

**NOTE**  
**PARENTS UNDER PRESSURE:**  
**WHY CPS NEEDS TO TELL PARENTS THEIR**  
**RIGHTS BEFORE WALKING IN THE DOOR**

I. INTRODUCTION

Imagine you are home eating dinner with your family after a long day of work, and suddenly you hear a knock on your door.<sup>1</sup> You are not expecting anyone in particular, but who greets you on the other side is your worst nightmare.<sup>2</sup> The stranger at your door identifies themselves as a caseworker for Child Protective Services (“CPS”).<sup>3</sup> You have heard about CPS before and fear they will take away your child.<sup>4</sup> Your heart is racing and you wonder what you could have done wrong, but your mind comes up blank.<sup>5</sup> You spent the day at work, your child spent the day with a friend, and you consider yourself a good parent.<sup>6</sup> Then, it is in this confusion and haze that the CPS worker asks to come inside.<sup>7</sup> Not knowing any better, you let them into your home and into your life.<sup>8</sup>

Once inside, the CPS worker makes some more requests and notifies you that someone called CPS regarding an incident of neglect.<sup>9</sup> They recall the incident that led to the report: the thirty minutes you left your seven-year-old child unattended yesterday morning.<sup>10</sup> Leaving your

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1. Chris Gottlieb, *Reflections on Judging Mothering*, 39 U. BALT. L. REV. 371, 381 (2010).

2. *Id.* at 379-80; Megan Conn, *Pressure Builds to Reduce Racial Disproportionality in New York’s Child Welfare System*, IMPRINT (Jan. 19, 2021), <https://imprintnews.org/child-welfare-2/new-york-calls-grow-address-racism-child-welfare/51073> [<https://perma.cc/42Y2-QW3G>].

3. *Id.*

4. *Id.*

5. Gottlieb, *supra* note 1, at 381.

6. *Id.*

7. Theresa Hughes, *Discovering the Undiscoverable in Child Protective Proceedings: Safety Planning Conferences and the Abuse of the Right to Counsel*, 10 U.C. DAVIS J. JUV. L. & POL’Y 429, 434 (2006); Zach Ahmad & Jenna Lauter, *How the So-Called “Child Welfare System” Hurts Families*, NYCLU (Oct. 29, 2021), <https://www.nyclu.org/en/news/how-so-called-child-welfare-system-hurts-families> [<https://perma.cc/H52U-RNZX>].

8. Hughes, *supra* note 7, at 434.

9. 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/XLZ8-9AZL>]; Gottlieb, *supra* note 1, at 377.

10. Gottlieb, *supra* note 1, at 379; *see infra* Part II.C.1.

child alone is not something you usually do, but the babysitter was running late, and you could not wait any longer.<sup>11</sup> Fearing losing your job, you confirmed that your childcare would be there soon and left for work.<sup>12</sup> In that short time, nothing happened to your child, and yet somehow and for some reason, CPS was called.<sup>13</sup>

The CPS worker in front of you starts to ask you questions regarding your child, your parenting, and your personal life.<sup>14</sup> Nervous, you answer them, and when you hesitate, they pressure you a little.<sup>15</sup> The worker gets up and walks around your one-bedroom apartment and starts to write things down.<sup>16</sup> What they are writing exactly?<sup>17</sup> You are not sure, but their tone is accusatory, and they are baffled by the dirty dishes in your sink, the fact that you both do not have your own rooms, and the lack of fresh food in your kitchen.<sup>18</sup>

Next, they examine your child's body despite you never laying a hand on it.<sup>19</sup> They ask more questions, and you answer, thinking complying will help your case.<sup>20</sup> You tell them more information about yourself; that you use marijuana occasionally with friends, that you work two jobs to support yourself and your child, and that you are a single parent.<sup>21</sup> After a while the CPS worker leaves your home, but they leave with a report three times longer than the one they came inside with.<sup>22</sup> However, this is not the last time you will be seeing them; you volunteered for drug testing and agreed to participate in services<sup>23</sup> the

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11. Gottlieb, *supra* note 1, at 381.

12. *Id.*

13. *Id.*

14. 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); Hughes, *supra* note 7, at 442.

15. Conn, *supra* note 2.

16. NEW YORK STATE CHILD PROTECTIVE SERVICES, CHAPTER 6: CHILD PROTECTIVE SERVICES MANUAL A-1, I-1-I-2 (2017), <https://ocfs.ny.gov/programs/cps/manual/2017/CPS-ch06-CPS-Investigations.pdf> [perma.cc/ER9M-L3HA].

17. *Id.*

18. Gottlieb, *supra* note 1, at 378-79.

19. Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021), <https://time.com/5946929/child-welfare-black-families> [https://perma.cc/CJ5X-FXQ9].

20. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 478 (1990); Larissa MacFarquhar, *When Should a Child Be Taken from His Parents?*, NEW YORKER (Aug. 14, 2017), <https://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents> [https://perma.cc/27HU-G8JC].

21. Gottlieb, *supra* note 1, at 378-79.

22. Hughes, *supra* note 7, at 442.

23. Some services include: mental health treatment, substance abuse programs, domestic violence preventative programs and support, exploited youth programs, special medical needs, after-

following week.<sup>24</sup> It was either you agree now, or risk going to court later.<sup>25</sup>

This situation is not uncommon, as a mere suspicion can get CPS into your door.<sup>26</sup> However, what most parents do not realize is that they never have to let the CPS worker into their home to begin with, nor do they have to answer the caseworker's questions.<sup>27</sup> Unfortunately, there are currently no protections afforded to parents to tell them this or any of their rights during an investigation; which includes their Fifth Amendment privilege against self-incrimination, their fundamental right to family and to raise their children as they see fit, and their Sixth Amendment right to counsel.<sup>28</sup> As a result, there are many families in the child welfare system that do not need to be there.<sup>29</sup> Once CPS agents are allowed in a family's home, they are given the opportunity to turn a speculative report into a long list of allegations.<sup>30</sup> Even worse, multiple studies have shown that the idea of neglect is subjective, and so the failure to apprise parents of their rights has a disproportionate impact on Black, indigent, and people of color ("BIPOC"), and poor families.<sup>31</sup>

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care programs and home care services. *Prevention Services*, NYC ADMIN. FOR CHILD.'S SERVS., <https://www1.nyc.gov/site/acs/child-welfare/prevention-services.page> (last visited Apr. 1, 2023) [<https://perma.cc/R7YJ-PC2H>].

24. N.Y. SOC. SERV. LAW § 424(10) (Consol. 2021). The law states that the CPS worker may: offer to the family of any child believed to be suffering from abuse or maltreatment such services for its acceptance or refusal, as appear appropriate for either the child or the family or both; provided, however, that prior to offering such services to a family, explain that it has no legal authority to compel such family to receive said services, but may inform the family of the obligations and authority of the child protective service to petition the family court for a determination that a child is in need of care and protection.

*Id.*

25. See Hughes, *supra* note 7, at 442.

26. SOC. SERV. § 422(2)(a). The hotline operator forwards a report for investigation when he or she believes that it "reasonably constitutes" child abuse or neglect. Burrell, *supra* note 14, at 130. SOC. SERV. § 422(2)(a) states:

When any allegations contained in such telephone calls could reasonably constitute a report of child abuse or maltreatment, [] such allegations and any previous reports to the central registry involving the subject of such report or children named in such report, including any previous report containing allegations of child abuse and maltreatment alleged to have occurred in other counties and districts in New York [S]tate shall be immediately transmitted orally or electronically by the [O]ffice of [C]hildren and [F]amily [S]ervices to the appropriate local child protective service for investigation.

SOC. SERV. § 422(2)(a).

27. See *infra* Part IV; see also § 424.

28. See *infra* Part IV.A.2.

29. Gottlieb, *supra* note 1, at 378.

30. MacFarquhar, *supra* note 20.

31. Chris Gottlieb, *supra* note 19 (stating that an "overwhelming majority of child removals do not even allege abuse" and instead, "[m]ost are related to poverty, and all involve subjective determinations . . . about what counts as acceptable parenting").

This Note argues that in order to preserve family stability and the constitutional rights of parents,<sup>32</sup> CPS workers should be obligated to tell parents their rights during CPS investigations.<sup>33</sup> This would allow parents or guardians to make an informed decision as to whether or not to comply with the caseworker or CPS.<sup>34</sup> By giving this warning, parents will better understand the gravity of the decisions they are making and the negative consequences that may come with complying voluntarily.<sup>35</sup> This warning would also protect families' constitutional rights which are not protected by the current Social Services Law ("SSL").<sup>36</sup> This Note aims to craft a piece of legislation that would protect the rights and interests of families that find themselves to be the subjects of a CPS investigation, which may lead to consequences such as criminal charges, removal of children from the home, or a referral for services.<sup>37</sup>

Part II of this Note will describe the applicable law as it pertains to CPS and its investigations as it stands today, what constitutional rights are infringed upon in such an investigation, and what the investigation process entails.<sup>38</sup> Part III of this Note will explain the legal issues that arise under the existing SSL pertaining to CPS investigations, the duties of workers, and how they implicate a parent's constitutional right to control the care and custody of their children.<sup>39</sup> Part IV of this Note will explain the proposed amendment to SSL § 424 in the New York Senate

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32. The CPS process also violates the rights of children, as the right to parent is reciprocal. *See Duchesne v. Sugarman*, 566 F.2d 817, 825 (1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent.") (citations omitted).

33. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021) This bill has been reintroduced in the 2023 legislative session under a new print number: S901. S.B. S901, 2023-2024 Leg. Sess. (N.Y. 2023). On January 9, 2023, it was referred to the Children and Families committee. *Id.*; *see infra* note 214 and accompanying text.

34. Burrell, *supra* note 14, at 145; *see supra* note 32.

35. *Id.*

36. N.Y. SOC. SERV. LAW § 424 (Consol. 2021).

37. *See infra* Part IV. This Note is not advocating that parents deserve *more* rights, but rather they deserve to be made aware of the rights that they currently have. Although many parent and family advocates believe that more rights are warranted in order to protect families and improve the child welfare system, it seems more appropriate that before giving families additional rights, the state craft legislation notifying parents of the ones they currently hold. In order for any piece of legislation to be effective, parents and guardians need to be made aware of the tools afforded to them. For a discussion pertaining to giving additional rights to parents, see *From Rights to Reality: A Blueprint for Parent Advocacy and Family-Centered Child Welfare Reform*, RISE (Sept. 1, 2015), <https://www.risemagazine.org/2015/09/as-a-parent-investigated-by-the-child-welfare-system-you-have-rights> [<https://perma.cc/VY3C-XHKU>].

38. *See infra* Part II.

39. *See infra* Part III.

and why it needs to be passed.<sup>40</sup> Part IV will also explain why the proposed amendment does not go far enough to protect families and proposes additions to be made.<sup>41</sup>

## II. CHILD PROTECTIVE SERVICES INVESTIGATIONS AND APPLICABLE LAW EXPLAINED

In general, CPS has immense powers in comparison to the families that they work with.<sup>42</sup> These powers, left unchecked, allow CPS agents to take advantage of the families that they work with, especially if these families are not aware of the rights they have at their disposal.<sup>43</sup> Part II of this Note begins by discussing the basic purposes of CPS.<sup>44</sup> Next, it discusses the applicable law and constitutional rights implicated when an investigation into a family has begun.<sup>45</sup> It concludes by giving a basic framework into how the CPS investigation process begins and what it entails.<sup>46</sup>

### *A. Purpose of Child Welfare Agencies*

In New York State, the Office of Child and Family Services (“OCFS”) is responsible for child welfare programs and services such as foster care, adoption, and CPS; including the Statewide Central Register of Child Abuse and Maltreatment (“SCR” or “hotline”), and preventative

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40. See *infra* Part IV. This Note will only be addressing the laws pertaining to child services and CPS procedures in New York State. The proposed bill is only in the New York State Senate and no other state has similar legislation either in effect or proposed. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021). Also, New York State has one of the highest amounts of children in reported CPS cases and a largely populated city, meaning it can serve as a model to other states in crafting similar legislation. *Child Maltreatment 2019*, U.S. DEP’T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. AND FAM., ADMIN. ON CHILD., YOUTH AND FAM., & CHILD.’S BUREAU 28-30 (2021), <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/child-maltreatment> [<https://perma.cc/69PF-9FC2>] (last visited Apr. 1, 2023).

41. See *infra* Part IV.B.

42. See *infra* Part II.B.2; Eileen Grench, *Union Push Back on Informing Parents 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/8SLY-2YY2>] (“‘This is a system that often goes overlooked, even though it is a system with a great amount of power,’ said Zachary Ahmad, senior policy counsel at the New York Civil Liberties Union. ‘We’re talking about an agency that has the power to remove children from a parent’s care.’”).

43. See *infra* note 215 and accompanying text; Grench, *supra* note 42 (quoting one parent named in a report: “As a parent that is the scariest thing in the world. . . It’s hard in the moment, I think, to be able to assert any rights that you might have or to inquire into what your rights are.”).

44. See *infra* Part II.A.

45. See *infra* Part II.B.

46. See *infra* Part II.C.

services<sup>47</sup> for children and families.<sup>48</sup> OCFS serves the public “by promoting the safety, permanency and well-being of our children, families and communities.”<sup>49</sup> In 2020, New York City alone had 41,493 investigations concerning child abuse and neglect; 66,171 children were named in reports and in 35.7% of those reports, abuse or neglect was found.<sup>50</sup>

### B. Applicable Law

This Subpart will discuss the constitutional rights invoked when CPS knocks on a family’s door.<sup>51</sup> Then, it will introduce the applicable New York State law pertaining to investigations, which includes the Child Protective Services Act and Family Court Act (“FCA”).<sup>52</sup> Finally, it will introduce the SSL that this Note proposes should be amended.<sup>53</sup>

#### 1. The Constitutional Right to Family

CPS investigations interfere with a parent or guardian’s constitutional right to oversee the care, custody, and control of one’s child.<sup>54</sup> Although there is no explicit clause stating “the right to parent” in the Constitution, it is considered a fundamental right.<sup>55</sup> It has been held that the Due Process Clause of the Fourteenth Amendment<sup>56</sup> does not permit a state or its agencies to infringe on the fundamental right of a parent to

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47. Some examples of preventative services offered by one county in New York: General Counseling Programs, Sexual Abuse Treatment Programs, Crisis Intervention, PINS, JD, Diversion and Probation Programs, Adult and Teen Pregnancy/Parenting Programs, and Other Specialized Programs. See *Preventative Services*, OFF. SITE OF MONROE COUNTY, N.Y., <https://www.monroecounty.gov/hs-preventative> [<https://perma.cc/FX9B-8DZ2>] (last visited Apr. 1, 2023).

48. *About OCFS*, N.Y.S. OFF. OF CHILD. AND FAM. SERVS., <https://ocfs.ny.gov/main/about> [<https://perma.cc/YM24-A3GN>] (last visited Apr. 1, 2023).

49. *Id.*

50. *Abuse/Neglect Investigations by Community District, 2015-2020*, ADMIN. FOR CHILDS. SERVS., <https://www1.nyc.gov/assets/acs/pdf/data-analysis/abuseneglectreport15to20.pdf> [<https://perma.cc/GC59-WHPR>] (last visited Apr. 1, 2023).

51. See *infra* Part II.B.1.

52. See *infra* Part II.B.2.

53. See *infra* notes 65-71 and accompanying text.

54. See *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (holding that grandparents did not have the right to petition the court for visitation with their grandchildren under a Washington custody law because it was an infringement on the mother’s fundamental right to make decisions concerning the care, custody, and control of her two daughters).

55. *Id.* (citing *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997)).

56. U.S. CONST. amend. XIV. The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty, or property, without due process of law.” *Id.* This clause also substantially “provides heightened protection against government interference with certain fundamental rights and liberty interests.” *Troxel*, 530 U.S. at 65 (citing *Glucksberg*, 521 U.S. at 719).

make decisions for their own child.<sup>57</sup> However, the right to parent is not absolute and can be interfered with if the state has a fundamental interest that outweighs the right to parent, like protecting a child from abuse or neglect.<sup>58</sup>

## 2. The Family Court Act and New York State Social Services Law

The Child Protective Services Act of 1973 established CPS in each county of New York.<sup>59</sup> CPS is the only agency responsible for child protective activities such as receiving reports of child abuse and maltreatment and investigating such reports.<sup>60</sup> The Child Protective Services Act has five fundamental components: (1) detection through third-party recognition (including mandatory reporters), (2) emergency protective custody, (3) the SCR, (4) CPS, and (5) court actions.<sup>61</sup>

In New York State, there are two bodies of law that deal with child abuse and maltreatment: the SSL and the FCA.<sup>62</sup> Section 412 of Article Six of the SSL defines child abuse<sup>63</sup> and maltreatment.<sup>64</sup> It also details OCFS's roles and responsibilities throughout the investigation process.<sup>65</sup>

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57. *Troxel*, 530 U.S. at 65.

58. *Glucksberg*, 521 U.S. at 721.

59. *The Statewide Central Register of Child Abuse and Maltreatment*, N.Y.S. OFF. OF CHILD. AND FAM. SERVS., <https://ocfs.ny.gov/programs/cps> [<https://perma.cc/5ET7-SUHC>] (last visited Apr. 1, 2023).

60. N.Y. SOC. SERV. LAW § 411 (Consol. 2021).

61. *A Guide to New York's Child Protective System*, N.Y.S. ASSEMBLY COMM. ON CHILD. & FAMS. (2001), <https://www.nyassembly.gov/comm/Children/20011016/htmldoc.html> [<https://perma.cc/R7K4-DEST>] (last visited Apr. 1, 2023).

62. *Child Protective Services FAQ*, N.Y.S. OFF. OF CHILD. AND FAM. SERVS., <https://ocfs.ny.gov/programs/cps/FAQ.php> [<https://perma.cc/RRA3-LUUT>] (last visited Apr. 1, 2023).

63. SOC. SERV. § 412 (defining abused child as “a child under eighteen years of age and who is defined as an abused child by the [F]amily [C]ourt [A]ct”). The FCA states:

“Abused child” means a child less than eighteen years of age whose parent or other person legally responsible for his care (i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or (ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or (iii)(A) commits, or allows to be committed an offense against such child defined in article one hundred thirty of the penal law; (B) allows, permits or encourages such child to engage in any act described in sections 230.25, 230.30, 230.32 and 230.34-a of the penal law; (C) commits any of the acts described in sections 255.25, 255.26 and 255.27 of the penal law; (D) allows such child to engage in acts or conduct described in article two hundred sixty-three of the penal law; or (E) permits or encourages such child to engage in any act or commits or allows to be committed against such child any offense that would render such child either

Section 424 of the SSL describes the duties of CPS concerning reports of abuse and maltreatment.<sup>66</sup> These duties include receiving reports on a twenty-four-hour basis, maintaining an up-to-date child abuse and maltreatment register of all cases reported, forwarding a copy of the report to the appropriate child protective agency or district attorney, making a timely assessment of each report and contacting law enforcement if necessary, and taking a child into protective custody to protect him or her from further abuse or maltreatment.<sup>67</sup> Once the case is forwarded, the CPS agent must determine within sixty days whether the report is “indicated”<sup>68</sup> or “unfounded.”<sup>69</sup> Once the investigation is complete, SSL

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a victim of sex trafficking or a victim of severe forms of trafficking in persons pursuant to 22 U.S.C. 7102 as enacted by public law 106-386 or any successor federal statute; (F) provided, however, that (1) the corroboration requirements contained in the penal law and (2) the age requirement for the application of article two hundred sixty-three of such law shall not apply to proceedings under this article.

N.Y. FAM. CT. ACT § 1012 (McKinney 2021).

64. SOC. SERV. § 412 (stating a “maltreated child” includes a “child under eighteen years of age: (a) defined as neglected child by the [F]amily [C]ourt [A]ct, or (b) who has had serious physical injury inflicted upon him or her by other than accidental means”). The FCA states:

“Neglected child” means a child less than eighteen years of age (i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care (A) in supplying the child with adequate food, clothing, shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so, or, in the case of an alleged failure of the respondent to provide education to the child, notwithstanding the efforts of the school district or local educational agency and child protective agency to ameliorate such alleged failure prior to the filing of the petition; or (B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by misusing a drug or drugs; or by misusing alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court; provided, however, that where the respondent is voluntarily and regularly participating in a rehabilitative program, evidence that the respondent has repeatedly misused a drug or drugs or alcoholic beverages to the extent that he loses self-control of his actions shall not establish that the child is a neglected child in the absence of evidence establishing that the child’s physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as set forth in paragraph (i) of this subdivision; or (ii) who has been abandoned, in accordance with the definition and other criteria set forth in subdivision five of section three hundred eighty-four-b of the social services law, by his parents or other person legally responsible for his care.

FAM. CT. ACT § 1012.

65. *Child Protective Services FAQ*, *supra* note 62.

66. SOC. SERV. § 424.

67. *Id.*

68. SOC. SERV. § 412(7). An indicated report is defined as:

[A] report made pursuant to this title if an investigation: (i) commenced on or before December thirty-first, two thousand twenty-one determines that some credible evidence of



§ 424 allows the agency to offer services to the family for their acceptance or refusal, while also explaining it has “no legal authority to compel such family to receive services.”<sup>70</sup> However, the agency may also inform the family of its obligation and authority to petition the family court for an order requiring such services.<sup>71</sup> Later, if the situation requires CPS to petition family or criminal court, the agency assists the family during all stages of the family court proceedings, and coordinates rehabilitative services for the family on a voluntary basis or under an order from the court.<sup>72</sup>

### C. The CPS Investigation Process

This Subpart will briefly describe what happens after a report of child abuse or maltreatment is made to the hotline, or SCR.<sup>73</sup> After, it discusses the procedures followed by CPS during the investigation process.<sup>74</sup> Lastly, it will detail the interactions between CPS and police agencies throughout the investigation.<sup>75</sup> The hard truth for many families across the state is that one short phone call starts a process which habitually violates their rights.<sup>76</sup>

#### 1. Reporting

The SCR, or hotline, maintains all of the reports made to it pursuant to the SSL.<sup>77</sup> The SCR receives reports during all hours of the day from those who are mandated (required by law)<sup>78</sup> to report child abuse and

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the alleged abuse or maltreatment exists; or (ii) commenced on or after January first, two thousand twenty-two determines that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.

*Id.*

69. *Child Protective Services FAQ*, *supra* note 62. An unfounded report is defined as: [A]ny report made pursuant to this title unless an investigation: (i) commenced on or before December thirty-first, two thousand twenty-one determines that some credible evidence of the alleged abuse or maltreatment exists; or (ii) commenced on or after January first, two thousand twenty-two determines that a fair preponderance of the evidence of the alleged abuse or maltreatment exists.

SOC. SERV. § 412(6).

70. SOC. SERV. § 424(10).

71. *Id.*

72. *Id.* §§ 424(10)-(13).

73. *See infra* Part II.C.1; *A Guide to New York's Child Protective System*, *supra* note 61.

74. *See infra* Part II.C.2.

75. *See infra* Part II.C.3.

76. *See infra* Part III.

77. *The Statewide Central Register of Child Abuse and Maltreatment*, *supra* note 59.

78. SOC. SERV. § 413; Rachel Blustain & Nora McCarthy, *The Harmful Effects of New York City's Over-Surveillance*, IMPRINT (Oct. 21, 2019), <https://imprintnews.org/child-welfare-2/the-harmful-effects-of-over-surveillance/38441> [<https://perma.cc/6NGL-7HJ3>]. Over-reporting already

maltreatment and other calls from non-mandated reporters.<sup>79</sup> Mandated reporters may include medical and hospital personnel, school officials, social service workers, child care workers, residential care workers, and law enforcement personnel.<sup>80</sup> The reports to the SCR are then forwarded to the local CPS agency for investigation.<sup>81</sup> Most of the families that become involved with CPS are first the subject of a report to this hotline.<sup>82</sup>

## 2. CPS Investigations

Once a report is forwarded to an investigator, he or she is usually given entry into the family's life and home.<sup>83</sup> Investigators have about two months to determine if there is "some credible evidence" of abuse or neglect once a report is made, which may include something as simple or subjective as an unkept or dirty home.<sup>84</sup> These investigators can also show up to a child's school to interview the children and their teachers, which can be embarrassing for the family, especially if the school had no clue about the report or the report is unfounded.<sup>85</sup> Not only are case-workers allowed into the homes and schools of these children without a court order or sufficient evidence supporting the need to enter, but they are also given access to the medical records of the family.<sup>86</sup>

In the course of the investigation, CPS is required to interview the child and may also interview the reporter, conduct a home safety assessment within two days of receiving the report, obtain information about other children in the home (if not named in the report), and

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makes children and families more vulnerable as they see teachers and doctors as threats, leading families to hide what they are going through as they fear that their struggles will turn into larger crises if CPS is involved. Blustain & McCarthy, *supra* note 78. In New York, school officials are the number one source of reports. *Id.* (noting that the law should be "reimagined" to ensure that "community-based support" is given and reporters are educated about the harmful effects of reporting and that the law "represents a profound missed opportunity to work with families to meet children's needs"); see also Diane Redleaf, *After the Hotline Call*, ATL. (Jan. 27, 2019), <https://www.theatlantic.com/ideas/archive/2019/01/problem-child-protective-services/580771> [<https://perma.cc/GC59-WHPR>] (reporting that hotline callers do not think twice about the potential ramifications of their calls).

79. *The Statewide Central Register of Child Abuse and Maltreatment*, *supra* note 59.

80. *Id.*

81. *Id.*

82. *How the Child Welfare System Works*, CHILD WELFARE INFO. GATEWAY 2 (Oct. 2020), <https://www.childwelfare.gov/pubpdfs/cpswork.pdf> [<https://perma.cc/QX8X-3334>].

83. Burrell, *supra* note 14, at 131; see also SOC. SERV. §§ 424(6a)-(6b).

84. Burrell, *supra* note 14, at 130-32, 145.

85. *Id.* at 130.

86. *Id.*

communicate information with the family.<sup>87</sup> The home safety assessment is an unannounced visit to the home where CPS must speak to all the children, caretakers, and adults living there.<sup>88</sup> While there, CPS must also give the family a “Notice of Existence” letter, informing them of the open investigation of abuse or maltreatment against them.<sup>89</sup>

While in the home, the CPS agent should check to make sure it is free of hazards, has adequate food, safe sleeping arrangements, and whatever else he or she sees fit.<sup>90</sup> While doing so, the CPS agent must determine the “nature, extent and cause of any condition enumerated in such report.”<sup>91</sup> From there, the CPS agent (usually the same one who entered the home on the first day) must determine the risk to the children if they continue to remain in the home and determine whether or not to remove them in accordance with the provisions of the FCA.<sup>92</sup>

### 3. Interaction with Police Agencies

Overall, CPS and law enforcement maintain a close relationship whether the initial report concerns criminal conduct or not.<sup>93</sup> The New York SSL correctly accounts for the common occurrence of a child abuse or maltreatment report involving the authorities or the court.<sup>94</sup> SSL § 423(6) allows each district to establish a multidisciplinary investigative team for the purposes of investigating child abuse or mistreatment.<sup>95</sup> These teams can include representatives from CPS, law enforcement, the district attorney’s office, medical providers, mental health professionals and advocacy personnel.<sup>96</sup> This multidisciplinary team can participate in “joint interviews and conduct investigative functions consistent with the mission of the particular agency member involved.”<sup>97</sup>

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87. *A Parent’s Guide to the Child Abuse Investigation*, N.Y.C. ADMIN. FOR CHILD.’S SERVS., <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> [<https://perma.cc/JTC8-HDDL>] (last visited Apr. 1, 2023).

88. *Id.*

89. *Id.*

90. *Id.*

91. NEW YORK STATE CHILD PROTECTIVE SERVICES, *supra* note 16, at A-2.

92. *Id.*; *see also* N.Y. SOC. SERV. LAW § 424 (Consol. 2021).

93. *State Statutes: Cross-Reporting Among Responders to Child Abuse and Neglect*, CHILD WELFARE INFO. GATEWAY 2, 16 (2016), <https://www.childwelfare.gov/pubpdfs/xreporting.pdf> [<https://perma.cc/7LVV-B5LE>].

94. SOC. SERV. §§ 424(10)-(13).

95. SOC. SERV. § 423(6); *see also State Statutes: Cross-Reporting Among Responders to Child Abuse and Neglect*, *supra* note 93.

96. SOC. SERV. § 423(6); *see also State Statutes: Cross-Reporting Among Responders to Child Abuse and Neglect*, *supra* note 93.

97. SOC. SERV. § 423(6).

The Child Protective Services Act of 1973<sup>98</sup> requires CPS to consult with law enforcement and the district attorney.<sup>99</sup> Cross-reporting allows the two agencies, CPS and law enforcement, to investigate and sanction the same underlying conduct.<sup>100</sup> These two agencies have a common interest in child abuse and neglect cases, ensuring that children and their families are safe.<sup>101</sup> However, the two agencies can also borrow evidence and resources from each other in order to strengthen their investigations or allegations.<sup>102</sup>

The cross-reporting between agencies can complicate matters for families and children.<sup>103</sup> There is also a concern that CPS and criminal courts work together to “enhance penalties against parents.”<sup>104</sup> In addition to this, as more providers and agencies get involved, it can not only become more confusing for families and children, but the stakes of the investigation get higher.<sup>105</sup> Although the two agencies are focused on the safety of the child, criminal court and family court have competing purposes; one is focused on indictment while the other is focused on rehabilitation.<sup>106</sup>

Upon receipt of the initial report, CPS begins to make progress notes which it must continue until the case is closed.<sup>107</sup> These progress notes become a part of the record which can be entered into evidence in both family and criminal court.<sup>108</sup> These notes must “describe all communications and interactions with the subject, children, other persons named in the report, source or collateral contacts.”<sup>109</sup> SSL § 422(4)(A)(1) allows the police or district attorney to access CPS information regarding indicated and pending reports.<sup>110</sup>

Furthermore, CPS is also responsible for notifying the police in three situations: (1) cases in which a crime is believed to be occurring; (2) when the family is inaccessible and there is reason to fear for the

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98. SOC. SERV. §§ 411-29(b).

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

100. *Id.*

101. *Id.*

102. *Id.* at 911.

103. *Id.* at 873; THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, THE BRONX DEFENDERS, 40-41 <https://www.reentry.net/ny/library/attachment.265297> [<https://perma.cc/RG7E-8VJC>].

104. McEvoy, *supra* note 99, at 911-12.

105. *Id.*

106. *Id.* at 879; *see also* People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994).

107. NEW YORK STATE CHILD PROTECTIVE SERVICES, *supra* note 16, at I-1.

108. *Id.*

109. *Id.*

110. *Id.* at L-5.

child's safety; and (3) when an immediate response is essential and the police can access the child's location faster than CPS can.<sup>111</sup> This is how and why a parent's innocent confession to a caseworker may result in them being sent to prison, further disrupting their home and lives.<sup>112</sup> It is important to note that many of these "confessions" have nothing to do with parenting.<sup>113</sup>

#### *D. Shifting Focus to the Parent*

This Subpart explains how the investigation process tends to focus on and burdens parents.<sup>114</sup> It describes how the focus shifts from the child, who was the subject of the report, to the parent, who then volunteers for or must comply with court-ordered services, or face possible criminal convictions.<sup>115</sup> Lastly, it discusses the consequences of the investigation and the neglect or abuse charge after it has been substantiated.<sup>116</sup>

##### 1. Services and Court Orders

After a report is made, a local unit of CPS begins the investigation within twenty-four hours, which includes an evaluation of the safety of the child or children involved, and a determination of whether they should remain in the home while the investigation proceeds.<sup>117</sup> After assessing the family, CPS may arrange whatever rehabilitative services they deem appropriate, including foster care and preventative services.<sup>118</sup>

In order for a judge to make a finding for abuse or neglect against a parent, the local child welfare agency who brought the case has the burden to prove their allegations.<sup>119</sup> If the agency brings sufficient evidence at trial, the judge will then make a finding of abuse or neglect against the

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111. *Id.* at L-6; see Hughes, *supra* note 7, at 471-72.

112. See Hughes, *supra* note 7, at 471-72.

113. *Whatever They Do, I'm Her Comfort, I'm Her Protector: A Report on the Child Welfare and Foster System*, MOVEMENT FOR FAM. POWER 131 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5ead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> [https://perma.cc/86FB-ZH59] (last visited Apr. 1, 2023) (explaining how the foster care system had been ground zero for the drug war, with many parents being criminalized and separated from their children instead of being offered rehabilitative services).

114. See *infra* Part II.D.1-2.

115. See *infra* Part II.D.1.

116. See *infra* Part II.D.2.

117. *Child Protective Services FAQ*, *supra* note 62.

118. NEW YORK STATE CHILD PROTECTIVE SERVICES, *supra* note 16, at B-3 to B-4.

119. *Nicholson v. Scopetta*, 820 N.E.2d 840, 844-45 (N.Y. 2004).

parent.<sup>120</sup> If such a finding is made, the judge then must decide what the dispositional order should be, and what rehabilitative services should be offered to the family.<sup>121</sup>

## 2. Other Consequences of an Investigation

The intervention of CPS affects all aspects of a family's life.<sup>122</sup> There should be clearer standards and less discretion given to caseworkers in order to ensure that intervention is warranted and there is an equal balance of power between CPS and guardians.<sup>123</sup> After the investigation, a caseworker must decide whether a report is indicated, meaning there is "some credible evidence" of abuse or neglect, or unfounded.<sup>124</sup> Indicated reports stay in the SCR for years and can be made available to future employers.<sup>125</sup> Parents who have indicated reports on the SCR can be denied employment in childcare, or prevented from becoming a foster or adoptive parent.<sup>126</sup> If added to the database, a caretaker's name stays in it for a dozen years, even if the judge dismisses the family court case.<sup>127</sup> If the report is indicated, the parent's name is in the SCR until the youngest child named in the report turns twenty-eight years old.<sup>128</sup> The reports are then made available to employers, family courts, police, district

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120. Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home*, 22 CUNY L. REV. 1, 15 (2019).

121. *Id.*

122. Blustain & McCarthy, *supra* note 78. One mother said about her experience with ACS: I followed all their instructions. I didn't go to work once a week for months in order to take my daughter to a psychologist who was an hour away by public transportation. I left my job early every two weeks to receive CPS investigators at my home. My daughter, who was only 3, was so nervous being interrogated by strangers so many times that she started behaving irregularly. And, as the investigation dragged on, I was so nervous at work that I couldn't concentrate. Plus, my boss was losing patience with my increasing absences. Eventually, I lost my job.

*Id.*

123. THE CONSEQUENCES OF CRIMINAL PROCEEDINGS IN NEW YORK STATE, THE BRONX DEFENDERS 40-42, <https://www.reentry.net/ny/library/attachment.265297> [<https://perma.cc/RG7E-8VJC>].

124. Burrell, *supra* note 14, at 132; N.Y. SOC. SERV. LAW § 424(7) (Consol. 2021).

125. Burrell, *supra* note 14, at 132; see generally Amanda S. Sen et. al., *Inadequate Protection: Examining the Due Process Rights of Individuals in Child Abuse and Neglect Registries*, 77 WASH. & LEE L. REV. 857 (2020) (analyzing the due process protections for people included in state child abuse and neglect registries).

126. Burrell, *supra* note 14, at 132.

127. Nikita Stewart, *The Child Abuse Charge Was Dismissed. But It Can Still Cost You a Job.*, N.Y. TIMES (Feb. 25, 2019), <https://www.nytimes.com/2019/02/25/nyregion/ny-child-abuse-database.html> [<https://perma.cc/DJ6Q-9DA5>].

128. *Know Your Rights: How to Challenge a State Central Register ("SCR") of Child Abuse/Neglect*, MANHATTAN LEGAL SERVS. NYC, [https://www.legalservicesnyc.org/storage/PDFs/KYR\\_SCR/english%20scr%20flyer.pdf](https://www.legalservicesnyc.org/storage/PDFs/KYR_SCR/english%20scr%20flyer.pdf) [<https://perma.cc/E7GF-QR6F>].

attorneys, and child welfare agencies.<sup>129</sup> In 2019 alone, the state processed 316,000 background checks for industries that were required to screen all applicants.<sup>130</sup>

Another one of the lasting consequences of a CPS investigation are the psychological effects<sup>131</sup> it has on children.<sup>132</sup> When a child is removed from the home or subjected to frequent visits and examinations, there are debilitating effects on his or her behavioral and emotional wellbeing.<sup>133</sup> Children involved with the child welfare system have been shown to have psychological, health, and education deficits and delays.<sup>134</sup> From the child's perspective, being removed from the home is associated with rejection or loss, and later affects their ability to form healthy attachments, even if the removal is just for a short time.<sup>135</sup>

### III. SOME CASEWORKERS ARE COPS

This Part explores the legal issues implicated by the current laws which regulate CPS investigations.<sup>136</sup> In New York, the child welfare system portrays an image of “helping” families and these families are viewed by the public as needing or deserving the unwanted intervention of CPS.<sup>137</sup> However, this mindset needs to be shifted; instead of questioning the family, the public should be skeptical of CPS which intrudes into and separates a family based on allegations that have not been proven true.<sup>138</sup> CPS invades the lives of families with one phone call by a “concerned bystander” or mandated reporter.<sup>139</sup> There is no burden of proof that must be met and a mere suspicion can allow CPS into a family's life so long as a hotline operator believes the conduct described

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129. *Id.*

130. Stewart, *supra* note 127.

131. See *Trauma Caused by Separation of Children from Parents*, AM. BAR ASS'N (2018), [https://www.americanbar.org/content/dam/aba/publications/litigation\\_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf](https://www.americanbar.org/content/dam/aba/publications/litigation_committees/childrights/child-separation-memo/parent-child-separation-trauma-memo.pdf) [<https://perma.cc/E5VJ-JFAP>], for more information regarding the psychological effects that CPS investigations and child removals have on children and their guardians.

132. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 212 (2017).

133. *Id.*; see also Katherine Kortenkamp & Jennifer Ehrle, *The Well-Being of Children Involved with the Child Welfare System: A National Overview* 1, URB. INST. B-43 (2002), <https://www.urban.org/sites/default/files/publication/59916/310413-The-Well-Being-of-Children-Involved-with-the-Child-Welfare-System.PDF> [<https://perma.cc/5NEN-4EKD>].

134. Kortenkamp & Ehrle, *supra* note 133, at 1.

135. Sankaran & Church, *supra* note 132, at 211-12.

136. N.Y. SOC. SERV. LAW § 424 (Consol. 2021).

137. Burrell, *supra* note 14, at 147.

138. *Id.* at 129, 137-38.

139. *Id.* at 130.

“reasonably constitute[s]” abuse or neglect.<sup>140</sup> The hotline operator makes this judgement based on the limited information that he or she receives over a short phone call without meeting the caller, the guardian, or the subjects of the report.<sup>141</sup>

This Part discusses the legal issues that arise when CPS agents make unannounced home visits and have other interactions with families that are the subjects of reports.<sup>142</sup> Specifically, in the course of the investigation, CPS workers frequently visit a family’s home unannounced, and parents or guardians are unaware that they have the right to say no to their requests or are too afraid to.<sup>143</sup> It will then proceed to discuss the lack of safeguards for parents, both in family and criminal court, throughout the investigation process.<sup>144</sup>

#### *A. Parents Are Unaware of Their Rights or Are Afraid to Exercise Them*

Although CPS has no legal authority to compel a family to receive services under SSL § 424, families have claimed that they felt CPS pressured or intimidated them into complying.<sup>145</sup> At one rally advocating for the abolishment of New York City’s Child Protective Services Agency (“Administration for Children’s Services” or “ACS”), an ACS worker, who had worked with the agency for over ten years, indicated that workers “use parents’ fear of having their children taken away to gain their cooperation and get access to information for the investigation.”<sup>146</sup> He bluntly stated that workers target the ignorance of families in order to “get the[] job done.”<sup>147</sup> It is not uncommon for an agency worker to knock on a family’s door and not respect the fact that the guardian refused the worker’s entry.<sup>148</sup> There are some workers that simply will not take no for an answer.<sup>149</sup>

When faced with the fear of losing a child, parents would agree to most requests, especially when they do not know any better.<sup>150</sup> Threats of family separation pressure a parent into making decisions pertaining

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140. *Id.*

141. *Id.*

142. *See infra* Part III.A-B.

143. *See infra* Part III.A.

144. *See infra* Part III.B.

145. N.Y. SOC. SERV. LAW § 424(10); Conn, *supra* note 2.

146. *See* Conn, *supra* note 2.

147. *Id.*

148. *Id.*

149. *Id.*

150. Michael Fitzgerald, *Rising Voices For ‘Family Power’ Seek to Abolish the Child Welfare System*, IMPRINT (July 8, 2020), <https://imprintnews.org/child-welfare-2/family-power-seeks-abolish-cps-child-welfare/45141> [<https://perma.cc/F7KH-CG8T>].



to their children that they may not agree with.<sup>151</sup> This coercion infringes upon the guardian's fundamental right to make decisions regarding how to raise their children, which is guaranteed to them under the Due Process Clause of the Fourteenth Amendment.<sup>152</sup> Even when parents are not directly pressured by CPS into complying, many are under the mistaken belief that the CPS agent is on their side and innocently confide in them.<sup>153</sup> This information is later used against them in court and in conference meetings.<sup>154</sup>

### *B. Lack of Safeguards for Parents in Court*

When a case makes its way to family court, there are fewer safeguards than when parents are defendants in criminal courts.<sup>155</sup> In cases where termination of parental rights is at issue, there is no automatic federal right to appointed counsel.<sup>156</sup> However, in New York, respondents in abuse and neglect proceedings have a constitutional right to counsel if the case advances to court.<sup>157</sup> But before that happens, parents and caregivers can make decisions during the investigative process, without the benefit of counsel, that have lasting repercussions.<sup>158</sup>

#### 1. Emergency Removals

Family separations traumatize children and their parents, and this goes unnoticed because the U.S. child welfare system “presents itself as noble, well-intentioned, and in service of families in need.”<sup>159</sup> However, the reality is that the child welfare system can often do more harm than good to the children and families it is seeking to protect.<sup>160</sup> Although, in New York State, the law requires a hearing whenever a child is removed from the home, a child can still be removed on trial discharge status or in emergency situations.<sup>161</sup>

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151. *Id.*

152. U.S. CONST. amend. XIV; *see also* Troxel v. Granville, 530 U.S. 57, 65 (2000).

153. Linda Martin, *Why the Child Protective Services Social Worker Isn't Helping You*, FIGHTCPS (June 29, 2015), <https://fightcps.com/why-cps-caseworker-is-not-helping-you/> [https://perma.cc/XF3J-G4V8].

154. Hughes, *supra* note 7, at 442-43; McEvoy, *supra* note 99, at 896-97.

155. Burrell, *supra* note 14, at 139-40.

156. Lassiter v. Dep't of Soc. Serv., 452 U.S. 18, 33-34 (1981).

157. N.Y. FAM. CT. ACT § 262(a) (McKinney 2021).

158. McEvoy, *supra* note 99, at 889-90.

159. Jennings, *supra* note 120, at 5-6.

160. *Id.* at 6.

161. *Id.* at 7.

Moreover, child removals are more often than not “emergency removals” which do not require court oversight.<sup>162</sup> In 2018, 46.8% of New York City’s removal actions were “emergency removals” where, if courts are closed, “child protective workers are allowed to remove a child from a home without seeking a judge’s permission first.”<sup>163</sup> In twenty to twenty-five percent of those emergency removal cases, a judge had later determined that the child should be returned home.<sup>164</sup> Most parents in child welfare cases do not get a lawyer until after a child is removed, the child welfare agency has already petitioned the court, and the family has already made their first court appearance.<sup>165</sup>

## 2. Self-Incrimination

The Fifth Amendment of the United States Constitution provides that “[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . .”<sup>166</sup> However, when parents or guardians voluntarily let CPS into their lives and homes, they run the risk of incriminating themselves as they are afforded no protections by CPS or its procedures.<sup>167</sup> There is a lot of interaction between CPS and police agencies; CPS is required to contact the police in certain situations<sup>168</sup> and CPS workers are required to disclose to the police when they believe a crime is occurring.<sup>169</sup> This seriously implicates a family’s right against self-incrimination and right to counsel, as the police are also given access to case notes and interview transcripts that the caseworker has collected in the course of an investigation.<sup>170</sup> Therefore, it is not uncommon for a report to lead to an arrest of an individual in the family, which may also lead to a termination of parental rights.<sup>171</sup>

The term “*Miranda* Rights” comes from the famous case of *Miranda v. Arizona*,<sup>172</sup> where the Court found that when an individual was taken into custody and subjected to questioning, the Fifth Amendment

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162. Michael Fitzgerald, *Hearings: Emergency Removals to Foster Care Have Surged in New York. Here Is One Case*, IMPRINT (Apr. 24, 2019), <https://imprintnews.org/featured/hearings-emergency-removal-new-york-city/34685> [<https://perma.cc/6V6X-MKF4>].

163. *Id.*

164. *Id.*

165. THE BRONX DEFENDERS, *supra* note 123, at 40-41.

166. U.S. CONST. amend. V.

167. Patton, *supra* note 20, at 480-82 (examining the Fifth Amendment implications of concurrent or consolidated proceedings); *Whatever They Do, I’m Her Comfort, I’m Her Protector*, *supra* note 113, at 5.

168. See discussion *supra* Part II.D.1.

169. NEW YORK STATE CHILD PROTECTIVE SERVICES, *supra* note 16, at L6.

170. *Id.* at I-1.

171. *Id.*

172. 384 U.S. 436 (1966).

privilege against self-incrimination was jeopardized.<sup>173</sup> In order to protect that privilege, procedural safeguards are required in the form of a warning before questioning, that one has a right to remain silent and that anything he or she says could be used against him or her in a court of law.<sup>174</sup> Therefore, evidence obtained as a result of such an interrogation could not be used against the defendant at trial, unless the prosecution could demonstrate that such warnings were given.<sup>175</sup> However, guardians are not given any similar warning before they are questioned by CPS workers, even though a CPS case may lead to criminal prosecution during which law enforcement are allowed to access the caseworker's notes and to admit CPS files into evidence to obtain their conviction.<sup>176</sup>

Courts in New York have long recognized that statements to a social worker are admissible in a criminal trial, even if there is no notice given to the individual that such statements may be used against them.<sup>177</sup> Therefore, it is already established that in absence of some sort of protection, families will not be able to suppress the statements that they unknowingly shared with their caseworkers.<sup>178</sup> In *People v. Hussain*,<sup>179</sup> the defendant was charged with rape and sodomy and made a motion to repress a statement that he had made to a caseworker.<sup>180</sup> The court relied on New York Criminal Procedure Law § 710.30(1), which explains that evidence in the form of statements made by a defendant to a public servant are only suppressible if they are involuntarily made.<sup>181</sup> The defendant relied on *Miranda v. Arizona* in saying that since he was not given notice by the social worker that the statements could be used against him in a criminal trial, they were involuntary and could not be admitted as evidence.<sup>182</sup> However, the court rejected this argument because *Miranda* only applied to law enforcement officers and their agents, and the CPS worker was not considered a law enforcement agent despite the intersectionality of the two agencies.<sup>183</sup>

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173. *Id.* at 439.

174. *Id.* at 498.

175. *Id.* at 498-99.

176. N.Y. SOC. SERV. LAW § 424 (Consol. 2021).

177. *People v. Hussain*, 638 N.Y.S.2d 285, 285-86 (Sup. Ct. 1996) (holding that “any statement made to a child welfare caseworker does not require notice, or a hearing on suppression”); *see also* *People v. Davila*, 637 N.Y.S.2d 200, 200 (App. Div. 1996).

178. *Hussain*, 638 N.Y.S.2d at 285-86.

179. 638 N.Y.S.2d 285 (Sup. Ct. 1996).

180. *Id.* at 285.

181. N.Y. CRIM. PROC. LAW § 710.30(1) (McKinney 2021).

182. *Hussain*, 638 N.Y.S.2d at 285.

183. *Id.*

In *People v. Gwaltney*,<sup>184</sup> the court reaffirmed this idea by stating that since the parents involved were free to leave any time during the CPS worker's questioning, the worker was not required to tell them their rights, and the defendant's statement could be used in his criminal trial.<sup>185</sup> Overall, these cases support the assertion that parents would not have made statements voluntarily to the social worker had they known the statements would later be used against them in a court of law.<sup>186</sup>

### 3. The Right to Counsel

During the course of CPS investigations, families' rights to counsel are not protected.<sup>187</sup> The Sixth Amendment gives the criminal defendant the right to counsel in proceedings.<sup>188</sup> But in cases of termination of parental rights, there is no automatic right to appointed counsel.<sup>189</sup> The constitutional right to counsel during a CPS investigation is only triggered when the respondents' case in an abuse or neglect proceeding advances to court.<sup>190</sup> But before this even happens, parents can agree to binding service plans in informal meetings or proceedings.<sup>191</sup> These meetings are typically called "Service Plan Meetings" and usually occur before the court even gets involved.<sup>192</sup> In said meetings, there are no

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184. 530 N.Y.S.2d 437 (Sup. Ct. 1988)

185. *Id.* at 438-39 (reasoning that there is a presumption that CPS workers are not required to tell guardians and families their rights because they are not considered agents of the police but rather are more like mandatory reporters). In this case, the defendant was charged with rape and moved for an order to suppress statements that he made to a caseworker. *Id.* The caseworker was investigating a child abuse case and although the mother was told of her rights in the interview, the father was not and proceeded to disclose to the social worker the events that transpired. *Id.* Those statements were later used during his indictment in criminal court. *Id.* The caseworker gave the mother a form which stated the parents' rights the day before, however, the worker had not inquired into whether or not the father had seen this form or whether he understood his rights. *Id.* The court reasoned that *Miranda* warnings were not required because the defendant was free to leave at any time during the questioning. *Id.*

186. *Compare Hussain*, 638 N.Y.S.2d at 286 (holding that a CPS worker is not required to read a parent their rights before an interview because they are not a member of or agent of law enforcement), with *People v. Ledbetter*, 998 N.Y.S.2d 286, 291-92 (Sup. Ct. 2014) (holding that the statements made to a CPS investigator were inadmissible in a criminal trial and violated the defendant's right to counsel because the CPS investigator's interview was so intertwined with the district attorney's grand jury presentation that the investigator became an agent of the prosecution and was required to give *Miranda* warnings).

187. Hughes, *supra* note 7, at 441-42, 461.

188. U.S. CONST. amend. VI.

189. *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 32-34 (1981).

190. N.Y. FAM. CT. ACT § 262(a) (McKinney 2021).

191. Hughes, *supra* note 7, at 442.

192. *Id.* at 441-42.

legal standards that need to be met, there only needs to be a belief by the investigator that the family is in need of intervention.<sup>193</sup>

These informal meetings are designed to “help the family” and “facilitate communication” but often ultimately serve as a guise for entering the family into contractual obligations of compliance with CPS and its recommended services, without the benefit of having an attorney to advocate for them.<sup>194</sup> In said conferences, parents are questioned in detail about anything pertaining to what the caseworker believes is parenting, and often times parents comply because they wrongly believe that the worker is trying to help them or is on their side.<sup>195</sup> Sometimes the statements made in these proceedings only further implicate the family, and the abuse or neglect allegations that brought them there are finally given some legs to stand on.<sup>196</sup>

Although parents technically have the right to refuse to come to these meetings, case workers have and can threaten to file charges in court which intimidates parents into cooperating.<sup>197</sup> The workers then encourage parents to reveal personal information in order to create a plan that improves the quality of their family life, all while assuring parents that this information will not be used against them.<sup>198</sup> Later, the worker will amend the family’s abuse or neglect petition to include the information that was stated at the hearing which the parent made without the benefit of counsel.<sup>199</sup>

#### IV. A *MIRANDA*-LIKE REQUIREMENT IN CHILD PROTECTIVE SERVICES INVESTIGATIONS

Under § 424 of New York’s SSL, there is no obligation for the agency to tell a parent or guardian his or her rights.<sup>200</sup> Guardians not knowing their rights during these investigations could lead to a CPS worker leaving home visits or interviews with a series of allegations that they did not have before.<sup>201</sup> Families also need to be told their rights by caseworkers throughout the investigation in order to protect them from

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193. *Id.* at 439-43.

194. *Id.* There are cases where these informal meetings do serve to help the families or keep all parties informed of what is going on, but for many families they are an unnecessary intrusion. *Id.* Even if they are helpful, it would still be beneficial to have an attorney present, as anything said can be put in the family’s case file to be used against them later. *Id.*

195. Martin, *supra* note 153.

196. Hughes, *supra* note 7, at 441-42.

197. *Id.* at 442.

198. *Id.* at 442-43.

199. *Id.*

200. N.Y. SOC. SERV. LAW § 424 (Consol. 2021).

201. Hughes, *supra* note 7, at 442-43.

unnecessary intrusion into their constitutional rights; like their Fifth Amendment privilege against self-incrimination, their fundamental right to family and to raise their children as they see fit, and their Sixth Amendment right to counsel.<sup>202</sup> Giving these *Miranda*-style warnings in child welfare cases would allow more families to stay together and avoid being taken advantage of by the child welfare system.<sup>203</sup>

Today, there is a proposed bill in the New York State Senate, S5484A, which would amend SSL § 424 and require child protective services to orally and in writing disclose certain information to parents who are the subjects of a services investigation.<sup>204</sup> This provision would require CPS workers to tell guardians their rights as they relate to the investigation; including the right to deny entry to the residence, the right to deny an interview with the child without a court order, the right to know the allegations brought against them, the right to remain silent and not speak with the CPS agent without a court order and that whatever they do say can be used against them in a court of law, the right to an attorney, the right to deny any requests made by CPS without a court order, and the right to contact information for family resources.<sup>205</sup> This law needs to be passed not only to protect parents' constitutional rights but also to further protect families.<sup>206</sup> Although this law is a step in the right direction, there is more to be done in order to adequately protect families.<sup>207</sup>

#### A. New York State Senate Bill S5484A

There was a proposed bill in the New York State Senate for the 2021-2022 legislative session which would empower families subjected to child welfare investigations by requiring CPS workers to notify them of their rights.<sup>208</sup> This proposed would will not only inform parents of their rights but also take away some of the fear and uncertainty that parents experience during the CPS investigation process and after.<sup>209</sup> This Subpart will introduce the bill as proposed<sup>210</sup> and its benefits which include: protecting parents' rights,<sup>211</sup> alleviating some of the harmful

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202. Patton, *supra* note 20, at 483-86; *see* discussion *supra* Part III.B.

203. Burrell, *supra* note 14, at 144.

204. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

205. *Id.*

206. Burrell, *supra* note 14, at 144.

207. *See infra* Part IV.B.

208. S.B. S5484A.

209. *Id.*; Conn, *supra* note 2.

210. *See infra* Part IV.A.1.

211. *See infra* Part IV.A.2.

effects that occur when children are removed from the home,<sup>212</sup> and empowering BIPOC families.<sup>213</sup>

### 1. About S5484A

Senate Bill S5484A “[r]equires child protective services to orally and in writing disclose certain information to parents and caretakers who are the subject of a child protective services investigation.”<sup>214</sup> The purported purpose is to provide parents “with the ability to have their rights communicated to them.”<sup>215</sup> The first section of the proposed amendment is titled “Information regarding parent or caretaker’s rights.”<sup>216</sup> The amendment requires CPS to orally and in writing inform a parent or caretaker of his or her rights at the initial point of contact in his or her preferred language.<sup>217</sup> Then the worker documents in the case record when the Parental Bill of Rights was stated.<sup>218</sup> The information given should include, but is not limited to:

- (1) The parent or caretaker is not required, unless court ordered, to permit the child protective services representative to enter the residence of the parent or caretaker;
- (2) The parent or caretaker who is the subject of the investigation is entitled to be informed of the allegations being investigated;
- (3) The parent or caretaker is not required, unless court ordered, to speak with the child protective services representative, and any statement made by the parent, caretaker or other family member may be used against the parent or caretaker in an administrative or court proceeding;
- (4) The parent or caretaker is entitled to seek the advice of an attorney and to have an attorney present when the parent or caretaker is questioned by a child protective representative;
- (5) The parent or caretaker is not required, unless court ordered, to allow a child protective services representative to interview or examine a child;
- (6) The parent or caretaker is not required, unless

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212. *See infra* Part IV.A.3.

213. *See infra* Part IV.A.4.

214. S.B. S5484A.

215. *Id.*

216. *Id.* The official text of the amendment reads as follows:

A parent or caretaker has the right to receive certain information regarding their rights at the initial point of contact during a child protective investigation. At the initial point of contact with a parent or caretaker, child protective services shall orally and in writing disseminate, in the parent or caretaker’s preferred language, information regarding the parent or caretaker’s rights during such investigation and shall document in the case record that such information has been provided to the parent or caretaker.

*Id.*

217. *Id.*

218. *Id.*

court ordered, to agree to any requests made by a child protective services representative, including, but not limited to, requests to sign a release of information, to take a drug or alcohol test, or to submit to a mental health evaluation; (7) Contact information for resources which may be available to parents and caretakers during a child protective services investigation, including legal services from a designated organization.<sup>219</sup>

A version of this amendment was previously introduced in the 2019-2020 legislative session to address criticism that the agency is “anti-family” and does not have adequate “checks and balances” to make sure that it runs correctly.<sup>220</sup> The 2021 version of the bill in its justification states that the sponsors believe that families not knowing their rights is the “crux of the problem” and would ensure that the system runs correctly.<sup>221</sup> It addresses that CPS investigations invoke “needless trauma,” which leads parents to act in ways and make statements that they ordinarily would not.<sup>222</sup> By providing parents with what it calls a “Parental Bill of Rights,” the co-sponsors<sup>223</sup> hope to ensure justice in the child welfare system.<sup>224</sup>

## 2. Protecting Parents’ Rights

This bill needs to be passed in order to better protect families’ right to parent their children and also their right against self-incrimination.<sup>225</sup> Since police agencies and CPS are allowed to “borrow” evidence from one another, it is important that parents are made aware of potential risks.<sup>226</sup> If parents were aware that they had the right to deny CPS agents entry into their home, there would potentially be less incriminating evidence against them.<sup>227</sup> Often, the police and CPS are investigating the same conduct side-by-side for one reason or another; whether it be because the initial report to CPS was given by the police or CPS was required to inform the police about suspicions of criminal activity.<sup>228</sup>

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219. *Id.*

220. S.B. S7553A, 2019-2020 Leg. Sess. (N.Y. 2020).

221. S.B. S5484A.

222. *Id.*

223. *Id.* Co-sponsors include: Alessandra Biaggi (D) of the 34th Senate District; Jessica Ramos (D) of the 13th Senate District; Gustavo Rivera (D) of the 33rd Senate District and Julia Salazar (D) of the 18th Senate District. *Id.*

224. *Id.*

225. *Id.*

226. McEvoy, *supra* note 99, at 896-97.

227. *Id.* at 911.

228. NEW YORK STATE CHILD PROTECTIVE SERVICES, *supra* note 16, at L-6.



Therefore, it is important for parents or caretakers to know the consequences of voluntarily admitting information to a caseworker.<sup>229</sup>

For some of these families, voluntarily allowing a caseworker into their home can lead to the removal of their child or serious criminal charges.<sup>230</sup> But much of the investigation and evidence-gathering in a CPS investigation happens way before the family is brought in front of a court and told they are entitled counsel.<sup>231</sup> Therefore, the standard of proof to get in the door is much lower than an arrest or search warrant, despite it having the same purpose or end-result as one.<sup>232</sup>

It is not until a guardian is in court that they are told of their rights, including the right to contact an attorney, and by then it may be too late.<sup>233</sup> Before that even occurs, the family could have entered into a plea bargain, voluntarily agreed and bound themselves to services, undergone drug and mental health testing, allowed body scans of their children, participated in taped interviews, and allowed the agent into their home to assess it and take pictures.<sup>234</sup> This evidence can later be used against them in a criminal trial, and if they are convicted, it could potentially traumatize their family even more.<sup>235</sup>

### 3. Harmful Effects of Removal

This bill also needs to be passed because of the harmful effects that family separation has on children in their developing years.<sup>236</sup> The removal of a child from a home is traumatic and oftentimes done without a court order.<sup>237</sup> If a CPS agent gains entry into the home from an unsuspecting guardian, they are given the power to decide whether or not there needs to be an emergency removal despite knowing little about the family besides information from the initial report and a few glances around some bedrooms.<sup>238</sup> Children in the system have historically presented more behavioral problems and foster resentments within the home and against CPS.<sup>239</sup>

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229. McEvoy, *supra* note 99, at 896-97.

230. *See* Hughes, *supra* note 7, at 433-34.

231. McEvoy, *supra* note 99, at 889-90.

232. *Id.* at 890; Burrell, *supra* note 14, at 143-44.

233. McEvoy, *supra* note 99, at 889-90.

234. Hughes, *supra* note 7, at 433-34, 442.

235. McEvoy, *supra* note 99, at 896-97.

236. Kortenkamp & Ehrle, *supra* note 133, at 2.

237. *See* Sankaran & Church, *supra* note 132, at 211-13.

238. Jennings, *supra* note 120, at 13.

239. Kortenkamp & Ehrle, *supra* note 133.

#### 4. Empowering and Benefitting BIPOC Families

Finally, this bill would balance the scales on the side of families, especially those who are already unnecessarily targeted by CPS because of their poverty level or cultural differences.<sup>240</sup> Historically, CPS has targeted BIPOC families and those on the poverty line.<sup>241</sup> These groups would benefit most from the bill, not only because it would provide them an opportunity to make informed decisions but also because it requires their rights be communicated to them in their respective languages.<sup>242</sup> The Parental Bill of Rights and Bill S5484A would help keep these families together and stop the system from taking advantage of them.<sup>243</sup> Many of these families already feel targeted by CPS, and by empowering them to push back, it would make them feel like they have options.<sup>244</sup>

##### *B. Further Protections*

This Subpart discusses why the proposed law does not go far enough to protect families who may come into contact with CPS investigators and proposes additions that would ensure families' rights are secured.<sup>245</sup> First, it will propose an exclusionary clause which would bar evidence from coming into criminal trials if parents are not read or told their rights.<sup>246</sup> Second, the bill as proposed only requires CPS workers to indicate on the report that parents were told of their rights, and it, instead, should require that parents sign that they were told their rights if applicable.<sup>247</sup> Lastly, it recommends that since multiple guardians or family members may be involved in an investigation, each should be told of their rights instead of requiring rights only be read once.<sup>248</sup>

##### 1. Introducing a *Miranda*-like Exclusionary Clause

Although Bill S5484A is a good start, families need further protections which could be guaranteed through an exclusionary clause similar

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240. Nancy Fortunato of Rise to NYC City Council: "Every Parent Should Have Timely Legal Representation at the Beginning and Be Informed of Their Rights, Just Like the Miranda Rights," RISE (Nov. 1, 2019), <https://www.risemagazine.org/2019/11/nancy-fortunato-of-rise-to-nyc-city-council> [https://perma.cc/9KZP-ZFTR].

241. Gottlieb, *supra* note 1, at 381-82.

242. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

243. Burrell, *supra* note 14, at 145.

244. Grench, *supra* note 42.

245. S.B. S5484A.

246. *See infra* Part IV.B.1; *Miranda v. Arizona*, 384 U.S. 436, 476 (1966).

247. *See infra* Part IV.B.2.

248. *See infra* Part IV.B.3.

to the one in the *Miranda* rights law.<sup>249</sup> The exclusionary rule in the *Miranda* rights law prevents the government from using evidence gathered in violation of the Constitution.<sup>250</sup> However, the rule does not apply to civil proceedings and parents are not currently being given protection in the context of CPS investigations.<sup>251</sup> The clause in Bill S5484A will be similar to the one in the current *Miranda* law and would guarantee that if a guardian is not given a Parental Bill of Rights during the investigation, then the evidence obtained by a caseworker would not be admitted into a criminal trial.<sup>252</sup> This warning would clarify the consequences of a parent not being told their rights and balance the scales in favor of parents who are already being taken advantage of through evidence-borrowing.<sup>253</sup>

Currently, the line between who is and who is not required to inform a parent of their *Miranda* rights during an investigation is a blurry one.<sup>254</sup> Under the criminal law, caseworkers are not required to tell a parent their rights because they are not considered agents of the police.<sup>255</sup> However, police agencies frequently borrow evidence from one another, and the investigations are thoroughly intertwined.<sup>256</sup>

Moreover, including this language into the law will stop Fourth Amendment violations made by CPS agents and add an additional deterrent value.<sup>257</sup> In *Immigration & Naturalization Service v. Lopez-Mendoza*,<sup>258</sup> the Supreme Court declined to extend the exclusionary rule to deportation arrests and hearings.<sup>259</sup> The Court reasoned that given the nature of Immigration and Naturalization Service (“INS”) arrests and the crimes of the people involved, the costs of applying the rule in civil deportation hearings are too high and the additional deterrent value too low.<sup>260</sup> The Court in *Lopez-Mendoza* acknowledged that arrests made by INS are “chaotic,” as they often arrest large numbers of people at one time.<sup>261</sup> There were also already procedures employed by

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249. *Miranda*, 384 U.S. at 476.

250. U.S. CONST. amend. V.

251. *Id.*

252. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

253. *Id.*; McEvoy, *supra* note 99, at 896.

254. *People v. Gwaltney* 530 N.Y.S.2d 437, 438 (Sup. Ct. 1988); *see also* *People v. Hussain*, 638 N.Y.S.2d 285, 286 (Sup. Ct. 1996).

255. *Hussain*, 638 N.Y.S.2d at 286.

256. McEvoy, *supra* note 99, at 869.

257. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42 (1984) (justifying the application of the exclusionary rule by its tendency to deter officials from committing *Miranda* violations).

258. *Id.*

259. *Id.* at 1050.

260. *Id.*

261. *Id.* at 1044.

INS to safeguard the rights of those that they are arresting.<sup>262</sup> Furthermore, those detained by INS “immediately resume their commission of a crime” once they are released because of their unlawful presence in this country.<sup>263</sup>

In contrast, these reasons the Court had in not extending the exclusionary rule there are not ordinarily present in CPS proceedings or subsequent arrests.<sup>264</sup> First, CPS agents handle individual families and not large crowds of people, making warnings easier to give and less chaotic.<sup>265</sup> Also, family members do not live in a permanent state of illegal activity, and CPS can offer rehabilitative services in order to stop future criminal or wrongful conduct.<sup>266</sup> Lastly, CPS today does not have safeguards in place to protect families, and instead is known to pressure parents into getting the information and access they need.<sup>267</sup>

Much like the exclusionary rule in the context of the *Miranda* rights law, the same exceptions would apply in the context of child welfare investigations.<sup>268</sup> The exceptions to the exclusionary rule in the context of the criminal law include those for tangible evidence,<sup>269</sup> impeachment,<sup>270</sup> witness discovery,<sup>271</sup> public safety,<sup>272</sup> and for “inevitable discovery.”<sup>273</sup> These exceptions would also help the caseworker who may have forgotten to tell parents their rights or who feels too threatened to do so.<sup>274</sup> Therefore, adding an exclusionary rule to the SSL would not be overly

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262. *Id.*

263. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1032 (1984).

264. *See id.* at 1043-44.

265. *Id.*

266. *People v. Roselle*, 643 N.E.2d 72, 74 (N.Y. 1994).

267. *Conn.*, *supra* note 2.

268. U.S. CONST. amend. V.

269. *United States v. Patane*, 542 U.S. 630, 633-34 (2004) (holding that any tangible evidence acquired without a *Miranda* warning is admissible because the physical evidence does not implicate the self-incrimination clause).

270. *Kansas v. Ventris*, 556 U.S. 586, 593-94 (2009) (holding that incriminating statements acquired in violation of the Sixth Amendment right is admissible for the limited purpose of impeaching a defendant).

271. *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (holding that if a criminal defendant gives police the name of another witness without a *Miranda* warning, the court is not required to suppress testimony of that witness).

272. *New York v. Quarles*, 467 U.S. 649, 649, 654-56 (1984) (holding that if public safety demands it, a suspect in custody can be questioned before being read *Miranda* warnings and evidence acquired is admissible).

273. *Wayne v. United States*, 318 F.2d 205, 209 (D.C. Cir. 1963) (holding that the evidence acquired—location of a body—could be admitted because it would have been discovered inevitably by the coroner); *see also Exceptions to the Exclusionary Rule in Criminal Procedure*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/exceptions-to-the-exclusionary-rule> [<https://perma.cc/48VU-64KR>] (last visited Apr. 1, 2023).

274. *See Exceptions to the Exclusionary Rule in Criminal Procedure*, *supra* note 273.

burdensome, as there are already mechanisms in place to limit its application.<sup>275</sup>

## 2. Going Beyond Case Notes: Why Parents Should Have to Sign

The requirement for CPS workers to only write down that they told the parent their rights does not go far enough to ensure that parents actually heard their rights and understood the gravity of the situation.<sup>276</sup> CPS workers should also get the guardian's signature when possible.<sup>277</sup> By having guardians sign, it would ensure that they were actually told and understand their rights.<sup>278</sup>

Requiring families to sign would also serve a functional purpose, as it would serve as a tangible reminder to caseworkers that they must inform parents of their rights.<sup>279</sup> The requirement would also help ensure those that do not understand English are given sufficient information.<sup>280</sup> Most importantly, by requiring parents to sign it ensures that no mistakes are made, or information forgotten by the caseworker.<sup>281</sup>

Moreover, the requirement would not be absolute.<sup>282</sup> Understandably there would be exceptions making not getting a signature from a parent acceptable,<sup>283</sup> such as when the guardian is hostile and refuses to sign or there is an emergency situation.<sup>284</sup> In these situations, it would be acceptable for the caseworker to simply indicate that he or she read or gave said parents their Parental Bill of Rights.<sup>285</sup> There, the safety of the worker and family involved would take priority over signing.<sup>286</sup>

## 3. Parents Should be Notified of Their Rights More Than Once

In order for the warnings proposed in Bill S5484A to be effective, guardians need to be given these rights more than once in order to

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275. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1041-42, 1050 (1984) (showing that courts are capable of accurately weighing the cost and balances in applying the exclusionary rule).

276. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. Sankaran & Church, *supra* note 132, at 213 (stating “[b]ut so long as child welfare agencies remain underfunded, overburdened and susceptible to the same biases that affect anyone, errors in judgment will occur and mistakes will be made”).

282. U.S. CONST. amend. V.

283. *Id.*

284. *Id.*

285. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

286. U.S. CONST. amend. V.

account for the changing family unit.<sup>287</sup> Reading a Parental Bill of Rights once does not ensure that all guardians are aware of their rights during the investigation.<sup>288</sup> The family unit is no longer considered nuclear, parents live apart, do not communicate, or there could be multiple sets of parents for one child.<sup>289</sup> Moreover, there could be others present in the child's home who also deserve to know their rights when they open the door to a CPS worker.<sup>290</sup>

Today, caseworkers are not required to notify family members that any statements made to them are admissible in a court of law.<sup>291</sup> This is because caseworkers are not considered "agents" of police despite the two agencies' close relations with each other.<sup>292</sup> In *People v. Gwaltney*,<sup>293</sup> the court reasoned that although the caseworker was required to report abuse or maltreatment to the police, the caseworker was not considered an agent of the police any more than a doctor was.<sup>294</sup> There, a form was given to one parent and not the other notifying them of the potential consequences of an investigation.<sup>295</sup> After this, the parent who was not given the form and not made aware of it by his wife, proceeded to tell the caseworker information that was later used to convict him in a criminal court.<sup>296</sup> Although the court said that a warning was not required and ruled the evidence admissible, it stated:

This court firmly believes that it can hardly be expected in cases that by handing one copy of [the] form to one spouse it will be forwarded to the other spouse, or that the contents contained therein would be imparted to that spouse. It is suggested that a better practice would be for the caseworker to hand the above form to each interviewee, and that this procedure would not add any greater expense to the Bureau of Child Welfare.<sup>297</sup>

By giving multiple warnings, it would acknowledge the changing dynamics of families, especially those in the child welfare system.<sup>298</sup> It would also clarify to parents that just because they allowed interviews or visits in the past, does not mean they have to continue to do so absent a

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287. *People v. Gwaltney*, 530 N.Y.S.2d 437, 438-39 (Sup. Ct. 1988).

288. *Id.* at 439.

289. *Id.*

290. *Id.*

291. N.Y. SOC. SERV. LAW § 412 (Consol. 2021).

292. *People v. Ledbetter*, 998 N.Y.S.2d 286, 292-93 (Sup. Ct. 2014).

293. 530 N.Y.S.2d 437 (Sup. Ct. 1988).

294. *Id.* at 439.

295. *Id.*

296. *Id.*

297. *Id.* at 439-40.

298. *Id.* at 440.

court order.<sup>299</sup> Without a court order, these parents have the power to change their mind and decide how to raise their children without interference from CPS.<sup>300</sup>

### C. Addressing Counter Arguments

This Subpart addresses the counter arguments for this bill and possible issues critics would have with the proposed amendments.<sup>301</sup> First, opponents of the bill believe that the protections afforded to parents would put children at a greater risk of harm because they would make it harder for CPS to get necessary information.<sup>302</sup> Others believe that requiring caseworkers to tell parents their rights only adds to their long list of responsibilities.<sup>303</sup> Opponents may also think that the exclusionary rule would make it harder to attain criminal convictions because police agencies rely so much on the CPS investigation to establish their case.<sup>304</sup>

#### 1. The Proposed Protections Will Not Put Children at Greater Risk of Harm

The additions to Bill S5484A would not put children at a greater risk of harm for a number of reasons, including the fact that there are already safeguards in place that give CPS overriding power, such as emergency removals.<sup>305</sup> Additionally, even if parents refuse to allow caseworkers inside their homes, the law still requires parents to bring their children to the agency for an interview and assessment.<sup>306</sup> It is not as if once a parent refuses entry or to participate in services that the case is automatically closed.<sup>307</sup> The proposed bill simply forces the local child welfare agency to meet a higher burden of proof, which would only protect families.<sup>308</sup>

First, even if a parent initially denies entry, that power is not absolute.<sup>309</sup> Today, the power to refuse a CPS visit without a court order exists, but agents of CPS are not required to mention it and generally

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299. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

300. *Id.*

301. *Id.*

302. *See infra* Part IV.C.1.

303. *See infra* Part IV.C.2.

304. *See infra* Part IV.C.3.

305. S.B. S5484A.

306. Burrell, *supra* note 14, at 131.

307. Hager, *supra* note 9.

308. Burrell, *supra* note 14, at 143.

309. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (stating that liberty interests can be infringed upon by the government if the process is narrowly tailored to serve a compelling state interest).

perceive refusal as a red flag.<sup>310</sup> Even if this bill is passed, emergency removals would still exist, allowing the state to take children out of harm's way despite the wishes of the parent.<sup>311</sup> CPS agents would also be able to attain an entry order from a judge if denied entry.<sup>312</sup> Also, despite being given this warning, some parents would still allow CPS agents inside.<sup>313</sup> This is much like those who are given their *Miranda* rights and choose not to exercise them.<sup>314</sup>

Critics may believe that the families that are subject to these reports do not deserve protections or safeguards written into the SSL because they have done something wrong or criminal, but the reality is that many of them have not.<sup>315</sup> There is a misconception about the families that are subject to investigations, and the public are under the impression that all the cases are brutal because those are the only cases that they hear about.<sup>316</sup> However, that is simply not the truth, and the majority of the investigations deal with neglect and not abuse.<sup>317</sup> Moreover, neglect cases are inherently more subjective than those regarding abuse and are based on subjective standards set by the caseworker.<sup>318</sup>

## 2. A Parental Bill of Rights Is Not a Heavy Burden on the Caseworker

The inclusion of a Parental Bill of Rights within the SSL is not an overwhelming burden on caseworkers and would actually benefit

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310. Conn, *supra* note 2; Nancy Fortunato of Rise to NYC City Council, *supra* note 240.

311. Fitzgerald, *supra* note 162.

312. Hager, *supra* note 9.

313. Burrell, *supra* note 14, at 145.

314. *Id.* (“[S]ome parents will likely overshare despite the warnings, as is the case in the criminal context, the prevalence and mainstream knowledge of these rights could serve to formalize parent’s interactions with child protective officials.”).

315. Gottlieb, *supra* note 1, at 378.

316. *Id.* at 380.

Of course, the image of police banging down a door and sweeping children into the arms of caseworkers is one typically associated with the burnt and beaten and dead children in the newspapers, the children for whom the caseworkers may have been too late. But the kids being taken are not those kids. Not most of the time. The extreme cases that get the attention of the media are rare. Not rare enough, of course, but they are aberrations.

*Id.*

317. *Id.* at 377.

318. *Id.* at 378-79. For example, experts and parents have disagreed on what is the proper age to leave a child home alone, an allegation that may lead to reckless endangerment charges being filed against parents. See Lisa W. Foderaro, *Children Left Alone at Home, Worriedly*, N.Y. TIMES (Aug. 13, 2008), <https://www.nytimes.com/2008/08/14/nyregion/14alone.html> [<https://perma.cc/UQX4-6M74>] (explaining how parenting decisions, such as what is the proper age to leave children home alone, “raise questions about safety, maturity, class, cultural traditions and peer pressure”).



them.<sup>319</sup> Bringing the Parental Bill of Rights would also not be an imposition on caseworkers who already are required to bring forms to such visits.<sup>320</sup> Critics may also argue that this “warning” will become meaningless, since it adds just another piece of paperwork for CPS agents and guardians to fill out.<sup>321</sup> Although caseworkers do already have a lot of responsibilities, the inclusion of a *Miranda*-like provision would empower the families they work with.<sup>322</sup> Being honest and straightforward with families from the beginning of the CPS process would only create a better relationship between the caseworker and the families they are investigating.<sup>323</sup>

The inclusion of the Parental Bill of Rights would benefit both the families involved in an investigation and all caseworkers or government employees they encounter.<sup>324</sup> Having to read parents their rights aloud would stop the “rogue” caseworker and remind them that families have the right to refuse entry and not comply.<sup>325</sup> It would force them to think twice before pressuring families into doing what they ask.<sup>326</sup> It may also stop the workers from labeling families “hostile” when they do not comply because the worker is actively giving them the option.<sup>327</sup> Overall, families would be more open to rehabilitation if they were not fearful of the process with CPS.<sup>328</sup>

### 3. Parental Protections Will Not Delay or Burden Criminal Convictions

This bill and its proposed additions would also not make it harder to attain criminal convictions.<sup>329</sup> First, people can still come forward with the information they know, and there are some families that, despite hearing their rights, will still comply.<sup>330</sup> So long as parents are given a

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319. Grench, *supra* note 41 (“Why can’t you spend a couple of minutes getting out the information orally, or written?”).

320. *People v. Gwaltney*, 530 N.Y.S.2d 437, 439 (Sup. Ct. 1988).

321. *See generally* Michael D. Cicchini, *The New Miranda Warning*, 65 SMU L. REV. 911, 913-15 (2012) (arguing that the *Miranda* warnings have become meaningless in their administration).

322. McEvoy, *supra* note 99, at 892.

323. Gottlieb, *supra* note 31, at 378.

324. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

325. Grench, *supra* note 42.

326. Hager, *supra* note 9 (“To up the pressure, some caseworkers said they would use lines like ‘I don’t want to discuss your business out here in the hallway.’ Others: ‘Well, I’m not going to stop coming.’ ‘Why not, if you don’t have anything to hide?’”).

327. Burrell, *supra* note 14, at 139-40, 144-46.

328. *Id.* at 141.

329. Patton, *supra* note 20, at 480-82.

330. *Miranda v. Arizona*, 384 U.S. 436, 477-78 (1966).

warning, case notes and evidence gathered by the caseworker would still be admissible in criminal court.<sup>331</sup> Also, the exclusionary clause would not apply if there was a truly hostile situation.<sup>332</sup> The exceptions to the exclusionary rule would guarantee that police agencies could use evidence despite warnings not being given when appropriate, similar to the *Miranda* rights law.<sup>333</sup>

## V. CONCLUSION

The New York State Senate should pass Bill S5484A and amend the existing SSL.<sup>334</sup> The bill would help ensure that families understand their rights during CPS investigations and avoid unnecessary intrusions in their lives.<sup>335</sup> By passing the bill, legislators would be acknowledging that the child welfare system needs improvement and families need to be afforded more protections.<sup>336</sup> However, despite the present amendment being a substantial step forward for family rights, there are additions that need to be made in order for the bill to be effective.<sup>337</sup>

First, a Parental Bill of Rights during CPS investigations would inform families of their rights and resolve some worries that parents have.<sup>338</sup> CPS and the SSL as they exist today target poor and BIPOC families.<sup>339</sup> Investigators take advantage of families' ignorance of the law or pressure them into complying.<sup>340</sup> The inclusion of a Parental Bill of Rights will allow them to make a more informed decision and take away some of the fear they experience throughout the process.<sup>341</sup> However, the bill does not provide clarity as to what the consequences are when parents do not receive this warning.<sup>342</sup> By adding an exclusionary clause, it would make clear to caseworkers what the repercussions are for keeping families in the dark about their rights.<sup>343</sup> Also, requiring a signature would guarantee that guardians were actually informed.<sup>344</sup>

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331. *Id.*

332. *Id.* at 478; *see supra* Part IV.B.2.

333. *See supra* notes 277-81 and accompanying text.

334. *See supra* Part IV.A.1-2.

335. S.B. S5484A, 2021-2022 Leg. Sess. (N.Y. 2021).

336. Josh Gupta-Kagan, *Beyond Law Enforcement: Camreta v. Greene, Child Protection Investigations, and the Need to Reform the Fourth Amendment Special Needs Doctrine*, 87 TUL. L. REV. 353, 361-64 (2012).

337. *See supra* Part IV.B.

338. *See supra* Part IV.B.1-2.

339. *See supra* notes 235-39 and accompanying text.

340. *See supra* Part III.A.

341. *See supra* Part III.A.

342. *See supra* Part IV.A.3.

343. *See supra* Part IV.B.1.

344. *See supra* Part IV.B.2.

Passing Bill S5484A would also further protect the constitutional rights of families, including the right to parent,<sup>345</sup> the right against self-incrimination,<sup>346</sup> and the right to counsel.<sup>347</sup> Under the current SSL, it is way too easy for CPS to intrude into families' lives and homes.<sup>348</sup> Many guardians do not know to contact an attorney and are not informed of their right to counsel before it is too late.<sup>349</sup> The lack of safeguards for parents throughout the process seriously threatens their right to parent, as they could be agreeing to family services or risking removal of their children without knowing it.<sup>350</sup> If parents are told sooner that they can refuse to comply with CPS and have the right to an attorney, it could make a real difference in their case and more importantly, to their families.<sup>351</sup>

Not only would informing parents of their rights protect a multitude of constitutional rights, it would also minimize the negative effects that CPS intervention has on children and families.<sup>352</sup> When parents participate in the process unaware of their rights, they subject themselves to unnecessary intrusion by CPS and potentially even criminal conviction.<sup>353</sup> This can lead to long-lasting psychological effects among children and affect parents for years to come.<sup>354</sup> Giving parents the information included in the bill would empower them to make informed and intentional decisions as they work with the investigator.<sup>355</sup> Most importantly, it would empower them in a system that they already feel disenfranchised in.<sup>356</sup>

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345. See *supra* notes 53-57 and accompanying text.

346. See *supra* Part III.B.2.

347. See *supra* Part III.B.3.

348. See *supra* Part II.B.2.

349. See *supra* notes 228-30 and accompanying text.

350. See *supra* Part III.B.

351. See *supra* Part IV.

352. See *supra* Part IV.A-B.

353. See *supra* Part III.

354. See *supra* notes 127-31 and accompanying text.

355. See *supra* Part IV.

356. See *supra* notes 235-39 and accompanying text.

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