1017(a).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Thomas R. Brooks, *Administrative Directive: Changes to the Family Court Act Regarding Child Protective and Permanency Hearings*, N.Y. STATE OFF. OF CHILD. AND FAM. SERVS. (Apr. 13, 2017), https://ocfs.ny.gov/main/policies/external/OCFS_2017/ADFs/17-OCFS-ADM-02-Changes-to-the-Family-Court-Act-CPS.pdf [hereinafter *Changes to the Family Court Act Regarding Child Protective and Permanency Hearings*].

⁹⁶ *Id.*

⁹⁷ *Id.*

Governor Andrew Cuomo a memorandum in support of the legislation.⁹⁸ She explained that Article 10 of the Family Court Act “contains gaps and anomalies with respect to the treatment of non-respondent parents.”⁹⁹ However, she suggested that this amendment, while not completely remedying the issues, could rectify some of the more obvious concerns pertaining to non-respondent parents and help “enable their greater participation in abuse or neglect proceedings, as well as permanency hearings, concerning their children.”¹⁰⁰ She explained that allowing non-respondent parents to take a more active role in child welfare proceedings involving their children is extremely important because “there is a growing recognition . . . that [non-respondent parents] may . . . provide vital resources for their children.”¹⁰¹

Susan Jacobs Esquire, the Executive Director at the Center for Family Representation explained that the Center for Family Representation supported the amendment because “all too often non-respondent parents and potential kinship resources are identified only after a child has been removed from their family and placed in foster care with strangers.”¹⁰² The Center for Family Representation hoped that expanding the definitions of a “parent,” “relative,” and “suitable person,” would increase the opportunities for “non-respondent parents (particularly fathers) to step forward and actively plan for their children,”¹⁰³ thus likely preventing placement in non-kinship foster care and reducing “the likelihood of a child experiencing the often-devastating consequences of such placement.”¹⁰⁴ Tamara A. Steckler, the Attorney in Charge at the Legal Aid Society agreed that “placing children with appropriate non-respondent parents. . . is critical to reducing the trauma they suffer when they are removed from their parents and homes.”¹⁰⁵ Although the intentions and goals of this amendment and its supporters are to provide non-respondent parents more of an opportunity to be involved in child welfare cases concerning their children, too often ACS ignores its obligations to locate parents and family or children they are removing.¹⁰⁶

⁹⁸ *Couns. to the Governor Legis. Bill and Veto Jackets*. No. 12590-15. L. 2015, Ch 567, N.Y. S. ARCHIVES (N.Y. 2015), <http://digitalcollections.archives.nysed.gov/index.php/Detail/objects/62020>.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² N.Y. S. Res., *supra* note 98 at 26.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ N.Y. S. Res., *supra* note 98 at 28.

¹⁰⁶ Interview with Emma Ketteringham, *supra* note 8.

III. THE PROBLEM

ACS fails to reach out to non-respondent parents, especially fathers, even though they are required to do so by Family Court Act §1017.¹⁰⁷ Additionally, New York Social Service Law § 393 requires “giving preference to placement of a child with an adult relative over a non-related caregiver.”¹⁰⁸ However, “children are rarely placed with relatives quickly without a great deal of advocacy in court.”¹⁰⁹ This is because the relatives do not always receive the information about the option to be a custodian.¹¹⁰ While this practice applies to all families involved in child welfare proceedings, it disproportionately affects fathers as “more often than not, the non-respondent parent is the child’s father.”¹¹¹ This practice disproportionately affects poor, Black families.

Financial Status and the Child Welfare System

Emma Ketteringham, the Managing Director of the Family Defense Practice at the Bronx Defenders explains that “[t]he greatest driver of families in the system is poverty, not acts of abuse.”¹¹² In her capacity as Managing Director, Ketteringham “supervises attorneys who work with social workers and parent advocates in defense teams representing parents accused of child abuse and neglect and facing possible termination of parental rights.”¹¹³ Ketteringham states that poverty is “a proxy for neglect and even defined into New York’s definition of child neglect.”¹¹⁴

The impact of poverty upon affected communities is evident upon a brief examination of the most common types of reported maltreatment. In 2018, “as in previous years, neglect was overwhelmingly the most common form of child maltreatment,” with neglect making up 74.9% of the reported maltreatment.¹¹⁵ Neglect cases relate directly to poverty, such as “poor

¹⁰⁷ N.Y. FAM. CT. ACT § 1017.

¹⁰⁸ Lauren Shapiro et al., *Advocating for Placement of Children With Relatives*, PRACTICE INSIGHT (2005), <https://plus.lexis.com/document/index?crd=3c60d802-1cfd-4c01-84c9-01488e1e1eb5&pdpermalink=504ac94e-cf26-451a-a623-6234b8854676&pdmfid=1530671&pdisurlapi=true>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Jeffrey A. Adolph et al., *Issues Concerning Non-Respondents in Child Welfare Proceedings – Changes in Practice Under 2005 Legislation*, PRACTICE INSIGHT (2005), <https://plus.lexis.com/document/teaserdocument?crd=4aa56fef-a865-4ef1-8d23-75730edef951&pdpermalink=a12ca39a-79d5-49dc-98f7-540e11cae32a&pdmfid=1530671&pdisurlapi=true>.

¹¹² Interview with Emma Ketteringham, *supra* note 8.

¹¹³ BRONX DEFENDERS STAFF - EMMA KETTERINGHAM, <https://www.bronxdefenders.org/staff/emma-ketteringham/> (last visited Feb. 18, 2021).

¹¹⁴ Interview with Emma Ketteringham *supra* note 8.

¹¹⁵ Child Welfare Information Gateway, *supra* note 4.

housing conditions or children missing school.”¹¹⁶ Very few families living in poverty withstand the scrutiny of a CPS’s home investigation.¹¹⁷ Something such as not having enough food in the refrigerator could result in a case being indicated against the family.¹¹⁸ Allegations of abuse or neglect can have compounding impacts as the CPS will have substantial access to the individual’s home.¹¹⁹ The majority of the cases brought to family court by ACS are not brought because of a risk of serious harm to the child. Rather, they are indicated because the children live in homes that do not meet ACS standards due to circumstances that are largely out of the parent’s control.¹²⁰ Only approximately 10% “of the children in foster care are there because of serious abuse.”¹²¹

Ketteringham explains that this reflects a political choice rooted in the nineteenth century to treat poverty as an issue of individual fault.¹²² New York State has allocated billions of dollars to ACS to address issues caused by poverty rather than providing the poor families the resources they need in order to meet the minimum degree of care.¹²³ For example, instead of providing financial support to the parents, ACS removes the child and provides the foster parent financial support to care for the child.¹²⁴ This is a punitive response to parents who are struggling, rather than rehabilitative.¹²⁵ This is a response to the social problem of poverty that does nothing to address the various causes of poverty.¹²⁶

Parents trying to improve the quality of life for their children are also punished by the state for their current circumstances rather than assisted by the state to help them achieve that goal. For example, a woman was charged with “two counts of felony child abuse and sentenced to 18 years of supervised probation, all because she had no childcare and had to leave her two younger children in the car while she went on a job interview.”¹²⁷ The child welfare system has become more about enforcing social norms rather

¹¹⁶ Yasmeen Khan, ‘It Is a Racist System’: NYC Advocates, Lawmakers Demand Greater Oversight at Child Welfare Agency, *GOHAMIST* (Sept. 30, 2019), <https://gothamist.com/news/it-racist-system-nyc-advocates-lawmakers-demand-greater-oversight-child-welfare-agency>.

¹¹⁷ Interview with Fam. Ct. Judge, *supra* note 12.

¹¹⁸ *Id.*

¹¹⁹ *A Parent’s Guide to a Child Abuse Investigation*, *supra* note 39.

¹²⁰ Khan, *supra* note 116.

¹²¹ Guggenheim, *supra* note 5.

¹²² Interview with Emma Ketteringham, *supra* note 8.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ AREEN, *supra* note 3, at 387.

than child safety.¹²⁸ The laws intertwine risk assessment and moral judgment, as a parent has to choose between offering their child independence and being able to provide for their child.¹²⁹ The parent does not need to be punished or sent to parenting classes, the parent needs financial assistance so that they are not faced with risking losing their child either due to inability to financially provide or due to giving the child more independence than what is socially acceptable.¹³⁰ “In a country that provides no subsidized childcare and no mandatory family leave, no assurance of flexibility in the workplace for parents, no universal preschool and minimal safety nets for vulnerable families” these laws in effect “make it a crime to be poor.”¹³¹ These same circumstances often prevent a poor parent or guardian from being able to comply with the reasonable efforts suggested by ACS.

What constitutes “reasonable efforts” depends on each family’s circumstances and the nature of the abuse or neglect.¹³² Although completing the actions recommended by ACS is not technically compulsory, if a parent does not participate in these programs it is much more likely their child will be removed from their care.¹³³ Although the individual circumstances of each family are considered, the services recommended often put parents in impossible situations.¹³⁴ For example, in a neglect case filed as a result of failing to provide the minimum degree of care as a result of low income, a parent may be asked to attend a program such as a parenting class.¹³⁵ This same parent needs to acquire additional employment.¹³⁶ While the parent is working and attended the recommended program, the child needs to be supervised however they are not provided childcare.¹³⁷

Parents are often sent to programs, such as a parenting class, because the child protective system believes that poverty and lack of resources is a failure of will and classes and therapy can assist.¹³⁸ A parent does not often face accusations of educational neglect because they do not care about education, but rather because there is an issue beyond the parent’s control such as a resource issue, a transportation issue, or even a safety issue at the school.¹³⁹ Parents may have a child who has anxiety about attending school,

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² Interview with Fam. Ct. Judge, *supra* note 12.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Interview with Emma Ketteringham, *supra* note 8.

¹³⁹ *Id.*

or they are trying to transfer their child to a better school.¹⁴⁰ The punishment for such action is built on the idea that parents in the system are not capable of parenting or do not love their children enough.¹⁴¹ The criminal justice system has come under a substantial amount of scrutiny for being prejudiced against low income communities.¹⁴² However, the majority of people still believe that child protective workers are doing good work, despite the strong parallels between the criminal punishment system and so-called child welfare system.

Racial Status and the Child Welfare System

Low-income families and families of color are subject to more day-to-day scrutiny as they “have lives that are significantly more entangled with the state, through no choice of their own, and every interaction between a poor family and the myriad of state systems with which they come into contact on a day-to-day basis is another opportunity for someone to make a call to child protective services.”¹⁴³ Families with more financial resources are under significantly less scrutiny as they have the means to “access private resources to address personal and family crises that might otherwise result in intervention by the child welfare system.”¹⁴⁴ Further, “Black families in particular, are less likely to receive in-home services meant to address underlying causes and prevent removal. Thus, the state is more likely to permit white children to remain with their families and take Black children away from theirs when faced with similar allegations.”¹⁴⁵

In New York, “any person (mandated by law or not), official or institution participating in good faith in making a report . . . pursuant to the duties of the child protective service according to the law has immunity from any liability, civil or criminal, that otherwise might result from such actions.”¹⁴⁶ Good faith is “presumed as long as they were acting in the discharge of their duties and within the scope of their employment.”¹⁴⁷ Thus,

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ AREEN, *supra* note 3, at 380.

¹⁴⁴ *Id.*

¹⁴⁵ Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019), https://plus.lexis.com/document/?pdmfid=1530671&crd=3c8414d4-e069-4df5-bbd8-939b9a260ac3&pdpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5WND-JH40-00SW-41X0-00000-00&pdcontentcomponentid=224661&pdteaserkey=&pdslpamode=false&pdworkfolderlocatorid=NOT_SAVED_IN_WORKFOLDER&ecomp=mt4k&earg=sr0&prid=94bb1cc4-987b-46b4-9a3c-117fb4e444b4.

¹⁴⁶ SHELDON SILVER & ROGER GREEN, A GUIDE TO NEW YORK’S CHILD PROTECTIVE SERVICES SYSTEM (2001), <https://www.nyassembly.gov/comm/Children/20011016/html/doc.html#link16>.

¹⁴⁷ *Id.*

“there is no legal risk for reporting, but considerable exposure to legal risk, including criminal prosecution in most states, for a failure to report.”¹⁴⁸ Mandated reporters are relatively free to rely on their own opinion about what situations require intervention complete with their own conscious or unconscious biases.”¹⁴⁹

Racial biases affect whether or not an incident is reported as: “compared with children from other races and ethnicities, Black children are more likely to be reported to the child welfare system.”¹⁵⁰ Essentially, if a white individual takes a child to the doctor and the doctor questions the parent about a bruise or injury, the doctor will usually take the parent’s explanation at face value.¹⁵¹ However, if a poor Black individual does the same thing, the doctor will often question the situation further.¹⁵² Even in situations of little suspicion, the doctor will report the incident to avoid legal risk.¹⁵³ As previously stated, once an incident is reported, CPS will proceed with an investigation.

The statistics demonstrate that this racial bias disproportionately affects Black families as “approximately one in five Black children will have a report of maltreatment confirmed by . . . age 18, as compared with . . . one in nine white children.”¹⁵⁴ Black children are also more likely to be removed from their home once a case is indicated as “one in nine Black children will be placed in foster care before age 18, as compared with one in 19 Hispanic children, one in 21 white children, and one in 47 Asian children.”¹⁵⁵

The disproportionate rate at which Black children are removed from their families shows that the bias is not only present at the reporting stage but remains present throughout the case including in the courtroom.¹⁵⁶ Judges in New York Family Courts are overwhelmingly white while the litigants are overwhelmingly Black and Latino. “Scholars have labeled family court the ‘poor person’s court,’ and the child welfare system an ‘apartheid institution.’”¹⁵⁷ A witness at an Albany Public Hearing summarizes the dynamic:

Can you imagine how a Black single parent feels the first time she goes into that intimidating place [Family Court] and sees white clerks, white

¹⁴⁸ David Pimentel, *Fearing the Bogeyman: How the Legal System’s Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235 (2015).

¹⁴⁹ AREEN, *supra* note 3, at 381.

¹⁵⁰ *Id.*

¹⁵¹ Interview with Fam. Ct. Judge, *supra* note 12.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ AREEN, *supra* note 3, at 381.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ Trivedi, *supra* note 145 at 536.

guards, white psychologists, white correction officers, white lawyers, and white court judges? -she immediately senses that they have all the power and we have none. The court personnel's attitude is [that an] inner city person is a nobody, and we feel helpless rage as we see them snickering and whispering snide remarks and things to each other as they talk about us. They only give respect in conversation to each other and to the white parents in court.¹⁵⁸

Black men are even further disadvantaged in Family Court. Black fathers are often assumed to be “deadbeats, violent, or felons.”¹⁵⁹ There is an assumption that they actively chose to not have a role in the lives of their children.¹⁶⁰ This assumption is perpetuated by judges, court officers, and other staff in the way that they treat Black men in the courthouse.¹⁶¹

Poverty in general decreases access to the internet and, consequently, sources that could provide information about a non-respondent parent's rights.¹⁶² Forty percent of households in New York City, roughly 2.4 million people, do not have both access to home and mobile internet connections, while 18 percent have neither.¹⁶³ Council Member Bob Holden explained that the “pandemic and its consequences of online transition highlight the disparities between those with home internet access and internet-capable devices and those without.”¹⁶⁴ Holden stated that “[i]nternet access is not a luxury. It is a basic right that can open numerous doors.”¹⁶⁵ Not only does this include resources that can help a non-respondent parent learn their rights, but also resources that prevent a neglect proceeding from occurring in the first place such as welfare benefits like food stamps and rental assistance as many enrollment centers have closed.¹⁶⁶

In January 2020, Mayor Bill de Blasio released an “Internet Master Plan” which intended to provide affordable and accessible access to high-speed internet.¹⁶⁷ However, New York City has yet to see a material change

¹⁵⁸ Hon. Erika Edwards, *Report to the New York State Court's Commission on Equal Justice in the Courts*, THE JUDICIAL FRIENDS ASSOCIATION, INC. (2020), <https://www.nycourts.gov/LegacyPDFS/ip/ethnic-fairness/pdfs/Judicial-Friends-Report-on-Systemic-Racism-in-the-NY-Courts.pdf>.

¹⁵⁹ *Id.* at 45.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Samar Khurshit, *De Blasio Administration Pledges to Finally Address City's Persistent 'Digital Divide' with Universal Internet Access*, GOTHAMGUZZETTE, Oct. 15, 2020, <https://www.gothamgazette.com/city/9824-new-york-city-digital-divide-de-blasio-internet-access-broadband-plan>.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

in access.¹⁶⁸ Maya Wiley, who served as de Blasio’s counsel stated that this is ‘disappointing’ as Broadband is no longer a luxury and the delay is largely due to a “lack of urgency, vision and attention.”¹⁶⁹ These repeated delays are an example of the incompetence of the city government which fails all of us, but disproportionately fails poor people of color.¹⁷⁰ The “unprecedented economic hardships [due to Covid-19] faced by a growing number of New Yorkers highlights . . . the need for immediate policy interventions to support those who are increasingly struggling to make ends meet.”¹⁷¹

The COVID-19 pandemic has shed light on yet another racial inequality, however, the identified inequality is not new, nor is it unusual. The COVID-19 economic downturn has been labeled the “most unequal recession in U.S. history, with low-wage workers and people of color disproportionately impacted by job loss, pay cuts, and financial hardship.”¹⁷² This is most evident in New York City as the majority of job loss occurred within low-paying industries.¹⁷³ COVID-19 has helped to shed light on the systemic racial inequities as “53 percent of those who lost work related to COVID-19 were low-income prior to the pandemic.”¹⁷⁴ However, although COVID-19 has been labeled the most unequal recession, is it not uncommon for economic downturns in the United States to have a worse effect on racial minority families than white families.

The Black-White income gap has remained steady in the United States since 1970.¹⁷⁵ In 1970, the average household income for White families was \$54,100 while the average household income for Black families was \$30,400.¹⁷⁶ In 2018, the average household income for White families was \$84,600 while the average household income for Black families was \$51,600.¹⁷⁷ Further, the United States economy follows a pattern of inflation

¹⁶⁸ Reuven Blau, *De Blasio Promised to ‘Accelerate’ his Long-Stalled Broadband Plan in July. Some 1.5 Million New Yorkers Are Still Waiting...*, THE CITY, Jan. 10, 2021, <https://www.thecity.nyc/2021/1/10/22211441/broadband-stalled-nyc-wifi-nycha-deblasio>.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ Jarrett Murphy, *The Good News on NYC Poverty is Old News, Which is Bad News*, CITY LIMITS, Sept. 21, 2020, <https://citylimits.org/2020/09/21/the-good-news-on-nyc-poverty-is-old-news-which-is-bad-news/>.

¹⁷² Irene Lew, *The Pandemic Economy: COVID-19 Fallout Continues to Hit Low-Income New Yorkers the Hardest*, COMMUNITY SERVICE SOCIETY NEW YORK, Nov. 19, 2020, <https://www.cssny.org/news/entry/pandemic-economy-covid-fallout-low-income-new-yorkers>.

¹⁷³ *Id.*

¹⁷⁴ *Poverty Tracker Spotlight: COVID-19, Poverty & Hardship*, ROBIN HOOD, May 18, 2020, <https://robinhoodnyc.medium.com/poverty-tracker-spotlight-covid-19-poverty-hardship-4a1ace2cf89d>.

¹⁷⁵ Katherine Schaeffer, *6 Facts About Economic Inequality in the U.S.*, PEW RES. CTR., (Feb 7, 2020), <https://www.pewresearch.org/fact-tank/2020/02/07/6-facts-about-economic-inequality-in-the-u-s/>.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

and deflation as about every ten years the United States enters a recession.¹⁷⁸ Racial minorities were more harshly affected by the 2008 recession as “minority workers have fewer employment opportunities, lower wages, or both as compared to their white counterparts . . . As a result, minorities are less well situated than white families to save and build wealth that would provide an economic cushion in bad economic times.”¹⁷⁹

Very little attention is being given to the needs of Black communities, who have faced the greatest impact of the pandemic.¹⁸⁰ This critical community of New Yorker’s opinions have not been heard concerning policymaking centered on pandemic response, “even though they are the key to ensuring an equitable recovery in the city.”¹⁸¹ Similarly, while Black families are impacted the most by the child welfare system, the actual needs of Black families go ignored.¹⁸² There is a valuable resource that is going untapped, the voices of those who are experiencing inequality first-hand.¹⁸³ Social welfare programs in our country are developed based largely on who society deems deserving and who society deems undeserving with the idea in mind that other’s behaviors can be controlled and modified by employing reform policies that essentially equal punishment.¹⁸⁴

The Negative Effects of Limiting Access to Kinship Care

In New York, courts consider only whether “a child is at risk of harm if she remains in her parents’ care, without factoring in the harm that results from the alternative,” which is often non-kinship care.¹⁸⁵ The requirement of reasonable efforts, as well as recognition of a parent’s fundamental right to parent their child, reflect the legislature’s knowledge that the foster care system is deeply flawed.¹⁸⁶ As previously noted, the standard for reasonable efforts is that the “child’s health and safety . . . be the paramount concern,” thus the effects that the foster care system has on children’s health and safety must be examined.¹⁸⁷ “Returning children to homes made safe, and doing so quickly, does protect the children; it minimizes the psychological damage

¹⁷⁸ Tom Harris, *How Recessions Work*, HOWSTUFFWORKS, <https://money.howstuffworks.com/recession8.htm>.

¹⁷⁹ Amanda Logan & Christian Weller, *The State of Minorities: The Recession Issue*, CTR. FOR AM. PROGRESS, (Jan. 16, 2009), <https://www.americanprogress.org/issues/race/news/2009/01/16/5482/the-state-of-minorities-the-recession-issue/>.

¹⁸⁰ Lew, *supra* note 172.

¹⁸¹ *Id.*

¹⁸² Interview with Emma Ketteringham, *supra* note 8.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Trivedi, *supra* note 145 at 536.

¹⁸⁶ Child Welfare Information Gateway, *supra* note 77.

¹⁸⁷ 42 U.S.C.A. § 671(a)(15)(A).

that can come from disrupting the parent-child relationship.”¹⁸⁸ Not only does the foster care system often result in psychological damage, adults out of foster care frequently face long term financial and familial effects. The Children’s Defense Fund reported in 2003 that,

Within two to four years of leaving foster care, only 54% of foster kids had completed high school, fewer than half were employed, 25% had been homeless, 30% had no access to needed healthcare, and 60% of the young women had given birth. A child is more than twice as likely to die of abuse in foster care than in the general population. The rate of sexual abuse in foster homes has been shown to be two to four times higher than in the general population, while physical abuse is three times higher.¹⁸⁹

These statistics make evident that the foster system is not in a child’s best interest except in cases of extreme abuse or threat of imminent risk. The consequences of children living in foster care prove that the state is not a good parent.¹⁹⁰ Foster children are particularly vulnerable to sexual abuse. This may be due to the “non-permanent and non-biological nature of the familial relationships (resulting in diminished incest taboos),” poor training of foster care parents, “lack of particularized matching of foster children with families, insufficient visitation from caseworkers, and failure to follow up on suspicions of abuse or referrals of allegations of abuse and/or neglect.”¹⁹¹ It is likely that actual abuse rates are higher than those reported are essentially the foster care provider admitting their own failures which could result in liability or scrutiny.¹⁹²

Not only does physical abuse occur at high rates, but mental and emotional abuse also takes place, as several children have reported being treated differently by their foster parents.¹⁹³ One child reported that whenever she asked a question, her foster parents answered sarcastically. This makes bonding extremely difficult.¹⁹⁴ Social science suggests that “children who are removed from their homes based on allegations of abuse or neglect often face more abuse and neglect in foster care.”¹⁹⁵

Treatment of children in foster care often perpetuates the cycle of foster care.¹⁹⁶ Young girls in foster care are substantially more likely to become

¹⁸⁸ Kathleen S. Bean, *Aggravated Circumstances, Reasonable Efforts, and ASFA*, 29 B.C. THIRD WORLD L.J. 223, 224 (2009).

¹⁸⁹ Kurt Mundorff, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, CARDOZO PUB. L. POL’Y & ETHICS J. 131, 154 (2003).

¹⁹⁰ Interview with Emma Ketteringham, *supra* note 8.

¹⁹¹ Trivedi, *supra* note 145 at 543.

¹⁹² *Id.*

¹⁹³ *Id.* at 544.

¹⁹⁴ *Id.* at 543-544.

¹⁹⁵ *Id.* at 544.

¹⁹⁶ Mundorff, *supra* note 189 at 149-150.

pregnant than girls outside of the system.¹⁹⁷ This, in turn, perpetuates a cycle, as “[a]dolescent mothers who were in the care of CPS when they gave birth are more than 7 times more likely to have their child taken into care before age 2 than adolescent mothers who were not in care.”¹⁹⁸ These statistics are directly related to a lack of appropriate education that foster children receive.¹⁹⁹ In fact, not only are foster care children more likely to become pregnant, they are also more likely to contract certain sexually transmitted diseases.²⁰⁰ A study concluded that 50% of the participants were unaware that condoms prevent sexually transmitted infections and diseases.²⁰¹ Thus, only 3% of the participants stated that they used a condom during intercourse in the last three months.²⁰² Increased exposure to sexually transmitted diseases and infections, as well as unintended or unplanned pregnancies can also affect the youths academic career.²⁰³

As previously discussed in detail, neglect cases are often brought to court as a result of poverty. A young mother is extremely likely to wind up in a poverty-stricken environment as teen pregnancy greatly decreases the likelihood that both the mother and the child receive higher education.²⁰⁴ Only about two-thirds of children born to teen mothers earn a high school diploma, compared to 81% of their peers with older parents, only 40% of teen mothers finish high school, and less than 2% of teen mothers finish college by age 30.²⁰⁵ “Educational achievement affects the lifetime income of teen mothers.”²⁰⁶ Restricting access to kinship care, thus perpetuates the foster care cycle.²⁰⁷

¹⁹⁷ Elizabeth Wall-Wieler, Marni Brownell, Deepa Dingal, Nathan Nickel, and Leslie L. Roos, *The Cycle of Child Protection Services Involvement: A Cohort Study of Adolescent Mothers*, OFFICIAL J. OF THE AM. ACAD. OF PEDIATRICS (2018).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ Kym R. Ahrens et al., *Laboratory-Disagnosed Sexually Transmitted Diseases Infections in Former Foster Youth Compared with Peers*, OFFICIAL J. OF THE AM. ACAD. OF PEDIATRICS, Jul. 2010, <https://www.ncbi.nlm.nih.gov/entrez/eutils/elink.fcgi?dbfrom=pubmed&retmode=ref&cmd=prlinks&id=20547646>.

²⁰¹ Nadine M. Finigan-Carr, *Why Foster Youth Need Sex-Ed*, PUBLIC HEALTH POST, May 10, 2019, <https://www.publichealthpost.org/research/why-foster-youth-need-sex-ed/>

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Postcard: Teen Pregnancy Affects Graduation Rates*, NATIONAL CONFERENCE OF STATE LEGISLATORS, June 17, 2013, <https://www.ncsl.org/research/health/teen-pregnancy-affects-graduation-rates-postcard.aspx>.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ Wall-Wieler et. al, *supra* note 197.

IV. THE SOLUTION

The harm caused by ACS's failure to reach out to non-respondent fathers in a timely manner is not only a harm caused to the subject children, but also a direct violation of the non-respondent parent's fundamental rights. These harms are increased due to the economic inequality present between white and Black households. However, very little attention has been drawn to this discriminatory practice, and even less has been done to remedy it. There are several steps that can be taken to draw the public's attention to this discriminatory practice and prevent ACS from continuing to employ it. ensure more public knowledge about this discriminatory practice.

Attention must be paid to the child welfare system similar to the way society has started to critique the criminal justice system. The New York State Justice Task Force's critical mission has become promoting "fairness, effectiveness and efficiency in the criminal justice system" through eradicating the harms caused by wrongful convictions; furthering public safety, and recommending judicial and legislative reforms to advance these causes.²⁰⁸ This task force is composed of judges, prosecutors, defense attorneys, law enforcement officials, victim advocates and others across the criminal justice system.²⁰⁹ The task force has been successful in creating major statutory changes to the criminal justice system.²¹⁰

Following the protests and other events following the killing of George Floyd in 2020, the taskforce members were directed to "focus their attention on the examination of racial disparities in the criminal justice system at all key stages of the process, from arrest through sentencing."²¹¹ Chief Judge of the Court of Appeals of New York, Janet DiFiore, stated that "institutional racism is perhaps the most significant and complex issue the Task Force has ever had to consider."²¹² The importance of tackling it head-on cannot be understated, particularly at this critical moment in our nation's history."²¹³ The issue of racial disparity within the child welfare system must be given the same level of importance as racial disparity within the criminal justice system, as the punishment of being denied the fundamental right to parent one's children is extreme.

Resources must be dedicated to creating a similar task force comprised of family court judges, lawyers from the Administration of Children's

²⁰⁸ Press Release, Hon. Paul G. Feinman to Lead State's Justice Task Force in Examining Racial Disparities in New York's Criminal Justice System (June 11, 2020) (on file with author), https://www.nycourts.gov/LegacyPDFS/press/pdfs/PR20_26.pdf.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

Services Family Court Legal Department, lawyers for parents from organizations such as the Center for Family Representation and the Bronx Defenders, lawyers from Lawyers for Children, and experts in child welfare. Additionally, the taskforce should include parent advocates, who have been involved in child welfare proceedings and have first-hand knowledge of the process in order to give a voice to the community that is most affected by the inherent discrimination within the system.

Even in the wake of George Floyd's killing, which drew greater attention to racial inequalities in the criminal justice system, the racial inequalities in the child welfare system goes largely unnoticed by the public. George Floyd's death has been said to have lit the fuse that exploded into a storm of protests.²¹⁴ It is not possible to say why exactly after decades of police brutality towards minorities, Floyd's death caused the uproar that it did, however, some have argued the video recording of the incident played a large role in creating the social movement that followed Floyd's killing.²¹⁵ Mary Moriarty, the prior chief public defender in Hennepin County, Minnesota, where Floyd was killed, describes the video and its impact as follows: "[p]oor George Floyd is begging for his life, and here you have a cop just nonchalantly killing him in broad daylight in front of bystanders who are begging him to stop, and he knows he's being videoed, and he just continues to do it. . . So I think this was the last straw here."²¹⁶ The public is unlikely to see a video that depicts the great injustices and inequalities perpetrated by the child welfare system due to the nature of the child welfare system. Without active public outreach, the last straw is unlikely to be drawn. Thus, the need for a task force that can provide the public information and advocate for the rights of black fathers is imperative as the lack thereof allows ACS to continue to disregard parent's fundamental rights while largely avoiding the view of the public eye. Not only should the task force inform the public, they should also advocate for greater enforcement of Family Court Act §1017 within the Family Courts.

A next step in the right direction would be to hold policymakers accountable by advocating for the implication of the plan to increase access to the internet. Providing internet access to indigent households will allow the public to educate themselves about their rights when facing child welfare proceedings and help them prepare to defend their fundamental right to parent. Prior to 2020, there was a "digital divide" which allowed access to the internet and all of its resources to those who can afford it, but those

²¹⁴ *How George Floyd's Death Became the Last Straw*, KU LEUVEN, <https://www.kuleuven.be/english/research-stories/2020/how-george-floyds-death-became-the-last-straw>.

²¹⁵ Brad Brooks, *'Last Straw': Americans Confront Racism, Violence in Chauvin Trial*, AMNY, Apr. 21, 2021, <https://www.amny.com/news/last-straw-americans-confront-racism-violence-in-chauvin-trial/>.

²¹⁶ *Id.*

without the adequate financial resources could not.²¹⁷ As previously stated, access to the internet is no longer a luxury.²¹⁸ A parent's lack of access to the internet can lead to a lack of access to information regarding their legal rights.

While informing the public and helping the public inform themselves will help draw attention to inequalities perpetuated by the child welfare system, and thus possibly create greater advocacy towards change, public knowledge alone will not fix this issue without the City government's active commitment to the cause. The task force should advocate for legislation which would help hold ACS accountable for this discriminatory practice. A solution would be for the legislature to amend the Family Court Act to establish a private right of action for non-respondent parents who have not been contacted by ACS in a timely manner. As described above, the legislature has amended the Family Court Act before in order to provide more protection to non-respondent parents, however, they have not yet taken a step as powerful as establishing a private right of action for non-respondent parents, which would allow them to petition ACS for its failure to comply with the law. Not only would this amendment hold the Administration accountable, but it would increase access for children to be placed in kinship care as, if ACS is found to be at fault, the non-respondent parent will now have documented proof of their interest in providing care to their child, thus, making it much more difficult for the Administration to dismiss poor Black fathers as absentee fathers.

As poverty directly relates to child welfare proceedings and the discriminatory practices within ACS, a private right of action will be useless unless indigent parents are provided council to initiate these proceedings. The Supreme Court of the United States in *Gideon v. Wainwright* held that indigent criminal defendants who could not afford a lawyer have a right to legal representation provided by the government.²¹⁹ The Court reasoned that due to the adversary system of criminal justice "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth."²²⁰ The Court further stated that because the government hires lawyers to prosecute and defendants who have money hire lawyers to defend, there is a strong indication that lawyers in criminal courts are necessities, rather than luxuries.²²¹

These same reasons are present in the lack of a private right of action against ACS. The fundamental right to parent is "perhaps the oldest of the

²¹⁷ Khurshit, *supra* note 162.

²¹⁸ *Id.*

²¹⁹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (U.S. 1963).

²²⁰ *Id.*

²²¹ *Id.*

fundamental liberty interests recognized” by the Supreme Court.²²² The child welfare system, like the criminal justice system, is adversarial as it monitors, regulates, and punishes poor Black families.²²³ Further, ACS is a government institution, thus, the lawyers that represent ACS in court are government attorneys.²²⁴ There is no reason that non-respondent parents seeking to bring a private right of action against a government agency to enforce their fundamental rights should not be provided legal counsel, especially considering the demographic most affected: Black fathers.

V. CONCLUSION

ACS fails in their goal to “protect and promote the safety and well-being of New York City’s children, young people, families, and communities by providing excellent child welfare. . .”²²⁵ With neglect being overwhelmingly the most common form of child maltreatment,²²⁶ and neglect being fundamentally tied to poverty, poor Black communities are disproportionately affected.²²⁷ The system often infringes upon the fundamental right to parent one’s child because there is a lack of a consistent practice of reaching out to non-respondent fathers, especially in a timely manner, by ACS.²²⁸ This violation of non-respondent parent’s constitutional rights to parents has been largely ignored.²²⁹

The positive effects of kin-ship care and the way that denying access to such disproportionately affects the poor Black communities is a great injustice that warrants more attention and sufficient solutions. In order to prevent further injustice, this note advocates for more public awareness and government action regarding ACS’s unlawful practice of failing to reach out to non-respondent black fathers in child welfare proceedings. Developing a task force comprised of competent individuals with expertise in the child welfare system is a step in the right direction. Advocacy for access to the internet for indigent individuals will help parents become aware of their rights and help them avoid neglect proceedings. Finally, the establishment of a private right of action will help hold ACS accountable. The nation as a whole must continue to fight against racial inequalities. This fight against

²²² *Troxel*, 530 U.S. at 65.

²²³ Dorothy Roberts & Lisa Sangoi, *Black Families Matter: How the Child Welfare System Punishes Poor Families of Color*, THE APPEAL, (Mar. 26, 2018), <https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/>.

²²⁴ ADMINISTRATION FOR CHILDREN’S SERVICES: DESCRIPTION AND HISTORY, *supra* note 2.

²²⁵ ACS MISSION & ORGANIZATION, *supra* note 1.

²²⁶ Child Welfare Information Gateway, *supra* note 4.

²²⁷ AREEN, *supra* note 3, at 381.

²²⁸ Interview with Emma Ketteringham, *supra* note 8.

²²⁹ Frank, *supra* note 7.

injustice in the child welfare system must be fought fiercely and must be fought now.