

CIVIL *MIRANDA* WARNINGS:  
THE FIGHT FOR PARENTS TO KNOW THEIR  
RIGHTS DURING A CHILD PROTECTIVE  
SERVICES INVESTIGATION

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## INTRODUCTION

On Thursday morning, Ms. M's ex-boyfriend placed a call to New York's child abuse hotline, the State Central Registry, claiming that she was abusing her children.<sup>1</sup> Later that night, Ms. M, a single mother of two, received a knock on her door.<sup>2</sup> The Administration for Children's Services (ACS)<sup>3</sup> caseworker told Ms. M that they must enter her home and speak to her children separately.<sup>4</sup> The caseworker searched every room and inspected the cupboards for adequate food.<sup>5</sup> They interviewed the kids privately and strip searched them to check for bruises or marks.<sup>6</sup> They then questioned Ms. M about her most intimate details: her sexual history, drug and alcohol use, and mental health diagnoses. Ms. M was not informed of the allegations against

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1. This story is all too common in the family court systems across the country. Ms. M is a conglomeration of narratives told through New York City Council hearing testimony, law review articles, and newspaper clips.

2. In New York, after a call has been placed to the State Central Registry, the Administration for Children's Services has 24 to 48 hours to go to the parents' home to investigate. N.Y.C. ADMIN. FOR CHILD.'S SERVS., *A Parent's Guide to a Child Abuse Investigation*, <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> [<https://perma.cc/NCL8-RDZK>].

3. The Administration for Children's Services (ACS) is New York City's Child Protective Services (CPS) agency. Other states use different names for the same system, including Department of Human Services (DHS) and Children, Youth & Families Department (CYFD). See *Child Protective Services*, OKLA. HUM. SERVS., <https://oklahoma.gov/okdhs/services/cps/cps-program-information.html> [<https://perma.cc/DKP6-3PJD>]; *Protective Services Overview*, N.M. CHILD., YOUTH & FAMS. DEP'T, <https://cyfd.org/ps-overview> [<https://perma.cc/W49A-GBWB>].

4. *Hearing on Int. 1728-2019 Before the New York City Council Comm. on General Welfare* 91 (2019) (testimony of Emma S. Ketteringham, Managing Director of the Family Defense Practice, Bronx Defenders).

5. 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, 518 (2005).

6. Teri Dobbins Baxter, *Constitutional Limits on the Right of Government Investigators to Interview and Examine Alleged Victims of Child Abuse or Neglect*, 21 WM. & MARY BILL RTS. J. 125, 164 (2012). See, e.g., TENN. CODE ANN. § 37-1-406(e)(1) (2022) (stating that an investigation "shall include a visit to the child's home, an interview with and the *physical* observation of the child, an interview with and the *physical* observation of any other children in the child's home") (emphasis added). In 2020, the American Bar Association wrote a resolution urging federal and state governments to adopt policies prohibiting strip searches of children, except in extraordinary circumstances. ABA COMM'N ON DOMESTIC & SEXUAL VIOLENCE, RESOLUTION 111B (2020), [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/111b-annual-2020-final.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/111b-annual-2020-final.pdf) [<https://perma.cc/L8GW-KL2B>].

her, even though she asked multiple times.<sup>7</sup> Ms. M, who had never dealt with ACS before, did not know that she could have refused the caseworker entry or that she could have contacted a legal service provider before being interviewed.<sup>8</sup> She thought that if she didn't let them in, the caseworker would take her children away.<sup>9</sup>

From that first interaction, ACS had sixty days to investigate.<sup>10</sup> The caseworker assigned to Ms. M's case showed up at her house unannounced, visited her children's school, and requested all medical records for her and her children.<sup>11</sup> ACS caseworkers want parents like Ms. M to admit they need help, but parents must be careful if they ask for too much help, as those statements could be admissible in court.<sup>12</sup> Caseworkers are simultaneously social service providers there to help families and government agents there to assist in prosecuting parents, even though they often act as though they are unconstrained by the rules protecting individual rights that law

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7. Coleman, *supra* note 5, at 431 n.40 (describing the caseworkers in *Tenenbaum v. Williams* who intentionally did not mention the real allegations that caused them to visit the family in question); *see also* *Tenenbaum v. Williams*, 193 F.3d 581, 589 (2d Cir. 1999) (“In accordance with Williams’ instructions, they [the caseworkers] did not mention the real reason they were there—the reports of possible sexual abuse.”).

8. *Hearing, supra* note 4, at 92 (testimonies of Emma S. Ketteringham, Managing Director of the Family Defense Practice, Bronx Defenders and Jessica Prince, Policy Counsel of the Family Defense Practice, Bronx Defenders).

9. *See* Coleman, *supra* note 5, at 430 n.38 (detailing how most families being investigated are not aware of their right to not speak with investigators and how regardless, CPS is typically able to convince families to cooperate).

10. N.Y.C. ADMIN. FOR CHILD.’S SERVS., *supra* note 2.

11. Michelle Burrell, *What Can the Child Welfare System Learn in the Wake of the Floyd Decision?: A Comparison of Stop-And-Frisk Policing and Child Welfare Investigations*, 22 CUNY L. REV. 124, 131 (2019) (articulating that investigators often show up at children’s schools unannounced and look into the parent and child’s medical records); *see also* *Hearing, supra* note 4, at 110 (testimony of Lauren Shapiro, Director of the Family Defense Practice, Brooklyn Defender Services) (describing how the organization often works with parents who have had their medical and mental health providers contacted and their children interviewed while at school without their informed consent).

12. Larissa MacFarquhar, *When Should a Child Be Taken From His Parents?*, NEW YORKER (July 31, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [on file with the *Columbia Human Rights Law Review*] (“But you should admit only so much, because she is not just there to help you: she is there to evaluate and report on you, so anything you say may be used against you in court.”).

enforcement agents must follow.<sup>13</sup> ACS asked Ms. M to comply with a long list of services, including parenting classes, anger management, and drug testing.<sup>14</sup> In response, she told the caseworker that she was not in need of services since she was currently focusing on working two jobs and taking her children to and from school.<sup>15</sup> Months down the road, this statement would be used against her when ACS claimed she refused to accept services intended to better her children's lives.<sup>16</sup> Displays of anger or frustration against the caseworker, even in such stressful and confusing moments, can have dire consequences for the parent.<sup>17</sup> Few are prepared, emotionally or legally, for the experience.

Ms. M's story is not uncommon. Most states statutorily require this type of intensive investigative procedure, even when based solely on a single anonymous phone call to a child abuse hotline.<sup>18</sup> During 2019, Child Protective Services (CPS) agencies across the country received 4.4 million such hotline referrals involving the alleged maltreatment of approximately 7.9 million children.<sup>19</sup> Of those calls, only 16.7% of claims were found to be substantiated or indicated.<sup>20</sup> In

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13. TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 95 (2016).

14. N.Y.C. ADMIN. FOR CHILD.'S SERVS., *supra* note 2 ("During the investigation, if it is determined that services are required, ACS will refer you to services and work with you to help you receive those services."); *see also* *Hearing*, *supra* note 4, at 127 (testimony provided by RISE) ("I thought she was trying to help me, and three days later, the judge did say that my kids could come home as long as I did anger management, took Parenting Journey, had preventive services . . .").

15. *See* *Hearing*, *supra* note 4, at 87 (testimony of Michelle Burrell, Managing Attorney of the Family Defense Practice, Neighborhood Defender Service of Harlem) (describing clients who indicate that they don't need services).

16. *Id.* ("[C]lients sometimes indicate at the child safety conference that they do not believe they are in need of services for their family . . . [Once] they arrive in court, that answer has been twisted into a report that the client is *refusing* services and thus their child must be removed.")

17. LEE, *supra* note 13, at 142–43.

18. Dale Margolin Cecka, *Abolish Anonymous Reporting to Child Abuse Hotlines*, 64 CATH. U. L. REV. 51, 51–52 (2014) ("All states allow the public to anonymously report suspicions of child abuse or neglect . . . If the report creates a suspicion of activity that meets the broad legal definition of 'abuse' or 'neglect,' the state must investigate the family reported upon and visit the family's home.")

19. CHILDREN'S BUREAU, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 2 (2021), <https://www.childwelfare.gov/pubpdfs/canstats.pdf> [<https://perma.cc/86W4-PTGS>].

20. *Id.*

the remaining 83.3% of claims, children were found not to be suffering maltreatment or were offered an alternative response program.<sup>21</sup>

In the past two years, calls have grown across the country for “civil *Miranda* warnings.” The proposed pieces of legislation would not create fundamentally new protections for parents, but would require CPS to explain to parents their rights at the onset of an investigation. Some of the rights to be explained include: the right to refuse CPS entry into the home, unless a court order is issued; the right to speak to an attorney; the right to refuse ACS to examine or interview a child; and the right to refuse to sign a HIPAA release or to take a drug test.<sup>22</sup> In New York, family defense activists and attorneys have been pushing for a new bill in the New York City Council and New York State Assembly since 2019.<sup>23</sup> In Texas, the Texas Association of Family Defense Attorneys and the Texas Public Policy Foundation tried to push through a nearly identical piece of legislation.<sup>24</sup> The legislation has yet to pass in either state.<sup>25</sup>

Today, in many states, parents and even the caseworkers conducting the investigations are unaware of parents’ rights during the course of an investigation.<sup>26</sup> The initial visits by CPS workers,

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21. *Id.* Differential response or alternative response programs allow CPS to divert a case to an alternative family service plan, as opposed to a traditional investigation, when they determine there is low to moderate risk of harm. *See* Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 631–36 (2012) (articulating the ways that a differential response system can undermine the concept of voluntariness, including a discussion of parents’ perceptions of the authority and power of CPS agencies and how this affects engagement with CPS).

22. *Hearing, supra* note 4, at 88 (testimony of Michelle Burrell, Managing Attorney of the Family Defense Practice, Neighborhood Defender Service of Harlem).

23. S. 7553—A, 2019–2020 Leg. Sess. (N.Y. 2020); Int. No. 1736, 2019 N.Y.C. Council Sess. (2019).

24. H.B. 2298, 2021 Leg., 87th Sess. (Tex. 2021); NIKKI PRESSLEY & ANDREW BROWN, PARENTAL NOTIFICATION OF RIGHTS IN CHILD WELFARE INVESTIGATIONS 4 (2020), <https://www.texaspolicy.com/wp-content/uploads/2020/04/Pressley-Brown-Notifications-of-Rights.pdf> [<https://perma.cc/6LQ9-3TCA>].

25. H.B. 2298, 2021 Leg., 87th Sess. (Tex. 2021); S. 7553—A, 2019–2020 Leg. Sess. (N.Y. 2020); Int. No. 1736, 2019 N.Y.C. Council Sess. (2019).

26. *Hearing, supra* note 4, at 141 (testimony of Chris Gottlieb, Co-Director, NYU Family Defense Clinic) (“[T]hose who get the knock at their door from ACS almost never know their rights. Perhaps even more dangerous, the ACS staff doing the knocking often don’t know the rights of the people in those homes or, worse, know those rights and misrepresent what they are.”); *see also* Burrell, *supra* note 11, at 145 (“Most parents that I have encountered have no idea what their rights

regardless of the outcome of the case, can create lasting fear and trauma within the family: the looming threat of a child being taken away; the presumptive, sometimes condescending, judgment by workers of parents' skills; and the psychological damage to a child from being physically searched for bruises or marks by a stranger.<sup>27</sup> Opponents to the New York legislation claim that it would put children at risk and that "invoking legal representation at this stage could undermine" the ability for CPS to engage in a "social work interaction."<sup>28</sup> Courts have provided minimal clarity on the legal guideposts for these home searches by state agents, even though they fall under the Fourth Amendment jurisprudence that guides police officers.

Communities are not only calling for civil *Miranda* warnings but also questioning the role of CPS as a whole. An increasing number of people in affected communities are trying to redefine CPS as the "family policing system."<sup>29</sup> These appeals expose the inherent disconnect between the stated goals of CPS—to be a support system for families—and how CPS is in fact perceived by those it impacts most, mainly low-income families of color. In many such communities, CPS is viewed as a surveillance and punishment system parallel to that of law enforcement.<sup>30</sup>

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are, especially with respect to the sharing of information and access to their homes when a child protective worker knocks on the door.”)

27. See Press Release, Colleen Kraft, President, Am. Acad. of Pediatrics, AAP Statement Opposing Separation of Children and Parents at the Border (May 8, 2018), <https://www.aap.org/en/news-room/news-releases/aap/2018/aap-statement-opposing-separation-of-children-and-parents-at-the-border/> [<https://perma.cc/5CEH-PZZ6>]. The American Association of Pediatrics found that separation of a parent from a child, even for a short time, can lead to “irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health. This type of prolonged exposure to serious stress—known as toxic stress—can carry lifelong consequences for children.” *Id.*

28. *Hearing, supra* note 4, at 19–20 (statement of David Hansell, ACS Commissioner).

29. *Why We’re Using the Term ‘Family Policing System,’* RISE MAG. (May 7, 2021), <https://www.risemagazine.org/2021/05/why-were-using-the-term-family-policing-system/> [<https://perma.cc/5S4N-9GMG>].

30. See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/9QDN-5QBV>] (arguing that giving CPS more money while defunding the police would lead to more surveillance and control over Black families); Ava Cilia, *The Family Regulation System: Why Those Committed to*

The Fourth Amendment has been underexamined in the context of the family regulation system.<sup>31</sup> Part I of this Note offers an overview of parents' constitutionally protected rights before turning to the current and historic socioeconomic and racial disparities within the family regulation system. It then examines why using *Miranda v. Arizona* as the legal basis for the goals of the legislation will fail, even though the legislation is colloquially called civil *Miranda* warnings. Part II turns to an important but heretofore unexamined rationale for statutorily mandating civil *Miranda* warnings: the Fourth Amendment. While Fifth Amendment *Miranda* rights are limited to criminal self-incrimination, the Fourth Amendment's prohibition against unreasonable search and seizure is not so narrow.<sup>32</sup> This Note articulates that CPS home searches do not fall under the special needs exception to the Fourth Amendment due to the underlying threat of criminal involvement and often fall short under the exigent circumstances and consent exceptions to the warrant requirement of the Fourth Amendment.<sup>33</sup> Since civil courts do not have a Fourth Amendment exclusionary rule, as do their criminal counterparts, this Note argues that the only way for the Fourth Amendment to be meaningful in the family regulation context is for parents to be aware of their rights at the onset of an investigation.<sup>34</sup> Since most parents

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*Racial Justice Must Interrogate It*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Feb. 17, 2021), <https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/> [<https://perma.cc/NHQ6-VJ4M>] (describing that activists prefer the term “family policing system” as a better way to describe its effect on impacting communities).

31. This Note uses the terms “family regulation system” and “family policing system” in lieu of “child welfare system” to reflect its current purpose more adequately, as well as to follow the terminology used by parents directly impacted by the system.

32. See *infra* Part II for a discussion of the scope of the Fourth Amendment and its extension to non-law enforcement government officials.

33. Here this Note expands upon the seminal piece by Doriane Lambelet Coleman, who first looked at the special needs exception in the CPS context. While Coleman focuses on the collaboration between CPS and law enforcement, this Note argues that the pervasive threat of police involvement, even absent collaboration, is sufficient to render the special needs doctrine inapplicable. See Coleman, *supra* note 5, at 480–90.

34. *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984); see also *In re Christopher B.*, 147 Cal. Rptr. 390, 393–94 (Ct. App. 1978) (finding that the policy implications of an exclusionary rule in family court outweigh its potential evidentiary benefits); *In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985) (finding that an exclusionary rule in family court would lead to unacceptable outcomes).



are unaware of the full set of implications of a CPS investigation,<sup>35</sup> statutorily enacted civil *Miranda* warnings—also called a Parent’s Bills of Rights—should be widely enacted. Part III provides the first systematic research into states that have successfully enacted such legislation. It examines the impact of the Parents’ Bill of Rights in Connecticut and concludes with concrete suggestions—specific statutory language and interim solutions—for other states to use, based on the successes and limitations of the Connecticut legislation.<sup>36</sup>

#### Part I: The Family Regulation System as it is Today

Part I provides background on important Supreme Court precedents relating to parental rights and examines the impact that CPS’s policies have on low-income communities of color. Section A examines incongruities in Supreme Court cases: the Court strongly upholds a parent’s fundamental right to raise one’s child but leaves procedural protections largely to the discretion of the state and local courts. Section B describes how current CPS practices exacerbate racial and socioeconomic inequities. Finally, Section C explains why the legal basis for criminal *Miranda* rights is unlikely to produce a civil family law equivalent through the courts.

##### A. Constitutional Protections & Limitations in the Family Regulation System

A parent’s right to raise their child is one of the most fundamental liberty interests recognized by the Supreme Court.<sup>37</sup> Parents have the right to make decisions concerning the care, custody, and control of their children under the Due Process Clause of the Fourteenth Amendment.<sup>38</sup> The Court has protected this right in a wide array of situations: by striking down a law that restricts education of

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35. Coleman, *supra* note 5, at 430 n.38. See *infra* Section I.A for a discussion of the implications of a CPS investigation. Some of the implications include the removal of one’s children, criminal charges being filed, the inability to apply to certain jobs, and, lastly, the “civil death penalty,” which is the legal termination of parental rights. *Id.*

36. See CONN. GEN. STAT. § 17a-103d (2011).

37. Troxel v. Granville, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case—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.”).

38. *Id.* at 65–66.

children in a foreign language,<sup>39</sup> by finding that a statute forcing parents to send their children to public school was unconstitutional,<sup>40</sup> and by holding that a Washington law that allowed any third party to request visitation rights over a parent's objection violated parents' rights.<sup>41</sup> This is not just a fundamental right for parents, it is also an essential right for children, even when their guardians have not been the perfect parents.<sup>42</sup> The Court has stated that children have a constitutionally protected interest in maintaining the "emotional attachments that derive from the intimacy of daily association" with parents.<sup>43</sup>

The fundamental tension in family law is between respecting one's right to family autonomy and deference to governmental policy goals, which include protecting children.<sup>44</sup> The legal right to care for one's child reaches its limitations when the child's safety is called into question.<sup>45</sup> The court may become involved in parents' decisions after a civil child welfare investigation has been opened. If the court determines that the allegations of abuse or neglect are well-founded, it can order the parent to participate in services, continue to monitor the family, or remove the child from the home.<sup>46</sup> The most draconian step is legally terminating parental rights, an often-irreversible decision that strips parents of all legal connections to their children.<sup>47</sup>

The Supreme Court has found that parents entangled in neglect or abuse proceedings have special procedural due process protections. In *Santosky v. Kramer*, the Court struck down a New York statute that allowed the state to terminate parental rights after finding

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39. Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

40. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

41. Troxel, 530 U.S. at 68.

42. Smith v. Org. of Foster Fams., 431 U.S. 816, 843–44 (1977) (emphasizing the importance of the family relationship).

43. *Id.* at 844.

44. D. KELLY WEISBERG & SUSAN FRELUCH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS xxxvii (Wolters Kluwer, 6th ed. 2006).

45. Brokaw v. Mercer, 235 F.3d 1000, 1019 (7th Cir. 2000) ("[T]his liberty interest in familial integrity is limited by the compelling governmental interest in the protection of children particularly where the children need to be protected from their own parents.") (quoting Croft v. Westmoreland Cnty. Child. & Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997)).

46. Vivek Sankaran, *Moving Beyond Lassiter: The Need for a Federal Statutory Right to Counsel for Parents in Child Welfare Cases*, U. MICH. SCHOLARSHIP REPOSITORY 1, 5 (2017).

47. *Id.* at 5.

that a child is permanently neglected, based only on a “fair preponderance of the evidence.”<sup>48</sup> The Court ruled that, due to the fundamental liberty interest at stake, the correct burden of proof was “clear and convincing evidence” at a minimum.<sup>49</sup> In *Stanley v. Illinois*, the Court judged that the Fourteenth Amendment requires a hearing on a parent’s fitness before a child is to be placed in foster care.<sup>50</sup>

Despite appellate courts’ description of the termination of parental rights as the “civil death penalty,”<sup>51</sup> the Supreme Court has provided limited guidance on the procedural protections required in these cases.<sup>52</sup> In *Lassiter v. Department of Social Services*, the Court declined to hold that the Constitution requires the appointment of counsel for parents in termination of parental rights proceedings.<sup>53</sup> The Court left it up to the trial court’s discretion whether to appoint counsel.<sup>54</sup> The Court’s “hierarchy of deprivations,” in which the Court views the physical deprivation of liberty, even briefly, as vastly more severe than the loss of one’s own child,<sup>55</sup> can be baffling to parents and caretakers. Legal commentators have pointed out the incongruity and absurdity of this: the Court sees a “one-day jail sentence to be more intrusive on liberty than a lifelong revocation of the parental right to the care, custody, and companionship of a child.”<sup>56</sup>

The *Lassiter* decision effectively leaves it up to state legislatures to determine what indigent parents deserve, thus creating a vast disparity across states regarding the right to counsel and parents’ awareness of their basic rights in family court proceedings.<sup>57</sup>

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48. 455 U.S. 745, 749 (1982).

49. *Id.* at 769.

50. 405 U.S. 645, 649 (1972) (finding that the state cannot presume that unmarried fathers are unsuitable and neglectful parents without a hearing).

51. Sankaran, *supra* note 46, at 5 & n.33 (citing to cases in which the court described terminating parental rights as the “civil death penalty”).

52. *Id.* at 5–6.

53. 452 U.S. 18, 33–34 (1981).

54. *Id.*

55. Amy Sinden, “*Why Won’t Mom Cooperate?: A Critique of Informality in Child Welfare Proceedings*,” 11 YALE J. L. & FEMINISM 339, 359 (1999).

56. Anthony Trombley, *Alone Against the State: Lassiter v. Department of Social Services*, 15 U.C. DAVIS L. REV. 1123, 1136–37 (1982); *see also* Douglas Besharov, *Terminating Parental Rights: The Indigent Parent’s Right to Counsel After Lassiter v. North Carolina*, 15 FAM. L. Q. 205, 219 (1981) (discussing negative consequences of the *Lassiter* decision).

57. Sankaran, *supra* note 46, at 6 (“In many ways, in the three decades after *Lassiter*, the inconsistency and disuniformity predicted by Trombley has borne out.”).

For example, Nevada simply provides that the court “may” appoint an attorney in termination of parental rights trials.<sup>58</sup> Even when states appoint counsel to clients during family court proceedings, parents are still unrepresented during the lengthy CPS investigations that occur before a formal case is filed.<sup>59</sup> Lack of parental legal representation early in the process can have detrimental effects once a case reaches the trial stage.<sup>60</sup> While a parent technically has the right to seek out legal advice at any point of the CPS investigation, rarely does a parent understand that this right exists or have the financial means to invoke it.<sup>61</sup>

### B. Disproportionate Impact on Low-Income Communities of Color

Section B highlights the alarmingly disproportionate rate at which low-income communities of color are surveilled and investigated by CPS, an impact that mainstream media and racial justice movements have largely failed to address.<sup>62</sup> The disproportionate

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58. Sankaran, *supra* note 46, at 7 (“Likewise, in Nevada, the statute does not require the appointment of counsel but instructs courts that they ‘may’ appoint one.”); *see also* NEV. REV. STAT. § 128.100(3) (2021); *see also* Letesheia O. v. Nevada, 115 P.3d 223, 225 (Nev. 2005) (finding that “no absolute right to counsel in termination proceedings exists in Nevada”).

59. *See* COMM’N ON PARENTAL LEGAL REPRESENTATION, INTERIM REPORT TO CHIEF JUDGE DIFIORE 16 (2019), <https://www.ils.ny.gov/files/2019%20Commission%20on%20Parental%20Legal%20Representation%20Interim%20Report.pdf> [<https://perma.cc/29E2-67GH>] (explaining that in New York, a parent’s “access to counsel is contingent on the filing of a petition by CPS and the parent’s appearance in court” and recommending that access to legal representation be provided earlier in the process).

60. *Id.* at 16–17 (describing that earlier representation can prevent unnecessary separation of children from their parents and has positive benefits).

61. Burrell, *supra* note 11, at 145 (“Most parents that I have encountered have no idea what their rights are, especially with respect to the sharing of information and access to their homes when a child protective worker knocks on the door.”); COMM’N ON PARENTAL LEGAL REPRESENTATION, *supra* note 59, at 17 (discussing the lack of representation afforded to parents during the investigatory period in New York and arguing that people who are financially able would seek counsel at that stage).

62. Tehra Coles, Zainab Akbar, Emma Ketteringham & Lauren Shapiro, *The Sad Omission of Child Welfare From Mainstream Discussion on Race*, IMPRINT (Aug. 6, 2020, 5:58 PM), <https://imprintnews.org/opinion/sad-omission-child-welfare-mainstream-discussion-race/46315> [<https://perma.cc/PXW3-6DUU>] (describing the lack of discussion of the family regulation system when discussing racial injustice). While it has mainly been left out of the mainstream narrative,

separation of children of color from their parents fits within a historic framework of racial oppression—from the separation of Black families during slavery<sup>63</sup> to the mid-nineteenth century boarding schools intended to “civilize” indigenous children.<sup>64</sup> In many cities, these inequities fall most intensely upon Black women. Some advocates contend that CPS has “become for [B]lack women what the criminal-justice system [is] for [B]lack men.”<sup>65</sup> As leading family law scholar Dorothy Roberts said, “[i]f you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families.”<sup>66</sup> More than half of Black children will deal with a CPS investigation in their childhood, compared with 28% of white children.<sup>67</sup> According to 2018 data, Black children were only 13.71% of the population, yet comprised nearly 23% of children in foster care.<sup>68</sup> The socioeconomic inequities are equally stark: families earning below

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there are notable exceptions. For example, Black Lives Matter Los Angeles started a campaign called Reimagine Child Safety, in which they demanded that Los Angeles end its partnership between the local CPS and law enforcement. See Chris Martin, *#ReimagineChildSafety, Get Cops Out of Child Protective Services*, ORGANIZEFOR, <https://campaigns.organizefor.org/petitions/reimaginechildsafety-get-cops-out-of-child-protective-services> [<https://perma.cc/CL68-JLXX>].

63. For a discussion of the historical origins of the separation of Black families, see generally Gwendoline M. Alphonso, *Political-Economic Roots of Coercion—Slavery, Neoliberalism, and the Racial Family Policy Logic of Child and Social Welfare*, 11 COLUM. J. RACE & L. 471 (2021); WALTER JOHNSON, *SOUL BY SOUL: LIFE INSIDE THE ANTEBELLUM SLAVE MARKET* (1999); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); MARIE JENKINS SCHWARTZ, *BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH* (2000); WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA* (1995); STEVEN MINTZ, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* (2004).

64. Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME MAG. (Mar. 17, 2021, 9:00 AM), <https://time.com/5946929/child-welfare-black-families/> [<https://perma.cc/T3WZ-MMXX>]; see also Theresa Rocha Beardall & Frank Edwards, *Abolition, Settler Colonialism, and the Persistent Threat of Indian Child Welfare*, 11 COLUM. J. RACE & L. 533, 546–65 (2021) (analyzing the change in family separation since the passage of the Indian Child Welfare Act).

65. MacFarquhar, *supra* note 12.

66. ROBERTS, *supra* note 63, at 6.

67. Coles, *supra* note 62.

68. *Disproportionality and Race Equity in Child Welfare*, NAT’L CONF. STATE LEGISLATURES (Jan. 26, 2021), <https://www.ncsl.org/research/human-services/disproportionality-and-race-equity-in-child-welfare.aspx> [<https://perma.cc/W4AB-XH82>].

the poverty line are twenty-two times more likely to have CPS involved in their lives than those whose income is above the poverty line.<sup>69</sup>

Systemic inequities based on race and class are pervasive throughout the distinct stages of a CPS case, which collectively can last from a couple of months to years. A CPS case typically begins with a call to a child abuse hotline.<sup>70</sup> Anyone can place this call—from a concerned neighbor to an abusive ex-boyfriend to a mandated reporter. Mandatory reporting laws in New York and throughout the country require physicians, therapists, hospital workers, teachers, social services workers, and mental health professionals to report to the State Central Registry if they believe there is reasonable cause to suspect child abuse or maltreatment.<sup>71</sup> Indigent families are unequally exposed to surveillance and monitoring at this stage, since families must “open themselves up to the state as a condition of receiving public benefits.”<sup>72</sup> Caretakers living in low-income communities are more likely to use public services than caretakers of greater socioeconomic privilege.<sup>73</sup> Parents are surveilled by a variety of social service providers, including shelter workers, public housing employees, public school officials, and hospital staff.<sup>74</sup> Not only are they monitored at higher rates, but they are judged by racialized constructions of parenthood, effectively

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69. Martin Guggenheim, *The Role of Counsel in Representing Parents*, A.B.A. (Feb. 1, 2016), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/child\\_law\\_practice/vol-35/february-2016/the-role-of-counsel-in-representing-parents/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-35/february-2016/the-role-of-counsel-in-representing-parents/) [https://perma.cc/547T-NVD8]. In 2022, the poverty line for a household of four people is a joint income of \$27,750. Annual Update of the HHS Poverty Guidelines, 87 Fed. Reg. 3315, 3316 (Jan. 12, 2022).

70. In New York, the child abuse hotline is called the State Central Registry. See N.Y. SOC. SERV. LAW § 413 (McKinney 2022) (listing the mandatory reporters required to place a call to the State Central Registry when they have reasonable cause to suspect child abuse or maltreatment).

71. Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 851 (2010) (“Currently, all fifty states and the District of Columbia require reporting from medical personnel, teachers/school officials, and social workers . . . .”); see, e.g., N.Y. SOC. SERV. LAW § 413(a) (McKinney 2022) (listing mandatory reporters).

72. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 612 (2020).

73. Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the “Womb- to-Foster-Care Pipeline”*, 20 CUNY L. REV. 77, 87 (2016).

74. *Id.*

concentrating “state scrutiny on Black mothers in particular.”<sup>75</sup> A 2010 study by the Philadelphia Children’s Hospital showed that doctors were more likely to order tests looking for signs of abuse in Black children than white children when they came in with similar head trauma.<sup>76</sup>

After a call has been placed, CPS begins its investigation by dispatching a caseworker to the parent’s home to determine if children are at risk. In New York, CPS has 24 to 48 hours to contact the child and, 60 days after that, to conduct a thorough investigation to assess the safety of the child.<sup>77</sup> This is when the state builds its case against a parent. Statements made to a caseworker during this period are often put into the initial court petition filing for neglect or abuse.<sup>78</sup> CPS often pathologizes parents for many of the problems that predictably stem from poverty.<sup>79</sup> As Professor Kelley Fong explains, “[m]others, especially mothers marginalized by race and class, are acutely aware that authorities . . . are . . . evaluating their motherhood against an ideal that fails to account for the systemic challenges they face.”<sup>80</sup>

During an investigation, CPS workers often use child welfare risk assessment measures to determine the severity of risk to children if they were to stay in the guardianship of the parent.<sup>81</sup> Standard risk

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75. Fong, *supra* note 72, at 615.

76. Joanne N. Wood et al., *Disparities in the Evaluation and Diagnosis of Abuse Among Infants With Traumatic Brain Injury*, 126 AM. ACAD. OF PEDIATRICS 408, 412 (2010).

77. N.Y.C. ADMIN. FOR CHILD.’S SERVS., *supra* note 2.

78. *Hearing*, *supra* note 4, at 40–41 (testimony from the Center for Family Representation) (“The statements parents make to caseworkers are often included in petitions or used in Court. Parents are often encouraged to share information that may not directly relate to the reason that ACS was initially called . . . . Once the matter comes to Court it is the parent’s word against the caseworker.”).

79. Dorothy Roberts, *Child Protection as Surveillance of African American Families*, 36 J. SOC. WELFARE & FAM. L. 426 (2014) (arguing that the United States has made a policy choice to investigate parents instead of tackling poverty’s structural roots).

80. Fong, *supra* note 72, at 615–16; *see also* Sinikka Elliott & Sarah Bowen, *Defending Motherhood: Morality, Responsibility, and Double Binds in Feeding Children*, 80 J. MARRIAGE & FAM. 499 (2018) (observing that poor mothers practice “defensive mothering”); Susila Gurusami, *Motherwork Under the State: The Maternal Labor of Formerly Incarcerated Black Women*, 66 SOC. PROBLEMS 128 (2019) (examining “how state surveillance under post-release supervision and child welfare services shapes and constrains formerly incarcerated Black women’s mothering practices”).

81. Tomi Gomory & Daniel Dunleavy, *Social Work and Coercion*, ENCYCLOPEDIA OF SOCIAL WORK (May 24, 2008) (discussing the risk assessment

assessment tools focus in on certain characteristics, like poverty and the presence of “nontraditional household residents,” even when those factors don’t always predict higher risks of neglect or maltreatment.<sup>82</sup> For example, the identification of a “dirty home” may be used in a risk assessment of a parent’s inability to care for her children, but it just as easily could be a telling indicator of poverty.<sup>83</sup> Even adequate risk assessment measures cannot account for the cognitive biases that plague CPS caseworkers, including confirmatory biases in which people focus on evidence that supports their baseline assumptions of a certain person.<sup>84</sup>

It is worth noting that these inequities were not lost on the Supreme Court nearly forty years ago. In *Santosky v. Kramer*, the Court described the root of these inequities: “Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias.”<sup>85</sup> The State’s “ability to assemble its case almost inevitably dwarfs the parents’ ability to mount a defense.”<sup>86</sup> The Court went on to explain that the State even “has the power to shape the historical events that form the basis for termination.”<sup>87</sup>

Individual states’ child welfare statutory schemes can further intensify racial and class biases. Legislation prohibiting an act is supposed to be particular and precise.<sup>88</sup> As Justice Sutherland stated in *Connally v. General Construction Co.*, a statute “which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning . . . violates the first essential of due process of law.”<sup>89</sup> However, child maltreatment statutes for abuse and neglect are notorious for their vagueness.<sup>90</sup> For

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tools used by social workers, as well as providing a critique of the use of coercion in the family regulation system).

82. *Id.* at 10.

83. *Id.*

84. *Id.*

85. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (citation omitted) (finding that due process requires that the state support its allegations by at least clear and convincing evidence).

86. *Id.*

87. *Id.*

88. *Connally v. Gen. Constr. Co.*, 269 U.S. 385 (1926).

89. *Id.* at 391.

90. Daniel Pollack et al., *The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives*, 22 U.



example, California describes “physical abuse” as “non-accidental bodily injury that has been or is being inflicted on a child.”<sup>91</sup> Such ambiguity effectively leaves it up to individual caseworkers to judge what constitutes abuse or neglect.<sup>92</sup> As Professor Doriane Coleman points out, California has “no intention to proscribe such culturally acceptable practices as ear piercing, male circumcision, or reasonable corporal punishment” as abuse, yet all would fit within the statutory language.<sup>93</sup>

Lastly, the family regulation system disproportionately impacts indigent parents who may lack the financial resources to seek out legal guidance in the absence of a state-appointed defender. Since there is no right to counsel throughout the investigatory procedure, indigent parents seldom have the resources to find or pay for legal guidance.<sup>94</sup> An attorney for the Center for Family Representation, a holistic defense organization in New York, says “[w]hile many parents with means would immediately call an attorney if a caseworker were to contact them, the families that ACS usually investigates and prosecutes do not have that ability.”<sup>95</sup> The above factors compound across the lengthy course of CPS cases and court proceedings to cause disproportionate harm to low-income communities of color.<sup>96</sup>

### C. The Limitations of *Miranda v. Arizona* in the Family Court Context

Although the colloquial term for legislative bills that propose extending *Miranda*-style warnings into the civil realm is civil *Miranda*

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MIA, INT’L & COMP. L. REV. 129, 132–33 (2015) (arguing that “child maltreatment statutes and definitions can be notoriously vague”); Coleman, *supra* note 5, at 428 (“Legal definitions of ‘abuse’ and ‘neglect’ are typically vague and overbroad, often purposefully so.”).

91. Coleman, *supra* note 5, at 428–29.

92. *Id.*

93. *Id.*

94. See *supra* Section I.A (discussing, in depth, the lack of legal representation for parents during family court proceedings and child welfare investigations).

95. *Hearing, supra* note 4, at 37 (testimony of the Center for Family Representation).

96. See Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020), <https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480> [<https://perma.cc/9QDN-5QBV>] (arguing for the abolition of the child regulatory system due to the adverse impact on communities of color).

warnings, these warnings will most likely not be required through the courts. *Miranda v. Arizona* was the landmark case in which the Supreme Court ruled that, under the Fifth Amendment, a person must be informed of their right against self-incrimination and their right to speak with an attorney before being interrogated by a police officer.<sup>97</sup> The Court explained that the suspect in a criminal case needed “something more” than just the *availability* of the Fifth Amendment privilege against compelled self-incrimination and a subsequent “totality-of-the-circumstances test,” given the inherent baseline coercion of a police investigation.<sup>98</sup> The “something more” was the *Miranda* warning, in which police needed an express waiver of rights from the suspect before proceeding with the interrogation.<sup>99</sup> The suspect’s waiver must be made voluntarily, knowingly, and intelligently.<sup>100</sup> Trial courts determine whether defendants have properly waived their *Miranda* rights by looking at a variety of factors including the accused’s age, their ability to speak with an attorney, the method of the interrogation, and the knowledge of the charge against them.<sup>101</sup> To trigger *Miranda* warnings, three factors are required: 1) the interrogation is conducted by a law enforcement officer or someone acting as the officer’s agent; 2) there is an interrogation; and 3) the defendant is in custody or otherwise “deprived of [their] freedom of action in a significant way.”<sup>102</sup> Today, the phrase *Miranda* warnings is a part of our everyday lexicon.<sup>103</sup> As Chief Justice Rehnquist stated in *Dickerson v. United States*, “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.”<sup>104</sup>

Circuits and states are currently split on whether *Miranda* warnings are required from CPS agents when they are acting “as agents of law enforcement” during a traditional custodial

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97. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

98. *Dickerson v. United States*, 530 U.S. 428, 442 (2000) (“The Court therefore concluded that something more than the totality test was necessary.”).

99. Geoffrey S. Corn, *The Missing Miranda Warning: Why What You Don’t Know Really Can Hurt You*, 2011 UTAH L. REV. 761, 761 (2011).

100. *Miranda*, 384 U.S. at 444.

101. See, e.g., MARY BABB MORRIS, GEORGIA PROCEDURE: CRIMINAL PROCEDURE § 27:22 (2022) (listing factors to consider).

102. *Miranda*, 384 U.S. at 444.

103. Bernice B. Donald & Nicole Langston, *Fifty Years Later and Miranda Still Leaves Us with Questions*, 50 TEX. TECH L. REV. 1, 1 (2017).

104. 530 U.S. 428, 443 (2000).

interrogation.<sup>105</sup> In 2018, the Supreme Court denied certiorari on *Jackson v. Ohio*, which asked whether an interrogation that would violate the Fifth Amendment if conducted by the police would also violate the Fifth Amendment if conducted by a CPS caseworker.<sup>106</sup> The Ohio Supreme Court found that the CPS agent did not need to Mirandize Jackson when interviewing him in jail, even though she had a statutory duty to subsequently provide all of the interview information to the police.<sup>107</sup>

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105. Compare *Jackson v. Conway*, 763 F.3d 115, 135–36 (2d Cir. 2014) (finding that a CPS caseworker’s interview of petitioner constituted an “interrogation” subject to *Miranda*), *Saranchack v. Beard*, 616 F.3d 292, 304 (3d Cir. 2010) (explaining that an interview by a caseworker with a person “charged with offenses involving children” would violate the Fifth Amendment because the interview would have “a high probability of leading to informant testimony at a criminal trial”), *Buster v. Commonwealth*, 364 S.W.3d 157, 164 (Ky. 2012) (“[T]he fact that Bell is a social worker rather than a police officer does not mean that his actions could not violate Appellant’s rights under *Miranda* . . .”), *Commonwealth v. Gatewood*, No. 1420-21-1, 2013 WL 215926, at \*6 (Va. Ct. App. Jan. 22, 2013) (upholding the suppression of statements with CPS worker), *In re Welfare of J.W.*, 415 N.W.2d 879, 882 (Minn. 1987) (“[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment.”) (quoting *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977)), *State v. Harper*, 613 A.2d 945, 949–50 (Me. 1992) (finding a Sixth Amendment violation because the DHS worker “is clearly a government agent”), *People v. Kerner*, 538 N.E.2d 1223, 1225 (Ill. App. Ct. 1989) (finding a Department of Children and Family Services employee who acted “as an agent of the prosecution” was subject to the *Miranda* requirements), *State v. Deases*, 518 N.W.2d 784, 790 (Iowa 1994) (holding that a state official who conducts a custodial interrogation that would require a *Miranda* warning if conducted by a police officer is also required to give a *Miranda* warning in order to protect the defendant’s constitutional rights), *State v. Helewa*, 537 A.2d 1328, 1334 (N.J. Super. Ct. App. Div. 1988) (holding that the close working relationship between Division of Youth and Family Services (DYFS) and the Middlesex County Prosecutor’s Office equated the DYFS caseworker with a law enforcement officer for purposes of *Miranda* during a custodial interview), and *State v. Oliveira*, 961 A.2d 299, 310–11 (R.I. 2008) (finding that child protective investigator was an agent of the state for purposes of *Miranda*), with *State v. Jackson*, 116 N.E.3d 1240, 1240, 1246 (Ohio 2018) (finding that the social worker was not an agent of law enforcement for purposes of *Miranda*), *State v. Bernard*, 31 So. 3d 1025, 1035 (La. 2019) (finding that the child protection officer was not an agent of law enforcement for purposes of *Miranda*), and *Hennington v. State*, 702 So. 2d 403, 409 (Miss. 1997) (finding that social worker was not required to read defendant his *Miranda* rights).

106. 116 N.E.3d 1240, 1241 (Ohio 2018), cert. denied, 139 S. Ct. 2621 (2019).

107. *Id.*

Even in jurisdictions where courts have held that CPS workers are required to provide *Miranda* warnings in certain custodial contexts, the warnings were not required at the CPS caseworker's initial point of contact with a parent, which is what civil *Miranda* legislation proposes. This is because *Miranda* warnings are solely concerned with defendant's rights against *criminal* self-incrimination. The Fifth Amendment states that "No person shall . . . be compelled in any *criminal* case to be a witness against himself."<sup>108</sup> The vast majority of CPS investigations do not lead to criminal charges and therefore do not implicate the Fifth Amendment.<sup>109</sup>

Family Court proceedings are viewed as civil proceedings, rather than criminal, and therefore do not receive Fifth Amendment protection.<sup>110</sup> One example of how this makes the courtroom procedure different: in New York, a judge may draw a negative inference from a parent's failure to testify in Family Court.<sup>111</sup> This does not make the interactions inherently less coercive or the threat of losing one's child any less traumatic. However, it does limit the power of the Fifth Amendment during the CPS investigatory period under our current legal landscape.

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108. U.S. CONST. amend. V (emphasis added).

109. See Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Green, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 358 (2012) (explaining that the majority of CPS searches do not involve law enforcement). While the majority of CPS cases do not implicate the Fifth Amendment, there are certain CPS-recommended service plans that can have severe criminal consequences for parents and implicate their Fifth Amendment rights. Parents are sometimes forced into a "confession dilemma" in which a parent is asked to confess to harming a child (therefore criminally implicating themselves) to be reunited with the child. See *Blanca P. v. Superior Ct.*, 53 Cal. Rptr. 2d 687, 696 (Cal. Ct. App. 1996) (noting that CPS used "the fact parents deny they have committed a horrible act as proof that they did it"); *In re Blakeman*, 926 N.W.2d 326, 334–36 (Mich. Ct. App. 2018) (calling this situation a "Hobbesian choice" because the parent is required to either (1) retract their innocence to complete DHS services and expose themselves criminally or (2) maintain their innocence and have parental rights terminated).

110. See, e.g., N.Y. FAM. CT. ACT § 580-316(g) (McKinney 2016) ("If a party called to testify at a civil hearing refuses to answer on the ground that the testimony may be self-incriminating, the trier of fact may draw an adverse inference from the refusal.").

111. *Id.*

## Part II: The Meaninglessness of the Fourth Amendment Without Adequate Warnings

While Fifth Amendment *Miranda* rights are limited to the threat of potential criminal self-incrimination, Fourth Amendment rights apply more broadly.<sup>112</sup> The Fourth Amendment provides the right for people to be secure in their houses, papers, and effects against unreasonable search and seizure.<sup>113</sup> A touchstone of the Fourth Amendment is whether the search and invasion of privacy is reasonable.<sup>114</sup> A search or seizure is generally viewed as unreasonable when conducted without a warrant with probable cause or when it does not fall within one of the recognized warrant exceptions, including “special needs” beyond law enforcement, exigent circumstances, and consent.<sup>115</sup> The probable cause requirement ensures that a rumor or strong suspicion will not alone justify violating the privacy rights of an individual.<sup>116</sup> Importantly, the warrant brings part of the process under the decision of a neutral magistrate—it must be issued by “a judicial officer, not by a policeman or Government enforcement agent.”<sup>117</sup>

A search of a home has historically been viewed as the gravest sort of intrusion.<sup>118</sup> In *Silverman v. United States*, Justice Stewart stressed that “[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from

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112. See *Camara v. Mun. Ct.*, 387 U.S. 523, 527–28 (1967) (holding that administrative inspections are subject to Fourth Amendment constraints); *Marshall v. Barlow’s, Inc.* 436 U.S. 307, 325 (1978) (finding that an inspector from the Occupational Safety and Health Administration’s warrantless inspections violated the Fourth Amendment).

113. U.S. CONST. amend. IV.

114. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

115. U.S. CONST. amend. IV. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (stating that a warrantless search must be “strictly circumscribed by the exigencies which justify its initiation”) (quoting *Terry v. Ohio*, 392 U.S. 1, 25–26 (1968)); *Ferguson v. City of Charleston*, 532 U.S. 67, 74 (2001) (articulating the “special needs” exception); *Horton v. California*, 496 U.S. 128, 141 (1990) (stating police may seize evidence in “plain view” without a warrant, even if it was not inadvertent); *Chimel v. California*, 395 U.S. 752, 766–67 (1969) (stating that a search incident to arrest is limited to the arrestee and the space from which they could reach for weapons or evidence); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (articulating that consent is one of the exceptions to the warrant requirement).

116. *Coleman*, *supra* note 5, at 460.

117. *Johnson v. United States*, 333 U.S. 10, 14 (1948).

118. *Silverman v. United States*, 365 U.S. 505, 511 (1961).

unreasonable governmental intrusion.”<sup>119</sup> In 1967, the Supreme Court made it clear that the reach of the Fourth Amendment goes beyond criminal investigations.<sup>120</sup> As Justice White said in *Camara v. Municipal Court*, “[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior.”<sup>121</sup> In *New Jersey v. T.L.O.*, the Supreme Court reiterated that the Fourth Amendment strictures are restraints imposed upon government action, not just police.<sup>122</sup>

While the Supreme Court has yet to speak on the Fourth Amendment in CPS investigations of parents’ homes, some circuits have been filling in the legal gap. Essentially all circuits agree that CPS agents are state actors, therefore placing them under the Fourth Amendment’s jurisprudence.<sup>123</sup> In addition, as the Supreme Court articulated in *Mincey v. Arizona*, the severity of the alleged crime does not in and of itself make a warrantless search permissible.<sup>124</sup>

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119. *Id.*

120. *See Camara v. Mun. Ct.*, 387 U.S. 523, 537 (1967) (finding that a city code provision allowing municipal health and safety inspectors to conduct warrantless searches into potential building code infractions violated a person’s Fourth Amendment rights).

121. *Id.* at 530.

122. 469 U.S. 325, 335 (1985) (“[T]his Court has never limited the Amendment’s prohibitions . . . to operations conducted by the police. Rather, [it] has long spoken of the Fourth Amendment’s strictures as restraints imposed upon ‘government action.’”) (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). *T.L.O.* dealt with the search by a school’s Vice Principal of a student’s purse. However, the Court upheld the search due to the “reasonableness, under all the circumstances, of the search.” *Id.* at 341.

123. *See Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (“[T]he strictures of the Fourth Amendment apply to child welfare workers, as well as all other governmental employees.”); *Roska v. Peterson*, 328 F.3d 1230, 1241–42 (10th Cir. 2003) (discussing the Fourth Amendment in the context of CPS and explaining that there is “no special need that renders the warrant requirement impracticable when social workers enter a home to remove a child, absent exigent circumstances.”); *Roe v. Tex. Dep’t of Protective & Regul. Servs.*, 299 F.3d 395, 401 (5th Cir. 2002) (“We have held that the Fourth Amendment regulates social workers’ civil investigations . . . .”); *Calabretta v. Floyd*, 189 F.3d 808, 813 (9th Cir. 1999) (“Any government official can be held to know that their office does not give them an unrestricted right to enter peoples’ homes at will.”); *see also Coleman*, *supra* note 5, at 471 (stating that no court has found child protective investigations to not constitute a search or seizure).

124. 437 U.S. 385, 394–95 (1978) (finding that there is no “murder scene exception” to the Fourth Amendment and that the severity of the crime does not

In Part II, this Note analyzes the pervasive and underexamined Fourth Amendment violations that occur in CPS investigations. Section A lays out and elaborates upon Doriane Lambelet Coleman’s argument that the special needs doctrine is inapplicable to the CPS investigatory period due to CPS’s dual civil and criminal purpose under the Supreme Court case *Ferguson v. City of Charleston*.<sup>125</sup> It follows, therefore, that the Fourth Amendment requires CPS caseworkers to have a warrant with probable cause, “voluntary” consent, or exigency to enter the home. Section B argues that a warrant with probable cause, adequate consent, or exigent circumstances is often lacking during the initial point of contact between a parent and a CPS caseworker. Lastly, in Section C, this Note turns to the missing piece of the puzzle: the remedy. Whereas in the criminal context defendants can seek an exclusionary order when a Fourth Amendment violation has occurred,<sup>126</sup> in the civil context of child welfare cases, no comparable remedy is available.<sup>127</sup> Since the Court sees unreasonable search and seizure committed by non-law enforcement and law enforcement to be equally concerning,<sup>128</sup> there must be—to use the Court’s own language—“something more” to protect these rights.<sup>129</sup> As Part III discusses, a Parents’ Bill of Rights or civil *Miranda* warning enacted by the legislature may be that “something more” in the family regulation system context.

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mean there should not be a neutral and objective magistrate reviewing the warrant). This rationale was recently used in the Pennsylvania Supreme Court case *In re Y.W.-B.*, in which the court found that “cases involving possible harm to children are the same as those developed in criminal cases and that no perceived increase in the societal interest involved alters these standards.” 265 A.3d 602, 619 (Pa. 2021).

125. Coleman, *supra* note 5, at 481–84 (2005); 532 U.S. 67 (2001).

126. Mapp v. Ohio, 367 U.S. 643 (1961).

127. I.N.S. v. Lopez-Mendoza, 468 U.S. 1032 (1984) (finding that the exclusionary rule does not apply in a civil deportation hearing); *see also* People *ex rel.* A.E.L., 181 P.3d 1186 (Colo. App. 2008); State of New Mexico *ex rel.* CYFD v. Michael T., 172 P.3d 1287 (N.M. Ct. App. 2007); *In re* Nicholas R., 884 A.2d 1059 (Conn. App. 2005); *In re* Corey P., 697 N.W.2d 647 (Neb. 2005); State *ex rel.* A.R. v. C.R., 982 P.2d 73 (Utah 1999) (cases holding that the exclusionary rule does not apply to family court).

128. Camara v. Mun. Ct., 387 U.S. 523, 530 (1967).

129. Dickerson v. United States, 530 U.S. 428, 442 (2000).

### A. The Special Needs Exception to the Fourth Amendment

Although administrative search doctrine has been described as being “notoriously unclear,” the special needs exception generally exists when two conditions are met.<sup>130</sup> The first condition is when the government’s main “programmatic purpose” is advancing a special need *other* than law enforcement and criminal sanctions.<sup>131</sup> The second prong is that the government’s search is deemed reasonable based on a balance of public and private interests, as opposed to a probable cause or reasonable suspicion standard.<sup>132</sup> Multiple circuit courts have found that the special needs exception does not apply to CPS investigations or have refused to affirmatively decide whether it does.<sup>133</sup> By applying the Court’s “primary programmatic purpose” doctrine from *Ferguson*, this Note expands upon Professor Coleman’s articulation that the special needs exception is inapplicable to CPS investigations, since they are insufficiently divorced from criminal and law enforcement

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130. Eve Brensike Primus, *Disentangling Administrative Searches*, 111 COLUM. L. REV. 254, 257 (2011) (stating that administrative searches are “notoriously unclear”); *see also* Gupta-Kagan, *supra* note 109, at 358 (2012) (citing to Primus’s work and others to explain that the “academy has criticized the special needs doctrine” for being confusing).

131. *Ferguson v. City of Charleston*, 532 U.S. 67, 81–82 (2001).

132. *See Chandler v. Miller*, 520 U.S. 305, 309–12 (1997) (finding that a statute violated the Fourth Amendment after balancing an individual’s privacy expectations against the state’s purpose in enacting the statute); *Nat’l Treasury Emp.’s Union v. Von Raab*, 489 U.S. 656, 656 (1989) (conducting a similar balancing of individual privacy interests against the state’s interest).

133. *See Gates v. Tex. Dep’t of Protective and Regul. Servs.*, 537 F.3d 404, 422 (5th Cir. 2008) (categorically rejecting the special needs exception for CPS investigations); *Roska v. Peterson*, 328 F.3d 1230, 1242, 1249–50 (10th Cir. 2003) (finding that the Fourth Amendment controls CPS warrantless entries and searches of a home, but leaving the door open for the possible application of special needs exceptions when the child is already in the system); *Good v. Dauphin Cnty. Soc. Servs. for Child. & Youth*, 891 F.2d 1087, 1092 (3d Cir. 1989) (requiring a court order, exigency, or adequate consent for a parent to enter); *Andrews v. Hickman Cnty.*, 700 F.3d 845, 859 (6th Cir. 2012) (requiring a warrant, consent, sufficient grounds to believe that exigent circumstances exist, or another recognized warrant exception); *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (requiring consent, exigent circumstances, a court order, or probable cause that the child’s condition will be seriously endangered if they are not taken into immediate custody); *Tenenbaum v. Williams*, 193 F.3d 581, 603–05 (2d Cir. 1999) (refusing to answer the question of whether the special needs exception applies to CPS searches). The Fourth Circuit is the only circuit that has found that CPS workers may be subject to a lower Fourth Amendment scrutiny than their criminal counterparts. *Wildauer v. Frederick Cnty*, 993 F.2d 369, 372–73 (4th Cir. 1993).



ends.<sup>134</sup> Josh Gupta-Kagan has recently articulated that Coleman’s approach overstates CPS and law enforcement collaboration.<sup>135</sup> Gupta-Kagan insightfully argues that the special needs doctrine should distinguish instead between those searches which implicate fundamental constitutional rights and those that do not, as opposed to a bright-line rule distinguishing between searches that implicate law enforcement and those that do not.<sup>136</sup> Until future court rulings provide for such distinctions, this Note argues that, even though most CPS cases do not end up actively involving law enforcement, the constant underlying *threat* of criminal involvement is sufficient to render the current special needs doctrine inapplicable. As Coleman has previously articulated, this threat is pervasive in *Ferguson* and in CPS investigations.<sup>137</sup>

In *Ferguson v. City of Charleston*, the Supreme Court rejected the special needs exception for hospital workers’ warrantless searches of pregnant women’s urine for cocaine and other drugs.<sup>138</sup> The Court explained that the hospital scheme did not fall within the special needs exception because the primary programmatic purpose was tied to the threat of law enforcement and criminal prosecution.<sup>139</sup> The inspection of the women’s urine in the hospital had a dual civil purpose of providing treatment options and a criminal purpose of referring the

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134. Coleman, *supra* note 5, at 497. Even when circuits have found there is no special needs exception, many child welfare agencies across the country operate as if the Fourth Amendment does not apply to their investigations. As Josh Gupta-Kagan articulates, “Fourth Amendment concepts appear to be largely foreign to the day-to-day operations of child protection investigations.” Gupta-Kagan, *supra* note 109, at 364. However, many states have written into statutes an emergency exception to the need for consent or a warrant when a caseworker believes that a child is in *imminent danger*. See *infra* Section III.C (outlining New York State’s emergency exceptions to the need for consent or a warrant); *Hearing*, *supra* note 4, at 144 (testimony of Chris Gottlieb, Co-Director, NYU Family Defense Clinic) (explaining the safeguards in place in New York). These statutory exceptions are analogous to the exigent circumstance’s exception to the Fourth Amendment, which allows for an intrusion into someone’s home without a warrant when there is probable cause and “there is compelling need for official action and no time to secure a warrant.” *Michigan v. Tyler*, 436 U.S. 499, 509 (1978).

135. Gupta-Kagan, *supra* note 109, at 358.

136. *Id.* at 357–58.

137. Coleman, *supra* note 5, at 497.

138. *Ferguson*, 532 U.S. at 84.

139. *Id.* at 83–84 (finding that the program’s primary purpose was to use “the threat of arrest and prosecution in order to force women into treatment” and that the “extensive involvement of law enforcement officials at every stage of the policy” meant that this does not fit within the special needs exception).

women who tested positive to law enforcement.<sup>140</sup> The drug screening policy stated that the hospital staff should “identify/assist pregnant patients suspected of drug abuse,”<sup>141</sup> provide referrals to substance abuse clinics,<sup>142</sup> and, lastly, incorporate the threat of law enforcement intervention to provide “the necessary ‘leverage’ to make the [p]olicy effective.”<sup>143</sup> When a mother tested positive, the police were to be notified.<sup>144</sup>

Like the hospital’s warrantless search in *Ferguson*, CPS holds a dual civil and criminal function—providing social services and support to families, while simultaneously reserving the right to assist in prosecuting them.<sup>145</sup> The investigatory purposes of CPS and law enforcement agencies inevitably overlap. Both CPS and law enforcement investigate cases where a parent or legal guardian is suspected of child abuse or neglect.<sup>146</sup> Law enforcement’s mandate is more expansive in that it includes all serious forms of child abuse or neglect, not only those in which the parent or guardian is accused of abuse.<sup>147</sup> However, it is also limited to cases where there is an alleged crime, which does include less severe forms of neglect.<sup>148</sup> The ultimate result is that most investigations fall under the umbrella of both CPS and law enforcement.<sup>149</sup> This leads to the potential for coordination and collaboration between the two.<sup>150</sup> In *Ferguson*, the police helped

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140. *Id.* at 71–72 (explaining that once the urine sample was found to be positive, the police were to be notified and that a “chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings”).

141. *Id.* at 71.

142. *Id.* at 72.

143. *Id.* (alteration in original).

144. *Id.*; see also Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL’Y 1, 5 (2002) (explaining *Ferguson* and the involvement of the police in implementing the program and guiding the hospital to increase chances that the evidence could be used at trial).

145. Fong, *supra* note 72, at 610.

146. Theodore P. Cross et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, 10 CHILD MALTREATMENT, 224, 226 (2005).

147. *Id.*

148. *Id.*

149. *Id.*

150. Ryan Charles McEvoy, *The Parent Trap: Rebalancing Parallel Enforcement Between Child Protective Services and Law Enforcement*, 169 UNIV. PA. L. REV. 867, 873 (2021).

implement the program by “guiding hospital employees to care for evidence in a way that would maximize its chances of trial admissibility.”<sup>151</sup> Similarly, law enforcement and CPS work together in building their policy goals and their county-level Child and Family Services plans, oftentimes in ways that help preserve evidence for potential criminal court proceedings.<sup>152</sup>

Many states, citing a parallel enforcement rationale, statutorily require the sharing of information and collaboration between CPS and law enforcement.<sup>153</sup> For example, in Oklahoma, the relevant law states that “law enforcement and child welfare staff shall conduct joint investigations in an effort to effectively respond to child abuse reports.”<sup>154</sup> The statute acknowledges that the efforts of CPS and the prosecutor are similar: it justifies the joint investigations as a means to “eliminate duplicative efforts.”<sup>155</sup> Similarly, in New York, over forty New York cities and counties have built a “synergistic relationship between the two agencies through multidisciplinary teams (MDTs), often deployed within a local Child Advocacy Center (CAC).”<sup>156</sup> The MDTs are made up of law enforcement, CPS, a forensic interviewer, a mental health provider, a medical professional, and a

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151. Taslitz, *supra* note 144, at 5; *see also* Ferguson v. City of Charleston, 532 U.S. 67, 71–72 (“[The policy] stated that a chain of custody should be followed when obtaining and testing urine samples, presumably to make sure that the results could be used in subsequent criminal proceedings.”).

152. McEvoy, *supra* note 150, at 873; *see also* ILL. DEP’T OF CHILD. & FAM. SERVS., REPORTS OF CHILD ABUSE AND NEGLECT PROCEDURES, § 300.50(e)(1) (Sept. 9, 2022), [https://www2.illinois.gov/dcf/aboutus/notices/Documents/procedures\\_300.pdf](https://www2.illinois.gov/dcf/aboutus/notices/Documents/procedures_300.pdf) [<https://perma.cc/8KBM-6YJP>] (explaining that the rule provides the rationale that CPS and law enforcement should work together to preserve evidence); ILL. DEP’T OF CHILD. & FAM. SERVS., CONCURRENT INVESTIGATIONS WITH LAW ENFORCEMENT (Dec. 23, 2014), [http://m.policy.dcf.lacounty.gov/Src/Content/Concurrent\\_Investigation.htm](http://m.policy.dcf.lacounty.gov/Src/Content/Concurrent_Investigation.htm) [<https://perma.cc/HEU4-ETQ6>] (stating that caseworkers are to avoid disturbing potential forensic evidence and are to communicate the existence and location of potential evidence with law enforcement); WASH. STATE DEP’T OF CHILD., YOUTH & FAMS., POLICIES AND PROCEDURES 2331, CHILD PROTECTIVE SERVICES (CPS) INVESTIGATION (2022), <https://www.dcyf.wa.gov/policies-and-procedures/2331-child-protective-services-cps-investigation> [<https://perma.cc/RQ74-4PA5>] (stating that caseworkers should contact law enforcement if assistance is needed in observing and preserving evidence).

153. McEvoy, *supra* note 150, at 898.

154. OKLA. STAT. tit. 10A, § 1-9-102(c)(1)(a) (2019).

155. *Id.* § 1-9-102(c)(1)(d).

156. McEvoy, *supra* note 150, at 874.

family advocate.<sup>157</sup> In MDTs, members with investigative roles (law enforcement or CPS) “must participate in joint interviews and conduct investigative functions consistent with the mission of the specific agency member involved.”<sup>158</sup> In counties without a multidisciplinary investigative team, “investigations shall be conducted jointly by local child protective services and local law enforcement.”<sup>159</sup> In Illinois, the investigation specialist (CPS caseworker) shall notify law enforcement of reports of physical abuse, sexual abuse, or death within twenty-four hours.<sup>160</sup> Some of the stated rationales for the Illinois procedure are to inform law enforcement of a criminal act, to protect the CPS worker, and to preserve evidence.<sup>161</sup>

These joint efforts mean that CPS investigations can serve as a de facto information gathering operation for criminal cases against parents. Even though many CPS investigations do not directly involve law enforcement, the constant threat of law enforcement and criminal penalties is sufficient to render the special needs exception inapplicable.<sup>162</sup> In New York, for instance, a district attorney may request and receive all CPS reports, and CPS is required to turn over all reports involving the alleged physical or sexual abuse of a child.<sup>163</sup> CPS agents even participate in New York Police Department training programs to provide them with investigative tools.<sup>164</sup> One practitioner

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157. *Id.* at 875.

158. *Id.*

159. N.Y. SOC. SERV. LAW § 424(5-a) (2017).

160. ILL. DEP’T OF CHILD. & FAM. SERVS., REPORTS OF CHILD ABUSE AND NEGLECT PROCEDURES, § 300.50(m)(1) (Sept. 9, 2022), [https://www2.illinois.gov/dcfs/aboutus/notices/Documents/procedures\\_300.pdf](https://www2.illinois.gov/dcfs/aboutus/notices/Documents/procedures_300.pdf) [<https://perma.cc/S3P7-SRK8>].

161. *See id.* § 300.50(m)(2–3).

162. *See Ferguson v. City of Charleston*, 532 U.S. 67, 83–84 (2001) (“Given the primary purpose of the Charleston program . . . to use the threat of arrest and prosecution . . . to force women into treatment, and . . . the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of ‘special needs.’”).

163. N.Y. SOC. SERVS. LAW § 424(5-a) (2017) (CPS must “forward immediately a copy of reports made pursuant to this title which involve suspected physical injury . . . or sexual abuse of a child or the death of a child to the appropriate local law enforcement”).

164. Thomas Tracy, *Administration of Children’s Services Staffers Now Being Sent to NYPD Investigator Course*, N.Y. DAILY NEWS (Sept. 24, 2017, 2:43 PM), <https://www.nydailynews.com/new-york/acs-staffers-nypd-investigator-article-1.3518025> [<https://perma.cc/7KVS-QPS3>]. One ACS caseworker even spoke on the record about the similarities between CPS investigatory tactics and law enforcement canvassing of neighborhoods. *Id.*

has drawn an analogy between this form of invasive investigation and stop-and-frisk tactics by police.<sup>165</sup> In both *Ferguson* and CPS investigations, the *threat* of criminal charges, whether or not they are pursued, serves to “encourage, frighten, or force parents to stop engaging in risky or harmful behaviors.”<sup>166</sup> Therefore, based on the Supreme Court’s precedent in *Ferguson*, there is reason to find that CPS investigations are insufficiently separated from law enforcement, and therefore do not fall within the special needs exception under the Fourth Amendment.

## B. Probable Cause Warrant, Exigency, and Consent

Without the special needs exception to the Fourth Amendment, CPS investigators must have a warrant with probable cause, exigent circumstances, or obtain adequate consent to enter a home.<sup>167</sup> This Note argues that most CPS caseworkers do not initially possess enough information for a warrant with probable cause or exigent circumstances, nor do they reliably and conscientiously seek to achieve voluntary parental consent to search a home at the onset of an investigation.

### 1. Probable Cause with a Warrant and Exigent Circumstances

A probable cause warrant is based on the “totality of the circumstances,” in which the court may look to the reliability, basis of knowledge, and veracity of the person providing the information.<sup>168</sup> CPS investigations can be initiated with an extremely low burden of proof, whether it be provided by an anonymous public caller or a mandated reporter.<sup>169</sup> Prior to most CPS investigations, there is not a detailed evaluation of the veracity, reliability, and basis of knowledge of a hotline tip before the investigation is initiated.<sup>170</sup> All states allow

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165. Burrell, *supra* note 11, at 124.

166. Coleman, *supra* note 5, at 497.

167. U.S. CONST. amend. IV. See *Mincey v. Arizona*, 437 U.S. 385, 393 (1978) (stating that a warrantless search must be “circumscribed by the exigencies which justify its initiation”); *Ferguson v. City of Charleston*, 532 U.S. 67, 79–81 (2001) (articulating the “special needs” exception); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (articulating that consent is one of the exceptions to the warrant requirement).

168. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

169. Burrell, *supra* note 11, at 130.

170. Gupta-Kagan, *supra* note 109, at 370.

for confidential reporting to the child abuse hotline, which means that in some instances, the basis of knowledge of the information provided to the hotline is unknown.<sup>171</sup> Mandated reporters are encouraged to be overinclusive in their reporting, since failing to report can lead to misdemeanor or felony charges.<sup>172</sup> In New York, once a call has been screened in, investigators go to a family's home to determine if there is "some credible evidence" of abuse or neglect.<sup>173</sup> In 2019, only 16.7% of calls placed nationally to child abuse hotlines were found to be "substantiated" by sufficient evidence to prove the allegation.<sup>174</sup> This reflects states' policy objectives to be overly inclusive in the calls they "screen in" and send to CPS agencies for further investigation.<sup>175</sup> As one court explained, "[i]f [this authority were restricted], it is likely that 'some child abuse would go undetected and some innocent lives unprotected.'"<sup>176</sup> This policy rationale increases the number of investigations each year that are based on unfounded and uncredible evidence.<sup>177</sup> Due to these factors, a single phone call to the child abuse hotline will rarely reach the level of probable cause to grant a warrant on its own.

While the major tenet of the Fourth Amendment is the warrant requirement, exigent circumstances will also justify a warrantless entry into the home "to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."<sup>178</sup> The exigency exception will exist only when "there was no time to seek out

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171. See Cecka, *supra* note 18, at 54.

172. *Id.* at 67; see also U.S. DEP'T OF HEALTH & HUM. SERVS., PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF CHILD ABUSE AND NEGLECT 2 (2019), [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/report.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/report.pdf) [<https://perma.cc/4DSY-F7XU>] (noting that 49 states may impose criminal misdemeanor charges when mandatory reporters fail to report suspected abuse; in Florida, mandatory reporters can be charged with a felony if they fail to report).

173. N.Y. COMP. CODES R. & REGS. tit. 18, § 432.2(b)(3)(iv) (2022).

174. CHILD.'S BUREAU, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 2 (2021), <https://www.childwelfare.gov/pubpdfs/canstats.pdf> [<https://perma.cc/86W4-PTGS>].

175. Coleman, *supra* note 5, at 429.

176. *Id.* at 444 (quoting *Darryl H. v. Coler*, 801 F.2d 893, 897, 899 (7th Cir. 1986)).

177. See CHILD.'S BUREAU, CHILD MALTREATMENT 2019: SUMMARY OF KEY FINDINGS 2 (2019), <https://www.childwelfare.gov/pubpdfs/canstats.pdf> [<https://perma.cc/86W4-PTGS>] (finding that only 16% of calls were substantiated).

178. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); see also *Michigan v. Tyler*, 436 U.S. 499, 509 (1978) (providing that a warrantless entry can be legal "when there is compelling need for official action and no time to secure a warrant").

a magistrate and secure a warrant.”<sup>179</sup> The circuit courts have varying tests to determine when exigency exists in the context of child protection services.<sup>180</sup> For example, in *Good*, the Third Circuit required that the state actors making the search “have reason to believe that life or limb is in immediate jeopardy and that the intrusion is reasonably necessary to alleviate the threat.”<sup>181</sup> In *Gates*, the Fifth Circuit found that the child protective service workers’ entry into the home did not rise to an “immediate danger” supporting a warrantless entry because the “stated purpose of entering the house was to interview the children, not to guard them against some sort of immediate danger.”<sup>182</sup> Most states have codified the exigency exception with statutes allowing for the removal of children in the face of a true emergency.<sup>183</sup> While exigent circumstances provide an exception to the warrant requirement, a single call to the State Central Registry—often with allegations for neglect, which are due to conditions of poverty—will rarely rise to the level of exigent circumstances under circuit court tests, nor will they fit into codified statutory definitions for emergency removal.

## 2. Consent

One way for caseworkers to bypass the warrant requirement is to receive consent from a parent to enter and search the home. Under *Schneckloth v. Bustamonte*, the Fourth Amendment requires that consent be “freely and voluntarily” given based on the totality of all the surrounding circumstances.<sup>184</sup> The standard for measuring consent is “that of ‘objective’ reasonableness—what would the typical reasonable

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179. *Schmber v. California*, 384 U.S. 757, 771 (1966).

180. *See Roska v. Peterson*, 328 F.3d 1230, 124012401240–41 (10th Cir. 2003) (finding no exigent circumstances for CPS to enter the home and remove the child); *Good v. Dauphin Cnty. Soc. Servs. For Child. & Youth*, 891 F.2d 1087, 1094–95 (3d Cir. 1989) (finding no exigent circumstances because the record did not demonstrate that a reasonable person in those circumstances could have believed that either the petitioner consented or that there was imminent danger necessitating intrusion); *Gates v. Tex. Dep’t of Protective and Regul. Servs.*, 537 F.3d 404, 422 (2008) (finding that there was no exigency since the alleged abuser and parent were not even home at the time that CPS came to the door and CPS conducted interviews with the children in a non-emergency-like manner).

181. 891 F.2d at 1094.

182. 537 F.3d at 423.

183. *See infra* Section III.C (outlining New York’s emergency statute provisions).

184. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973).

person have understood by the exchange between the officer and the suspect?”<sup>185</sup> In seeking consent, government officials may not “mislead the consenting party as to the nature of the crime under investigation and, consequently, the character of the objects for which they desire to conduct a search,” and then “subsequently use that consent . . . to conduct a general exploratory search.”<sup>186</sup>

Some have estimated that over 90% of CPS home searches are through a parent’s consent.<sup>187</sup> However, the coercive nature of the investigatory procedure may limit or blur the voluntary nature of such consent.<sup>188</sup> Caseworkers oftentimes mislead parents regarding the state’s authority to compel cooperation<sup>189</sup> or use the threat of further court involvement to elicit consent from parents.<sup>190</sup> Parents in New York, for example, often do not understand that they are not required to consent to investigations or speak with the caseworker at the onset of a CPS investigation.<sup>191</sup> One CPS official from New York explained that even if the parent does recognize the existence of the right to refuse CPS entry, CPS is able to convince them of the value of cooperation “ninety-nine out of 100 times.”<sup>192</sup> This is because caseworkers often use a parent’s willingness or unwillingness to engage with the caseworker or engage in a number of services as a

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185. Florida v. Jimeno, 500 U.S. 248, 251 (1991).

186. Coleman, *supra* note 5, at 463 (quoting WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 8.2(n), at 707 (3d ed. 1996)).

187. Coleman, *supra* note 5, at 430.

188. Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 504 (1988) (arguing that a caseworker’s threats implying law enforcement involvement “vitiates consent for at least two reasons”). First, they imply a long-term deprivation of custody, even though failing to comply with an investigation is never a sufficient basis for depriving a parent of custody of a child. Second, the threats imply that a court order is inevitable, even though it is up to the judge to grant the order. *Id.*

189. Coleman, *supra* note 5, at 430 n.38.

190. See Victoria A. Copeland, Comment, “It’s the Only System We’ve Got”: Exploring Emergency Response Decision-Making in Child Welfare, 11 COLUM. J. RACE & L. F. 43, 60 (2021) (quoting a caseworker involved in the CPS system who stated they can induce cooperation with the threat of getting a warrant); Coleman, *supra* note 5, at 430–31 n.38 (referencing Georgia’s CPS manual, which states that CPS workers dealing with uncooperative parents should inform “the parents of the department’s intent to involve court/law enforcement unless they immediately cooperate”).

191. Coleman, *supra* note 5, at 430 n.38 (referencing an interview with a New York CPS official who found that most parents assumed they had to let a CPS worker into their home).

192. *Id.*



criterion for assessing the level of risk a child faces in the home.<sup>193</sup> Therefore, the caseworker can articulate to parents that by *not* allowing them entry, they are putting themselves at a greater risk of having their children taken from them.<sup>194</sup> When describing why parents agree to “voluntary” CPS services, some explain that they fear “failure to consent ‘will only add the curse of “uncooperative” to the list of their sins when the case comes to court . . . .”<sup>195</sup> One caseworker said of the investigatory process, “[w]hen we say voluntary services, we say it in a way where it’s not voluntary. . . . So basically, read between the lines. If you don’t get this . . . if you don’t accept to have these services, we may potentially write up a warrant to take your children.”<sup>196</sup>

Oftentimes caseworkers are intentionally deceptive about the reasons they have come to a parent’s home, which makes the voluntary consent questionable.<sup>197</sup> A leading example of such tactics is described in the Second Circuit case *Tenenbaum v. Williams*, in which a CPS supervisor told a caseworker to visit the Tenenbaums’ home, “examine the child for marks and bruises,” and “discuss with the Tenenbaums [the child’s] sleeping in school and her delayed development.”<sup>198</sup> “In accordance with [the CPS supervisor’s] instructions, [the CPS worker] did not mention the real reason they were there—the reports of possible sexual abuse.”<sup>199</sup> In addition, parents seeking government aid or who are in public housing are unfortunately more accustomed to government surveillance and are, therefore, less likely to assert their rights to refuse certain investigatory procedures.<sup>200</sup>

Similar to the hospital scheme in *Ferguson*, CPS’s dual functions often conflict with each other. CPS claims to perform social service work to protect families but also possesses the state’s power to

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193. LEE, *supra* note 13, at 117.

194. *Id.*

195. McGrath, *supra* note 21, at 670.

196. Copeland, *supra* note 190 at 60 (quoting a caseworker involved in the CPS system).

197. See Coleman, *supra* note 5 at 433 n.40 (describing how *Tenenbaum v. Williams*, 193 F.3d 581 (2d. Cir. 1999) is an example of this behavior); see also *Tenenbaum v. Williams*, 193 F.3d 581, 589 (2d. Cir. 1999) (caseworker intentionally withheld the true allegations for why they came to the home).

198. 193 F.3d at 589.

199. *Id.*

200. Coleman, *supra* note 5, at 430–31 n.38 (large percentage of families that face investigations are already involved in state intervention for other reasons); see also Fong, *supra* note 72, at 612 (“[F]amilies open themselves up to the state as a condition of receiving public benefits.”).

sever parents' ties to their children, frequently leading to parental confusion about the purpose and power of CPS during the investigatory period.<sup>201</sup> In other words, CPS agencies' "goal of supporting families stands alongside its power to separate them."<sup>202</sup> Social work academic Leroy H. Pelton wrote, "[t]he fundamental structure of the public child welfare system is that of a coercive apparatus wrapped in a helping orientation."<sup>203</sup> This combination gives the state significantly more unchecked power in the family regulation context than it possesses in the criminal context.<sup>204</sup> By "framing the coupling of care with coercive authority," CPS expands its ability to surveil families and communities.<sup>205</sup> A parent therefore may consent under the guise of help without understanding the full set of ramifications of the investigation or their right to refuse.<sup>206</sup> As Jamison Tessneer, a family defense attorney in Washington, said

The law enforcement officer is a known adversary, but the CPS investigator is purportedly attempting to help the family and so they are initially viewed as an ally or support, but then the investigator transitions to an adversary. It usually sets a contentious tone for the case moving forward because there was trust and then the parents feel betrayed by the investigator.<sup>207</sup>

Furthermore, analogizing to *Ferguson*, the social service aspirations of CPS's policies, like the hospital's function of providing drug treatment and rehab, in no way deters CPS from exercising its

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201. LEE, *supra* note 13, at 141–44.

202. Fong, *supra* note 72, at 611.

203. Leroy H. Pelton, *Commentary, Four Commentaries: How We Can Better Protect Children From Abuse and Neglect*, 8 THE FUTURE OF CHILDREN 120, 126 (1998).

204. Fong, *supra* note 72, at 622–23 (stating that "[c]ompared with the analogous stage in criminal justice—police stops or perhaps arrests—CPS investigations are much more informationally invasive").

205. *Id.* at 611. (explaining that the dual capacity frames CPS as an "all-purpose agency," which extends "CPS surveillance to families seen as unlikely candidates for sustained intervention and exposes families unequally to the state").

206. Hardin, *supra* note 188, at 503 (explaining that "[a] parent is not likely to know the precise powers of the state, but might perceive that the state may take the child if the parent is evasive or noncooperative" and, therefore, the parent "may feel even less free to refuse entry in a child abuse investigation than a suspect in a typical criminal investigation, even if the parent is confident that the child has not been maltreated.").

207. Email from Jamison Tessneer, Family Defense attorney with the Washington State Office of Public Defense (Dec. 4, 2021, 5:22 EST) (on file with the *Columbia Human Rights Law Review*).

equally powerful law enforcement functions or from potentially assisting in prosecuting parents.<sup>208</sup> As explained in *Ferguson*, even a motive that is “benign rather than punitive” cannot “justify a departure from Fourth Amendment protections.”<sup>209</sup> This lack of separation between CPS’s two end goals of *punishing* the parent and *supporting* the parent fuels the tension and lack of trust in CPS by community members. In short, the foundation of the investigation (often no more than a single hotline call) and the current policy standards and practices in many CPS agencies across the country call into question many parents’ consent for CPS to search their home.

### C. Remedy: The Lack of an Exclusionary Rule

When a Fourth Amendment violation occurs in the family court context, the outcome is significantly different than its criminal counterpart.<sup>210</sup> The exclusionary rule, which prohibits the government from using evidence collected in violation of the U.S. Constitution, governs criminal courts.<sup>211</sup> In the canonical case *Mapp v. Ohio*, the Court found that the exclusionary rule applies to evidence obtained in violation of the Fourth Amendment.<sup>212</sup> Justice Clark explained that without such a deterrent safeguard, the “Fourth Amendment would have been reduced to ‘a form of words.’”<sup>213</sup> Since *Mapp*, the exclusion of evidence has been the primary remedy for Fourth Amendment violations.<sup>214</sup>

However, the exclusionary rule does not currently apply to civil cases, and may never be found to apply in the family court context, even if a court agrees that a Fourth Amendment violation occurred.<sup>215</sup> The primary rationale for this is the different consequences of enforcing the rule in the family law context versus the criminal law

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208. *Ferguson v. City of Charleston*, 532 U.S. 67, 85 (2001).

209. *Id.*

210. *Compare* *Mapp v. Ohio*, 367 U.S. 643, 657 (1961) (establishing the exclusionary rule), *with* *I.N.S. v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (finding that the exclusionary rule does not apply in the civil context).

211. *Mapp*, 367 U.S. at 643.

212. *Id.* at 657.

213. *Id.* at 648.

214. Ronal Jay Allen et al., *COMPREHENSIVE CRIMINAL PROCEDURE* 331 (5th ed., 2020). Other forms of remedies include damages, injunctions, criminal prosecutions, and civilian review boards. These have been rarely used and have been found to be a weak tool for institutional reform. *Id.* at 334–36.

215. *See, e.g., In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985) (finding there to be no exclusionary rule in child protective proceedings).

context.<sup>216</sup> A family court exclusionary rule would not lead to the lack of imprisonment or fining of an individual for breaking the law as it does in the criminal system, where, as Justice Cardozo put it, “[t]he criminal is to go free because the constable has blundered.”<sup>217</sup> Instead, the consequence would be to release a child back to the custody of a parent who is allegedly abusing or neglecting the child.<sup>218</sup>

Lower courts have clearly articulated this rationale.<sup>219</sup> In *In re Christopher B.*, the Third District in California stated that the “potential harm to the children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence.”<sup>220</sup> Similarly, the Second Department in New York explained that society has accepted that sometimes a “past crime goes unpunished” because of the exclusionary rule, but that in child welfare proceedings applying the exclusionary rule could lead to unacceptable outcomes, such as “condemn[ing] an innocent child to a life of pain and fear or even to death.”<sup>221</sup> One could argue that this risk is not unusual to family court, since the exclusionary rule in the criminal context would also mean releasing someone who could potentially cause harm. However, as a practical matter, this distinction has constrained courts from applying the same Fourth Amendment remedy to CPS investigations, since courts have articulated that it would risk exposing a child to future harm because of an evidentiary violation by the state. Still, there needs to be something in place to protect parents’ Fourth Amendment rights.

Since the Court views the problem of unreasonable search and seizure committed by non-law enforcement personnel to be just as

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216. *Id.*

217. *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926).

218. *See In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985).

219. *See In re Christopher B.*, 147 Cal. Rptr. 390, 393–94 (Ct. App. 1978) (finding that the exclusionary rule cannot apply to the exclusion of evidence in the family court context due to the dire policy implications of risking children’s lives); *In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985) (same).

220. 147 Cal. Rptr. at 394 (Ct. App. 1978) (finding that the exclusionary rule cannot apply to the exclusion of evidence in the family court context due to the dire policy implications of risking children’s lives).

221. *In re Diane P.*, 494 N.Y.S.2d 881, 884 (App. Div. 1985) (“Where the result would be so abhorrent, utilization of a rule normally intended to provide protection from illegal police activity is not justifiable. Nor does the potential impact upon a parent of a child protective proceeding require application of the rule.”).

serious as when committed by law enforcement,<sup>222</sup> there must be—to use the Court’s own language—“something more” to balance these rights.<sup>223</sup> When parents are unclear about the nature of the search and about their right to refuse the search, and there is no recourse in the courts to exclude evidence from the search, the Fourth Amendment’s principle of excluding unreasonable searches is rendered meaningless. Without “something more,” the Fourth Amendment is effectively irrelevant in the family regulation realm because, when a potential Fourth Amendment violation does occur, parents have no significant remedy and CPS suffers no adverse consequences.

It is essential that parents understand their rights and the consequences of a CPS investigation from the beginning. As numerous scholars have explained, legislative enactment is an important and necessary step in protecting people’s rights when the Supreme Court fails to speak on an issue.<sup>224</sup> Law Professor Rachel Harmon argues that “[p]rotecting rights requires inputs from institutions other than courts.”<sup>225</sup> When there is inaction in Congress and in the courts, states must create their own set of constitutional protections and pass laws to protect their citizens.<sup>226</sup> Therefore, states should enact legislation to make the Fourth Amendment stand for something in the family regulation system.

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222. *Camara v. Mun. Ct.*, 387 U.S. 523, 530 (1967).

223. *Dickerson v. United States*, 530 U.S. 428, 442 (2000).

224. See Rachel Harmon, *The Problem of Policing*, 110 MICH. L. REV. 761, 776–81 (2012) (explaining how courts alone cannot regulate the police and that “[c]onstitutional rights are structurally incapable of encouraging law enforcement to impose only necessary, fair, and efficient harms on legitimate individual interests”); Chris Kemmitt & Georgina Yeomans, *The States Can Save Us From the Supreme Court’s Brutal Rulings Protecting Bad Police*, SLATE (Oct. 18, 2021, 2:54 PM), <https://slate.com/news-and-politics/2021/10/supreme-court-qualified-immunity-police-reform.html> [<https://perma.cc/73RA-H2NA>] (urging states and cities to pass legislation to “ensure that qualified immunity does not apply to police officers and other state officials” due to Supreme Court rulings and inaction in Congress).

225. Harmon, *supra* note 224, at 776.

226. Kemmitt & Yeomans, *supra* note 224 (“With our federal government now having failed to affirm the rights of victims of police abuse, it’s now fully up to the states to protect Americans . . .”). See generally Harmon, *supra* note 224 (“[T]he public policy problems presented by the use of police power necessarily extend beyond constitutional law and courts. Protecting rights and balancing competing individual and social interests require a broader set of regulatory tools and institutions.”).

Such legislation would require parents to be told their rights to refuse to consent to a search of their homes and of their right to seek legal counsel, imposing much needed limits on the coercive power of CPS. Civil *Miranda* warning legislation is the most immediate solution to CPS's daily unjust intrusion of privacy. It would not only reduce the coercion of parents as they make difficult decisions about cooperating with CPS, but would also help build community awareness of parents' rights, similar to the national understanding after *Miranda v. Arizona* of criminal defendant's rights.<sup>227</sup>

### Part III: Current Legislation & Future Recommendations

Part III examines current and proposed civil *Miranda* legislation, which is currently enacted in at least two states.<sup>228</sup> Section A assesses the statutory language in Connecticut's Parents' Bill of Rights, which is one of the most comprehensive pieces of civil *Miranda* legislation thus far enacted in the country. This Note then investigates how the legislation works on the ground and uses relevant data to assess whether the legislation has had a positive effect overall in Connecticut. Section B explains why Connecticut's legislation has been more effective than similar legislation in Washington State. Section C turns to current proposals for civil *Miranda* legislation in New York and Texas and explores the major pushback against them. This Note concludes with specific statutory and policy recommendations.

#### A. Connecticut Legislation

##### 1. The Parents' Bill of Rights Statute in Connecticut

In 2011, Connecticut passed a Parents' Bill of Rights statute requiring the Department of Children and Families (DCF), which is Connecticut's CPS equivalent, to provide "written notice, in plain

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227. Burrell, *supra* note 11, at 145 ("[W]ith shows like 'Law & Order,' the mainstream public has the Miranda [sic] rights memorized. This would be helpful to normalize . . . [parents'] understanding of their rights and allow them to grasp the gravity of the investigation and . . . potential implications, so . . . they can make informed choices about how to interact with ACS.").

228. See CONN. GEN. STAT. § 17a-103d (2011) (stating that written notice of parent's rights must be provided in plain language upon initial face-to-face contact); ARIZ. REV. STAT. § 8-803(A) (2014) (stating that CPS must inform parents of various rights and that the CPS worker "has no legal authority to compel the family to cooperate with the investigation").

language” to a parent or guardian “at the time of any initial face-to-face contact” with the Department of Children and Families.<sup>229</sup> At the onset of a DCF investigation, caseworkers are required to give parents and guardians a “Parents Right to Know” brochure.<sup>230</sup> In each brochure, caseworkers write in the specific allegation that the parent faces.<sup>231</sup> This brochure is far more informative than New York’s current “Parents Right to Know” brochure provided during the investigation, which does not include the specific allegations or explain to parents their available rights.<sup>232</sup> In Connecticut, the parent must sign that they understand their rights.<sup>233</sup> If they refuse to sign, the caseworker signs to indicate the refusal.<sup>234</sup>

The end of the document explains the important—but rarely known—rights that a parent has, including the right not to permit a CPS employee into one’s residence, speak with a CPS employee, or sign any document.<sup>235</sup> This is the biggest distinction between Connecticut and states without parental “know your rights” laws: parents are explicitly told that they do not need to speak with the caseworker.<sup>236</sup> In addition, the brochure informs parents that they have the right to seek the advice of an attorney and to have that attorney present during questioning.<sup>237</sup> The brochure explains that a DCF social worker is not an attorney, and that any statement made to the caseworker may be used against the parent in court or administrative proceedings.<sup>238</sup> The brochure further explains that there is an emergency exception to the need for consent to enter the home if there is “probable cause to believe that the child is at imminent risk of physical harm.”<sup>239</sup>

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229. CONN. GEN. STAT. § 17a-103d(a) (2011).

230. See CONN. STATE DEPT OF CHILD. & FAMS., “PARENT’S RIGHT TO KNOW” BROCHURE, <https://portal.ct.gov/DCF/Multicultural-Affairs/Parents-Right-to-Know> [<https://perma.cc/U6GU-5WLK>] [hereinafter CONN. BROCHURE].

231. *Id.*

232. N.Y.C. ADMIN. FOR CHILD.’S SERVS., *supra* note 2.

233. CONN. BROCHURE, *supra* note 230.

234. *Id.*

235. *Id.* The brochure explains other rights, including the right to request that all documents be translated, and the right to receive understandable answers to any questions about the Department’s involvement with their family. *Id.*

236. This language is distinctly missing from New York’s brochure. See N.Y.C. ADMIN. FOR CHILD.’S SERVS., *supra* note 2.

237. CONN. BROCHURE, *supra* note 230.

238. *Id.*

239. *Id.*

## 2. The Limitations of Connecticut's Legislation

The Connecticut civil *Miranda* warnings are not a panacea. The brochure advises parents that “choosing not to communicate with a DCF employee may have serious consequences, which may include DCF filing a petition to remove the child from your home. It is, therefore, in your *best interests* to either speak with the DCF employee or immediately seek the advice of an attorney.”<sup>240</sup> Professor Kelley Fong, who conducted fieldwork in Connecticut’s CPS system for several months, observed that trainers sometimes advised caseworkers to let parents know that refusing to cooperate could cause complications for their case.<sup>241</sup> In some instances, it can indeed be in the parent’s best interest to speak with CPS at the initial visit, since caseworkers use the parent’s compliance as criterion for assessing the level of risk a child faces.<sup>242</sup>

The simple reading of one’s technical rights fails to account for the complex power dynamics at play in each interaction, and for the fact that silence can indeed be used against you during CPS investigations.<sup>243</sup> In the criminal context, Professor Geoffrey Corn argued that *Miranda* warnings actually produced a net gain for law enforcement, since there was a presumption of voluntariness for each *Miranda* waiver.<sup>244</sup> This led to an increase in the admissibility and

240. *Id.* (emphasis added).

241. Telephone interview with Kelley Fong, Assistant Professor in the School of History and Sociology at Georgia Tech in Atlanta, Georgia (Dec. 9, 2021).

242. LEE, *supra* note 13, at 141.

[C]aseworkers use compliance as both a shorthand to assess the level of risk a child faces in his home and a way to measure when risk decreases. Compliance is taken to mean that parents have acknowledged their problems and are taking steps to remedy them. At the same time, compliance is also a matter of the differential power held by caseworkers and parents in these interactions. It can be the decisive factor in the decision to remove or not . . . .

*Id.*

243. Cecka, *supra* note 18, at 73–74 (“In fact, when CPS visits a family’s home, a parent’s attempt to assert Fourth or Fifth Amendment rights may come back to haunt him or her.”); Copeland, *supra* note 190, at 51 (describing a situation where a caseworker moved the family into a “more formal relationship with the court” because the father would not communicate with the agency).

244. Corn, *supra* note 99, at 766 (“[T]he proclivity of suspects to waive their rights, coupled with this presumption of actual voluntariness demonstrated by a valid waiver, produced a net gain for law enforcement. . . . [A]lmost the same



probative value of statements, even when they may have been coerced.<sup>245</sup> It is unclear whether Connecticut's legislation is producing a similar effect in the family law context.

Another concern is the paucity of free legal resources for Connecticut parents who do want to retain an attorney at this stage in the CPS process.<sup>246</sup> Connecticut lacks a robust pre-legal representation hotline and indigent parents are not afforded free legal representation in Connecticut until court proceedings have been initiated.<sup>247</sup> During the investigative period, therefore, parents must pay to have a legal representative.<sup>248</sup> In Connecticut, Professor Fong almost always observed parents agreeing to speak with the caseworkers.<sup>249</sup> As one caseworker told her, the parents who say they intend to retain an attorney during the investigation seldom actually end up obtaining legal representation.<sup>250</sup> Thus, in some ways, the legislation mirrors pre-existing socioeconomic inequities within the CPS system: indigent parents usually cannot access legal resources and guidance, even when they know they have that right.

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number of suspects provided incriminating statements, and those statements became even more reliable in both their admissibility and probative value.”).

245. *Id.*

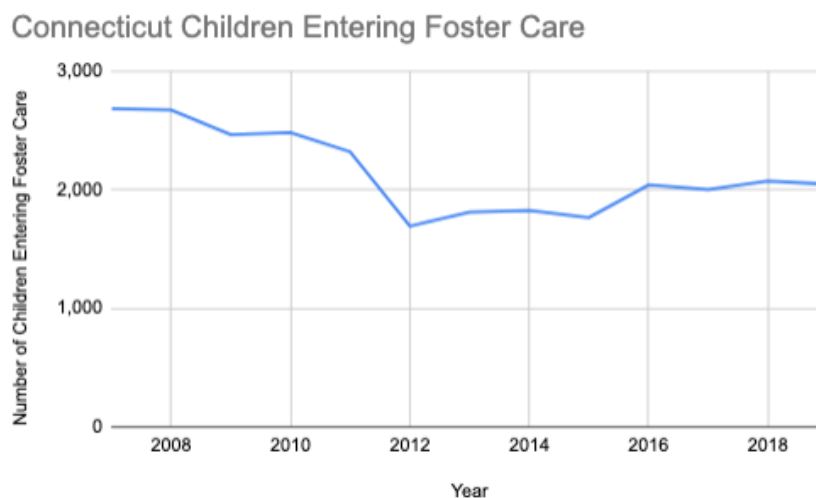
246. There is no guaranteed counsel during the investigatory stage of a CPS case in Connecticut. *See* CONN. GEN. STAT. § 45a-717(b) (2022) (stating that the court shall appoint a parent counsel during a termination of parental rights case).

247. This is the case in most states. One notable exception is New Jersey, in which the Legal Services of New Jersey has partnered with New Jersey's CPS to provide representation to referred clients before a petition has been formally filed against them in court. Gianna Giordano & Jey Rajaraman, *Increasing Pre-Petition Legal Advocacy to Keep Families Together*, A.B.A. (Dec. 15, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/winter2021-increasing-pre-petition-legal-advocacy-to-keep-families-together/> [<https://perma.cc/DD62-BH5E>].

248. *See supra* note 246.

249. Telephone interview with Kelley Fong, *supra* note 241.

250. *Id.*



*Data captured from the U.S. Department of Health and Human Services, Children's Bureau*<sup>251</sup>

Data compiled from 2007 to 2018 show that the number of children entering foster care in Connecticut significantly decreased between 2011 and 2012—which is when the Parents' Bill of Rights went into effect—and stayed lower in the following years.<sup>252</sup> However, unrelated administrative changes and other legislation enacted at this time probably impacted this data more than the Parents' Bill of Rights.<sup>253</sup> In January of 2011, a new Commissioner took over DCF.<sup>254</sup> Under her leadership, Connecticut began a “kinship homes” program to prioritize placing children with relatives and friends instead of in foster care.<sup>255</sup> Unfortunately, there is no data about post-legislation changes in the number of parents who sought legal advice or refused

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251. Data captured from U.S. DEPT OF HEALTH & HUM. SERS., CHILD'S BUREAU, FOSTER CARE FY 2002-FY 2009 ENTRIES, EXITS AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR, [https://web.archive.org/web/20100904200845/http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/statistics/entryexit2009.htm](https://web.archive.org/web/20100904200845/http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2009.htm) [https://perma.cc/B9PK-9NKS].

252. *Id.*

253. See Mark Pazniokas, *Malloy Celebrates a DCF Milestone, Undeterred by Other Setbacks*, CT MIRROR (Sept. 6, 2016), <https://ctmirror.org/2016/09/06/malloy-celebrates-a-dcf-milestone-undeterred-by-other-setbacks/> [https://perma.cc/DSD6-E3YV].

254. *Id.*

255. *Id.*

initial entry to CPS caseworkers. Overall, Michael Williams, deputy commissioner of operations for the Connecticut Department of Children and Families, explained that this greater transparency has brought down the anxiety of the interaction between parents and caseworkers.<sup>256</sup>

### B. Washington State

In 2005, Washington passed the Justice and Raiden Act in response to the death of two children.<sup>257</sup> The bill provided more guidance to social workers interacting with parents with substance-abuse problems, but it also added protections for parents being investigated for possible child abuse by emphasizing that CPS should notify them of their rights.<sup>258</sup> The legislation reads:

The legislature finds parents and children often are not aware of their due process rights when agencies are investigating allegations of child abuse and neglect. The legislature reaffirms that all citizens, including parents, shall be afforded due process . . . . To facilitate this goal, the legislature wishes to ensure that parents and children be advised in writing and orally, if feasible, of their basic rights and other information . . . .<sup>259</sup>

Three major distinctions between the above legislation and Connecticut's may limit its efficacy in practice. First, these rights are not required to be read at the *initial point* of contact.<sup>260</sup> Second, the statute does not enumerate the "basic rights" the investigator should share.<sup>261</sup> Lastly, the statute requires the advisement of the rights only "if feasible," allowing the individual caseworkers to make judgment

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256. Eli Hager, *CPS Workers Search Millions of Homes a Year. A Mom who Resisted Paid a Price*, NBC NEWS, Oct. 13, 2022, <https://www.nbcnews.com/news/us-news/child-abuse-welfare-home-searches-warrant-rcna50716> [<https://perma.cc/S7W3-GHJE>].

257. *Senate Passes Child-Neglect Bill*, SEATTLE TIMES (Apr. 25, 2005), <https://www.seattletimes.com/seattle-news/senate-passes-child-neglect-bill/> [<https://perma.cc/V9PF-JV6P>].

258. *Id.*

259. WASH. REV. CODE § 26.44.100(1) (2017).

260. The statute requires that parents are told of the allegations against them at the initial point of contact. However, it does not state that they must be told their *rights* at the initial point of contact. WASH. REV. CODE § 26.44.100(2) (2017).

261. *Id.*

calls about whether or not to tell a parent they do not need to speak with them.<sup>262</sup> Jamison Tessneer, a family attorney with the Washington State Office of Public Defense, is skeptical that parents are explicitly told their right to refuse entry or to speak with an attorney that early in the process.<sup>263</sup> Tessneer explained that investigators often conduct interviews with the client under the guise of wanting to help, thereby encouraging the parents to be open about issues like addiction.<sup>264</sup> Investigators can then use those statements in petitions alleging safety issues that could lead to removal.<sup>265</sup> In short, Washington's Know Your Rights statute is not as robust as Connecticut's.

### C. Proposals for Civil *Miranda* Warnings in New York and Texas

#### 1. New York City Council and State

Family defense attorneys and activists, including the Parent Legislative Action Network (PLAN), first pushed for legislation in 2019 that would require ACS—New York's CPS—to explain orally and in writing a parent's rights at the onset of an investigation. In October of 2021, ACS successfully lobbied city council members to remove from consideration a vote on this *Miranda* rights legislation.<sup>266</sup> The ACS Commissioner David Hansell testified in opposition to this and additional proposed legislation in 2019, arguing that ACS investigations are social work in their nature.<sup>267</sup> The argument that explaining parental rights early in the investigation makes it unnecessarily adversarial is misguided for two reasons. First, many parents affected by the present system already view the interaction as

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262. *Id.*

263. E-mail from Jamison Tessneer, Family Defense attorney with the Washington State Office of Public Defense (Dec. 4, 2021, 05:22 EST) (on file with the *Columbia Human Rights Law Review*).

264. *Id.*

265. *Id.*

266. Eileen Grench, *City, Union Push Back on Informing Parents of Rights in Child-Welfare Probes*, CITY (Oct. 19, 2021), <https://www.thecity.nyc/2021/10/19/22735575/nyc-child-welfare-probes-parents-not-told-their-rights> [<https://perma.cc/CA6V-7JDC>].

267. *Hearing, supra* note 4, at 18–20 (testimony of David Hansell, ACS Commissioner).

adversarial and coercive.<sup>268</sup> Self-determination and informed consent are two of the major tenets of the Social Work Code of Ethics, which arguably would be fostered by helping parents understand their rights and the CPS process.<sup>269</sup> Second, the CPS system is fundamentally set up as an adversarial system<sup>270</sup> and attorneys working for the state may consult with caseworkers throughout the investigation.<sup>271</sup>

The City of New York’s Memorandum in Opposition to the civil *Miranda* warnings legislation articulated that the legislation “would stymie the ability of the CPS caseworker to connect and build a rapport with the family.”<sup>272</sup> The Parent Legislative Action Network Memorandum in Support of the legislation stated “[t]hese are not social work interactions—instead parents experience them as judgmental and punitive prosecutions.”<sup>273</sup> A Center for Family Representation pilot program in the early 2000s demonstrated that early pre-petition representation for parents actually helped build rapport between ACS and parents rather than undermine it.<sup>274</sup> Parents aware of their

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268. McGrath, *supra* note 21, at 641 (“Not surprisingly, this investigatory process is typically perceived by families as intrusive and adversarial.”).

269. NAT’L ASS’N SOC. WORKERS, CODE OF ETHICS §§ 1.02–1.03 (2021), <https://www.socialworkers.org/About/Ethics/Code-of-Ethics/Code-of-Ethics-English> [<https://perma.cc/J2JS-9Q45>] (“Social workers respect and promote the right of clients to self-determination and assist clients in their efforts to identify and clarify their goals. . . . Social workers should provide services to clients only in the context of a professional relationship based . . . on valid informed consent.”).

270. Gupta-Kagan, *supra* note 109, at 396 n.208 (“In the federal government’s terms, investigations have an ‘adversarial orientation.’”); CHILD.’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., DIFFERENTIAL RESPONSE OF ABUSE AND NEGLECT 6 (2008), [http://www.childwelfare.gov/pubs/issue\\_briefs/differential\\_response/differential\\_response.pdf](http://www.childwelfare.gov/pubs/issue_briefs/differential_response/differential_response.pdf) [<https://perma.cc/5BHX-UAJB>]; *see also* COMM’N ON PARENTAL LEGAL REPRESENTATION, *supra* note 59, at 17 (“Rather than an offer of assistance to the family, some parents experience a CPS investigation as a prosecution—a search for parental wrongdoing, as several witnesses explained.”).

271. *Id.*

272. Memorandum in Opposition from Chatodd Floyd, Interim Dir. State Legis. Affs., City of N.Y. Off. of the Mayor, to the N.Y. State Senate 2 (Feb. 2, 2020) (on file with the *Columbia Human Rights Law Review*) (arguing that the legislation would prevent ACS from making timely investigations into children’s safety).

273. Memorandum in Support of the Family Rights Act from the Parent Legis. Action Network to the N.Y. State Senate 4 (May 5, 2021) (on file with the *Columbia Human Rights Law Review*) (articulating that the trauma of these investigations is amplified because parents are left uninformed about the process and their right to make decisions about how the system intervenes in their family).

274. COMM’N ON PARENTAL LEGAL REPRESENTATION, *supra* note 59, at 17.

autonomy and rights felt empowered to be more proactive in the investigation and thus developed stronger bonds of trust with the CPS workers.<sup>275</sup> As Michael Williams, deputy Commissioner of operations for the Connecticut Department of Children and Families, said “[w]e are not experiencing what New York is stating.”<sup>276</sup> Mr. Williams has found there to be “no negative impact on child safety” due to this legislative reform in Connecticut.<sup>277</sup>

## 2. Statutory Avenues to Remove a Child From the Home in an Emergency in New York

The City of New York’s biggest concern is that the proposed legislation would put children at increased risk of prolonged child abuse and would hinder CPS’s ability to protect children.<sup>278</sup> However, when the agency has legitimate reason to believe there is imminent risk of child harm, the New York Family Court Act provides multiple avenues for it to respond quickly with or without court approval.<sup>279</sup> When ACS believes that “a child or children’s life or health may be in danger,” it may seek court orders to remove the child before a legal petition has been filed.<sup>280</sup> Even without prior judicial approval, the agency can take the child into the state’s custody when the caseworker determines that remaining in the parent’s custody presents “an imminent danger to the child’s life or health.”<sup>281</sup> In less severe situations, ACS may seek other preliminary orders without the parent’s consent, including orders of protections and additional types of assistance.<sup>282</sup> These pathways to remove a child in the face of an

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275. *Id.*

276. Hager, *supra* note, at 256.

277. *Id.*

278. Memorandum in Opposition from Chatodd Floyd, Interim Dir. State Legis. Affs., City of N.Y. Off. Of the Mayor, to the N.Y. State Senate 2 (Feb. 2, 2020) (on file with *Columbia Human Rights Law Review*).

279. *See* N.Y. FAM. CT. ACT §§ 1022, 1034(2).

280. *Id.* § 1034(2) (“Before a petition is filed and where there is reasonable cause to suspect that a child or children’s life or health may be in danger, child protective services may seek a court order . . .”).

281. *Id.* § 1024(a) (“[A] designated employee of a city or county department of social services shall take all necessary measures to protect a child’s life or health including, when appropriate, taking or keeping a child in protective custody . . .”).

282. *Id.* § 1022 (“The court shall also consider and determine whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection . . .”).

emergency address exactly the kind of fears that the ACS Commissioner raises to justify not reading a parent their rights.<sup>283</sup>

### 3. Texas Proposals

Advocacy groups in Texas have been lobbying for legislation nearly identical to New York's.<sup>284</sup> It was first introduced in the 86th Legislative Session in 2019 and then again in the 87th session in 2021.<sup>285</sup> Although it has yet to pass, the bill has bipartisan support.<sup>286</sup> Its main sponsor is a Democrat, but the think tank lobbying for the bill is the Texas Public Policy Foundation, which is known for its conservative views. The Texas Public Policy Foundation memorandum in support of the proposed legislation explains that such a bill would help parents understand “how to effectively comply with CPS while limiting opportunity for coercion” and would be “an accountability mechanism for investigators and caseworkers to respect an individual’s due process rights.”<sup>287</sup>

The Texas Public Policy Foundation explained in its support memo that the proposed legislation would not grant any new rights to parents. CPS is already required to tell a parent of their rights “as soon as possible;” these rights include the right to an attorney,<sup>288</sup> the right

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283. *Hearings, supra* note 4, at 144 (testimony of Chris Gottlieb, Co-Director, NYU Family Defense Clinic).

284. H.B. 2298, 2021 Leg., 87th. Sess. (Tex. 2021).

285. *Id.*

286. *See* Pressley & Brown, *supra* note 24, at 4; H.B. 2298, 2021 Leg., 87th. Sess. (Tex. 2021); *see also* Roxanna Asgarian, *Why Democrats and Republicans in the Lege Formed a Rare Alliance on Child Welfare*, TEX. MONTHLY (Sept. 21, 2021), <https://www.texasmonthly.com/news-politics/child-welfare-reform-texas> [<https://perma.cc/TYG8-5TTK>] (noting that the upEND Movement, a progressive advocacy group from the Houston Graduate School of Social Work promoting “family policing” abolition, have formed an alliance with the We The Parents Texas, a conservative advocacy group). The major distinction between the groups is that the progressive movement looks at reform through a racial justice lens and abolition lens, while the conservative groups take a libertarian approach and focus on limiting government involvement in the family unit. *Id.*

287. Pressley & Brown, *supra* note 24, at 1.

288. TEX. FAM. CODE ANN. § 261.307(a)(1)(c)(iv) (2021); TEX. FAM. CODE ANN. § 262.201(c)(2) (2021).

to deny consent to interview the child or parent,<sup>289</sup> and the right to deny entry into the home.<sup>290</sup>

#### D. Recommendations

Section D outlines specific recommendations for civil *Miranda* warnings legislation based on the failures and successes of such legislation in Connecticut and Washington. The legislation should include a provision that requires parents to be read their rights “before any interview or discussion.” Currently, the legislation proposed in New York and Texas requires only that parents be read their rights at the time of any initial contact, which is not the same as “before any interview or discussion.”<sup>291</sup> Informing parents of their rights after the first interviews or searches have taken place, even if still during the “onset” of an investigation, can work to the parents’ detriment, since a caseworker can interview the parent before explaining to them their rights.<sup>292</sup>

One shortcoming of the Connecticut bill is the unlikelihood that low-income families will be able to find and afford early legal representation even when they want to and are aware of their right to do so. This perpetuates socioeconomic inequities within the family regulation system. It is important to couple any civil *Miranda* warning legislation with additional funding for pre-petition legal representation.<sup>293</sup>

In certain cases, unfortunately, parents who know, access, and utilize their rights may do their family court cases more harm than

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289. Child Protective Services: Handbook Revision, June 2016, TEX. DEPT OF FAM. & PROTECTIVE SERVS., [http://www.dfps.state.tx.us/Handbooks/CPS/Revision/cps\\_revisions\\_after\\_5-07/2016-06-01\\_CPS\\_memo.asp](http://www.dfps.state.tx.us/Handbooks/CPS/Revision/cps_revisions_after_5-07/2016-06-01_CPS_memo.asp) [https://perma.cc/EU5W-7D2H] (including Section 2241.32 on “Parental Refusal to Allow a Child to be Interviewed”).

290. *Id.*

291. *See* H.B. 2298, 2021 Leg., 87th. Sess. (Tex. 2021); S7553A, 2021-2022 Leg. Sess. (N.Y. 2022); Int 1736-2019, 2019 New York City Council Session (2019).

292. *See* CONN. GEN. STAT. § 17a-103d(a) (2011) (“Upon receiving a complaint of abuse or neglect of a child, the Department of Children and Families shall, at the time of any initial face-to-face contact with the child’s parent or guardian . . . provide the parent or guardian with . . . written notice . . .”).

293. New Jersey has a unique pre-petition program with the Family Representation Project of Legal Services of New Jersey. The pre-court representation has had positive effects, including the fact that none of the children involved have been removed from the parents’ homes. *See* Giordano & Rajaraman, *supra* note 247.



good. This is because CPS agencies deem parental compliance—allowing caseworkers into their home and participating in services plans—to be a major “success” factor.<sup>294</sup> Refusing CPS entry into the home can have adverse consequences, such as encouraging CPS to obtain a court order, interview the child at school without the parent’s consent, or call the police.<sup>295</sup> Parents who exercise their rights may weaken their eventual case or lead caseworkers to believe they are hiding something.<sup>296</sup> On balance, however, these risks do not outweigh the benefits of parents understanding their rights, as has been demonstrated by the high success rates of pilot programs in which attorneys become involved early in the investigatory stage.<sup>297</sup>

While legislation is still pending, two interim solutions can greatly benefit parents. First, public defense organizations should create emergency legal hotlines for parents who have been contacted by CPS.<sup>298</sup> These hotlines can advise parents of their rights, while also connecting them to much needed legal and family services.<sup>299</sup> Second, community activists and legal organizations should undertake widespread “know your rights” trainings to help parents understand

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294. LEE, *supra* note 13, at 142.

Caseworkers look favorably on clients who are compliant in the sense of being cooperative with them, properly deferential and calm, and willing to do anything to keep custody of their children. They are suspicious if parents do not let them into their homes, do not answer all their questions, or do not comply with requests (such as a request to submit to drug testing), although all these things are within parents’ legal rights.

*Id.*

295. Cecka, *supra* note 18, at 74.

296. LEE, *supra* note 13, at 142.

297. COMM’N ON PARENTAL LEGAL REPRESENTATION, *supra* note 59, at 21 n.57 (2019). For example, the Center for Family Representation between 2004 and 2005 launched a pilot program, Project Engage, which connected attorneys to families at the beginning of an investigation approximately 80% of the families were able to avoid a filing in family court. *Id.*; see also Martin Guggenheim & Sue Jacobs, *A New National Movement in Parent Representation*, 47 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 35, 44–46 (2013).

298. See, e.g., *Need Legal Help?*, BRONX DEFENDERS, <https://www.bronxdefenders.org/clients-community/help/> [https://perma.cc/6N24-8BCT] (detailing how to contact the organization’s Legal Emergency Hotline).

299. *Id.* The Bronx Defenders’ hotline provides preliminary legal advice to families and connects parents to family strengthening services upon parents’ request. Once a parent has been taken on as a client, the Bronx Defenders has advocates that will attend interviews and child safety conferences with the parent.

how CPS investigations work *before* the first knock on the door.<sup>300</sup> Recently in New York, Joyce McMillan, the founder of the Parent Legislative Action Network, started a Know Your Rights ad campaign on buses running throughout the Bronx.<sup>301</sup> Similar to the criminal legal system, the way one interacts at the initial point of contact with a government official can alter the rest of the investigation and potential future court proceedings.<sup>302</sup> The point of the civil *Miranda* legislation, as well as these interim solutions, is to achieve widespread community knowledge about the impact and adverse consequences of a CPS investigation, similar to how public awareness of criminal *Miranda* warnings has spread in the past fifty years.

#### CONCLUSION

If we embrace the reality that CPS caseworkers and law enforcement have similar functions and goals in the context of child welfare, we must reckon with the fact that the protections provided to parents during criminal and family investigations are drastically different. A right is rendered meaningless if the people it affects are unaware the right exists. Today, parents rarely understand their rights when CPS first knocks on their door. The conflict between the fundamental protections guaranteed by the Fourth Amendment and the on-the-ground reality of many CPS investigations creates an urgent need for Parents' Bill of Rights legislation. Although civil *Miranda* legislation will not radically transform the family regulation system, it is an important step both in breaking down its systemic socioeconomic and racial inequities and in empowering parents to make the best decisions for themselves and their children.

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300. See, e.g., *Virtual Workshop: Parents Rights When ACS Knocks on Your Door*, FACEBOOK (June 30, 2020), <https://www.facebook.com/BrooklynDefenderServices/videos/1553779874793145/> [https://perma.cc/D2QG-P6HD]; RISE, *Parent Toolkits: Setting Parents Up for Success* (Apr. 11, 2017), <https://www.risemagazine.org/2017/04/setting-parents-up-for-success-in-visits/> [https://perma.cc/UPZ9-K6W9].

301. Arya Sundaram, *A Parent-Empowering Ad Campaign Runs Through the Bronx*, GOTHAMIST (Sept. 5, 2022), <https://gothamist.com/news/a-parent-empowering-ad-campaign-runs-through-the-bronx?br=1> [https://perma.cc/YKF2-DPPJ].

302. Burrell, *supra* note 11, at 146 (“[T]he way a parent reacts to the [initial] confrontation [between CPS and the parent] can have an impact on how the rest of the investigation will go.”).