

Catalyzing the Separation of Black Families: A Critique of Foster Care Placements Without Prior Judicial Review

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Although decades of efforts have realized significant progress toward the goal of eliminating racial discrimination in the child welfare system, black children continue to enter foster care at rates that exceed their level of need. This Note explores how the standard practice of removing a child without prior judicial authorization has quietly contributed to this civil rights crisis by enabling racial bias to go unchecked in the placement decision-making process.

In an attempt to understand how state legislatures can ensure that risk, rather than race, informs foster care placements, this Note introduces an original analysis comparing the racial disparity rates in foster care entries among states. Based on the study's finding that greater racial disparities exist in jurisdictions with flexible emergency removal laws, this Note recommends that states excuse pre-deprivation hearings only when taking the time to seek an ex parte court order would jeopardize a child's safety.

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I. INTRODUCTION

Across the country, child protective agencies removed nearly sixty thousand African American¹ children from their homes and placed them in foster care in 2016.² While many of these removals were warranted due to dangerous home environments, not all were. Some of the sixty thousand children relegated to state custody were victims not necessarily of maltreatment, but of stereotypes about black parental unfitness.³

Child protective removals are emblematic of the racial discrimination that has been pervasive in the child welfare system for almost a century.⁴ At every stage of the child protective continuum, black children are over-represented and under-served as compared to white children: they are more likely to be reported to agencies as suspected victims of maltreatment, more likely to be investigated, and more often forcibly removed from their homes.⁵ Once in foster care, black children receive worse placements, remain for longer, and are less likely to be reunified with their parents.⁶

Child welfare interference, as a result, may at times hurt children more than it helps. The state's intrusion in the upbringing of a child can emotionally and financially harm her family.⁷ The consequences are more pronounced when the state separates the child from her family and places her in an unfamiliar out-of-home placement.⁸ Even if the removal is temporary, the experience inflicts lasting trauma on the family.⁹ The damage is compounded when reunification is delayed or does not occur.¹⁰

1. "Black" and "African American" are used synonymously throughout this Note.

2. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT 2 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf> [<https://perma.cc/4HSK-93HY>].

3. For a discussion of these stereotypes and their effects, see *infra* Part II.A.

4. See Robert B. Hill, *Institutional Racism in Child Welfare*, in CHILD WELFARE REVISITED: AN AFRICENTRIC PERSPECTIVE 60 (Joyce E. Everett et al. eds., 2004) (observing that one of the earliest indictments of the child welfare system's inequitable treatment of African American children was at the 1930 White House Conference on Child Health and Protection of Dependent and Neglected Children).

5. See *infra* notes 44, 48.

6. See *infra* note 38 and accompanying text.

7. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 459 (2004). For an overview of how the child welfare system works, see *infra* note 18.

8. See discussion *infra* Part II.C.

9. Title IV-E Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 65 Fed. Reg. 4051, 4052 (proposed Jan. 25, 2000) (to be codified at 45 C.F.R.

At the same time, the state's removal of a child — a devastating governmental intrusion that requires due process¹¹ — is often effectuated without a pre-deprivation hearing.¹² Data from a number of states reveal that around half of all removals are conducted without prior judicial review.¹³ Although states theoretically reserve these emergency removals for exceptional circumstances in which an agency suspects that a child faces at least an imminent risk of harm, studies have uncovered that a considerable number of children were immediately removed when no such risk was identified and less restrictive alternatives existed.¹⁴

This Note argues that the pervasiveness of emergency removals catalyzes black children's disproportionate¹⁵ and disparate¹⁶ engagement with the foster care system. Because there is no judicial check on decision-making susceptible to racial bias, case-workers are more likely to remove children because of racial prejudice rather than the risk to which they were exposed.¹⁷

In search of a solution to preclude racial bias from readily influencing these governmental interferences, this Note examines state laws that authorize emergency removals without prior judicial authorization. This Note specifically performs an original analysis comparing the disparity rates in foster care entries among states to identify whether a particular kind of enabling

pts. 1355–57) (observing that a removal has a “profound effect on the child and family . . . that cannot be undone”).

10. *See id.*

11. *See Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (holding that the “liberty” protected by the Due Process Clause includes the rights of parents to raise their children); *Troxel v. Granville*, 530 U.S. 57, 75 (2000) (reaffirming 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).

12. *See* discussion *infra* Part II.B.

13. *Id.*

14. *Id.*

15. This Note defines disproportionality as the “ratio of the percentage of persons of a certain race in a target population . . . to the percentage of persons of the same group in a reference . . . population.” *See* John Fluke et al., *A Research Synthesis on Child Welfare Disproportionality and Disparities*, in *DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH* 8 (2011), https://www.cssp.org/publications/child-welfare/alliance/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011.pdf [<https://perma.cc/2YYW-E6MJ>].

16. This Note defines disparity as the “comparison of the ratio of one race or ethnic group in an event to the representation of another race or ethnic group who experienced the same event.” *Id.* at 8. Stated differently, disparity compares outcomes between two racial groups. *Id.* A disparity exists when the ratios being compared are not equal and indicates unequal treatment. *See id.* at 8–9.

17. *See infra* Part II.A.

law better safeguards against discriminatory removals. The analysis shows that in states with less stringent emergency removal laws — when the agency does not have to consider whether there is enough time to file a court order before removing a child — greater racial disparities exist among foster care entries by all measures. Based on the study’s findings, this Note suggests that state legislatures enact more stringent emergency removal laws in order to safely reduce the number of black children entering foster care.

This Note will proceed as follows. Part II will provide background on racial disproportionalities and disparities in the child welfare system. Additionally, Part II will explore the role of emergency removals in driving racial imbalances and the need to scrutinize the laws authorizing these removals. Part III will offer an overview of the state laws governing summary removals and the circuit split over the constitutionality of these laws. Part IV will introduce a study comparing racial disparities in foster care entries among jurisdictions and propose a legislative solution to decrease racial disparities in foster care.

II. THE ROLE OF EMERGENCY REMOVALS IN UNNECESSARILY SEPARATING BLACK FAMILIES

A. EVIDENCE OF RACIAL BIAS IN CHILD PROTECTIVE REMOVALS

In 2016, African American children constituted nearly one-quarter — almost 60,000 — of all entries into foster care across the United States.¹⁸ At the same time, they represented less

18. See CHILDREN’S BUREAU, *supra* note 2, at 2. A brief background of the child protective system is in order. Every state has a statute authorizing governmental intervention into a parent-child relationship on behalf of neglected or abused children. See Roberts E. Buckholz, Jr., *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 719 (1979). Agencies tasked with enforcement of these statutes lie at the center of the child welfare system. CHILD WELFARE INFO. GATEWAY, U.S. DEPT’ OF HEALTH & HUMAN SERVS., HOW THE CHILD WELFARE SYSTEM WORKS 2–3 (2013), <https://www.childwelfare.gov/pubPDFs/cpswork.pdf#page=1&view=Introduction> [<https://perma.cc/6KHJ-WU7D>].

Although the practice may vary among states, state agencies generally employ caseworkers, who receive referrals of suspected child abuse or neglect. See *id.* at 3. If there is sufficient information in the report to warrant an investigation, the caseworker “screens in” the report. *Id.* She then conducts an investigation, which may consist of interviewing the parents, child, neighbors, and school personnel, and gathering other relevant information. See *id.* at 4. Following the investigation, the caseworker may then decide that there was no maltreatment and close the case. *Id.* Or she may find that the

than one-seventh of the country's child population.¹⁹ While the disproportionate representation of African American children in foster care is not a new phenomenon, its cause is a source of heated debate among scholars and practitioners.²⁰ Some posit that disproportionate victimization of black children by their parents drives their overrepresentation, while others contend that black families are targets of racial bias in the child welfare system, which explains the system's excessive interference.²¹

child did — or is likely to — experience abuse or neglect. *Id.* Should the caseworker believe that the child was or may be a victim of abuse or neglect (or that the report is “substantiated”), the agency decides whether in-home services are sufficient to alleviate the risk while the child stays at home or whether the child should be removed and placed in foster care. *Id.* at 5–6.

A caseworker can try to effect a child's placement in foster care in one of three ways. She can attempt to have the parents sign a voluntary agreement, which will typically authorize the state to keep the child in foster care for a specified amount of time. *Id.* at 5. If the parents and agency are unable to come to a voluntary placement agreement, the caseworker can ask the agency's attorneys to petition the court to remove the child. *Id.* at 4. Alternatively, she may unilaterally remove the child, with court review to follow. *Id.* In all cases, a fact-finding hearing must be held to determine whether the parent abused or neglected the subject child. *See, e.g.*, WASH. REV. CODE § 13.34.070 (2016). A dispositional hearing follows to determine whether the child should remain in foster care or be returned home. *See, e.g.*, WASH. REV. CODE § 13.34.110(4) (2016); *see also* 42 U.S.C. § 675(5)(B) (2012) (requiring that a court or agency review the status of each child in foster care at least once every six months).

Regardless of the outcome of any court case, many state agencies keep records of “substantiated” child abuse and neglect reports in central registries, sometimes for decades. HOW THE CHILD WELFARE SYSTEM WORKS, *supra* note 18, at 6. If the parent seeks to work with children, adopt a child, or serve as a temporary caregiver for her own relatives, the employer or adoption agency will search these registries when performing a background check. *Id.*

19. *See Child population by race*, KIDS COUNT DATA CENTER, <http://datacenter.kidscount.org/data/tables/103-child-population-by-race?loc=1&loct=1#detailed/1/any/false/573,869,36,868,867/68,69,67,12,70,66,71,72/423,424> [https://perma.cc/5EV7-XBR3] (last visited Apr. 1, 2018) (showing non-Hispanic black children made up 14% of all children in 2015).

20. *See* Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 217 (2013) (“Whether this disproportionate representation in foster care of African American[s] . . . is justified or biased is the question in the ongoing national debate.”).

21. *Compare* Brett Drake in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 15, at 100 (“[T]he current research clearly shows that poverty matters, strongly supporting the ‘risk’ explanation. . . . [and] does not clearly show the presence of large amounts of bias.”); Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 907 (2009) (positing that actual maltreatment rates of black children are significantly higher than those of white children and that this confirms the “non-discriminatory character of [child protective agencies] decision-making”), *with* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 48 (2002) (“[T]he overwhelming weight of the evidence indicates that racial bias is at work.”).

Advocates of the disproportionate victimization theory focus on the population's larger exposure to maltreatment-related risk factors, such as poverty, unemployment, single-parenthood, and substance abuse.²² Poverty has been found to be the most influential predictor of maltreatment²³ and can be tied to race: African American children are almost three times as likely to live in poverty as non-Hispanic white children²⁴ and over six times more likely to live in neighborhoods characterized by concentrated poverty.²⁵

While the interaction between race and poverty may offer a strong explanation for why black families disproportionately engage with the child welfare system, the maltreatment-related risk factors that black families experience do not fully explain their disproportionate contact.²⁶ Studies controlling for such risks still find disparities in foster care placements by race,²⁷ which suggests that racial disproportionalities among out-of-home placements are reflective not only of a family's risk, but also of racial bias.²⁸

Stereotypes that black families are dysfunctional and require state supervision are powerful and pervasive, and reinforced by

22. Barthelet, *supra* note 21, at 907; Sarah A. Font et al., *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD & YOUTH SERVS. REV. 2188, 2191 (2012).

23. ANDREA J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 5–11, 12, https://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf [<https://perma.cc/ZN5V-HQN7>] (finding that children in low socioeconomic households experienced some type of maltreatment at more than five times the rate of other children, as they were more than three times as likely to be abused and seven times as likely to be neglected).

24. U.S. CENSUS BUREAU, *Table 3: People in Poverty by Selected Characteristics, Income and Poverty in the United States: 2015* (2016) https://www2.census.gov/programs-surveys/demo/tables/p60/256/pov_table3.xls [<https://perma.cc/X6G8-2PJQ>] (last visited Apr. 1, 2018) (noting that 24.1% of black people live in poverty, compared to 9.1% of non-Hispanic white people).

25. *Children living in areas of concentrated poverty by race and ethnicity 2010–2014*, KIDS COUNT DATA CENTER (last visited Apr. 1, 2018), <http://datacenter.kidscount.org/data/tables/7753-children-living-in-areas-of-concentrated-poverty-by-race-and-ethnicity?loc=1&loc2=2#detailed/1/any/false/1485/10,11,9,12,1,185,13/14943,14942> [<https://perma.cc/PR5Q-5G3M>] (finding that 32% of Black children live in areas of concentrated poverty — census tracts with poverty rates of 30 percent or more — compared to 5% non-Hispanic white children).

26. Fluke et al., *supra* note 15, at 22, 36–38 (2011).

27. *Id.*

28. See ROBERTS, SHATTERED BONDS, *supra* note 21, at 47 (noting that one way to study racial bias is to examine whether black children are treated differently from other children in similar circumstances).

the striking racial disparities in the child welfare system.²⁹ Black mothers, often portrayed as “welfare queens,” are assumed to be unfit parents;³⁰ black fathers are stereotyped as uninvolved deadbeats.³¹ Further, most black children are raised in single-parent homes,³² and caseworkers typically use as their reference point a “model family” that consists of a white middle-class family with married parents.³³ Black children are consequently perceived to be at risk of harm and to fare better if separated from their parents.³⁴

Although evidence of animus is not readily available, studies show that racial stereotypes affect the state’s decision to place a child in foster care.³⁵ Racial bias is reflected in these decisions to the degree that child protective actors make removal decisions that differ by a family’s race in otherwise identical situations.³⁶ Even when need for child protective services is the same, black families receive different, and worse, treatment.³⁷

While results are mixed and research is scarce, various studies have established the impact of race in foster care placement. Studies conducted in a number of states have found that child

29. Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html> [<https://perma.cc/4JLM-PXZG>]; see also Cooper, *supra* note 20, at 238–39.

30. *Id.* at 60–61.

31. TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY’S CHILD WELFARE SYSTEM 79, 133 (2016).

32. *Children in single-parent families by race 2011–2015*, KIDS COUNT DATA CENTER (last visited Apr. 1, 2018), <http://datacenter.kidscount.org/data/tables/107-children-in-single-parent-families-by#detailed/1/any/false/870,573,869,36,868/10,11,9,12,1,185,13/432,431> [<https://perma.cc/RN5P-M4AF>] (documenting that 66% of black children are in single-parent homes, compared to 24% of non-Hispanic white children in 2015); see also ROBERTS, SHATTERED BONDS, *supra* note 21, at 48.

33. ROBERTS, SHATTERED BONDS, *supra* note 21, at 59 (noting that caseworkers generally use a model family as a reference point as they make child welfare decisions, and that the model family for many caseworkers is a white, middle-class family with married parents).

34. *Id.* at 138; see also THE CTR. FOR THE STUDY OF SOC. POLICY, RACE EQUITY REVIEW: FINDINGS FROM A QUALITATIVE ANALYSIS OF RACIAL DISPROPORTIONALITY AND DISPARITY FOR AFRICAN AMERICAN CHILDREN AND FAMILIES IN MICHIGAN’S CHILD WELFARE SYSTEM 17 (2009), <https://www.cssp.org/publications/child-welfare/institutional-analysis/race-equity-review-findings-from-a-qualitative-analysis-of-racial-disproportionality-and-disparity-for-african-american-children-and-families-in-michigans-child-welfare-system.pdf> [<https://perma.cc/K84R-8PXK>] (reporting on operational assumptions in the child welfare system that African American children would fare better if removed from their families and communities).

35. See *infra* notes 38–43 and accompanying text.

36. Fluke et al., *supra* note 15, at 9 (defining discrimination as different treatment of identically situated individuals).

37. See *infra* notes 110–112 and accompanying text.

protective agencies are more likely to place African American children in foster care, even when their families enjoyed the same — and sometimes better — circumstances.³⁸ One of the most extensive national studies analyzing the role of race in the child welfare system found that “minority children, and in particular African American children, are more likely to be in foster care placement, *even when they have the same problems and characteristics as white children.*”³⁹ This study, conducted in 1994 by the U.S. Department of Health and Human Services Administration for Children and Families, documented the characteristics of children and families based on a sample of 2,109 children across the country who received either in-home or out-of-home services from 1993 to 1994.⁴⁰ The data showed that when African American children enjoyed the same advantaged characteristics as white children — they had working parents with no prior case openings and lived in safer neighborhoods — they were nonetheless significantly more likely to be placed in foster care.⁴¹

A national study conducted in 2004 similarly identified race as a significant predictor of a child’s placement in foster care.⁴² Even when African American parents benefited from a combination of advantaged characteristics, their children were significantly more likely to be removed from their homes and placed in foster care when compared to parents of other ethnicities with disadvantaged characteristics.⁴³

38. See, e.g., Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and Risk on the Substantiation Decision in Child Welfare*, 33 CHILDREN AND YOUTH SERVS. REV. 1630, 1634–36 (2011) (finding that African American families assessed with lower risk scores than white families were more likely to have their children removed by the Texas Department of Family and Protective Services); Barbara Needell et al., *Black Children and Foster Care Placement in California*, 25 CHILDREN AND YOUTH SERVS. REV. 393 (2003) (discussing a study of California’s child welfare system, which demonstrated that African American children are more likely than white children to be placed in foster care, even when controlling for maltreatment-related factors such as age, maltreatment type, and poverty); WASH. STATE INST. FOR PUB. POLICY, RACIAL DISPROPORTIONALITY IN CHILD WELFARE SYSTEM (2008), http://www.wsipp.wa.gov/ReportFile/1018/Wsipp_Racial-Disproportionality-in-Washington-States-Child-Welfare-System_Full-Report.pdf [<https://perma.cc/Q8AZ-LP6Y>] (finding that African American children in Washington were more likely than white children to be removed from their homes, controlling for case characteristics); ROBERTS, SHATTERED BONDS, *supra* note 21, at 52 (noting a Virginia study finding that decisions about the level of risk and intervention were distorted by the race of the child and family, independent of all other factors).

39. ROBERTS, SHATTERED BONDS, *supra* note 21, at 17 (emphasis added).

40. Hill, *supra* note 4, at 66 (explaining 1994 study).

41. *Id.* at 67.

42. *Id.*

43. *Id.*

Those in direct contact with the child protective system have corroborated the role of race in foster care placements.⁴⁴ A 2007 Government Accountability Office report found that caseworkers, mandated reporters, and judges across the country identified racial bias as a primary factor contributing to the disproportionate number of black children entering out-of-home placements.⁴⁵

To be sure, the racial bias that colors removal decisions is not necessarily reflective of racism on the part of the caseworker who decides whether or not to remove a child.⁴⁶ Rather, these decisions may be products of cultural biases stemming from prior decision-makers or, more likely, from systemic racism entrenched in internal child welfare agency policies.⁴⁷ In fact, racism has been shown to influence most critical decision points leading up to a child's foster care placement: a family's race also shapes the decision to report a child, to investigate the report,⁴⁸ and to allocate resources to the family.⁴⁹ But regardless of its source, racial bias continues to taint an agency's ultimate decision of whether to place a child in foster care, suggesting that a considerable number of black children are unnecessarily removed from their families.⁵⁰

44. See also MARIAN S. HARRIS, RACIAL DISPROPORTIONALITY IN CHILD WELFARE 96 (2014) (highlighting studies in Oregon and Washington State in which child welfare participants, including caseworkers and judicial officers, reported racial bias in their decision-making); Conor Friedersdorf, *When the State Takes Kids Away From Parents: Three Perspectives*, THE ATLANTIC (July 24, 2014), <http://www.theatlantic.com/national/archive/2014/07/when-the-state-gets-between-kids-and-parents-3-radically-different-perspectives/374954/> [<https://perma.cc/W6MP-2GZ7>] (describing a former foster child's opinion that African American children are taken away for "very little reason" and that the problem of unnecessary interference is "clearly institutional racism with a side order of classism. If you address those issues, the children unnecessarily removed would plummet. Mandated reporters, caseworkers, and judges are more suspicious of non-white parents. These racial biases drive the decision to report a child, to substantiate a case, allocate fewer resources to these mothers, and ultimately the drastic to remove a child from their home.").

45. U.S. GOV'T ACCOUNTABILITY OFF., GAO-07-816, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 22–25 (2007).

46. See Fluke et al., *supra* note 15, at 16.

47. *Id.*

48. *Id.* at 31–33, 37, 47 (demonstrating that professionals are more likely to report children of color to child welfare agencies and that agencies investigate reports involving African American children at a rate of up to 4.6 times that of white children); Frank Farrow et al., *Racial Equity in Child Welfare: Key Themes, Findings and Perspectives*, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 15, at 140.

49. See *supra* text accompanying notes 112–113.

50. See ROBERTS, SHATTERED BONDS, *supra* note 21, at 255.

B. EVIDENCE OF UNWARRANTED EMERGENCY REMOVALS

The forcible removal of a child is a severe governmental intrusion requiring due process.⁵¹ As Justice O'Connor observed in *Troxel v. Granville*, “the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court.”⁵² The prevalence of discriminatory removals, as a result, raises concerns about how judges — who have an obligation to protect parents' constitutional rights — authorize these out-of-home placements.

A close look at foster care data reveals the underlying problem: judges are often absent from the caseworkers' initial decisions to remove a child. Even though removals without prior judicial authorization are reserved by law in most states for the “rarest of circumstances,”⁵³ statistics demonstrate that emergency removals at times make up around half of all involuntary foster care placements.⁵⁴ Stated differently, a child welfare agency's decision to place a child in foster care is not reviewed by a judge until after a caseworker removes the child from her home in approximately half of all cases.

For instance, data suggest that the percentage of emergency removals in New York City fluctuated between 40% and 56.5% of all removals in 2017.⁵⁵ This number has remained high for the past few years: in 2013, 45.7% to 57.7% of all forcible removals were effected without a court order.⁵⁶ In New York State, of the

51. See *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

52. *Troxel*, 530 U.S. at 65; see also *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (“The rights to conceive and to raise one's children have been deemed ‘essential,’ ‘basic civil rights of man,’ and ‘rights more precious . . . than property rights.’”) (citations omitted).

53. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 378 (2004).

54. National data on the percentage of removals conducted on an emergency basis is unavailable.

55. NYC ADMIN. FOR CHILDREN'S SERVS., FLASH REPORT (Aug. 2017) <https://www1.nyc.gov/assets/acs/pdf/data-analysis/2017/FlashIndicators.pdf> [<https://perma.cc/6YK5-ATPZ>].

56. N.Y. COURTS, ANNUAL REPORT 2014 tbl. 10 (2014), www.nycourts.gov/publications/pdfs/2014%20Annual%20Report%20tables.pdf [<https://perma.cc/M63Q-M626>]; see also *Tenenbaum v. Williams*, 193 F.3d 581, 591 (2d Cir. 1999) (observing that the decision to proceed with an “emergency” removal, rather than one based on parental consent or a court order, was not aberrational but “standard office procedure” and that employees regularly failed to consider whether there was time to secure judicial authorization before removing children).

8,565 non-consenting removals, 2,750 — nearly one-third — were effectuated without a court order.⁵⁷

This phenomenon is not unique to New York. In just two counties in California, more than 80,000 children were removed without a warrant from 1996 to 2016.⁵⁸ In Minnesota, 52.6% of all children entering foster care were initially placed without a prior court order.⁵⁹ The numbers are similarly staggering in the nation's capital: nearly 60% of all removals in Washington, D.C. in 2016 were not reviewed in advance by a judge.⁶⁰ The regularity of these removals has drawn media attention and public outcry among local communities in recent years.⁶¹

Caseworkers remove a substantial number of children without first consulting the judiciary — a practice even the most lenient states reserve for instances in which a child faces an imminent risk of harm.⁶² State-wide statistical analyses and anecdotal evidence, however, demonstrate that many children placed in state custody absent prior judicial authorization have not been exposed to the level of risk required by law. Instead, many children for whom intervention short of removal may be warranted are nonetheless removed on an emergency basis.⁶³

57. ANNUAL REPORT 2014, *supra* note 56, at tbl. 10.

58. Jessica Weisberg, *A Family Matter*, ATAVIST MAG. (AUG. 2016), <https://magazine.atavist.com/a-family-matter> [<https://perma.cc/RCN9-6N8X>].

59. E-mail from Katie Bauer, Public Information Officer, Minn. Department of Human Services, to author (Feb. 17, 2017) (on file with author).

60. In 2016, 239 out of the 403 children entering foster care had a legal status of “Administrative Hold” or “Shelter Care,” indicating that the first judicial hearings would follow their removals. D.C. CHILD AND FAMILY SERV. AGENCY, ANNUAL PUBLIC REPORT FY 2016 26 (2016), <https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/FY2016-CFSA-APR.pdf> [<https://perma.cc/A4LC-GGFW>].

61. See, e.g., Leslie Kaufman, *City Often Took Children Without Consulting Court*, N.Y. TIMES (Oct. 28, 2004), <http://www.nytimes.com/2004/10/28/nyregion/city-often-took-children-without-consulting-court.html> [<https://perma.cc/77BT-PBG5>] (reporting on unwarranted emergency removals in New York); Weisberg, *supra* note 58 (chronicling the “horrible” experiences of mothers in California and Iowa whose children were immediately placed in foster care that are reflective of a broader trend of warrantless foster care placements); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow’*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html> [<https://perma.cc/XUA8-TYYP>] (discussing the trauma parents experience due to emergency removals).

62. See *infra* notes 153–156.

63. ROBERTS, SHATTERED BONDS, *supra* note 21, at 55 (noting that the emergency exception to prior court authorization for removals is “widely abused”); Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005) (discussing the impropriety of numerous emergency removals); Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in*

A 2006–2010 study of Washington, D.C. by the Citizens Review Panel (the Panel), an external independent oversight body for the District’s child welfare system, discovered that a significant number of children were wrongly removed on an emergency basis.⁶⁴ After learning that for five consecutive years approximately one-third of children placed in foster care were returned to similar home environments within four months, the Panel investigated these prompt returns.⁶⁵ The overarching question was whether the child protective agency unnecessarily removed these children from their families or prematurely returned them to problematic environments.⁶⁶

The study revealed a pattern of imprudent removal decisions.⁶⁷ In the majority of cases reviewed, the Panel found a child’s placement in foster care unnecessary; it did not identify an adequate justification — an imminent danger of serious harm⁶⁸ — warranting the removal.⁶⁹ The Panel instead found the reverse: alternatives to foster care existed and were not exhausted prior to removal in most cases.⁷⁰

Notwithstanding the absence of an immediate threat or the presence of less restrictive alternatives, the child protective agency placed each child in foster care without judicial participation. In all cases reviewed, the agency removed children without prior court orders.⁷¹ In no instance did the agency file an abuse or neglect petition, seek an *ex parte* order, or consult with agency at-

Foster Care, 19 U. PA. J.L. & SOC. CHANGE 207, 216, 226 (2016) (explaining that the number of children who return home after thirty or fewer days in foster care — 25,000 each year — reveals that “too many” are unnecessarily placed in foster care).

64. D.C. CITIZEN REVIEW PANEL, AN EXAMINATION OF THE CHILD AND FAMILY SERVICE AGENCY’S PERFORMANCE WHEN IT REMOVES CHILDREN AND QUICKLY RETURNS THEM TO THEIR FAMILIES: FINDINGS AND RECOMMENDATIONS FROM THE CITIZENS REVIEW PANEL 2 (2011), http://www.dc-crp.org/Citizen_Review_Panel_CFSA_Quick_Exits_Study.pdf [<https://perma.cc/4U2X-VJX7>]. For this study, the Panel reviewed twenty-seven randomly selected cases involving forty-one children who were removed from their families and returned home within 120 days. *Id.* at 4. The Panel used a “uniform case review instrument” for each case, which asked a series of objective and subjective questions. *See id.*, app. B. To answer these questions, the Panel reviewed each case’s records, including the contact notes, investigation summaries, hotline reports, and court reports. *Id.* at 87.

65. *Id.* at 87.

66. *Id.* at 2.

67. *Id.* at 4.

68. D.C. CODE ANN. § 16-2309 (2015) (allowing a child to be taken into custody when a caseworker has reasonable grounds to believe that the child is in immediate danger from her surroundings and that the removal of the child from her surroundings is necessary).

69. D.C. CITIZEN REVIEW PANEL, *supra* note 64, at 5.

70. *Id.* at 6.

71. *Id.* at 5.

torneys prior to removing a child.⁷² Moreover, the agency removed the children on the same day it received reports alleging neglect or abuse in nearly all cases.⁷³ These findings led the Panel to conclude that “[i]n too many situations, [the child welfare agency] is too quick to separate children from their families”; caseworkers could and should have sought court approval first.⁷⁴

Consider the stories of two families that the Panel investigated. In one case, a young boy was living with his uncle, who had reported to the agency that he was facing eviction.⁷⁵ The uncle communicated that he was feeling tired, frustrated, and hungry, and that caring for his nephew would impede the relinquishing of his apartment. Although the eviction was not scheduled for several weeks and the uncle’s story “could have been understood as a request for housing assistance,” the agency immediately placed the boy in emergency custody.⁷⁶

The other case involved a sick mother who brought her children with her to the hospital. After she was admitted, she could not identify anyone who could care for her kids that night. Instead of providing respite care,⁷⁷ the agency swiftly placed these children in foster care.⁷⁸

In each situation, there were clear alternatives to removal — from respite care to housing assistance — and any risks facing the children did not rise to a level of imminent risk of harm. And yet, the agency consistently circumvented the judiciary and immediately placed each child in foster care, leading to patently unwarranted family interventions.

C. EMERGENCY REMOVALS AS A CATALYST OF RACIAL DISPARITIES IN FOSTER CARE ENTRIES

The tendency to remove children suspected of experiencing maltreatment without prior judicial review has prompted masses of children to flood into foster care on questionable grounds. This

72. *Id.* at 19.

73. *Id.*

74. *Id.* at 18.

75. *Id.* at 24.

76. *Id.*

77. Respite care is temporary care provided to parents or other caregivers. *Respite Care Programs*, CHILD WELFARE INFORMATION GATEWAY (last visited Mar. 10, 2018), <https://www.childwelfare.gov/topics/preventing/prevention-programs/respite/> [https://perma.cc/S7EQ-UT7H].

78. D.C. CITIZEN REVIEW PANEL, *supra* note 64, at 28.

Note argues that this practice offers a compelling explanation for why many African American children unnecessarily enter foster care. Emergency removals — effected without prior judicial authorization — are uniquely vulnerable to flawed decision-making that invites racial bias, which may drive African American children into foster care at rates that exceed their level of need.

The conditions that shape caseworkers' decision-making processes shed light on the motivating factors behind their tendencies to hastily remove children, and arguably African American children in particular. A variety of incentives work in tandem to encourage caseworkers to be aggressively cautious. Once a caseworker receives a report alleging that a child is abused or neglected, she faces intense pressure to protect the suspected victim at any cost.⁷⁹ Caseworkers perform their jobs under a disquieting fear that an overlooked child will suffer a serious injury or death.⁸⁰ Should that fear materialize, they may lose their job or face unwanted media scrutiny.⁸¹ Prosecution and civil or criminal liability may also ensue.⁸² Meanwhile, if a caseworker unnecessarily removes a child in violation of the parent's due process rights, this typically draws no punitive measures or media attention.⁸³ The psychological damage accompanying an unnecessary parent-child separation is thus overshadowed by the public uproar following a case of undetected child abuse that later takes a child's life.⁸⁴

Financial incentives further encourage agencies to separate families.⁸⁵ Federal programs, such as the Title IV-E Foster Care program, provide “unlimited reimbursement for foster care

79. Chill, *supra* note 7, at 459 (describing how “defensive social work” has led to “removal stampedes”).

80. *Id.*

81. *Id.*

82. *Id.*; e.g., S. DAK. UNIFIED JUDICIAL SYS., SOUTH DAKOTA GUIDELINES FOR JUDICIAL PROCESS IN CHILD ABUSE AND NEGLECT CASE 22 (2007), <https://ujs.sd.gov/media/pubs/SDGuidelinesAandNProceedings.pdf> [<https://perma.cc/JAK6-EHMJ>] (warning child protective workers that “if you fail to conduct an adequate assessment and do not take the necessary actions to protect a child and the child is subsequently harmed you can be held liable and responsible in part for the harm inflicted on the child”).

83. See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 142 (1995) (noting that the consequences of family disruption are “rarely visible to the court or to the public”).

84. See *id.* at 151–52.

85. See *Smith v. Org. of Foster Families For Equality and Reform*, 431 U.S. 816, 835 (1977) (observing that “systems of foster care funding encourage agencies to keep the child in foster care”).

placements and limited funding for family preservation programs.⁸⁶ Caseworkers are therefore fundamentally biased toward making well-meaning but overreaching removal decisions; almost no incentives exist for them to make pro-family decisions,⁸⁷ even though it is the child protective agency's mission to do just that.⁸⁸

To compound the problem, caseworkers are over-worked and under-trained.⁸⁹ Although the recommended ratio is no more than fifteen children per caseworker, caseworkers oversee anywhere from ten to over 100 children at a time, at an average of twenty-four to thirty-one children each.⁹⁰

Together, these factors discourage caseworkers from conducting a neutral balancing of the harms and render it almost impossible for them to collect enough information to make individualized assessments tailored to the families' unique needs.⁹¹ At the same time, the need for a thorough investigation could not be overstated: a caseworker rarely receives a clear-cut case in which a child unambiguously requires out-of-home placement.⁹²

Agencies therefore make these difficult decisions lacking factual information but awash in systemic bias. The dearth of information to inform what is often a complicated decision creates a need for cognitive short-cuts.⁹³ Racial bias — whether it stems from individual or institutional practices — likely fills in any

86. Cooper, *supra* note 20, at 265. Title VI-E of the Social Securities Act provides payments for eligible children under the supervision of the state and placed in foster family homes. See Social Security Act, 42 U.S.C. § 670 et seq. (2012).

87. See Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem that Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 145 (1999) (“[S]evere cuts in early intervention programs and preventive services are forcing poor families to look at the coercive process of child protection as their primary source of much needed assistance.”).

88. See, e.g., CHILDREN'S DIV., ONONDAGA CTY. DEP'T OF SOC. SERVS., *Child Welfare*, <http://www.ongov.net/cfs/childwelfare.html> [<https://perma.cc/EU84-TG68>] (last visited Apr. 2, 2018) (asserting that their mission is to “strengthen families”).

89. U.S. GEN. ACCOUNTING OFFICE, GAO-03-357, REPORT TO CONGRESSIONAL REQUESTERS, CHILD WELFARE: HHS COULD PLAY A GREATER ROLE IN HELPING CHILD WELFARE AGENCIES RECRUIT AND RETAIN STAFF, 3–4, 14, 19–21 (2003).

90. *Id.* at pp. 3–4, 14, 19–21.

91. ROBERTS, SHATTERED BONDS, *supra* note 21, at 56 (noting that caseworkers are “overwhelmed with too many cases and must often make snap judgments”); *D.G. ex rel. Strickland v. Yarbrough*, No. 08-CV-074, 2011 WL 6009628, at *18–19 (N.D. Okla. Dec. 1, 2011) (“Extensive child welfare research links high caseloads to poor decision making, increased turnover and worse outcomes for children.”).

92. LEE, *supra* note 31, at 55 (“[Caseworkers] rarely deal with clear-cut cases in which the facts unambiguously show that a child is in danger.”).

93. ROBERTS, SHATTERED BONDS, *supra* note 21, at 55–56.

gaps.⁹⁴ Well-intentioned caseworkers in this overwhelmed decision-making environment are tempted to draw inferences about whether maltreatment has occurred based on pre-existing notions about how black parents tend to treat their children.⁹⁵ Even if a caseworker does not harbor racial prejudice of her own, the strained decision-making conditions may make it difficult for her to identify and filter out any racism accompanying prior decision points.⁹⁶

While all removal decisions are susceptible to decision-making processes that invite racial bias, most have to be approved by the judiciary before the agency can place a child in foster care. In contrast, prior judicial review is entirely absent for caseworkers removing a child on an emergency basis. As a result, they initially have exceptionally wide latitude to make arguably the most difficult and consequential decision facing the child protective agency, with judicial review to follow.⁹⁷

Consulting the judiciary beforehand, however, is important. Judges check executive license and avert errors.⁹⁸ Equipped with intensive legal training, they are reasonably expected to vindicate parents' due process rights.⁹⁹ As it is their duty to serve as an independent body, courts also have a different set of objectives than caseworkers, consciously endeavoring to impartially balance

94. LEE, *supra* note 31, at 121 (“The leeway that caseworkers and others have in making decisions, however, allows space for racial stereotypes to affect decision making and for problems associated with poverty to be recast as individual failures and labeled neglect.”); ROBERTS, SHATTERED BONDS, *supra* note 21, at 55–56 (discussing how the decision-making environment encourages caseworkers to act on “intuition, hunches, and instinct,” which invites prejudice). Certainly, implicit racial bias is not unique to caseworkers, but is prevalent across all populations. See Nilanjana Dasgupta, *Color Lines in the Mind*, in TWENTY-FIRST CENTURY COLOR LINES 98–112 (Andrew Grant-Thomas & Gory Orfield eds., 2008).

95. LEE, *supra* note 31, at 64, 65; see also *supra* Part II.A (discussing stereotypes of black families).

96. For more information on the role of a caseworker's race, see Sara A. Font et al., *Examining Racial Disproportionality in Child Protective Services Case Decisions*, 34 CHILD YOUTH SERV. REV. 2188 (2012) (finding that black caseworkers were more likely to substantiate a report involving black families).

97. *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999).

98. See William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891 (1991).

99. See Mark Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO STATE L.J. 913, 920 (2004) (“Dispensing with the need for prior judicial review . . . risks unnecessary invasions of privacy and familial harmony.”); Cooper Davis & Barua, *supra* note 83, at 147–48 (noting that, because of judges' objectivity and professional training, the legal system expects them to “remain objective and to balance competing harms fairly and dispassionately”).

the harms of keeping the child at home versus sending her to foster care.¹⁰⁰ Circumventing the judiciary, therefore, makes it particularly likely that racially-based stereotypes impacting a decision will go unchecked until after the child is removed from her home, causing many African American children whose experiences do not warrant removal to be relegated to state custody.¹⁰¹

Moreover, a judge is less likely to impartially assess the propriety of a removal decision once the child is in foster care.¹⁰² A caseworker's initial placement decision, even if made in error, is often self-perpetuating in subsequent court decisions.¹⁰³ One litigator experienced in child protective proceedings framed the problem:

Possession is nine-tenths of the law. Children at home with their parents at the beginning of a child protective proceeding are likely to remain at home; children who have been removed are likely to remain in governmental custody for a long time, even years.¹⁰⁴

A judge may tend to continue an existing custodial placement because she is hesitant to upset the status quo.¹⁰⁵ Further, some judges, in fear of accidentally enabling child maltreatment and inciting a barrage of criticism, err toward excessive caution.¹⁰⁶ These tendencies reinforce one another when a child has already been placed in foster care, resulting in the judicial branch's consistent ratification of emergency removals.¹⁰⁷

Reunification is increasingly unlikely as time passes. Caseworkers and judges interpret parents' frustration with the system

100. See Cooper Davis & Barua, *supra* note 83, at 145–46.

101. See ROBERTS, SHATTERED BONDS, *supra* note 21, at 55–56 (asserting that emergency removals grant caseworkers significant discretion, which opens the door to biased placements).

102. Chill, *supra* note 7, at 459.

103. *Id.*; see also Cooper Davis & Barua, *supra* note 83, at 139, 146, 152–55 (finding “an error that is made [in the custodial decision at one stage of a child protective proceeding] is more likely to be maintained or exaggerated than reversed”).

104. Chill, *supra* note 7, at 460.

105. Brown, *supra* note 99, at 981; Cooper Davis & Barua, *supra* note 83, at 149.

106. Brown, *supra* note 99, at 981 (“Faced with rescues that have already taken place, moreover, judges would err on the side of extreme caution.”); Cooper Davis & Barua, *supra* note 83, at 152 (“[T]he specter of a headline announcing that a child has suffered injury or death as a result of being returned to its parents looms more realistically for most judges and may cause some to deviate from the norm of unskewed decisionmaking.”).

107. Brown, *supra* note 99, at 981. In Florida, for instance, judges ratified more than 97% of child removals. *Id.*

as unstable parenting, and children may develop a bond with their foster care parents.¹⁰⁸ Returning a child to her parents — even if the child was originally removed on shaky grounds — is thus challenging, and minimizing any risk of error before the agency seizes a child is critical to protect the child from the “limbo” of foster care.¹⁰⁹

For the foregoing reasons, this Note argues that the unrestrained role a family’s race may play in emergency removals presents a pressing civil rights challenge. As around half of all removals are made on an emergency basis, it is important to address the flawed decision-making processes that shape these initial custody placements and may perpetuate the dismantling of African American families.

D. THE DISPARATE HARM OF REMOVALS

Child protective removals are paralyzing experiences for children and their families. While some may contend that foster care is a better alternative than keeping a child in a potentially unsafe home — which may indeed be true in certain cases — this argument ignores the extent of the harm that children, and black children in particular, face when torn from their families.

A sudden deprivation of the familiar relationships on which a child depends is certainly emotionally devastating for the child and her family.¹¹⁰ Moreover, the alleged maltreatment that prompted the child’s removal doesn’t end once the child enters foster care: children in foster care experience a heightened risk of emotional and medical neglect, as well as physical abuse.¹¹¹

108. See, e.g., *In re Alexander T.*, 2002 WL 31310709, at *11 (Conn. Super. Ct. Sept. 23, 2002) (finding that a mother could not care for her child’s needs when she refused to cooperate with the agency and demonstrated “outright and unwarranted hostility”); *People v. Catherine P.*, 770 N.E.2d 1160, 1173 (Ill. App. Ct. 2002) (finding the father’s “extreme displays of aggression and hostility” toward an agency established neglect).

109. *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 836 (“Many children apparently remain in [the foster care] ‘limbo’ indefinitely.”).

110. Chill, *supra* note 7, at 457 (outlining the traumatic series of events following a removal); ROBERTS, SHATTERED BONDS, *supra* note 21, at 17, 228.

111. Chill, *supra* note 7, at 459 (finding rates of abuse and neglect are significantly higher in foster care than in the general population); ADMIN. FOR CHILDREN & FAMILIES, U.S. DEPT OF HEALTH & HUMAN SERVS, CHILD MALTREATMENT 2015 49 tbl. 3–13 (2015), <https://www.acf.hhs.gov/sites/default/files/cb/cm2015.pdf> [<https://perma.cc/ADS6-JQ3J>] (noting that 37.50% of reporting states did not ensure that at least 99.68% of foster care children were not maltreated by a foster care provider).

Black children are most at risk. They are more likely to receive less desirable placements, more likely to have fewer visits with family members, more often moved to different foster care homes, and less likely to obtain necessary mental health services.¹¹² Further, African American children hoping to exit state custody face the most daunting odds. They spend more time in out-of-home placements and are less likely to be reunified with their families than children of any other race, even when they are placed in foster care for the same reasons.¹¹³

In addition to the short-term effects of child removals, children on the margin of placement who enter foster care face poorer prospects in the long run when compared to children who remain at home. They tend to have worse outcomes down the road, which includes homelessness, poor school performance, chemical dependency, incarceration, and behavioral problems.¹¹⁴ The consequences of foster care placement are indeed destabilizing.

The disproportionate numbers of black children entering foster care also manifests a systemic injustice for African Americans as a group. While any child's separation from her parents to the care of strangers is undoubtedly traumatic, it is important to address the distinct racial harms inflicted when the state removes large numbers of black children from their families.¹¹⁵ As Professor Dorothy Roberts elucidates in *Shattered Bonds*, the child welfare system's treatment of black parents and children is closely related to the status of black Americans as a whole.¹¹⁶ When large numbers of children are removed from their families and delegated to destructive state institutions, black families are dis-

112. Fluke et al., *supra* note 15, at 47–48 (2011) (citing research showing that African American children “received less frequent and lower quality services” in foster care, “are less likely to have plans for contact with their families,” and “receive fewer mental health services”); Hill, *supra* note 4, at 68–69 (citing a study that found that African American children in New York were less likely than white children to be placed in agencies that had superior outcome records, irrespective of the characteristics that prompted their entry into foster care).

113. Fluke et al., *supra* note 15, at 43–45; see also Frank Farrow et al., *Racial Equity in Child Welfare: Key Themes, Findings and Perspectives*, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, *supra* note 15 at 141–43.

114. See generally Joseph J. Doyle Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REVIEW. 1583 (2007); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCH. 57 (2006) (finding that children exiting the foster care system experienced increased behavioral problems when compared to children who remained at home in Minnesota).

115. ROBERTS, SHATTERED BONDS, *supra* note 21, at 228–29.

116. *Id.* at 232.

rupted.¹¹⁷ Dismantling large numbers of black families disadvantages black people's political status and collective welfare.¹¹⁸ As Professor Roberts explains, "[e]xcessive state interference damages people's sense of personal and community identity, weakens Blacks' collective ability to overcome institutionalized discrimination and achieve greater political strength, and reinforces negative stereotypes about Black people's incapacity to govern themselves, perpetuating racial inequality in the country."¹¹⁹ Minimizing the error rate of removals is therefore critical in order to mitigate the child welfare system's systemic oppression of black communities.

E. THE CASE FOR LEGISLATIVE REFORM

Since 1990, a wealth of initiatives has been employed to address the catastrophic consequences that the disparate resort to foster care has on black families and their communities.¹²⁰ In 2002, the U.S. Children's Bureau convened a research roundtable of experts to explore the extent and consequences of racial disproportionalities in the child welfare system.¹²¹ Since then, federal and state commissions have emerged to better understand racial disparities, report on findings, and propose recommendations for reform.¹²² In response, states have endeavored to better engage families in the child protective decision-making process, provide culturally appropriate preventative services, train caseworkers with the skills to work with people of all ethnicities, employ standardized risk assessment tools, and form partnerships with other public and private agencies.¹²³

Minnesota, for example, has implemented far-reaching reforms to reduce racial disparities in child welfare. In 2000, the

117. *Id.*

118. *Id.* at 222.

119. *Id.* at 237.

120. See Hill, *supra* note 4, at 78, 80 (2004).

121. HARRIS, *supra* note 44, at xvii (2014).

122. See Theo Liebmann, *What's Missing from Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 *HAMLIN J. PUB. L. & POL'Y* 141, 143 (2006).

123. CHILD WELFARE INFO. GATEWAY, U.S. DEPT OF HEALTH & HUMAN SERVS., ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE 5-23 (2011); ORONDE MILLER & AMELIA ESENSTAD, STRATEGIES TO REDUCE RACIALLY DISPARATE OUTCOMES IN CHILD WELFARE 7-13 (2015); AFRICAN AMERICANS IN FOSTER CARE, *supra* note 45, at 4-6, 33.

Minnesota legislature directed the Department of Human Services to establish the African American Disparities Advisory Committee.¹²⁴ For the past seventeen years, the committee has worked to eliminate racial disparities by developing service and training strategies, partnering with the African American community, identifying needed resources, and improving monitoring and evaluation systems.¹²⁵ Further, Minnesota has strengthened programs aimed at engaging families and their support systems in the child protective process.¹²⁶

Some of these strategies, including Minnesota's, have successfully improved outcomes for African American children engaged with the child protective system and have specifically reduced racial disparities in foster care entries.¹²⁷ Nonetheless, "there is still reason to be concerned about the racialized outcomes."¹²⁸ Black children continue to enter foster care at unnecessarily high rates despite reforms.¹²⁹ While Minnesota, for example, realized an impressive forty-four percent reduction from 2003 to 2011 in its foster care entry rates for African Americans,¹³⁰ as of 2013 African Americans represented 20% of all children entering foster care in Minnesota, but only 8% of the general child population.¹³¹

What is missing from reform efforts is a review of the laws authorizing emergency removals. The forcible removal of a child constitutes a severe intrusion into a family's private life. And yet, as discussed in Part II.B, agencies routinely remove children without prior judicial review when less invasive solutions are

124. MILLER & ESENSTAD, *supra* note 123, at 9, 45; CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, UNIV. OF MINN., CHILD WELL-BEING IN MINNESOTA: LEGISLATIVE RESPONSES TO REDUCE RACIAL AND ETHNIC DISPARITIES IN CHILD WELFARE 3 (2012), https://casw.umn.edu/wp-content/uploads/2013/11/policyreport3_web-versionFINAL.pdf [<https://perma.cc/W8PZ-45SQ>].

125. MINN. DEPT OF HUM. SERVS., MINNESOTA CHILD WELFARE DISPARITIES REPORT 6 (2010), http://www.mncourts.gov/Documents/0/Public/Childrens_Justice_Initiative/Disparities_-_Minnesota_Child_Welfare_Disparities_Report_%28DHS%29_%28February_2010%29.pdf [<https://perma.cc/KSY9-E2LA>].

126. MADELYN FREUNDLICH, NAT'L CONF. OF STATE LEG., LEGISLATIVE STRATEGIES TO SAFELY REDUCE THE NUMBER OF CHILDREN IN FOSTER CARE 10 (2010), http://www.ncsl.org/documents/cyf/strategies_reducing_the_number_of_children_in_foster_care.pdf [<https://perma.cc/SKA3-8JKH>].

127. MILLER & ESENSTAD, *supra* note 123, at 16.

128. *Id.* at 17.

129. CTR. FOR ADVANCED STUDIES IN CHILD WELFARE, *supra* note 124, at 3.

130. MILLER & ESENSTAD, *supra* note 123, at 46.

131. ALICIA SUMMERS, NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (FISCAL YEAR 2013) 41 (2015) <https://www.ncjfcj.org/sites/default/files/NCJFCJ%202013%20Dispro%20TAB%20Final.pdf> [<https://perma.cc/7EZP-58T3>].

available.¹³² This practice may have sweeping civil rights consequences: because state agencies have unbridled discretion when they conduct emergency removals, racism endemic in the child welfare system is likely to go unchecked, leading African American children to needlessly enter foster care.

There is therefore a need to study the laws that govern these removals. Do these laws provide sufficient procedural safeguards to protect against racism, or do they enable discrimination and lead to wrongful state interference driven by prejudice? If the latter, a reformulation of the emergency removal laws may prove to be an effective tool to combat the discriminatory practices that unnecessarily separate black families and destabilize their communities.

III. THE LAW GOVERNING EMERGENCY CHILD PLACEMENTS

Children regularly enter foster care without prior judicial authorization, which may explain why black children are erroneously separated from their families in the name of child protection. An examination of the laws authorizing unilateral placements may illustrate whether — and how — states should reform the enabling legislation as part of their efforts to lower racial disparities in foster care.

To that end, the following part surveys the emergency removal laws in each state and discusses the circuit split on the constitutionality of these laws. Part IV then introduces a study comparing the racial disparities in foster care entries among states to identify whether a particular type of law better safeguards against discriminatory removals. Based on the study's findings, Part IV recommends that states enact more stringent emergency removal laws.

A. AN OVERVIEW OF EMERGENCY CHILD REMOVAL LAWS

States normally require notice and a hearing before a child is involuntarily removed from her parents and placed in foster care.¹³³ Almost all states, however, authorize caseworkers¹³⁴ to

132. See *supra* Part II.B.

133. *Troxel v. Granville*, 530 U.S. 57, 66 (2000); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

unilaterally remove a child without a hearing in emergency situations.¹³⁵ Following the removal, a court must hold a preliminary hearing within a set period of time at which the parents have the right to appear.¹³⁶ During this hearing, a court typically determines whether the child would face imminent risk to her life or health if returned home.¹³⁷ A full fact-finding hearing is held thereafter.¹³⁸

1. *Type 1 Laws*

Two different approaches have emerged in how states define the emergency circumstances that justify removing children from their homes without prior judicial authorization.¹³⁹ In twenty-eight states, a child protective agency can circumvent the judicial process prior to removal in narrowly defined circumstances. These laws (referred to hereinafter as “Type 1” laws) provide that a caseworker¹⁴⁰ may unilaterally remove a child only when two conditions are met.¹⁴¹ First, a caseworker must have reasonable

134. Some states alternatively require a police officer or physician. *See, e.g.*, S.C. CODE ANN. § 63-7-620 (2017) (only a police officer may take emergency custody of child).

135. *See infra* notes 141, 155.

136. *See, e.g.*, 42 PA. CONS. STAT. ANN. § 6332(a) (West Supp. 1999) (informal hearing must be held within 72 hours of removal); WASH. REV. CODE § 13.34.060(1) (1998); TEX. FAM. CODE § 262.103 (West 1996) (within 14 days).

137. *See, e.g.*, N.Y. FCA § 1028 (2010).

138. *See, e.g.*, WASH. REV. CODE § 13.34.070 (2016).

139. Brown, *supra* note 99, at 979.

140. Or, in some states, a police officer or physician. *See, e.g.*, DEL. CODE ANN. tit. 16, § 907 (2018).

141. *See, e.g.*, ALASKA STAT. § 47.10.142(a) (2013) (authorizing unilateral placement when “immediate removal” is necessary); ARK. CODE ANN. § 9-27-313 (2015) (when a juvenile is in “immediate danger” and “removal is necessary to prevent serious harm from his or her surroundings or from illness or injury,” and “if parents, guardians, or others with authority to act are unavailable or have not taken action necessary to protect the juvenile from the danger and there is not time to petition for and to obtain an order of the court before taking the juvenile into custody”); CONN GEN. STAT. ANN. § 17-101g (2018) (when a child faces an “imminent risk of physical harm” and “immediate removal from such surroundings is necessary to ensure the child’s safety”); DEL. CODE ANN. tit. 16, § 907 (when a child is in “imminent danger” and threat to life “may occur before the Family Court can issue a temporary protective custody order”); IDAHO CODE § 16-1612 (2017) (when a child is “endangered” and “prompt removal is necessary”); ILL. COMP. STAT. ANN. § 5-5 (2013) (when “there is not time to apply for a court order”); IND. CODE ANN. § 31-34-2-3 (2013) (when a child will be seriously endangered if “not immediately taken into custody” and “there is not a reasonably opportunity to obtain a court order”); IOWA CODE ANN. § 232.79 (2018) (when “[t]here is not enough time to apply court an order”); K.S.A. § 38-2231 (2013) (when a child will be “harmed if not immediately removed from the place or residence where the child has been found”); LA. CHILD. CODE ANN. art. 621 (2017) (when a “child’s surroundings are such as to endanger his welfare and immediate removal appears to be

cause to believe the child faces an “imminent” risk of harm. Second, the caseworker must have reason to believe either that “immediate removal is necessary” or that “there is not enough time to seek an [*ex parte*] court order.”¹⁴²

In theory, this standard is a stringent one. These states favor *ex parte* court orders when a child is believed to face an “imminent” risk of harm,¹⁴³ and allow a child to be independently removed only when the threat is “so immediate, so urgent that the

necessary for his protection”); 110 MASS. CODE REGS. § 4.29 (2009) (when “(a) a condition of serious abuse or neglect (including abandonment) exists; and (b) that, as a result of that condition, removal of the child is necessary in order to avoid the risk of death or serious physical injury of the child; and (c) that the nature of the emergency is such that there is inadequate time to seek a court order for removal”); MICH. COURT R. 3.963 (2018) (when a child is at substantial risk of harm or is in surroundings that present an imminent risk of harm and the child’s immediate removal from those surroundings is necessary to protect the child’s health and safety.”); MISS. CODE ANN. § 43-21-303 (2013) (when there is “probable cause to believe that the child is in “immediate danger” and “immediate custody is necessary”); MO. ANN. STAT. § 210.125 (2012) (when a child is in “imminent danger” and there is “reasonable cause to believe the harm or threat to life may occur before a juvenile court could issue a temporary protective custody order”); NEV. REV. STAT. ANN. § 432B.390.1(a) (2013) (when “immediate action is necessary” to protect the child); N.H. REV. STAT. ANN. § 169-C:6(1) (2013) (when “there is not enough time to petition for a court order”); NEB. REV. STAT. ANN. § 43-248 (West 2017) (when a juvenile is “seriously endangered in his or her surroundings and immediate removal appears to be necessary for the juvenile’s protection”); N.J. STAT. ANN. § 9:6-8.29(a) (2013) (when a child is in “imminent danger” and “there is insufficient time to apply for a court order”); N.Y. FAM. CT. ACT § 1024 (2018) (when “there is not enough time to apply for an order”); N.C.G.S.A. § 7B-500 (2016) (when a child has been “abused, neglected, or dependent,” and may be “injured or could not be taken into custody if it were first necessary to obtain a court order”); OHIO ADMIN. CODE 5101:2-39-01 (2016) (when “exigent circumstances requiring immediate intervention exist, and time does not permit obtaining a court order”); S.C. CODE ANN. § 20-7-610(A)(1) (2013) (when a child faces “substantial and imminent danger” and “there is not enough time to apply for a court order”); S.D. Codified Laws § 26-7A-12 (when there is “an imminent danger to the child’s life or safety and there is no time to apply for a court order and the child’s parents, guardian, or custodian refuse an oral request for consent to the child’s removal from their custody or the child’s parents, guardian, or custodian are unavailable.”); TENN. CODE ANN. § 37-1-114 (2010) (when a child is “neglected, dependent, or abused” and “subject to an immediate threat to the child’s health or safety to the extent that delay for a hearing would be likely to result in severe or irreparable harm”); TEX. FAM. CODE ANN. § 262.104 (2017) (when there is “no time to obtain a temporary order” and an “immediate danger”); VA. CODE ANN. § 63.2-1517(A) (2017) (when there is an “imminent danger” and a “court order is not immediately obtainable”); WASH. REV. CODE ANN. § 26.44.050 (West 2018) (when a child is “abused or neglected” and “would be injured or could not be taken into custody if it were necessary to first obtain a court order.”); WYO. STAT. ANN. § 14-3-405 (2011) (when a child is “seriously endangered” and “immediate custody appears to be necessary for his protection”).

142. Several courts have interpreted a statute requiring immediate removal as the same as one requiring insufficient time to seek a court order. *See, e.g.*, *RH v. State*, 261 P.3d 697, 705 (Wyo. 2011) (interpreting a statute mandating immediate removal as one that “clearly references an emergency situation where there is no opportunity for a hearing”).

143. *See also* *Brown*, *supra* note 99, at 917.

child's life or safety will be at risk before an order can be obtained."¹⁴⁴

New York offers an example of this kind of legislation. Caseworkers in New York must obtain an *ex parte* court order for removals if they believe there is insufficient time to file a petition and the parent does not consent to a removal.¹⁴⁵ In these *ex parte* proceedings, the court considers whether the child's continuation in the parent's home would be contrary to the child's best interests, whether reasonable efforts to prevent the need for the child's removal were made prior to the application, and whether the issuance of a temporary order directing the removal of the respondent parent from the child's residence would eliminate the imminent risk to the child.¹⁴⁶

If, however, there is reasonable cause to believe that the child would be in imminent danger if she remained at home and there is not enough time to apply for a court order, a caseworker may unilaterally remove her from her home.¹⁴⁷ Should the child protective agency remove a child on an emergency basis and not return the child that day, the agency must file a child protective proceeding petition by the next court day.¹⁴⁸ A preliminary hearing must then be held no later than the court day after the petition is filed, unless extended briefly for good cause.¹⁴⁹ During this hearing, a court must do more than identify the existence of a risk of serious harm.¹⁵⁰ Rather, a court must weigh whether the imminent risk to the child can be mitigated by reasonable efforts in order to avoid removal.¹⁵¹ It must balance that risk against the harm the removal might bring and determine which course is in the child's best interests.¹⁵²

2. *Type 2 Laws*

States on the other side of the divide more broadly define the circumstances in which a caseworker is authorized to inde-

144. N.Y. FAM. CT. ACT § 1024; *Nicholson v. Scoppetta*, 820 N.E.2d 840, 853 (N.Y. 2004).

145. N.Y. FAM. CT. ACT § 1022; *Nicholson*, 820 N.E.2d at 853.

146. N.Y. FAM. CT. ACT § 1022; *Nicholson*, 820 N.E.2d at 853.

147. N.Y. FAM. CT. ACT § 1024(a).

148. *Id.*, § 1026(c).

149. *Id.*

150. *Nicholson*, 820 N.E.2d at 853.

151. *Id.*; see also N.Y. FAM. CT. ACT § 1027.

152. *Nicholson*, 820 N.E.2d at 853; N.Y. FAM. CT. ACT § 1027.

pendently remove a child.¹⁵³ In accordance with these laws (referred to hereinafter as “Type 2” laws), a caseworker need not consider the feasibility of petitioning the court prior to a unilateral removal.¹⁵⁴ For several jurisdictions, a caseworker may place a child in foster care without a court order if she has a reasonable belief that the child faces an “imminent risk” of harm and that the child’s removal — rather than *immediate* removal — is necessary.¹⁵⁵ Most of these states, however, require only that a caseworker reasonably believe that a child is in “imminent” risk of danger.¹⁵⁶ Unlike Type 1 laws, Type 2 laws do not favor *ex parte* orders when the child is in “imminent” danger.

153. See Brown, *supra* note 99, at 917.

154. *Id.*

155. See ARIZ. REV. STAT. ANN. § 8-821 (2013) (when custody is “clearly necessary” to protect a child because the child is a) a victim of abuse or neglect; b) suffering serious physical or emotional injury; c) physically injured; or d) a missing child at risk of serious harm); COLO. REV. STAT. § 19-3-401 (2013) (when “the safety or well-being is immediately at issue and there is no other reasonable way to protect the child without removing the child from the child’s home”); D.C. CODE ANN § 16-2310(b) (West 2013) (when a child is in “imminent danger from his or her surroundings” and “the removal of the child from his or her surroundings is necessary”); GA. CODE ANN. § 15-11-45 (West 2014) (when a child would be in “imminent danger of abuse or neglect if he or she remains in the home”); HAW. REV. STAT. ANN. § 587-22(a) (West 2013) (when “imminent harm” exists); KY. REV. STAT. ANN. § 620.040 (West 2013) (when a child is “in danger of imminent death or serious physical injury”); N.D. Cent. Code Ann. § 27-20-13 (West 2015) (when there is “immediate danger” and removal is “necessary”); 42 PA. CONS. STAT. ANN. § 6324 (2013); UTAH CODE ANN. § 62A-4a-202.1 (West 2013) (when a child’s home is “unsafe and removal is necessary”); VT. STAT. ANN. tit. 33, § 5301 (2013) (when a child is in “immediate danger” and removal is “necessary”); WISC. STAT. § 48.19 (2013) (when a child is suffering from “illness or injury” or is in “immediate danger from his or her surroundings and removal from those surroundings is necessary”).

156. See, e.g., ALA. CODE § 26-14-6 (1975) (when there is an “imminent danger”); CAL. CODE REGS. tit. 11, § 930.52 (1991) (when the “child(ren)’s condition or surroundings reasonable appear to jeopardize the child(ren)’s health and welfare); FLA. STAT. ANN. § 39.401 (West 2014) (when a child has been “abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment”); GA. CODE ANN. § 15-11-45 (2013) (when a child would face “imminent danger of abuse or neglect if he or she remains in the home”); HAW. REV. STAT. ANN. § 587-22(a) (West 2013) (when a child is in “imminent harm”); KY. REV. STAT. ANN. § 620.040 (2013) (when a child is “in danger of imminent death or serious physical injury”); MINN. STAT. ANN. § 260C.175 (West 2010) (when a child is found in surroundings or conditions which endanger the child’s health or welfare or which such peace officer reasonably believes will endanger the child’s health or welfare); MD. CODE ANN., FAM. LAW § 5-709 (West 2013) (when there is “serious, immediate danger”); MONT. CODE ANN. § 41-3-301 (West 2017) (when a child faces an “immediate or apparent danger of harm”); N.M. STAT. ANN. § 32A-4-6 (West 2015) (when a child has been “abused or neglected” and there is an “immediate threat”); OKLA. STAT. ANN. tit. 10, § 7003-2.1.A.1 (West 2013) (when the “surroundings endanger the welfare of the child”); OR. REV. STAT. ANN. § 419B.150(1)(a) (West 2013) (when the “surroundings reasonably appear to be such as to jeopardize the child’s welfare”); 40 R.I. GEN. LAWS ANN. § 40-11-5 (West 2017) (when there is an “immediate danger to the child’s life or death”); WASH. REV. CODE ANN. § 43.185C.260 (West 2017) (when

States have thus adopted two different approaches to regulating emergency removals. The former prefers judicial participation, permitting independent executive action in only narrowly defined emergency situations.¹⁵⁷ The latter entrusts caseworkers to unilaterally place children in emergency custody, with hearings to follow within a prescribed period of time.¹⁵⁸

C. THE CIRCUIT SPLIT ON EMERGENCY REMOVALS

The divide in how states define “emergency circumstances” resembles the circuit split over the constitutionality of these summary removals. Two constitutional doctrines are relevant for determining when judicial oversight must precede the state’s removal of a child.¹⁵⁹ First, while the U.S. Supreme Court has not yet ruled whether the Fourth Amendment’s proscription against unreasonable searches and seizures protects families involved with the child welfare system, several circuits have recognized that the removal of children for child protective purposes qualifies as a seizure.¹⁶⁰ Second, the Supreme Court has consistently affirmed that parents have liberty interests in the custody and care of their children under the Fourteenth Amendment’s Due Process Clause, which generally requires process before deprivations of life, liberty, or property.¹⁶¹ However, what process is due before temporarily removing a seemingly endangered child from parental custody is an issue on which the Supreme Court has yet to rule and on which the circuit courts are split.

there is a “danger to child’s safety”); W. VA. CODE R. § 149-8-5 (2018) (when a child would be “abused and/or neglected without a court order if (1) the child is abandoned or (2) the law enforcement officer determines that a child is in a condition requiring emergency medical treatment by a physician and the child’s parents, parent, guardian or custodian refuses to permit such treatment, or is unavailable for consent”).

157. See Mark Brown, *supra* note 99, at 917.

158. *Id.*

159. *Id.* at 920.

160. Doe v. Heck, 327 F.3d 492, 509–10 (7th Cir. 2003) (finding that a removal of a suspected child victim was a search and seizure under the Fourth Amendment); Tenenbaum v. Williams, 193 F.3d 581, 602 (2d Cir. 1999) (finding a child’s removal constitutes a seizure); Rogers v. Cty. of San Joaquin, 487 F.3d 1288, 1294 (9th Cir. 2007) (holding that the Fourth Amendment protects children from being removed absent a showing of reasonable cause to believe that the child is in imminent danger of serious bodily harm and that the scope of intrusion is reasonably necessary to avert that specific injury). Courts apply the same legal standard in assessing Fourth and Fourteenth Amendment claims concerning the removal of children. Wallis v. Spencer, 202 F.3d 1126, 1137 (9th Cir. 2000).

161. Troxel v. Granville, 530 U.S. 57, 66 (2000); Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

The Second, Ninth, and Tenth Circuits have adopted a more stringent removal standard, holding that the Constitution requires that state actors reasonably believe that a child is in imminent danger and that they are unable to obtain a warrant before unilaterally removing the child.¹⁶² In *Tenenbaum v. Williams*, the Second Circuit expressed concern that unrestricted government access to children would inflict harm on the families.¹⁶³ In weighing the constitutional interests under the Due Process Clause, the *Tenenbaum* court concluded the state's interest in protecting children encompasses not only promoting the safety of children from the community's point of view, but also maintaining their psychological well-being, autonomy, and relationships to their family.¹⁶⁴ The court reasoned that while the "paramount importance of the child's well-being can be effectuated only by rendering State officials secure in the knowledge that they can act quickly and decisively in urgent situations . . . there is a critical difference between necessary latitude and infinite license."¹⁶⁵ *Tenenbaum* thus allowed only a narrow emergency removal exception: it is constitutional to remove a child without prior court approval only if there is insufficient time to petition for judicial authorization.¹⁶⁶

The First and Eleventh Circuits have applied a more flexible interpretation of the Due Process Clause.¹⁶⁷ In *Doe v. Kearney*, the Eleventh Circuit held that due process does not require caseworkers to specifically determine whether there is enough time to

162. *Tenenbaum*, 193 F.3d at 594 (holding that parents' procedural due process rights require caseworkers to consider whether there is sufficient time to obtain a court order prior to effecting an emergency removal of a child); *Roska v. Peterson*, 328 F.3d 1230, 1241 (10th Cir. 2003) (finding no "exigent" circumstances when the evidence did not establish that a "delay to obtain a warrant might have cost the child his life"); *Rogers*, 487 F.3d at 1294 (9th Cir. 2007) (holding that officials who remove a child from her home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant). Whether the Ninth or Tenth Circuits support this position, however, has been contested. Compare *Brown*, *supra* note 99, at 934 (arguing that the Ninth and Tenth Circuit support the Second Circuit's position) with *Doe*, 329 F.3d at 1295, 1298 (finding otherwise).

163. *Tenenbaum*, 193 F.3d at 594.

164. *Id.* at 595.

165. *Id.*

166. *Id.*

167. *Tower v. Leslie-Brown*, 326 F.3d 290, 298 (1st Cir. 2003) (concluding that caseworkers may place a child in foster care without prior judicial review "when they have evidence that a child has been abused or is in imminent danger"); *Doe*, 329 F.3d at 1295 (11th Cir. 2003) (holding that the constitutionality of a child removal does not rely on whether there was time to obtain judicial authorization, but on a variety of relevant factors).

obtain a court order before unilaterally effecting a removal.¹⁶⁸ *Doe* ruled in favor of a broader emergency removal exception to accommodate the state's interest in safeguarding vulnerable children.¹⁶⁹ If a caseworker has "reasonable cause" to believe that the child is in imminent danger, the *Doe* court would find that a removal without a court order comports with due process.¹⁷⁰

Regardless of what process is constitutionally required, removing a child from her family comes at an irreversible cost. As a result, the state's decision to place a child in foster care should be reserved for situations driven by an identifiable harm and not by race. As demonstrated in Part IV, requiring the judge — rather than the caseworker — to oversee these decisions absent truly exceptional circumstances may cabin executive license and eliminate costly errors, and ultimately reduce the number of African American children needlessly removed.

IV. A CALL FOR MORE STRINGENT EMERGENCY REMOVAL LAWS TO REDUCE RACIAL DISPARITIES IN FOSTER CARE

Emergency removals — the only form of removal through which caseworkers can bypass the court system prior to removing children from their homes — are particularly vulnerable to decision-making processes influenced by a family's race. In search of a legislative solution to reduce the role of race in child protective removals, this Note performed an original study comparing the racial disparity rates in foster care entries among states to determine whether the law governing emergency removals influenced racial disparities in foster care entries.

The study establishes that greater racial disparities exist among foster care entries in states with less stringent emergency removal laws. Based on the findings, this Note recommends states enact more stringent emergency removal standards to mitigate the effect of racial bias in foster care placements. Jurisdictions should excuse pre-deprivation judicial authorization only when time and circumstances prevent caseworkers from seeking court orders. Specifically, state laws should explicitly require that a caseworker reasonably believe *immediate* removal is nec-

168. *Doe*, 329 F.3d at 1295 (stating the court was "not persuaded that due process required such an inflexible rule").

169. *Id.* at 1297.

170. *Id.*

essary to protect a child — or that there is not enough time to consult with the judiciary — before independently taking the child into custody. More stringent laws, in turn, should help safely reduce the number of African American children entering foster care and lower the corresponding racial disparities.¹⁷¹

A. A STUDY COMPARING THE RACIAL DISPARITY RATES IN
FOSTER CARE ENTRIES BETWEEN TYPE 1 AND TYPE 2 STATES

1. *The Study's Methodology*

To identify whether states with a certain type of emergency removal law are more effective in preventing biased placements, I compared the extent of disparities between white and black children at the foster care placement decision point in states with Type 1 laws to their corresponding disparities in states with Type 2 laws.¹⁷²

To compare the degree of racial disparities, I calculated the median disparity rates of African Americans with respect to white children at the placement decision point among states with stricter Type 1 laws and states with more flexible Type 2 laws.¹⁷³ I calculated two types of disparity rates for each state: the population-based disparity index and the decision-based disparity index. These rates, which vary depending on the denominator, rep-

171. *Id.*

172. As mentioned in Part III.A, Type 1 laws explicitly provide that a caseworker may unilaterally remove a child only when (1) the child is in “imminent” danger of harm, and (2) taking the time to seek an *ex parte* court order would endanger the child or, alternatively, “immediate removal” is necessary to ensure the child’s safety. For purposes of this analysis, Maine, which does not have a statute allowing caseworkers to remove children under any circumstances without a court order, is included under the Type 1 category. See ME. REV. STAT. ANN. tit. 22, § 4034 (2016). In contrast, Type 2 laws require only that the child is in “imminent” danger of harm. A few Type 2 laws additionally require that removal is “necessary.”

This categorization does not take into account the varying types of harm that each statute requires to justify emergency removals. For example, some states require an “imminent danger of suffering serious physical harm or a threat to life” (Kentucky), while others require “harm to health or safety,” (Illinois), “injury, abuse or neglect,” (Nevada), or “an emergency” (North Dakota). Although such categorization is outside the scope of this preliminary analysis, further research is needed on how the requisite level of harm affects disparity rates.

173. I used disparity ratios, rather than disproportionality rates, because the current consensus among academics is that the disparity index is a sounder and more standardized measure. See Terry L. Shaw et al., *Measuring Racial Disparity in Child Welfare*, 78 CHILD WELFARE 23, 35 (2008) (contending that the Disparity Index should be the primary instrument for measuring racial disparity in the child welfare system).

resent two different approaches to calculating the extent of racial disparities.¹⁷⁴ The reference population of the population-based disparity index is the general population; it describes population-based differences in the likelihood of placement in out-of-home care.¹⁷⁵ This measure is the ratio of black child foster care admissions per 1,000 black children to white children admissions per 1,000 white children.¹⁷⁶

I derived the population-based disparity index by dividing the population-based disproportionality index¹⁷⁷ of black children at the foster care entry decision point by the corresponding disproportionality index of white children.¹⁷⁸ After I found the population-based disparity index in each state, I calculated the median disparity indices of states with Type 1 laws and of states with Type 2 laws.

I also calculated the decision-based disparity index at the foster care placement decision point. As population-based rates may reflect the accumulated burden associated with the prior decisions of whether to report a child, to investigate a report, and to substantiate a report, these rates may not be as reliable in determining whether placement decisions solely, or primarily, caused the racial disparities among children entering foster

174. Fluke et al., *supra* note 15, at 30.

175. Fred Wulczyn, in DISPARITIES AND DISPROPORTIONALITY IN CHILD WELFARE: ANALYSIS OF THE RESEARCH, *supra* note 15, at 120, 121.

176. *Id.*

177. A population-based disproportionality index of 1.0 indicates that a group is represented in proportion to its representation in the general population; above 1.0 means the group is overrepresented; and below 1.0 means the group is underrepresented. For example, a disproportionality index of 1.5 among foster care entries means that African American children are 1.5 times as represented among the population of children entering foster care as they are in the general population. CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 123, at 3–4.

178. See Shaw et al., *supra* note 173, at 31 (noting the disparity index can be calculated by dividing the disproportionality index for one group by the disproportionality index for another group). Both disproportionality indices were obtained from the 2013 National Council of Juvenile and Family Court Judges' Report on Disproportionality Rates for Children of Color in Foster Care. SUMMERS, *supra* note 131, at 7 (deriving disproportionality rates by dividing the percentage of African American children at the foster care entry point — obtained from the National Data Archive on Child Abuse and Neglect's Adoption and Foster Care Analysis and Reporting System (AFCARS) — by the percentage of African Americans in the general child population, obtained from the U.S. Census Bureau). This Note relies on data from FY 2013 because that was the most recent year in which data were publicly available. Accordingly, for purposes of this analysis, I determined whether states were Type 1 or Type 2 states based on the law in effect during FY 2013.

care.¹⁷⁹ Computing decision-based rates can isolate the source of the disparities.¹⁸⁰

For this measure, the reference population is the population among the group who experienced the preceding decision point, rather than the general population.¹⁸¹ In other words, this approach measures disparity by comparing a particular racial group's representation at one decision point to its representation at the prior decision point.¹⁸²

To compute the appropriate decision-based disparity index for this analysis, I derived the decision-based disproportionality indices for white and black children entering foster care.¹⁸³ I then divided the disproportionality index of black children by that of white children. After finding the appropriate decision-based disparity index in each state, I calculated the median disparity indices of states with Type 1 laws and of states with Type 2 laws.¹⁸⁴

2. *The Study's Findings*

i. *Population-Based Disparities*

Nationally, African American children were approximately 2.33 times as likely to be placed in foster care as compared to

179. See Fluke et al., *supra* note 15, at 30.

180. *Id.* at 31.

181. *Id.* at 31.

182. CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITY IN CHILD WELFARE, *supra* note 18, at 4.

183. See Shaw, *supra* note 172, at 31. For this analysis, I calculated the decision-based disproportionality index for black children by dividing the proportion of black children who entered foster care by the proportion of black children who were substantiated as victims, the preceding decision point. Fluke et al., *supra* note 15, at 30. I then compared this number to an equivalently calculated rate for white children. *Id.* I obtained the percentage of black or white children entering foster care in each state from the 2013 National Council of Juvenile and Family Court Judges' Report on Disproportionality Rates for Children of Color in Foster Care. See generally SUMMERS, *supra* note 131. I derived the percentage of black children or white children who were substantiated as victims in each state from the U.S. Department of Health & Human Services via its 2013 Child Maltreatment Report by dividing the number of African American identified as victims of child abuse or neglect by the total number of identified victims in each state, which was rounded to two decimal points. See generally ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS, CHILD MALTREATMENT 2013 (2013), <https://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf> [<https://perma.cc/5Z37-5MFY>].

184. The median, rather than the mean, was used to determine the center of the data due to the data's skewed distribution. Montana, for example, was a clear outlier in this calculation, with a population-based disparity index of 7660, while the next highest population-based disparity index was 140.

their white counterparts in 2013.¹⁸⁵ Upon closer examination, African American children were less disparately represented, or enjoyed lower disparity scores, in states with stringent Type 1 laws than in states with flexible Type 2 laws. The median population-based disproportionality index for African Americans at the placement decision point was 1.7 among states with Type 1 laws, meaning that black children were 1.7 times as represented in the population of children entering foster care as in the general child population.¹⁸⁶ The equivalent rate for their white counterparts was 0.9, indicating that white children were underrepresented among foster care entries when compared to the general population.¹⁸⁷ In the end, the median disparity index — the disproportionality index for black children divided by the equivalent rate for white children — was 2.25 for states with stringent Type 1 laws.¹⁸⁸ In other words, African American children were 2.25 times as likely as white children to enter foster care.

Meanwhile, African American children in jurisdictions with flexible Type 2 laws were 2.44 times as likely as white children to enter foster care.¹⁸⁹ In these jurisdictions, black children were 1.8 times as represented among foster care entries as in the general child population — more overrepresented than in Type 1 states. White children were 0.8 times as represented in the population of children entering foster care as in the general child population — more underrepresented than in Type 1 states.¹⁹⁰ The median population-based disparity index in Type 2 states was accordingly 8.4% higher than in Type 1 states.¹⁹¹

In addition, states with Type 1 laws were more likely to have a population-based disparity index at or below 2.33 than states with more lenient Type 2 laws.¹⁹² Out of twenty-nine states with Type 1 laws, eighteen had a disparity index at or below 2.33 — 62% of all states. In contrast, 40.9% — 9 out of 22 — of states

185. This is based on my calculation of the median national disparity index. *See infra* app. tbl. 1.

186. *See infra* app. tbls. 1–2.

187. *See infra* app. tbl. 1.

188. *Id.*

189. *Id.*

190. *Id.*

191. The percentage difference was calculated by subtracting the disparity index of Type 1 states from the disparity index of Type 2 states, dividing this number the disparity index in Type 1 states, and multiplying the quotient by 100.

192. 2.33 is used as the reference point because 2.33 was the mean population-based disparity index across all states in 2013.

(including Washington, D.C.) with more flexible Type 2 laws had a disparity index at or below 2.33.

Evidently, African American children in states with emergency removal laws that excuse prior judicial authorization only in truly exceptional circumstances — when immediate removal is necessary or when there is insufficient time to seek a court order — enjoy less disparate representation at the placement decision point. Put differently, the likelihood of black children entering foster care as compared to their white counterparts was lower in jurisdictions with Type 1 laws than in jurisdictions with Type 2 laws.

This analysis, however, only explores the correlation between disparity rates and state laws, which does not imply causation. There may be other reasons why the disparity rates are lower in Type 1 states. Agencies in states benefiting from lower disparity rates, for example, may have implemented more successful initiatives to reduce black children's overrepresentation. Or, these states may have a lower percentage of black children in poverty, a characteristic strongly associated with maltreatment.¹⁹³

ii. *Decision-Based Disparities*

A comparison of the decision-based disparities indices helps to identify the role of removal decisions in driving racial disparities in foster care admissions.¹⁹⁴ In states with stricter Type 1 laws, the disparate representation of black children increased to a lesser degree as they progressed along the child welfare continuum from substantiation to placement. In these jurisdictions, black children entered foster care at a median rate of 1.1 times their rate in the population of children for which a substantiation of abuse or neglect was made,¹⁹⁵ which is the preceding decision point. For example, if black children represented 20% of all children who were substantiated as victims, they represented 22% of all substantiated victims who entered foster care. Conversely,

193. See *supra* Part II.A.

194. See Fluke et al., *supra* note 15, at 31 (“[L]ogically ordered enumerations with decision-based denominators can isolate decisions that are producing disparities”).

195. See *infra* app. tbl. 2. “Children for which a substantiation of maltreatment was made” is used synonymously with “indicated victims.” A victim is defined as “a child for whom the state determined at least one maltreatment was substantiated or indicated, or the child received a disposition of alternative response victim.” ADMIN. FOR CHILDREN & FAMILIES, *supra* note 111, at 18.

white children's representation decreased as they moved deeper into the child welfare system from substantiation to placement: they were 0.97 times as represented among foster care entries as among substantiated victims.¹⁹⁶ Most significantly, black children who were substantiated as victims were 1.11 times as likely as white substantiated victims to be placed in foster care.¹⁹⁷

In jurisdictions with Type 2 laws, African American victims were 1.29 times as likely as white victims to be placed in foster care.¹⁹⁸ Specifically, in Type 2 jurisdictions, black children were 1.29 times as represented among foster care entries as they were among the pool of substantiated victims. Said differently, if black children represented 20% of all substantiated victims, they represented 25.8% of all children entering foster care. White children entered foster care at a rate of 0.98 times their rate in the population of substantiated victims.¹⁹⁹ Accordingly, the median decision-based disparity index in Type 2 states was 16.8% higher than in Type 1 states.²⁰⁰

In addition, states with Type 1 laws allowing removal in only the narrowest circumstances were more likely to have a decision-based disparity index at or below 1.21 than states with more lenient Type 2 laws.²⁰¹ Out of twenty-eight states with Type 1 laws,²⁰² sixteen had a disparity index at or below 1.21 — 57.14% of all states. In contrast, 42.86% — 9 out of 21 — of states²⁰³ and Washington D.C. with more flexible Type 2 laws had a disparity index at or below 1.22.

As demonstrated, African American children in states with more stringent Type 1 removal laws enter foster care at lower disparity rates by every measure than in states with more flexible Type 2 removal laws. These findings suggest that in states that allow agencies to forgo prior judicial review in only the most

196. See *infra* app. tbl. 3.

197. *Id.*

198. See *infra* app. tbl. 4.

199. *Id.*

200. See *supra* note 191 and accompanying text for a description of how the percentage difference was calculated.

201. 1.21 is used as the reference point because 1.21 was the median population-based disparity index across all states in 2013.

202. See *infra* app. tbl. 3. Excluding Tennessee, which could not be calculated because its data were unavailable.

203. See *infra* app. tbl. 4. Excluding Pennsylvania, which could not be calculated because its data were unavailable.

time-sensitive circumstances, race plays less of a factor in foster care placements.²⁰⁴

The pattern of lower disparity scores among foster care entries in Type 1 states may be a product of these laws cabining the child protective agency's discretion and excusing the judiciary's participation only in the most pressing circumstances. Without truly exigent situations, the state must seek judicial authorization through an *ex parte* order before removing a child. The agency is required to articulate an imminent risk facing the child based on an individualized assessment of the facts rather than conjecture, and ultimately has to persuade an impartial judge that a balancing of the harms warrants the drastic measure of removal.²⁰⁵ Requiring a judge to oversee a wider array of agency decisions before the agency removes a child therefore helps to check executive license and eliminate bias, facilitating more focused and impartial placements.²⁰⁶

Further, raising the bar for when caseworkers can remove children without court orders may discourage caseworkers from seeking to remove children in marginal cases. As Professor William Stuntz observed, the warrant process makes police officers go through "some substantial trouble before engaging in searches . . . thereby encouraging them not to do so without good reason."²⁰⁷ This should minimize the number of biased removals and safely reduce the influx of black children into foster care.

Laws authorizing caseworkers to remove children under a broader set of circumstances, on the other hand, grant untrained caseworkers wider discretion in interpreting ambiguous evidence of maltreatment under strained circumstances that reward them for separating families.²⁰⁸ This enables racial bias to affect the initial, determinative decision to remove a child.²⁰⁹ In turn, this may result in unnecessary removals of black children and may explain the higher disparity scores in states with Type 2 laws.²¹⁰

204. See discussion *supra* notes 95–99.

205. *Id.*

206. *Id.*

207. Stuntz, *supra* note 98, at 891.

208. ROBERTS, SHATTERED BONDS, *supra* note 21, at 55–56; see also *supra* Part II.C (elaborating on how the decision-making environment invites racial stereotypes).

209. See *supra* Part II.C (exploring how emergency removals allow racial stereotypes to go unchecked and wrongfully drive black children into foster care).

210. *Id.*

3. *The Study's Limitations*

The legislative reform that this Note proposes is not a panacea.²¹¹ The proposal first assumes that judges do not act like rubber stamps and that ex-ante review minimizes the number of unnecessary removals, which may not always be the case. A number of judges have reported that they prefer to err on the side of extreme caution and almost always grant the agency's pre-removal petitions notwithstanding insufficient evidence.²¹² In New York, for example, where only narrowly exigent circumstances exempt the agency from seeking prior judicial authorization, reports find that some judges do not seriously question requests to remove children.²¹³ The decision, it is observed, is not always about the risk to the child, but rather about the "risk to the system."²¹⁴

Caseworkers, similarly, tend to err on the side of removal even in Type 1 states authorizing unilateral removals in a narrow set of situations, which may undermine the stricter statutory requirement. For instance, when Florida used to require Type 1 circumstances, caseworkers claimed that every case involved an emergency rising up to the high standard.²¹⁵ Further, in response to the *Tenenbaum* ruling clarifying that emergency re-

211. The study itself also has several limitations. First, although a decision-based disparity rate is a proxy for discriminatory treatment, it is not a perfect measure. Data in this area are scarce, and further research is needed to identify the influence of bias and risk in each emergency placement decision. Second, data from Minnesota and Pennsylvania were missing, which may skew the results. Third, the data used to calculate these rates may not be complete or accurate. If a state inconsistently reports on race, this may result in inaccuracies in the data. SUMMERS, *supra* note 131, at 7. Fourth, children identified as "multiple race" were not included in calculating the number of white or black children. Ultimately, this is a preliminary study and further research on this matter is needed in order to better understanding the role of emergency removals in driving racial disparities.

212. ANNIE E. CASEY FOUNDATION, ADVISORY REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 49 (2000), <https://files.eric.ed.gov/fulltext/ED439189.pdf> [<https://perma.cc/5AB2-AEZM>] (noting that family court judges "acknowledge that they do not hold [child protective services] accountable by refusing to grant their petitions [because] they could not risk making a mistake and having a child die"); see also Sarah Jane Tribble, *Emergency child custody hearings too disruptive, Juvenile Court says; judges may stop taking calls*, THE PLAIN DEALER (April 4, 2012), http://www.cleveland.com/metro/index.ssf/2012/04/cuyahoga_county_considers_chan.html [<https://perma.cc/8UFN-GN84>] (noting that, in only three of the 617 cases last year, a magistrate judge went against the opinions of the social worker and prosecutor and refused a court order).

213. LEE, *supra* note 31, at 118.

214. *Id.* at 60.

215. Brown, *supra* note 99, at 919 n.39.

movals in New York should be conducted only when the child is in imminent danger, a high-ranking city attorney instructed caseworkers to “go about their normal jobs as they always have, secure in the knowledge that the city stands behind them and will back that up.”²¹⁶

Favoring prior judicial authorization also carries its own costs. Judicial time and due process are expensive, and court dockets are crowded. Additionally, the demands of the warrant process may deter officials from pursuing removals in close cases, which may prevent necessary action from being taken and facilitate abusive home environments.²¹⁷

These costs, however, should be balanced against the harms that African Americans individually and collectively have long borne as a result of wrongful removals.²¹⁸ As was stressed in *Tenenbaum*, “we must be sensitive to the fact that society’s interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community’s point of view, but also with the child’s psychological well-being, autonomy, and relationship to the family.”²¹⁹

Finally, enacting laws that excuse pre-deprivation reviews in only the most exceptional circumstances is only one step toward mitigating the far-reaching consequences of distorted decision-making processes and ensuring accurate removal decisions. While black children in Type 1 states enjoy lower disparity rates, unequal representation of black children in foster care persists across the country.²²⁰ Other legislative and non-legislative changes are clearly necessary. Academics and practitioners have, for example, proposed narrowly defining the standard of “immi-

216. Leslie Kaufman, *City Often Took Children Without Consulting Court*, N.Y. TIMES (Oct. 28, 2004), <https://www.nytimes.com/2004/10/28/nyregion/city-often-took-children-without-consulting-court.html> [<https://perma.cc/9CBD-AUZC>].

217. Brown, *supra* note 99, at 981–82.

218. Notably, a child dying due to abuse or neglect after the family has engaged with child protective services is extremely rare. Over the five years preceding 2015, 105 children whose families had previously interacted with the child welfare system passed away. See ADMIN. FOR CHILDREN & FAMILIES, *supra* note 111, at tbl. 4-6. In comparison, over 130,000 children remained in foster care for less than one month in the past five years, THE AFCARS REPORT, *supra* note 2, at 20, 21, 22, 23, 24, suggesting that over 130,000 removals were unwarranted. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 210 (2016).

219. *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999).

220. See *infra* app. tbls. 1–4.

ment risk of harm” to “imminent risk of physical injury or death.”²²¹ This may further encourage state caseworkers to remove a child in only the most pressing circumstances. Recruiting a diverse workforce, providing cultural competence training, and applying standardized risk assessment tools have also been recommended as ways to improve the decision-making processes.²²² Together, these measures may help to improve the outcomes of African Americans who engage with the child welfare system and mitigate the racial inequities perpetuated by the system.

V. CONCLUSION

Black families’ disparate engagement with the foster care system has been widely documented for nearly a century. What has received little attention in the movement to reduce racial imbalances, however, is the regularity with which child protective agencies remove children from their homes without a pre-deprivation hearing. The prevalence of immediate removals, this Note argues, explains why black families interact with the system differently: the absence of a prior judicial check allows racial bias to influence the placement decision and drives black children unnecessarily into foster care.

In search of a legislative solution to mitigate the role of race in these temporary placements, this Note compares the racial disparity rates in foster care entries among states. Based on its findings, this Note recommends states enact more stringent emergency removal laws in order to safely reduce the number of black children entering foster care. Specifically, states should authorize a caseworker to independently remove a child only if taking the time to seek an *ex parte* court order would risk the child’s safety. At a time when reform initiatives abound and yet discriminatory removals persist, amending the overarching legislation may serve as a needed solution to address the systemic dismantling of African American families.

221. Paul Chill, *supra* note 7, at 463.

222. See CHILD WELFARE INFO. GATEWAY, ADDRESSING RACIAL DISPROPORTIONALITIES IN CHILD WELFARE, *supra* note 123, at 5, 8, 17; FREUNDLICH, *supra* note 127, at 9–10.