

Martinis, Mannhattans, and Maltreatment Investigations: When Safety Plans Are a False Choice and What Procedural Protections Parents Are Due

Ryan C. F. Shellady*

ABSTRACT: Over the last two decades, states have increasingly adopted differential response approaches as a supplement or alternative to child maltreatment investigations. This trend reflects growing concerns regarding the short-comings of traditional, adversarial approaches. Some critics believe traditional approaches overemphasize the role of parental fault. In response to these criticisms, a new investigatory tool was born: the safety plan. Safety plans borrow aspects from both differential response and traditional approaches. The plans are meant to be collaborative resolutions that alleviate immediate dangers identified during an investigator's initial maltreatment safety assessment while simultaneously allowing a traditional adversarial investigation to continue. Ideally, safety plans minimize the need for emergency, ex parte child removals at the outset of a maltreatment investigation. If, however, investigators abuse safety plans, then, the plans can deprive parents of fundamental liberty interests without any procedural due process protections. When investigators give parents an ultimatum—sign this plan, or I will remove your child—it should trigger due process protections. Unfortunately, current case law says otherwise. This Note first deconstructs the Seventh Circuit's opinion in Dupuy v. Samuels to establish why due process protections are necessarily triggered when child protection investigators offer safety plans. Next, this Note examines states' varying safety plan frameworks to identify what, if any, protections exist for parents

* J.D. Candidate, The University of Iowa College of Law, 2019; B.A., The University of Iowa, 2016. Thank you to Diane Redleaf, Sara Gilloon, and the Family Defense Center staff for giving me direction and support on this project. Thank you to the University of Michigan Child Advocacy Law Clinic and the Bergstrom Fellowship staff for providing tools and opportunities without which this project could not have come to fruition. Thank you to Professors Paul Gowder, Sacha Coupet, Vivek Sankaran, and Michael Bandstra, and to Carolyn Kubitschek for taking time out of their schedules to offer their support and guidance. Thank you to my fiancée, Victoria, for putting up with me. Lastly, thank you to Ghost Dog—you know who you are. The views and opinions in this Note are those of the author and do not necessarily reflect the express views of the Family Defense Center or of Latham & Watkins, LLP.

subjected to a safety plan. Finally, this Note encourages a new legislative regime that requires the least restrictive solution available, extends procedural rights to parents subjected to a safety plan, and encourages data collection quantifying annual use of safety plans around the country.

I.	INTRODUCTION.....	1615
II.	BACKGROUND	1617
	A. <i>CONSTITUTIONALLY PROTECTED FAMILIAL INTERESTS</i>	1620
	B. <i>DUTIES OF STATE AGENCIES AND LEGAL PRESUMPTIONS</i>	1623
	C. <i>SAFETY PLANS AND HOW THEY FIT INTO THE CHILD WELFARE SYSTEM</i>	1624
III.	FAILURES OF THE SAFETY PLAN SYSTEM	1626
	A. <i>CROFT, DUPUY, AND FALSE VOLUNTARINESS</i>	1627
	1. Investigator Lacks Removal Authority; Parent Refuses Safety Plan	1631
	2. Investigator Lacks Removal Authority; Parent Agrees to Safety Plan.....	1631
	3. Investigator Has Removal Authority; Parent Refuses Safety Plan	1632
	4. Investigator Has Removal Authority; Parent Agrees to Safety Plan.....	1632
IV.	VARIED STATE APPROACHES AND DUE PROCESS IMPLICATIONS	1634
	A. <i>DUE PROCESS</i>	1634
	B. <i>THE ILLINOIS APPROACH</i>	1636
	C. <i>THE ARIZONA APPROACH</i>	1638
	D. <i>THE LOUISIANA APPROACH</i>	1640
V.	THE IDEAL APPROACH: A LEGISLATIVE FRAMEWORK EXTENDING PROCEDURAL PROTECTIONS TO SAFETY PLANS.....	1641
	A. <i>THE INITIAL SAFETY DECISION: REQUIRING THE LEAST RESTRICTIVE SOLUTION</i>	1641
	1. Is There Time to Obtain a Court Order?	1641
	2. Is an In-home Safety Plan Sufficient and Appropriate?.....	1642
	3. Offer an Out-of-home Safety Plan.....	1643
	4. Executing an Emergency Removal	1644
	B. <i>PROVIDING NOTICE</i>	1644
	C. <i>OPPORTUNITY TO BE HEARD</i>	1646
	D. <i>POST-HEARING PROCESS</i>	1647
	E. <i>EFFECTUATING THIS SYSTEM</i>	1647

F. DATA COLLECTION.....	1648
VI. CONCLUSION	1648

“[V]nitatem in neccessarijs, in non neccessarijs libertatem, in omnibus caritatem.” – Marco Antonio de Dominis, 1617¹

I. INTRODUCTION

Few principles are more apt for child welfare law—and indeed all of the law— than De Dominis’s 17th century observation. His words roughly translate to “In necessary things unity, in uncertain things liberty, in all things love.” How precisely does one strike a balance between two competing, equally indispensable principles? Unfortunately, there is no easy answer; yet, this is precisely the challenge facing child welfare workers, attorneys, judges, and state legislators every day. “Under the . . . [*parens patriae* doctrine], the state has an obligation to ensure the safety and well-being of children.”² The federal government also provides funding to states to support “prevention, assessment, investigation, prosecution, and treatment” services relating to child welfare.³ Despite this obligation, a parent’s right to “the care, custody, and control of their children[] is perhaps the oldest of the fundamental liberty interests recognized by th[e] [U.S. Supreme] Court.”⁴ Undoubtedly, there are circumstances where children must be removed from their homes.⁵

1. MARCO ANTONIO DE DOMINIS, DE REPUBLICA ECCLESIASTICA, LIBRI X., 676 (1617). Marco Antonio de Dominis was a Dalmatian Ecclesiastic with a controversial history of criticizing the Catholic Church. See *Marco Antonio de Dominis*, CATH. ANSWERS, <https://www.catholic.com/encyclopedia/marco-antonio-de-dominis> (last visited Dec. 22, 2018).

2. Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 OHIO ST. L.J. 519, 521 (1996). *Parens patriae* translates to “parent of his or her country.” *Parens Patriae*, BLACK’S LAW DICTIONARY (10th ed. 2014). The doctrine gives the state the power to protect those people who would otherwise be unable to protect themselves. See *id.* This doctrine is discussed thoroughly in child welfare because children are a *parens patriae* class of protected persons.

3. CHILDREN’S BUREAU: CHILD WELFARE INFO. GATEWAY, FACTSHEET—ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2017), <https://www.childwelfare.gov/pubPDFs/about.pdf>.

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

5. See, e.g., Christine Clarridge & Sonia Krishnan, *Carnation Couple Charged in “Worst Case” Child Abuse of Teen Daughter*, SEATTLE TIMES (Oct. 13, 2008, 7:41 PM), <https://www.seattletimes.com/seattle-news/carnation-couple-charged-in-worst-case-child-abuse-of-teen-daughter> (discussing a case where police found a 14-year-old girl so malnourished she weighed only 48 pounds); Kristine Phillips, *Parents of Skeletal, Infected Infant Twins Arrested in ‘Worst Case of Child Abuse.’* WASH. POST (Dec. 15, 2016), <https://www.washingtonpost.com/news/true-crime/wp/2016/12/15/parents-of-skeletal-infected-nine-month-old-babies-arrested-in-worst-case-of-child-abuse> (describing a case where two nine-month-old infant children were extremely malnourished, had various infections, severe rashes, and bedsores); Michael P. Rellahan, *Ex-Phoenixville Sentenced for ‘Worst’ Child Sexual Abuse Case in Chesco*, DEL. CITY DAILY TIMES (June 18, 2015), <http://www.delcotimes.com/general-news/20150617/ex-phoenixville-sentenced-for-worst-child-sexual-abuse-case-in-chesco> (recounting

In these extreme cases, even adversarial parties should unify behind a decision to remove. Other times, the presence of danger is remote, uncertain, or extraordinarily attenuated.⁶ To the extent that parents must be able to reasonably parent their children the way they see fit, child welfare actors should defer to families' liberty interests where danger is uncertain. Perhaps most importantly though, it cannot be overemphasized that children and families deserve to be treated with compassion, patience, understanding, and love. All actions in the child welfare system must be taken with these considerations in mind.

In recent decades, some scholars have argued that the current child welfare system is disproportionately centered on a "parental-fault paradigm"⁷ rather than focusing on children's and families' individual needs. Despite the rise in differential and alternative response approaches,⁸ the parental fault paradigm continues to infiltrate even purportedly family-oriented practices. So-called "safety plans"⁹ illustrate this very problem. A safety plan is an agreement offered by child protective service investigators, immediately following an initial safety assessment, that restricts parents' ability to exercise their full rights to parent their children pending the outcome of a maltreatment investigation.¹⁰ Under the guise of voluntariness,¹¹ investigators give parents an ultimatum: agree to and sign a safety plan or have your child removed to foster care pending the outcome of a maltreatment investigation.¹² By signing a safety plan, parents lose any right to a hearing or

a case where a man was sentenced to a term of between 339 and 690 years in prison for raping and molesting four children under the age of ten).

6. Bonnie Miller Rubin, *Chicago Mother Wages 2-Year Fight Against Child Neglect Citation*, CHI. TRIB. (Oct. 7, 2015, 10:56 AM), <http://www.chicagotribune.com/news/ct-child-neglect-inadequate-supervision-law-met-20151007-story.html>. In this case, a mother let her 11, 9, and 5-year-old children play alone at a playground she could see out the window of her home. *Id.* This article also mentions another case where a mother "was cited for leaving a sleeping baby [in the home] while she took out the trash." *Id.*

7. See, e.g., Josh Gupta-Kagan, *Toward a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 903 (2014) (discussing broadly the need for a shift away from investigatory tactics to a public health approach). The current system places significant emphasis on determining what happened ex post (often assuming, by default, individual parental responsibility is the culprit) rather than problem-solving for the future and providing preventative measures ex ante (acknowledging how systemic issues affect a parent's choices and abilities).

8. See Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 631 (2012) (discussing the rising trend in differential response adoption).

9. See Dupuy v. Samuels, 465 F.3d 757, 759 (7th Cir. 2006).

10. Cf. McGrath, *supra* note 8, at 675-76 (explaining that there is not a uniform definition of safety plans, they are a mechanism purporting to be a voluntary agreement offered by investigators after a risk assessment).

11. See generally *id.* (explaining the nature of voluntariness as it relates to differential response and safety plans).

12. See, e.g., Smith v. Williams-Ash, 520 F.3d 596, 598 (6th Cir. 2008) (noting that an investigator threatened to permanently remove children if the parents no longer cooperated with

review by an impartial adjudicator despite this state-imposed restriction on their liberty interests.¹³ Safety plans allow Child Protective Services (“CPS”) to side-step a parent’s due process rights while continuing their own investigatory process.

Part II of this Note outlines and contextualizes the history and basic mechanics of safety plans.¹⁴ Next, Part III discusses some of the major criticisms of the safety plan process, relevant caselaw, and the current legal framework behind child welfare safety plans.¹⁵ Part IV then addresses varied safety plan approaches from around the country.¹⁶ Ultimately, Part V proposes a new safety plan regime that: (1) requires investigators to use the least restrictive solution available, (2) extends a parent’s statutorily-guaranteed procedural protections to parents subjected to safety plans—giving parents the ability to contest the plan in front of a judge at the outset of a maltreatment investigation, (3) encourages the use of team decision-making meetings (“TDMs”), if necessary, following a safety plan hearing, (4) is outlined under statutory or regulatory provisions, and (5) emphasizes data collection through state reporting for future research and innovation in the field.¹⁷

II. BACKGROUND

Determining where the ever-swinging child welfare pendulum ought to swing next is not an easy task.¹⁸ Part of the difficulty lies in the fact that not

the safety plan); *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1124 (3d Cir. 1997) (discussing an investigator’s use of an ultimatum forcing a father to leave his home to prevent his daughter from being removed to foster care). A maltreatment investigation is the process by which a state agency determines whether a child is neglected or abused. *See Investigation*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/responding/iaa/investigation> (last visited Dec. 23, 2018). This typically entails visiting the child’s guardians, the child’s home, interviews, and other fact-finding processes. *See Interviewing*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/responding/iaa/investigation/interviewing> (last visited Dec. 23, 2018) (providing resources for interviewing techniques). At the end of the investigation, the agency makes a decision about what occurred, who is responsible, and how to proceed moving forward. *See Decision-Making in Investigations*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/responding/iaa/investigation/decision> (last visited Dec. 23, 2018) (listing resources for decision-making).

13. *See Smith*, 520 F.3d at 599.

14. *See infra* Part II.

15. *See infra* Part III.

16. *See infra* Part IV.

17. *See infra* Part V.

18. The pendulum metaphor is pervasive in child welfare literature. *See, e.g.*, JENNIFER A. REICH, *FIXING FAMILIES: PARENTS, POWER, AND THE CHILD WELFARE SYSTEM* 27 (2005) (noting that historians describe the pendulum swinging between “trepidation” when removing a child from her family and “erring on the side of removing children”); Jacquelyn McCroskey, *The Future of Social Work in Child Welfare*, 6 *ADVANCES IN SOC. WORK* 156, 156 (2005) (discussing “the ‘pendulum swinging back and forth’—between prevention and remediation”); Alan Finder, *The Pendulum of Policies on Child Abuse*, *N.Y. TIMES* (Jan. 12, 1996), <http://www.nytimes.com/1996/>

everyone agrees that child safety and family preservation are competing interests,¹⁹ without which the pendulum has nowhere to swing. It is easy to focus on the most devastating child abuse and neglect incidents to justify policy positions encouraging the pendulum to move one way or the other. No one would dare contest that even one child's death is a death too many, but it is important not to let these extremely tragic, emotive examples shift the focus away from more widespread problems in the child welfare system. For example, in FY 2016, approximately 4.2 million children were referred to their respective CPS agency for a maltreatment response.²⁰ Of these children, around 3,038,508 received an investigation that concluded with either a substantiated or unsubstantiated finding, and 582,621 were placed on an alternative or differential response ("DR") track; 453,370 were investigated due to another child in the household being referred to CPS.²¹ Of the 3,038,508 investigations with a finding, 692,235 resulted in a substantiated finding.²² In these 692,235 cases, 74.8% of the children were neglected, 18.2% were abused, and 8.5% were sexually abused.²³ Eighty-six percent of the substantiated findings involved a single type of maltreatment, whereas 14% involved a combination of maltreatments.²⁴ During FY 2016, an estimated 1,750 children died due to maltreatment.²⁵ Fatalities make up .05%

01/12/nyregion/the-pendulum-of-policies-on-child-abuse.html (highlighting a concern that the pendulum had swung too far in favor of family-protective policies).

19. Although scholars often frame child protection and family preservation as competing interests, in some cases these interests may actually complement each other. See Anthony N. Maluccio et al., *Protecting Children by Preserving Their Families*, 16 CHILD. & YOUTH SERVICES REV. 295, 296 (1994).

20. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2016, at 31 (2016), <https://www.acf.hhs.gov/sites/default/files/cb/cm2016.pdf>. A response could be anything from correspondence or a brief visit to a full maltreatment investigation. See *id.* at 99–100. This 4.2 million is a duplicate count, meaning that it includes children who have been referred more than once. See *id.* at 17, 24. In some states, all children in a multi-child household might receive a response even if only one child is referred to CPS; these non-referred children are counted despite no maltreatment being alleged. *Id.* at 24.

21. *Id.* at 16, 30–31. The number 3,038,508 was determined by adding the total number of substantiated (692,235) and unsubstantiated (2,346,273) findings in Table 3-2 on page 30 of the report. *Id.* at 30. I did not include cases closed with no finding (57,158), or children with unknown or other outcomes. *Id.* at 31. Alternative or differential response is a non-investigatory alternative that focuses primarily on collaboration between families and CPS agencies to resolve concerns observed by the CPS agents during their initial response. *Id.* at 16.

22. *Id.* at 30.

23. *Id.* at 44. This percentage includes children who were counted more than once due to multiple types of maltreatment. *Id.* at 25.

24. *Id.* at 20.

25. *Id.* at 53. Although, as the report goes on to note, these numbers may be underestimated due to inadequate state reporting practices. *Id.* at 53–54. Moreover, in 28 states only 10.4% of reported fatalities occurred in families who received preservation services during the previous five years. *Id.* at 57. In 37 states, only 2.4% of reported fatalities occurred where children were reunited with their families in the previous five years after having been in foster care. *Id.*

of all children who received a response from a CPS agency.²⁶ Although the excruciating loss of a child can prompt major headlines²⁷ and spark discussion about reform, fortunately, fatalities are the exception—not the rule.²⁸ To interject these extreme examples into policy discussions about how to handle borderline cases, which comprise a much larger portion of CPS responses, conflates dissimilar scenarios that do not warrant similar CPS solutions.

In cases where immediate and obvious danger to a child²⁹ is clearly apparent, surely investigators who need to remove children to ensure safety, will do so—either by first removing the child and subsequently obtaining a court order, or via an out-of-home safety plan. Conversely, child welfare investigators are ideally pragmatic enough to understand that some accusations are based on little evidence.³⁰ If, during an initial safety assessment, any observed dangers are remote, uncertain, attenuated, or entirely unfounded, then hopefully investigators will advise their respective CPS supervisors that the case should be dropped. Somewhere between these two scenarios, however, is where decisions become tricky, and the implications of error could be anything from severe trauma or death to running complete roughshod over a family’s civil liberties. Whatever resolution is necessary for

26. This was calculated by taking the total number of child fatalities in the United States in FFY 2016 (1,750) and dividing it by the total number of responses from CPS agencies in the United States (3,500,000). *Id.* at 17, 53. Not every fatality resulting from maltreatment necessarily occurred in a family who had prior contact with their state’s CPS agency.

27. One recent case comes to mind: the highly publicized death of 17-month-old Semaj Crosby in Joliet, IL. See David Jackson & Gary Marx, *At DCFS Office that Handled Semaj Crosby Case, a ‘Toxic’ Work Environment*, CHI. TRIB. (Sept. 15, 2017, 4:08 PM), <http://www.chicagotribune.com/news/watchdog/ct-dcfs-semaj-caseloads-met-20170915-story.html>. Illinois Department of Children and Family Services (“DCFS”) investigators had investigated the household 11 times prior to the death of Semaj Crosby. *Id.* The investigations found evidence of abuse but because the evidence was insufficient to make an indicated finding (a guilty finding) against household members, the investigations were closed and no additional action was taken to protect the children. See *id.* (noting that cases were closed quickly when investigators were reassured of the children’s safety).

28. This is in no way meant to diminish the severity of losing a child, or other varied forms of child abuse. There are few things in this world more unbearable or abhorrent than a child’s death—particularly due to maltreatment.

29. Although courts occasionally use this phrase as a threshold for removal, there is not a clear standard or test to determine immediate and obvious dangers to a child. Still, if an investigator found a child suffered from severe bruising or hemorrhages that can only be explained by physical abuse—then the standard may be met.

30. For example, accusations stemming from mandatory reporting laws have been criticized as often lacking evidence of maltreatment. For an interesting discussion on this issue, see generally Bob Lonnie, *Mandatory Reporting and the Difficulties Identifying and Responding to Risk of Severe Neglect: A Response Requiring a Rethink*, in MANDATORY REPORTING LAWS AND THE IDENTIFICATION OF SEVERE CHILD ABUSE AND NEGLECT 245 (Ben Mathews & Donald C. Bross eds., 2015) (arguing that mandatory reporting is counterproductive for severe neglect cases). Mandatory reporters must report anything they find suspicious, but not everything suspicious is indicative of maltreatment. Accordingly, although mandatory reporting can lead to more discovery of maltreatment, it can also place an unnecessary microscope on safe, healthy, functional families.

this middle ground, it must fall within existing constitutional and statutory frameworks. Safety plans are a solution currently testing the boundaries of this very framework. Although safety plans may be preferable to temporary foster care placement, safety plans allow CPS investigators to deprive parents of their children, their constitutional liberty interests, and any legitimate means to contest the deprivation. To fully appreciate the magnitude of the problems safety plans pose, it is essential to recognize the varied interests at stake.

A. CONSTITUTIONALLY PROTECTED FAMILIAL INTERESTS

Courts have explicitly recognized³¹ and subsequently refined³² familial and parental rights over the last century. As early as 1923, the Supreme Court acknowledged that the Due Process Clause of the Fourteenth Amendment gives parents the right to “establish a home and bring up children.”³³ Courts have since expanded parents’ protected interests to include the right “to direct the . . . education of children under their control,”³⁴ and, more recently, the right to the “control of their children.”³⁵ Perhaps most notably, the court recognized “that the custody, care and nurture of [a] child reside[s] first in the parents . . . [and] the state can neither supply nor hinder [it.]”³⁶ These interests are fundamental³⁷ and, indeed, so essential that even parents who have lost custody of their children still retain an interest in maintaining their parental rights.³⁸ The Fourteenth Amendment not only protects parents; of course, children also have a right to due process protections if they are deprived of their liberty interests.³⁹ Still—although familial liberty interests are fundamental, they are not absolute; rather, they are “limited by

31. See *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

32. See *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 534–35 (1925).

33. *Meyer*, 262 U.S. at 399.

34. *Pierce*, 268 U.S. at 534–35.

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

36. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

37. *Troxel*, 530 U.S. at 57. But see Jeffrey Shulman, *The Constitutional Debate Over Parental Rights: A Missed Opportunity*, NAT’L CONST. CTR.: CONST. DAILY (July 21, 2014), <https://constitutioncenter.org/blog/the-constitutional-debate-over-parental-rights> (suggesting that despite the Supreme Court categorizing familial rights as fundamental, the Court was not entirely clear about which analytical framework or level of scrutiny should be applied in familial rights cases).

38. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Although the Court is not clear on what precisely this right entails, it probably refers to when a parent retains some degree of interest in their children, such as when their parental rights are not permanently terminated. For example, if in a divorce, one parent retains full custody of the children while the other retains no custody rights, the latter parent does not necessarily lose any and all interest in maintaining their actual parental rights despite having lost custody.

39. See *Kenny A. ex rel. Winn v. Perdue*, 356 F. Supp. 2d 1353, 1360 (N.D. Ga. 2005) (requiring that children be appointed legal counsel in deprivation proceedings). See generally *In re Gault*, 387 U.S. 1 (1967) (overruling a juvenile court holding that minors had no right to liberty and could therefore be denied due process protections).

the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents.”⁴⁰

Not all government interference into families’ lives is equal. For example, permanently terminating parental rights is a uniquely severe interference;⁴¹ whereas being subjected to CPS service providers occasional visiting to ensure compliance with an in-home safety plan⁴² is a lesser intrusion. Nevertheless, some courts have rejected even minor intrusions.⁴³ There is no clear blueprint for measuring the intrusiveness of government action. Likewise, determining what amounts to adequate due process is anything but formulaic:

The requirement of ‘due process’ is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But ‘due process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . ‘[D]ue process’ cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, ‘due process’ is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.⁴⁴

Because analyzing due process is complicated, it is unsurprising that most courts have refrained from broadly defining the amount of state interference necessary to trigger familial due process protections.⁴⁵ The federal standard

40. *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1125 (3d Cir. 1997).

41. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 118, 127–28 (1996) (recognizing that the *Lassiter* and *Santosky* decisions understood parental rights termination decrees to be “among the most severe forms of state action” (citing *Santosky*, 455 U.S. at 759; *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting))).

42. An in-home safety plan is where a child is allowed to remain in the home, but there are specific criteria that must be met during the duration of the safety plan. For example, CPS might require that a child not be left alone with a particular parent. Alternatively, CPS might force the parent to take parenting classes.

43. *See Doe v. Heck*, 327 F.3d 492, 524 (7th Cir. 2003) (noting that both a threat to remove a child and interviewing the child at his private school without the parents’ permission violated the family’s constitutionally protected interests).

44. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162–63 (1951).

45. Courts have focused on either narrowly tailoring a rule to the facts in the case at hand or mirroring the language of the protected interest. *See Pittman v. Cuyahoga Cty. Dep’t of Children & Family Servs.*, 640 F.3d 716, 729 (6th Cir. 2011) (“[D]ue process requires that when a State seeks to terminate [a protected] interest . . . it must afford ‘notice and opportunity for

most deferential to familial independence comes from *McCurdy v. Dodd*.⁴⁶ In that case, the Third Circuit interpreted the Supreme Court's holding in *Stanley v. Illinois* to mean "rigorous adherence to procedural safeguards [is necessary] anytime the state seeks to alter, terminate, or suspend a parent's right to the custody of his minor children."⁴⁷ In the Third Circuit, merely altering a parent's right to custody is sufficient to trigger due process protections. For the most part, this well-defined, robustly protective standard is unique to the Third Circuit.⁴⁸

The Seventh Circuit has held that, at a minimum, due process "requires that government officials not misrepresent the facts in order to obtain the removal of a child" and that "governmental officials will not remove a child from his home without an investigation and pre-deprivation hearing resulting in a court order of removal, absent exigent circumstances."⁴⁹ Whereas the Seventh Circuit was more specific about procedural due process as it relates to *removals*, the Third Circuit more broadly suggested that the state's attempt to merely *alter* the parent's rights to custody was enough to trigger due process protections. Procedural due process standards relating to familial rights are thus not uniform across every federal jurisdiction.

hearing appropriate to the nature of the case' before the termination becomes effective." (alterations in original) (quoting *Bell v. Burson*, 402 U.S. 535, 542 (1971))). The *Pittman* court limited its focus to terminations. *Id.* Other courts utilize the language of an already-defined liberty interest. See *Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999) ("As a general rule, therefore, before parents may be deprived of the care, custody or management of their children without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be accorded to them."). The *Tenenbaum* court simply parroted the "care, custody and management" language from *Troxel v. Granville*. *Troxel v. Granville*, 530 U.S. 57, 62 (2000).

46. *McCurdy v. Dodd*, 352 F.3d 820, 827 (3d Cir. 2003).

47. *Id.* In *Stanley*, the Court said:

The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones.

Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley v. Illinois, 405 U.S. 645, 656–66 (1972). Notice that nowhere does the *Stanley* language mention anything about *altering* parents' liberty interest being sufficient to trigger due process. Rather, this was the *McCurdy* court's interpretation of the *Stanley* holding.

48. The Court of Appeals of Texas did cite *McCurdy*'s standard in 2016. See *In re G.A.C.*, 499 S.W.3d 138, 141 (Tex. App. 2016).

49. *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1020 (7th Cir. 2000).

B. DUTIES OF STATE AGENCIES AND LEGAL PRESUMPTIONS

Although the state has a compelling interest in protecting children by removing them from abusive situations,⁵⁰ it has no constitutional *duty* to protect children outside state custody.⁵¹ Thus, absent articulable evidence giving rise to an objectively reasonable suspicion of neglect, abuse, or imminent danger (or exigent circumstances)⁵² of varying degrees⁵³ and definitions,⁵⁴ the state has no interest in removing children from their parents.⁵⁵ Moreover, parents are presumed fit as a matter of law; unfitness must be established on the basis of individualized proof.⁵⁶ Parents are thus entitled to a parental fitness hearing when children are removed from their

50. *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003) (quoting *Brokaw*, 235 F.3d at 1019). Based on current Supreme Court jurisprudence, whether this interest must be compelling, such that it satisfies strict scrutiny analysis, is not entirely clear. After *Troxel v. Granville*, the appropriate standard of review for familial liberty interests has blurred. In *Clark v. Jeter*, the Court was clear that questions of fundamental rights are to be subjected to strict scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461 (1988). Yet, as the Seventh Circuit recognizes, even though familial rights are fundamental liberty interests, a plurality consisting of Justices Rehnquist, O'Connor, Ginsburg, and Breyer utilized a combination of factors test in *Troxel*. *Heck*, 327 F.3d at 519. Justice Kennedy took a broader approach suggesting that in the area of familial interests, protections must be "elaborated with care" while Justice Thomas prefers actually applying strict scrutiny. *Id.* (quoting *Troxel*, 530 U.S. at 101 (Kennedy, J., dissenting)). At any rate, courts do use "some form of heightened scrutiny in analyzing these claims." *Id.*

51. *DeShaney v. Winnebago Cty. Dep't of Social Servs.*, 489 U.S. 189, 195 (1989) (acknowledging that the Due Process Clause does not place an affirmative duty on the State to protect citizens' life, liberty, or property interests from all private harms).

52. See *Arredondo v. Locklear*, 462 F.3d 1292, 1302 (10th Cir. 2006) (discussing need for both reasonable and articulable evidence); *Brokaw*, 235 F.3d at 1019 (noting that the "state has no interest in protecting children" without "definite and articulable evidence giving rise to a reasonable suspicion" of an "imminent danger").

53. Compare *Kirkpatrick v. Cty. of Washoe*, 792 F.3d 1184, 1187 (9th Cir. 2015), *aff'd in part and rev'd in part*, 843 F.3d 784 (9th Cir. 2016) (en banc) (requiring an "imminent danger of serious bodily injury") (emphasis added) (quoting *Mabe v. San Bernardino Cty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001)), with *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 337 (4th Cir. 1994) (noting that the child was never in "imminent danger of irremediable harm" (emphasis added)).

54. See *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003) (recognizing that the state cannot remove a child without "*probable cause* to believe the child is threatened with imminent harm" (emphasis added)); *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) (requiring "*reasonable cause* to believe" a child faces "imminent danger" (emphasis added)).

55. *Brokaw*, 235 F.3d at 1019 ("[C]ourts have recognized that a state has no interest in protecting children from their parents unless it has some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse.").

56. See *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (discussing the need for a fitness hearing before a putative father's rights were terminated).

custody during Termination of Parental Rights (“TPR”) proceedings⁵⁷ or when children are removed under emergency circumstances.⁵⁸

C. SAFETY PLANS AND HOW THEY FIT INTO THE CHILD WELFARE SYSTEM

Over the last two decades, legal actors have started re-examining the efficacy of the traditional, investigatory system⁵⁹—an adversarial system that pits parents and CPS departments against each other to ensure the safety of children above all else.⁶⁰ Although the adversarial system may be inevitable in cases where facts are unclear,⁶¹ a number of organizations and states now have alternative, “Differential Response” (“DR”) tracks for families involved in child welfare investigations.⁶² This is partly because, under the traditional approach, a “lack of collaboration [between investigators and families] leads to longer cases and squanders money, energy, and attention that could otherwise be used in more productive ways.”⁶³ DR is distinguishable from the traditional tracks because there is “no traditional CPS fact-finding investigation.”⁶⁴ Instead, “the traditional investigative approach is replaced with a problem-solving focus on assessing the strengths and needs of the family and child . . . without requiring a ‘substantiated’ . . . determination regarding maltreatment.”⁶⁵ Safety plans borrow aspects from both of these approaches, creating a hybrid tool for use during the maltreatment investigation.

57. See *id.*

58. Generally, the right to a hearing has been statutorily granted by states to satisfy due process. See, e.g., 705 ILL. COMP. STAT. 405/2-9 (2018) (requiring that any juvenile taken into temporary protective custody be brought in front of a judicial officer within 48 hours of the removal).

59. See generally Gary L. Siegel, *Lessons from the Beginning of Differential Response: Why it Works and When It Doesn't* 5–6 (Inst. of Applied Research, Jan. 2012) (discussing the recognition that the child maltreatment system had failed spectacularly, and alternative responses started being piloted as early as 1995).

60. See Kelly Browe Olson, *Family-Centered Decision-Making and Alternative Dispute Resolution*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES § 26.1, at 676–77 (Donald N. Duquette et al. eds., 3d ed. 2016).

61. See *id.* at 676.

62. U.S. DEP'T OF HEALTH & HUMAN SERVS.: CHILDREN'S BUREAU, DIFFERENTIAL RESPONSE TO REPORTS OF CHILD ABUSE AND NEGLECT 1 (2014), https://www.childwelfare.gov/pubPDFs/differential_response.pdf.

63. Olson, *supra* note 60, at 676. Advocates of this reform include major players in the Child Welfare field including Casey Family Programs, the American Humane Association, the Institute of Applied Research, and the Kempe Center for the Prevention and Treatment of Child Abuse and Neglect. Elizabeth Bartholet, *Differential Response: A Dangerous Experiment in Child Welfare*, 42 FLA. ST. U. L. REV. 573, 576 (2015).

64. Bartholet, *supra* note 63, at 589.

65. Olson, *supra* note 60, at 679.

Safety plans are purportedly⁶⁶ voluntary agreements between a state's CPS department and parents.⁶⁷ Like DR, safety plans are meant to be more collaborative than traditional approaches because the family *agrees* to enter into the safety plan.⁶⁸ However, unlike DR, safety plans are not an alternative to a traditional investigation. Instead, safety plans are a tool used by investigators *during* a traditional investigation.⁶⁹ Parents subjected to safety plans still face the prospect of a substantiated or indicated finding of abuse or neglect that they would not face if their case was pushed to a DR track. Parental non-compliance with a safety plan puts the children at risk for removal to foster care pending the outcome of a maltreatment investigation.

The objective of a safety plan is to “control[] or manage[] threats of danger” to a child.⁷⁰ Accordingly, signed safety plans take immediate effect to mitigate dangers identified during a preliminary safety assessment.⁷¹ However, not every safety plan is equal. At an investigator's discretion, and with their supervisor's approval, “[s]afety plans [can] range from entirely in-home to exclusively out-of-home care.”⁷² As the Chicago-based Family Defense Center (“FDC”), a non-profit that provides legal representation for families entangled in Illinois' Department of Children & Family Services (“DCFS”),⁷³ puts it, “safety plans range from innocuous requests (ensure ‘no unreasonable corporal punishment,’ for example), to effectively severing or suspending parental rights during investigations (and sometimes *after* investigations).”⁷⁴

Typically, a safety plan consists of a pre-prepared form meant to be filled out by the investigator in collaboration with family members and the respective alternative caregiver—although this is sometimes done by

66. See McGrath, *supra* note 8, at 675–81 (questioning whether safety plans actually are voluntary).

67. See, e.g., Dupuy v. Samuels, 465 F.3d 757, 761–62 (7th Cir. 2006) (holding that safety plans are voluntary agreements and, therefore, do not entitle parents to due process protections).

68. *Id.*

69. See Second Amended Complaint for Declaratory and Compensatory Relief and Punitive Damages, Kelly K. v. Walker, 17-C-4703, 2018 WL 4635641 (N.D. Ill. Sept. 27, 2018) (No. 1:17-cv-04703), 2017 WL 8948835, at *8–10.

70. Therese Roe Lund & Jennifer Renne, *Child Safety: What Judges and Lawyers Need to Know*, in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES § 15.7.2, at 370 (Donald N. Duquette et al. eds., 3d ed. 2016).

71. *Id.*

72. *Id.* § 15.7.3, at 370.

73. ILL. DEP'T OF CHILDREN & FAMILY SERVS., <https://www2.illinois.gov/dcf/Pages/default.aspx> (last visited Dec. 23, 2018).

74. THE FAMILY DEF. CTR., UNDERSTANDING AND RESPONDING TO DEPARTMENT OF CHILDREN AND FAMILY SERVICES' ABUSE AND NEGLECT INVESTIGATIONS IN ILLINOIS: A BASIC GUIDE FOR ILLINOIS PARENTS AND OTHER CAREGIVERS 47 (2016) [hereinafter RESPONDING TO INVESTIGATIONS], <http://www.familydefensecenter.net/wp-content/uploads/2016/04/Responding-to-Investigations-Manual-FINAL.pdf>.

investigators unilaterally⁷⁵— following a safety assessment during the initial home visit.⁷⁶ The Safety Plan form provides investigators discretion to propose solutions they believe will adequately nullify the dangers found during the safety assessment.⁷⁷ Safety plans are purposefully flexible to best account for each family's needs. Ideally, safety plans minimize traumatic, unnecessary removals to foster care following initial home visits and throughout the investigatory process. At first glance, safety plans seem to bridge the gap between unnecessary removals and having to leave children in dangerous situations—and if appropriately utilized safety plans might very well be a good temporary solution. The problem is that investigators abuse the safety plan system.

III. FAILURES OF THE SAFETY PLAN SYSTEM

With the help of Latham & Watkins, LLP,⁷⁸ lawyers from the FDC identified a number of problems they see in their office relating to safety plans. First, safety plans are rarely reviewed every five days⁷⁹ as guaranteed by DCFS.⁸⁰ Even though safety plans are supposed to be short-term solutions, they often last longer than a week and sometimes longer than the entire 60-day investigatory period.⁸¹ Although parents can request that the plan be altered or terminated, parents who do so often receive no response from DCFS at all.⁸² Even if DCFS does respond, “requests to [modify or] terminate safety plans are rarely granted.”⁸³ Moreover, DCFS investigators do not always explain what facts led the investigator to believe they had sufficient grounds for a legally-authorized emergency removal (a removal that occurs without

75. A number of parents subjected to Safety Plans report not signing any documents, or never receiving copies of these documents. *See id.* app. B.

76. *See* STATE OF ILL. DEP'T OF CHILDREN AND FAM. SERVS, FORM CFS 1441-A (2014), [hereinafter FORM CFS 1441-A], https://www2.illinois.gov/dcf/aboutus/notices/documents/cfs_1441-a_safety_plan_%28fillable%29.pdf.

77. *See id.* The form has space to fill out what the dangers are and how to address the dangers.

78. 2016 *Safety Plan Settlements*, FAMILY DEF. CTR., <http://www.familydefensecenter.net/fdc-cases/2016-safety-plan-settlements> (last visited Dec. 23, 2018). One of the FDC attorneys felt it was important to additionally credit Winston & Strawn LLP for their help in this area.

79. *See* RESPONDING TO INVESTIGATIONS, *supra* note 74, app. B.

80. ILL. DEP'T OF CHILD. & FAM. SERVS., SAFETY PLAN RIGHTS AND RESPONSIBILITIES FOR PARENTS & GUARDIANS (2016) [hereinafter FORM CFS 1441-D]., https://www2.illinois.gov/dcf/aboutus/notices/documents/cfs_1441-d_safety_plan_rights_and_responsibilities_for_parents_and_guardians.pdf. Note that FDC primarily serves Illinois, so the problems seen by FDC are viewed through the lens of the Illinois system. Given how little research there is about the use of safety plans around the country, this is currently the best source of the problems that actual workers see in the field.

81. *See* RESPONDING TO INVESTIGATIONS, *supra* note 74, app. B.

82. *See id.*

83. *See id.*

first obtaining a court order), so parents have no way of evaluating the legitimacy of the investigator's claimed legal authority.⁸⁴

Finally, “[m]any parents report not signing safety plans, not receiving copies of plans they do sign, and not knowing when safety plans are over.”⁸⁵ Although safety plan scholarship is fairly sparse, people seem to give the “voluntariness” aspect of safety plans the most attention.

A. CROFT, DUPUY, AND FALSE VOLUNTARINESS

In 1996, the Third Circuit heard a case called *Croft v. Westmoreland County Children and Youth Services*.⁸⁶ In *Croft*, a father was accused of sexually abusing his daughter.⁸⁷ Following a short interview, the investigator gave the father the following “ultimatum: unless [the father] left his home and separated himself from his daughter until the investigation was complete, [the investigator] would take [the daughter] physically from the home that night and place her in foster care.”⁸⁸ After further urging by the investigator, the father ultimately complied and left the family home, leaving his daughter to stay with his wife.⁸⁹ The parents filed suit in federal district court alleging the investigator “impermissibly interfered with [the parents’] Fourteenth Amendment liberty interest in the companionship of their daughter.”⁹⁰ The district court entered summary judgment in favor of the defendants reasoning that the parents’ right to intimate association with their children cannot be elevated above the state’s interest in protecting children.⁹¹

On appeal, the Third Circuit recognized that the investigator had interfered with the parents’ rights because the investigator “lacked objectively reasonable grounds to believe the child had been . . . abused or was in imminent danger of . . . abuse.”⁹² This standard is noteworthy because it mirrors the requisite standard for emergency removals during maltreatment investigations;⁹³ this means that without evidence to actually justify an emergency removal, ultimatums like the one in *Croft* are coercive. Subsequent cases in the Third Circuit district courts, however, interpret the *Croft* holding

84. *See id.*

85. *Id.*

86. *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123 (3d Cir. 1997).

87. *Id.* at 1124.

88. *Id.*

89. *Id.* at 1124–25.

90. *Id.* at 1125.

91. *Id.*

92. *Id.* at 1127.

93. *See Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1020–21 (7th Cir. 2000).

to mean that “absent any procedural safeguards,”⁹⁴ safety plans are a coercive practice which violate families’ due process rights.⁹⁵

Although *Croft* occurred before the rise of safety plans, it marked the beginning of a new conversation about the limitations on investigators’ field tactics. As later cases illustrate, not all courts agree on whether such behavior by an investigator is coercive or whether parents are owed due process protections. For example, in *Dupuy v. Samuels*, Judge Posner and the Seventh Circuit emphasized that Safety Plans are “voluntary” agreements that the state “offers” to parents.⁹⁶ The court reasoned not only that parents have the option to turn the plan down, but also that parents actually *will* reject the plan if they believe the state lacks sufficient evidence to justify an emergency removal.⁹⁷ Moreover, the court likened safety plans to a type of “interim settlement agreement,”⁹⁸ where refusing to sign may place parents in a worse position than if they had simply accepted the Safety Plan.⁹⁹ The Seventh Circuit further insisted that threatening to enforce one’s own legal rights is not coercion—as long as an investigator *has the legal authority* to remove the children, threatening to do so unless a safety plan is signed, is really not a threat at all.¹⁰⁰ The Seventh Circuit wrote that for a parent to choose between having their child temporarily removed to foster care or signing a safety plan is no different than the choice between picking “a Martini or a Manhattan.”¹⁰¹

The Seventh Circuit’s *Dupuy* opinion lacks empathy and understanding. By comparing a high-pressure, emotional situation (like a parent being forced to choose who gets their child when the government takes the child away) to a low-stakes, routine decision (like one’s drink of choice), the Seventh Circuit revealed how easy it is for our legal system to become blinded by legal technicalities at the expense of human compassion. Still, setting aside the deluge of condescension saturating the *Dupuy* opinion, the court’s reasoning is troubling in a number of other respects. The Seventh Circuit’s comparison of safety plans to settlement agreements ignores that settlement agreements happen over weeks, months, or even years with counsel guiding negotiations

94. See *Starkey v. York Cty.*, No. 1:11-cv-00981, 2012 WL 9509712, at *11 (M.D. Pa. Dec. 20, 2012). A procedural safeguard is a mechanism by which a plaintiff can challenge the implementation of a safety plan or any other alteration of the plaintiff’s familial rights. See *id.* at *11–12.

95. See *id.* at *11.

96. *Dupuy v. Samuels*, 465 F.3d 757, 761 (7th Cir. 2006).

97. *Id.* at 760–61. In fact, the Seventh Circuit did not cite to a single instance of parents ever refusing to sign a safety plan. *Id.*

98. *Id.* at 761.

99. *Id.*

100. *Id.* at 762.

101. *Id.* Judge Posner is known for delighting in divisive rhetoric; for example, Posner was recently quoted as saying that courts “don’t necessarily need lawyers” in civil trials. Kim Janssen, *Former U.S. Appeals Court Judge Richard Posner: Get Rid of Lawyers*, CHI. TRIB. (Oct. 25, 2017, 12:15 PM), <http://www.chicagotribune.com/news/chicago-inc/ct-met-posner-pro-se-1025-chicago-inc-20171024-story.html>.

the entire way. The Seventh Circuit seems to believe¹⁰² that parents—unsophisticated actors enmeshed in a situation with unequal bargaining power¹⁰³—should have the legal foresight to know whether investigators have identified sufficient dangers to actually enforce removal. In reality, parents typically sign safety plans on the spot, under pressure, and without counsel present.¹⁰⁴ *Dupuy* epitomizes this insidious mirage—an illusion of voluntarism permeating CPS action throughout the country.¹⁰⁵

For the lynchpin of voluntariness to turn on whether a state actor has the legal authority to execute an emergency removal, is to suggest that parents looking down the barrel of the state's gun ought to know whether its chamber is loaded. If the chamber is empty, the gun was, in fact, a coercive prop designed to force parents into involuntarily signing the Safety Plan. Alternatively, if the gun is loaded, removal is *no longer a threat*—rather it is a legally-authorized promise to restrict a parent's rights whether or not the parent consents. It is absurd to expect someone who has a gun pointed at them to carefully analyze whether it is loaded because, absent some specialized training, it is impossible to tell whether a bullet is in the chamber. Parents are typically unsophisticated actors compared with lawyers. Parents should not be expected to critically analyze whether state investigators have sufficient legal authority when deciding whether to say no to a safety plan.

102. This is not meant to suggest that the “voluntary” distinction is exclusive to the Seventh Circuit. In fact, citing to *Dupuy*, the Sixth Circuit followed in the Seventh's footsteps, characterizing safety plans as voluntary agreements. See *Smith v. Williams-Ash*, 520 F.3d 596, 599–600 (6th Cir. 2008).

103. See Kimberly Bundy-Fazioli et al., *A Qualitative Examination of Power Between Child Welfare Workers and Parents*, 39 BRIT. J. SOC. WORK 1447, 1454–58 (2009) (discussing themes including perceived hierarchical power imbalance from the parents' perspectives in CPS interactions).

104. See McGrath, *supra* note 8, at 679 (noting the lack of opportunity for parents to speak with counsel before signing safety plans); RESPONDING TO INVESTIGATIONS, *supra* note 74, app. B.

105. See generally McGrath, *supra* note 8 (explaining the coercion under the guise of voluntarism as it relates not only to safety plans, but also to DR tracks). There has been much debate—particularly in the context of criminal procedure—about what constitutes voluntariness. There has also been disagreement about whether voluntariness should turn on whether a state actor's actions were objectively reasonable, or instead, whether voluntariness should emphasize the subjective capacity of a person's will. Compare *Ashcraft v. Tennessee*, 322 U.S. 143, 153–54 (1944) (relying on external factors like length of seizure, not allowing sleep or rest, and other actions by police officers to determine whether a confession was voluntary), with *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973) (relying on internal factors such as the accused's lack of education and low intelligence to determine whether a confession was voluntary). Without consent in criminal procedure, the state must either obtain a warrant, or find another exception to the warrant requirement to justify the search. Under certain circumstances in child removal cases, the state actually can remove a child first and obtain the court order later. See *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 486 (7th Cir. 2011) (describing a removal “based on an ex parte order”). Even if parents say no to the safety plan, it is possible the state will still remove the child without any immediate court authority. This distinction shows why voluntariness related to child maltreatment is necessarily different than voluntariness in the criminal procedure setting.

The risk of losing a child to foster care is far too great, and the ultimatum is “marked by fear, uncertainty, and skepticism.”¹⁰⁶

The Seventh Circuit’s *Dupuy* opinion deviated dramatically from the district court’s opinion. For example, the district court opinion spanned 35 pages, reviewed nine cases where coercive tactics occurred, reviewed statistics set forth by the parties, and a detailed analysis of problems associated with safety plans.¹⁰⁷ The district court held that “safety plans effect a constitutional deprivation when combined with an express or implied threat of protective custody that is more than brief or temporary.”¹⁰⁸ The district court believed it was problematic that DCFS lacked a “procedure . . . for families to contest safety plans.”¹⁰⁹ According to the parents’ attorneys, the district court later ordered that DCFS review safety plans after 14 days.¹¹⁰ Believing 14 days was too long and that parents lacked an adequately neutral review of safety plans, the parents appealed¹¹¹ and ultimately lost any and all due process protections the district court had granted them—including the 14-day review process.¹¹² Instead, the Seventh Circuit Court of Appeals scrapped the district court’s sensible solutions in favor of the current, problematic safety plan framework that exists today.¹¹³

When a state actor “offers” parents a safety plan (particularly the out-of-home variety), the state forces parents to decide between limiting parental rights—and limiting parental rights. Irrespective of which “voluntary” decision a parent makes, the state is still imposing restrictions on parents’ rights to the care, custody, and control of their child. It is rather confusing why, by way of a safety plan, the state can not only deprive parents of their children, but also circumvent parents’ otherwise guaranteed due process protections.

There are two main variables during the presentation and implementation of a safety plan: (1) whether an investigator has the legal authority to justify and execute an emergency removal, and (2) whether the

106. McGrath, *supra* note 8, at 680.

107. See generally *Dupuy v. Samuels*, 462 F. Supp. 2d 859 (N.D. Ill. 2005) (holding that coerced agreement to safety plans lasting longer than a brief period of time violated families’ procedural due process rights).

108. *Id.* at 893.

109. *Id.* at 894. Although the district court was ultimately overruled, this shows that the district court was concerned about parents’ ability to contest plans. For example, despite the agreement that safety plans be reviewed every five days the court noted that it was unclear whether investigators were actually complying. *Id.* at 895. This is cause for concern irrespective of whether safety plans are voluntary. The rights granted to parents by CPS agencies might look nice on paper, but if the rights are not being given effect in practice, then there must be a better way for parents to ensure they can contest state-imposed restrictions on their liberty interests.

110. *Dupuy v. Samuels*, FAMILY DEF. CTR., <http://www.familydefensecenter.net/fdc-cases/dupuy-v-samuels> (last visited Dec. 23, 2018).

111. *Id.*

112. *Id.*

113. *Id.*

parent agrees or declines a safety plan. In the following sections, this Note will detail the implications of each scenario that can arise when a safety plan is offered.

1. Investigator Lacks Removal Authority; Parent Refuses Safety Plan

The first scenario mirrors the circumstances in *Croft*. An investigator gives a parent the following ultimatum: sign this safety plan, or I will remove your child. The investigator says this despite failing to find sufficient evidence during her initial safety assessment to justify an emergency, ex parte removal. The parent responds by refusing to sign the plan. Perhaps the parent does not believe the investigator has enough evidence, or maybe the parent is well versed in her rights and believes, as the Seventh Circuit supposes, that she is fine with having her child removed and will prevail at her guaranteed hearing in the next couple of days anyway.¹¹⁴ Because the investigator lacks the necessary evidence for removal, a removal would be inappropriate, so the investigator either continues investigating or leaves the home.

Here, the parent's liberty interests were not restricted, so no process is owed. However, there are few, if any, instances where a parent would refuse a safety plan under these circumstances without the advice of legal counsel. Moreover, CPS investigators sometimes force children or parents to leave their homes based on inadequate evidence,¹¹⁵ but this scenario assumes the investigator acts appropriately (pursuant to their authority) and chooses not to remove the child or force the parent to leave as in *Croft*. It bears emphasizing that *Croft* said making the ultimatum *at all* without the requisite authority to remove the child, is impermissible—even if no separation occurs.¹¹⁶

2. Investigator Lacks Removal Authority; Parent Agrees to Safety Plan

In the second scenario, an investigator gives the parent the same ultimatum: sign this safety plan, or I will remove your child. The investigator has still failed to identify the requisite evidence necessary to justify an emergency removal during her initial safety assessment. The parent signs the safety plan. Why? Perhaps because the parent is scared to lose her child, or

114. See *Dupuy v. Samuels*, 465 F.3d 757, 761 (7th Cir. 2006).

115. Judge Posner forecloses this possibility from ever happening. He says, if the State has “some inarticulable hunch,” parents “have only to thumb their nose at the offer.” *Id.* But see *Bower v. Lawrence Cty. Children & Youth Servs.*, 964 F. Supp. 2d 475, 478 (W.D. Pa. 2013) (recounting a mother who following a barbeque, went into labor, and following a false positive drug test from eating poppy seeds, had her newborn child taken from her for 75 days).

116. See *Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir. 1997).

maybe she feels she has no choice. Maybe she just feels it is a reasonable solution.¹¹⁷

Under the *Dupuy* framework, making this ultimatum without adequate legal authority to follow through is *still* coercive.¹¹⁸ Although parents are not guaranteed any sort of hearing once they agree to the safety plan, they can sue for injunctive relief to eliminate this unnecessary safety plan. Pending the outcome of that suit, however, the parents' rights have been immediately, and arbitrarily restricted by the state because of the investigator's coercive ultimatum. But for the government's coercive ultimatum, the parent's rights would never have been restricted.

3. Investigator Has Removal Authority; Parent Refuses Safety Plan

In the third scenario, the investigator has identified sufficient evidence to justify an emergency, ex parte removal. The investigator gives the parent the same ultimatum. Note that the parent is faced with the same information as before. Even if in the prior examples, the investigator listed some facts explaining why they felt removal was necessary, the parent still has to evaluate, likely without the help of counsel, whether the investigator has sufficiently met a legal evidentiary standard. If the parent chooses to say no in this scenario, the investigator actually *will* remove the child without a court order. Once this happens, the parent is guaranteed a hearing within 48 to 72 hours to protect the parent's (and the child's) liberty interests. Because the parent said no to the safety plan, the investigator executes an emergency removal of the child, and the parent is guaranteed procedural due process because they have been deprived of their constitutional liberty interests.

4. Investigator Has Removal Authority; Parent Agrees to Safety Plan

In this final scenario, the investigator has identified sufficient evidence to justify an emergency removal. The ultimatum is given, and the parent—as is typically the case—agrees to the safety plan. Under the *Dupuy* framework, this is precisely what safety plans are designed to do: give the parents the “option” of choosing where the child will reside during the remainder of the maltreatment investigation on the condition that the parent abide by the requirements agreed to in the safety plan.¹¹⁹ Moreover, having the child stay with a relative or known caregiver is better than foster care.¹²⁰ Although safety

117. If internal, subjective factors are considered, one wonders whether, when facing the prospect of having one's child taken away, any reasonable parent would ever say no to the safety plan without counsel.

118. See *Dupuy*, 465 F.3d at 763.

119. *Id.* at 762.

120. See ANNIE E. CASEY FOUN., STEPPING UP FOR KIDS: WHAT GOVERNMENT AND COMMUNITIES SHOULD DO TO SUPPORT KINSHIP FAMILIES—POLICY REPORT: KIDS COUNT 1 (2012), <http://www.aecf.org/m/resourcedoc/AECF-SteppingUpForKids-2012.pdf> (“Extended family members and close family friends care for more than 2.7 million children in this country . . .”). “[T]he vast

plans might lead to a healthier environment for children than foster care otherwise would, legal issues still remain—namely that the parent and child have still been deprived of their rights to care, custody, management, control, and companionship.

In these four scenarios, only the first left the parent's liberty rights completely intact. The remaining three scenarios restricted the parent's liberty interests either through a safety plan or due to an emergency removal. Scenarios two and three technically provide the parent a process to contest the restrictions before an impartial adjudicator.¹²¹ Under scenario four, however, the parent is provided no process¹²² to contest the safety plan before an impartial adjudicator despite her liberties being restricted. Although *Dupuy* draws the distinction between the first two and the latter two scenarios—because the ultimatum in the first two “was not grounded in proper legal authority,”¹²³—it also ignores the Hobson's choice presented by the latter two scenarios.¹²⁴ Once the investigator actually has legal authority to remove the child, the *only* outcome is a restriction on the parent's liberty interests—whether by an emergency removal to foster care, by removal to another caregiver due to an out-of-home safety plan, or by requirements

majority of children live in kinship families without any child protective services involvement” *Id.* at 2. “Children in kinship care [are] at lower risk at baseline and less likely to have unstable placements than children in foster care.” David M. Rubin et al., *Impact of Kinship Care on Behavioral Well-being for Children in Out-of-Home Care*, 162 ARCHIVES PEDIATRIC & ADOLESCENT MED. 550, 550 (2008). “Children placed into kinship care had fewer behavioral problems 3 years after placement than children who were placed into foster care.” *Id.* These are only two of many articles supporting the notion that kinship care is either no worse or better than placement in foster care for a child's well-being.

121. See, e.g., *Berman v. Young*, 291 F.3d 976, 985 (7th Cir. 2002) (“When the state removes a child from her parents, due process guarantees prompt and fair post-deprivation judicial review.” (citing *Brokaw v. Mercer Cty.*, 235 F.3d 1000, 1021 (7th Cir. 2000))); *Brokaw*, 235 F.3d at 1021 (“Thus, due process guarantees that the post-deprivation judicial review of a child's removal be prompt and fair.”); *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 343 (4th Cir. 1994) (“[I]t is well-settled that the requirements of process may be delayed where emergency action is necessary to avert imminent harm to a child provided that adequate post-deprivation process to ratify the emergency action is promptly accorded.” (citations omitted)); *Doe v. Hennepin Cty.*, 858 F.2d 1325, 1329 (8th Cir. 1988) (“Additionally, the state may intervene on behalf of abused children, thereby infringing upon a parent's liberty interest in the family if the state provides an adequate postdeprivation hearing.” (citing *Davis v. Page*, 618 F.2d 374, 381 (5th Cir. 1980)).

122. As is discussed *infra* Section V.A, on paper some parents can directly ask their respective CPS agency to have safety plans altered or terminated, but there is no guarantee that the agency will make any change or even respond. Moreover, because this right to alter or terminate the plan is written into the internal procedures, this right does not have the force of law. See *infra* Section V.A.

123. *Dupuy*, 465 F.3d at 763.

124. Hobson's choice is an expression meaning “no real choice at all.” Gary Martin, *The Meaning and Origin of the Expression: Hobson's Choice*, PHRASE FINDER, <https://www.phrases.org.uk/meanings/hobsons-choice.html> (last visited Dec. 23, 2018). The story goes that a man named Thomas Hobson, who lived from 1545 to 1631, rented out horses to Cambridge University students. *Id.* When the students came to rent a horse, Hobson would give the student a choice between a particular horse of Hobson's choosing or no horse. See *id.* (“[T]his or none.”).

placed on the parent due to an in-home safety plan. In substance, a parent's ability to visit or be near her child might be equally restricted irrespective of whether the child was removed to foster care or to some other caregiver. Yet, under the *Dupuy* framework, a parent is only owed process in the former scenario. Had it not been for the state actor, there would be neither an emergency removal nor a safety plan and, therefore, no deprivation.

Given that child safety is vital, fundamental civil liberties are indispensable, and that the reasoning in the Seventh Circuit's *Dupuy* opinion is troubling, the next question is if safety plans do violate a liberty interest, precisely what processes are parents owed? Furthermore, even if safety plans do not violate a liberty interest, are existing systems the best solutions, or is there a better process? States disagree on how to address this problem; states' safety plan approaches vary widely—from the power to administer and implement in and out-of-home safety plans without independent oversight to not using safety plans at all¹²⁵ and more solutions in between.

IV. VARIED STATE APPROACHES AND DUE PROCESS IMPLICATIONS

A. DUE PROCESS

“The two key questions in procedural due process analysis are . . . (1) is the government depriving someone of life, liberty, or property?; and (2) how much process is due?”¹²⁶ Traditionally, due process consists of notice and an opportunity to be heard.¹²⁷ Notice and an opportunity to be heard can, of course, be expressed in a number of ways. Hearings can occur before or after a deprivation and either in person or via written submission.¹²⁸ The deprived person may or may not be guaranteed an attorney.¹²⁹ Given the lack of safety plan uniformity across jurisdictions and the dearth of caselaw outlining any procedural due process rights for parents subjected to safety plans, a good place to start is to examine what approaches states currently use to protect parents' due process rights and what mechanisms ensure compliance with internal policies and procedures.

Voluntary or not, safety plans are widespread. The vast majority of states use some form of a safety plan system.¹³⁰ In fact, around 37 states use safety

125. New York does not appear to use safety plans.

126. Paul A. Gowder, Jr., *Procedural Due Process: The Missing Casebook Chapter 2* (Univ. Iowa Legal Studies Research Paper Series, Paper No. 13-46, 2013).

127. *Id.*

128. *Id.* at 3.

129. *Id.* at 2-3.

130. This number is not precise for various reasons including, but not limited to, variation in state language and availability of state materials needed to determine how their Safety Plan system functions. See Alabama, ALA. ADMIN. CODE. r. 660-5-34-.06(2)-(3) (West 2018); Alaska, ALASKA OFFICE OF CHILDREN'S SERVS., CHILD PROTECTIVE SERVICES MANUAL § 2.2.5.1 (2016), <http://dhss.alaska.gov/ocs/Documents/Publications/CPSManual/cps-manual.pdf>; Arizona, ARIZ. DEP'T OF CHILD SAFETY, POLICY AND PROCEDURE MANUAL 106-17 (2017), <https://extranet>.

azdcs.gov/DCSPolicy; Arkansas, ARK. DEP'T OF HUMAN SERVS.: DIV. OF CHILDREN & FAMILY SERVS., POLICY & PROCEDURE MANUAL 54-55 (2017), https://humanservices.arkansas.gov/images/uploads/dcf/Master_DCFS_Policy.pdf; Colorado, COLO. CODE. REGS. § 2509-2: 7.107.17 (West 2018); Delaware, DEL. DEP'T OF SERVS. FOR CHILDREN, YOUTH AND THEIR FAMILIES: DIV. OF FAMILY SERVS., POLICY MANUAL 178 (2018), <http://kids.delaware.gov/policies/dfs/fs-policy-manual.pdf>; Florida, FLA. STAT. § 39.301(9)(a)(6) (West 2018); Georgia, GA. DIV. OF FAMILY AND CHILDREN SERVS., CHILD WELFARE POLICY MANUAL § 5.6 (2018), <http://odis.dhs.gov/ViewDocument.aspx?docId=3005835&verId=1>; Idaho, THE SUPREME COURT OF THE STATE OF IDAHO: ADMIN. OFFICE OF THE COURT, IDAHO CHILD PROTECTION MANUAL: A PRACTICAL GUIDE FOR JUDGES AND ATTORNEYS 13-19 (4th ed. 2015), https://isc.idaho.gov/cp/manual/Idaho_Child_Protection_Manual_4th_Edition_FINAL.pdf; Illinois, ILL. DEP'T OF CHILDREN & FAMILY SERVICES, REPORTS OF CHILD ABUSE AND NEGLECT § 300.70(g) (2015), https://www.illinois.gov/dcf/aboutus/notices/Documents/procedures_300.pdf; Iowa, IOWA DEP'T OF HUMAN SERVS., CHILD WELFARE: CPS ASSESSMENT PROCEDURES 18a (2011), <http://dhs.iowa.gov/sites/default/files/17-B1.pdf>; Kansas, KANSAS DEP'T FOR CHILDREN AND FAMILIES, PPS POLICY AND PROCEDURE MANUAL 199-207 (2018), http://www.dcf.ks.gov/services/PPS/Documents/PPM_Forms/Policy_and_Procedure_Manual.pdf; Louisiana, LA. CHILD. CODE ANN. arts. 619, 620, 622, 624, 625 (West 2018); Maine, ME. CHILD AND FAMILY SERVS., CHILD AND FAMILY SERVICE POLICY at IV.D. (2010), <http://www.maine.gov/dhhs/ocfs/cw/policy>; Maryland, MD.'S HUMAN SERVS. AGENCY, PROTECTIVE SERVICES FOR CHILDREN 2 (2016), <http://dhr.maryland.gov/documents/Child%20Protective%20Services/Brochures/CPS-Parent-Guide-2016.pdf>; Minnesota, MINN. DEP'T OF HUMAN SERVICES, MINNESOTA'S BEST PRACTICES FOR FAMILY ASSESSMENT AND FAMILY INVESTIGATION 12-13 (2018), <https://edocs.dhs.state.mn.us/lfserver/Public/DHS-7059-ENG>; Mississippi, MISS. DEP'T OF HUMAN SERVS.: DIV. OF FAMILY & CHILDREN'S SERVICES, DFCS POLICY SECTION B: INTAKE/ASSESSMENT POLICY 37 (2016), <https://www.mdcp.ms.gov/wp-content/uploads/2017/01/MDCPS-Policy-Section-B-Effective-11-11-16.pdf>; Missouri, MO. DEP'T OF SOC. SERVICES, CHILD WELFARE MANUAL § 2, ch. 9(3) (2012), <https://dss.mo.gov/cd/info/cwmanual/section2/chg/sec2chgs3.htm>; Montana, MONT. DEP'T PUB. HEALTH & HUMAN SERVICES: CHILD & FAMILY SERVS. DIV., CHILD AND FAMILY SERVICES POLICY MANUAL, at 13, § 202-3 (2015), <http://dphhs.mt.gov/Portals/85/cfsd/documents/cfsdmanual/202-3.pdf>; Nevada, NEV. DIV. OF CHILD & FAMILY SERVS.: FAMILY PROGRAMS OFFICE, STATEWIDE POLICY MANUAL § 0510 - NEVADA SAFETY PLAN (2007), http://dcfs.nv.gov/uploadedFiles/dcfsvngov/content/Policies/CW/0510C_FPO_NevadaSafetyPlan.doc; New Jersey, N.J. DEP'T OF CHILDREN & FAMILIES, WORKING WITH FAMILIES: CASE PRACTICE GUIDE 13-14 (2016), <http://www.nj.gov/dcf/documents/divisions/Case%20Practice%20Case%20Guide%202016.pdf>; North Carolina, *Protective Services*, BUNCOMBE CTY. N.C., <https://www.buncombecounty.org/Governing/Depts/Dss/children/cps.aspx> (last visited Dec. 23, 2018); *Child Protective Services Investigation and In-Home Services*, MECKLENBURG CTY. GOV'T, <https://www.mecknc.gov/dss/adopt/Pages/ChildProtectiveServicesInvestigationandIn-HomeServices.aspx> (last visited Dec. 23, 2018); North Dakota, N.D. DEP'T OF HUMAN SERVICES, CHILD PROTECTION SERVICES MANUAL 640-30-25 (2006), http://www.nd.gov/dhs/policymanuals/640/Content/Attachments/Child_Protection_Service_s3-1.pdf; Ohio, OHIO ADMIN. CODE 5101: 2-37-02(A) (2014); Oklahoma, OKLA. DEP'T HUMAN SERVICES OKLA. CHILDREN'S SERVICES REFERRAL PROCEDURE 340: 75-1-151(1)(a)(i) (2013), <http://www.okdhs.org/library/policy/Pages/oac340075010151000.aspx>; Oregon, OR. DEP'T OF HUMAN SERVICES, CHILD WELFARE PROCEDURE MANUAL, at 1 ch. 3 § 4 (2007), http://www.dhs.state.or.us/caf/safety_model/procedure_manual/cho3/ch3-section4.pdf; Pennsylvania, PA. DEP'T OF PUB. WELFARE, THE SAFETY ASSESSMENT AND MANAGEMENT PROCESS REFERENCE MANUAL 75-76 (2012), <http://www.pacwrc.pitt.edu/SafetyAssessment/Safety%20Manual12.7.pdf>; S.C. DEP'T OF SOC. SERVS., HUMAN SERVICES POLICY AND PROCEDURE MANUAL ch. 7 § 719.02 (2010); Tennessee, TENN. DEP'T OF CHILDREN'S SERVS., CHILD SAFETY PLAN, <https://files.dcs.tn.gov/forms/1044.doc> (last visited Dec. 23, 2018); Texas, TEXAS FAMILY & PROTECTIVE SERVS., PARENTAL CHILD SAFETY PLACEMENT (PCSP) RESOURCE GUIDE (2018), http://www.dfps.state.tx.us/handbooks/CPS/Resource_Guides/PCSP_Resource_Guide.pdf (discussing the entirety of Texas' safety plan framework); Utah, UTAH'S DIV. OF CHILD AND FAMILY SERVS., CHILD

plans,¹³¹ but the way safety plans are utilized and the degree to which parents' due process rights are protected varies by state.¹³² Some states approach all safety plans equally whether they are in-home or out-of-home.¹³³ Others approach in and out-of-home plans differently.¹³⁴ Finally, some states like New York choose not to use safety plans at all.

B. THE ILLINOIS APPROACH

Although safety plans are briefly mentioned in the Illinois Administrative Code,¹³⁵ they are primarily a creature of DCFS policy and procedure.¹³⁶ This is not unique to Illinois. Around the country, safety plan frameworks exist primarily within CPS agencies' internal procedures,¹³⁷ and they are not subject to notice-and-comment requirements listed in states' respective

PROTECTIVE SERVICES: PRACTICE GUIDELINES § 202.6 (2017), <https://www.powerdms.com/public/UTAHDHS/documents/274985>; Vermont, VT. DEP'T FOR CHILDREN AND FAMILIES: FAMILY SERVS. DIV., FAMILY SERVICES POLICY MANUAL ch. 52 at 7 (2017), <http://dcf.vermont.gov/sites/dcf/files/FSD/Policies/52.pdf>; Virginia, VA. DEP'T OF SOC. SERVS.: DIVISION OF FAMILY SERVS., CHILD PROTECTIVE SERVICES: A GUIDE TO INVESTIGATIVE PROCEDURES 4 (2017), https://www.dss.virginia.gov/files/division/dfs/intro_page/publications/investigation/Bo32-01-0974-10-eng_08-17.pdf; Washington, WASH. STATE DEP'T OF SOC. AND HEALTH SERVS.: CHILDREN'S ADMIN., PRACTICES AND PROCEDURES GUIDE § 1130 (2017), <https://www.dshs.wa.gov/ca/1100-child-safety/1130-safety-plan>; West Virginia, W.VA. DEP'T OF HEALTH AND HUMAN RES.: BUREAU FOR CHILDREN AND FAMILIES, CHILD PROTECTIVE SERVICES POLICY 90-94, 98-101 (2016), <http://dhhr.wv.gov/bcf/policy/Documents/Child%20Protective%20Services%20Policy.pdf>; Wisconsin, WISC. DEP'T OF CHILDREN AND FAMILIES: DIV. OF SAFETY AND PERMANENCE, CHILD PROTECTIVE SERVICES SAFETY INTERVENTION STANDARDS 11-14 (2016), <https://dcf.wisconsin.gov/files/cwportal/policy/pdf/safety-intervention-standards.pdf>; Wyoming, WYO. DEP'T OF FAMILY SERVS., POLICY MANUAL § 1.2.1 (2013), <https://docs.google.com/file/d/oB6DSpyE-UESZxMTUE4blU4dzg/edit>.

131. See *supra* note 130. Admittedly, the actual number is difficult to determine because each state lists its safety plan framework in a different place. While some have their plan listed in policy or procedural manuals for the child investigators, others list them in the state's children's code, others still in their administrative codes, and still more indirectly mentioning them in documents like pamphlets meant for parents. Compare ARIZ. DEP'T OF CHILD SAFETY, POLICY AND PROCEDURE MANUAL ch. 2 § 7 (2017) [hereinafter POLICY AND PROCEDURE MANUAL], <https://extranet.azdcs.gov/dcspolicy> (detailing Arizona's policy and procedures for developing a safety plan for unsafe children), with LA. CHILD. CODE ANN. arts. 619, 620, 622, 624, 625 (2017) (detailing Louisiana's legislative code articles related to safety plans), and OHIO ADMIN. CODE 5101: 2-37-02 (2014) (detailing Ohio's administrative code provisions related to child safety plans).

132. See *infra* Sections III.B-D.

133. See *infra* Section III.B.

134. See *infra* Section III.C.

135. See ILL. ADMIN. CODE tit. 20, §§ 1905.130, 1910.20 (2017); ILL. ADMIN. CODE tit. 89, §§ 315.100, 501.180.

136. See generally ILL. DEP'T OF CHILDREN & FAMILY SERVS., *Reports of Child Abuse and Neglect, in PROCEDURES* § 300.70(g) (outlining the investigator's duties as they relate to safety plans). Administrative codes are compilations of a state's administrative rules, which actually have the force of law. *What Are Administrative Rules*, ADMINISTRATIVE CODES AND REGISTERS, <http://www.administrativerules.org/administrative-rules> (last visited Dec. 23, 2018).

137. But see LA. CHILD. CODE ANN. arts. 619, 620, 622, 624, 625 (2015) (outlining Louisiana's safety plan framework in its Children's Code passed by the state's legislature).

Administrative Procedures Acts.¹³⁸ Accordingly, these discretionary frameworks do not have the force of law like administrative rules do.

Although the Illinois Administrative Code acknowledges the existence of safety plans,¹³⁹ it does not enumerate any rights for those subjected to a safety plan. It does not outline how to implement safety plans or under what conditions a safety plan should be offered to a parent. It does not list any DCFS duties with respect to overseeing safety plans. All of this is listed within DCFS's procedures and forms.¹⁴⁰ This means that if a DCFS investigator fails to abide by a particular DCFS procedure, parents cannot use the procedure as a basis for suit against either the investigator or the department because the investigator did not break the law.¹⁴¹ An investigator's superiors have the ability to police compliance internally, but unless DCFS supervisors are impartial and routinely punish investigators for failing to follow procedures, there is little incentive for investigators to comply. As previously mentioned, although Illinois has forms that list a parent's "rights" under a safety plan,¹⁴² the Family Defense Center ("FDC") has observed these rights regularly being ignored by DCFS.¹⁴³

These "Rights and Responsibilities" forms are certainly a step in the right direction. They let parents know what reasonable expectations of DCFS should be. Through various settlement agreements between plaintiffs and DCFS, FDC helped shape the current "Rights and Responsibilities" forms in Illinois.¹⁴⁴ Among these rights is the requirement that a DCFS supervisor

138. State Administrative Procedure Acts are modeled on the Federal Administrative Procedures Act, which sets forth the administrative rule-making process for agencies to follow when promulgating new administrative rules and regulations, which have the force of law. *Compare, e.g.*, 5 ILL. COMP. STAT. 100/1-20, 1-35 to 1-40, 1-50 to 1-60, 1-70, 1-90 (2018) (mirroring the language of the Federal Administrative Procedures Act), *with* 5 U.S.C. § 551 (2012).

139. See ILL. ADMIN. CODE tit. 20, §§ 1905.130, 1910.20 (2017); ILL. ADMIN. CODE tit. 89, § 501.180 (2014); ILL. ADMIN. CODE tit. 89, § 315.100 (2008).

140. See ILL. DEP'T OF CHILDREN AND FAMILY SERVS., PROCEDURES 300 REPORTS OF CHILD ABUSE AND NEGLECT, §§ 300.70(g), 300.120(e), 300.130(b)-(d) (2015); FORM CFS 1441-D, *supra* note 80; ILL. DEP'T OF CHILDREN AND FAMILY SERVS., SAFETY PLAN RIGHTS & RESPONSIBILITIES FOR RESPONSIBLE ADULT CAREGIVER & SAFETY PLAN PARTICIPANTS FORM CFS 1441-E, https://www2.illinois.gov/dcf/aboutus/notices/documents/cfs_1441-e_safety_plan_rights_and_responsibilities_for_responsible_adult_caregiver_and_safety_plan_participants.pdf (last visited Dec. 23, 2018) [hereinafter FORM CFS 1441-E]; ILL. DEP'T OF CHILDREN AND FAMILY SERVS., SAFETY PLAN RESPONSIBILITIES FOR INVESTIGATORS AND CASEWORKERS FORM CFS 1441-F [hereinafter FORM CFS 1441-F], https://www2.illinois.gov/dcf/aboutus/notices/Documents/CFS_1441-F_Safety_Plan_Responsibilities_for_Investigators_and_Caseworkers.pdf (last visited Dec. 23, 2018).

141. A parent could sue on the grounds that the procedure is not allowed under a reasonable interpretation of the laws.

142. See FORM CFS 1441-D, *supra* note 80; FORM CFS 1441-E, *supra* note 140; FORM CFS 1441-F, *supra* note 140.

143. Compare FORM CFS 1441-D, *supra* note 80, FORM CFS 1441-E, *supra* note 140, and FORM CFS 1441-F, *supra* note 140, with RESPONDING TO INVESTIGATIONS, *supra* note 74, app. B.

144. FAMILY DEF. CTR., CALENDAR OF SETTLEMENT PROVISIONS AND DELIVERABLES, <http://www.familydefensecenter.org/wp-content/uploads/2016/08/Calendar-of-Settlement-Provisions->

review the dangers the investigator identified to ensure there are legally sufficient grounds to place the child in protective custody, that parents should “[b]e informed [by DCFS] in writing of the basis for the DCFS determination that there is an immediate and imminent threat,” that parents can request to modify or “[t]erminate the safety plan at any time,” and that the safety plan should be reviewed every five days to ensure that the danger that prompted the safety plan in the first place is still present.¹⁴⁵ Being informed of the basis for the safety plan and the ways in which the parent can request to modify or terminate the safety plan serve as a form of notice to parents. Although these protections are well-intentioned, they still do not have the force of law. Parents are not, by law, guaranteed any of these protections. This may help explain why the FDC continues to see problems arise with safety plans.

Illinois also does not have a different procedure in place for in-home versus out-of-home safety plans. DCFS does not provide any additional protections to parents whose choice is between removal and an out-of-home safety plan than provided to parents whose choice is between removal and an in-home safety plan. On one hand, if Illinois provides adequate protections for out-of-home safety plans, then the parents faced with in-home plans would likewise be given adequate procedural protections. On the other hand, if Illinois provides adequate procedural protections for the lesser deprivation (in-home plans) but such protections are inadequate for out-of-home plans, there is a problem. To clarify this difference, examining another state’s approach is helpful.

C. THE ARIZONA APPROACH

Arizona’s internal procedures treat out-of-home safety plans differently than in-home safety plans. Arizona’s system allows for in-home, out-of-home, or a combination of actions.¹⁴⁶ The Department of Child Services (“DCS”) specialist must determine whether an in-home safety plan is an available option by asking five questions.¹⁴⁷ If the answer is yes to every question, then

and-Deliverables.pdf (last visited Dec. 23, 2018); 2016 *Safety Plan Settlements*, FAMILY DEF. CTR., <http://www.familydefensecenter.net/fdc-cases/2016-safety-plan-settlements> (last visited Dec. 23, 2018).

145. FORM CFS 1441-D, *supra* note 80.

146. POLICY AND PROCEDURE MANUAL, *supra* note 131.

147. *Id.* The five questions are as follows: (1) “Is there a combination of safety actions and/or services capable of sufficiently controlling the identified danger threats, and are there sufficient resources within the family network or community to control the identified threats?”; (2) “Are the parents, guardians, or custodians willing for an in-home or combination safety plan to be implemented and have they demonstrated that they will cooperate with the responsible adults, safety service providers, and safety actions identified in the safety plan?”; (3) “Is the home environment calm and consistent enough for an in-home safety plan to be implemented and for responsible adults and/or safety service providers to be in the home safely?”; (4) “Can an in-home safety plan and the use of in-home safety actions and/or services sufficiently control impending danger without the results of outside professional evaluations (substance abuse, psychiatric/psychological, medical)?”; and (5) “Do the parents, guardians, or custodians have a

an in-home safety plan is an acceptable option to resolve the dangers identified during the initial safety assessment.¹⁴⁸ “If a child is removed or may be removed, a TDM Meeting is held with the family to make decisions about the child’s safety and placement.”¹⁴⁹

A Team Decision Making (“TDM”) meeting is led by a trained facilitator.¹⁵⁰ Aside from the facilitator, DCS Specialists “should” invite parents, step parents, other guardians, mental health professionals, therapists, counselors, the children if over 12-years-old, the respective kinship caregivers or foster parents, and juvenile probation officers.¹⁵¹ Parents are additionally allowed to invite paramours, relatives, friends, neighbors, babysitters, other caregivers, members of the family’s religious community, school officials, siblings, military officers, or potential placement caregivers.¹⁵² During this meeting, “[t]he facilitator will strive to reach group consensus that the recommended plan is the least restrictive . . . and in the best interest of the child(ren).”¹⁵³ The TDM meeting is to be requested within 24 hours of the circumstances that prompted the need for it.¹⁵⁴ The DCS supervisor then subsequently schedules the TDM meeting to occur within 48 hours of the removal.¹⁵⁵ This approach allows for a collaborative discussion with a wide number of people to help moderate any power imbalances a parent may feel when working with DCS. The meeting takes place shortly after the initial assessment, so the parent has a means of being heard and having support to ensure the least restrictive option is implemented. It is unclear what happens with the living arrangements during the interim 48-hour period between the initial safety assessment and the TDM meeting.

However, like Illinois, Arizona’s system is outlined in its policy and procedure manual. These are not statutorily created systems, nor are they given the force of law like administrative rules. Again, this system runs into the same compliance concerns as the Illinois system, so although Arizona addresses adversarial power imbalances, it still falls short of ensuring parents have guaranteed recourse to contest unreasonable conditions placed on their ability to have contact with and parent their child.

suitable place to reside where an in-home or combination safety plan can be implemented?” *Id.* (emphasis omitted).

148. *See id.*

149. ARIZ. DEP’T OF CHILD SAFETY, OVERVIEW OF DEPARTMENT OF CHILD SAFETY (DCS) DECISION MAKING PROCESS 1, https://dcs.az.gov/sites/default/files/media/cps_flow_chart_2015.pdf (last visited Dec. 23, 2018). The most recent version of the Arizona Department of Child Safety: Policy and Procedure Manual Chapter 2 Section 8 *expanded* the use of TDMs to when in-home plans are implemented. POLICY AND PROCEDURE MANUAL, *supra* note 131, at ch. 2 § 8.

150. *Id.*

151. *Id.*

152. *Id.* ch. 2 § 8.

153. *Id.*

154. *Id.* ch. 2 § 9.

155. *Id.*

Still, Arizona's decision to provide greater procedural protections for out-of-home safety plans raises some good questions. Are out-of-home safety plans a different type of deprivation than in-home safety plans? *Should* out-of-home safety plans entitle parents to greater procedural protections than in-home plans?

D. THE LOUISIANA APPROACH

Louisiana's safety plan framework is particularly unique because large parts of its system were passed by the state legislature. The Louisiana Children's Code indicates that when an employee of the local child protection unit believes a child needs to be removed under emergency circumstances or a safety plan needs to be implemented, the employee can file a complaint with the juvenile court.¹⁵⁶ The court, rather than a child protection supervisor—like in Illinois and Arizona—ensures that “reasonable efforts” were made by the department to “prevent or eliminate” the child's removal.¹⁵⁷ If the court determines removal is necessary, it will issue a removal order.¹⁵⁸ Louisiana also allows peace officers and probation officers to remove children absent a court order under emergency circumstances; child protective investigators, on the other hand, need a court order to remove a child.¹⁵⁹ If the court does allow the removal, parents are owed notice¹⁶⁰ and a hearing within three days to determine whether the safety plan or temporary placement is still necessary.¹⁶¹ This is a bit of a misnomer, however, because if the parents are in “agreement with the safety plan” then no hearing is necessary.¹⁶² Evidence of agreement is the parent's signature¹⁶³ which renders nearly all of Louisiana's strengths effectively moot.

Louisiana's system does guarantee procedural safeguards with the force of law, so unlike Illinois' and Arizona's approaches, compliance with the state's safety plan framework is likely to be less problematic. Nevertheless, once a parent signs the safety plan, they are no longer entitled to a hearing. That being said, child protective workers cannot justifiably threaten to immediately remove a child to coerce the parents into signing the safety plan because they need an *instanter*¹⁶⁴ order to remove the child. Louisiana's system is the strongest legal guarantee of due process for parents, despite its signature loophole.

156. LA. CHILD. CODE ANN. art. 619 (2017).

157. *Id.* art. 619(B).

158. *Id.* art. 619(C)(2).

159. *Id.* art. 621(A)–(B).

160. *Id.* art. 623.

161. *Id.* art. 624(A).

162. *Id.*

163. *Id.*

164. *Instanter* means “at once” or “immediately.” This is an order obtained the same day as the removal.

V. THE IDEAL APPROACH: A LEGISLATIVE FRAMEWORK EXTENDING PROCEDURAL PROTECTIONS TO SAFETY PLANS

Although each of the above approaches has individual strengths, they also suffer from individual weaknesses. However, by utilizing positive factors from each of the state methods above¹⁶⁵ a superior framework becomes clearer. The ideal safety plan approach will do three things: (1) adequately balance governmental and familial interests, (2) provide fair deference to familial constitutional and due process rights, and (3) ensure compliance so safety plans are not abused by investigators. With these considerations in mind, this Note proposes the following solutions: (1) require CPS investigators to use the least restrictive solution necessary to ensure child safety during the maltreatment investigation; (2) require investigators to clearly explain to parents what a safety plan is, the investigator's basis for the plan, and the parent's rights under the plan; (3) provide parents a hearing to contest safety plans in front of an impartial adjudicator; (4) after the hearing utilize TDM meetings to encourage collaboration; (5) use a statutory or regulatory framework to ensure departmental compliance with this safety plan regime; and (6) encourage states to collect data on safety plan usage.

A. *THE INITIAL SAFETY DECISION: REQUIRING THE LEAST RESTRICTIVE SOLUTION*

CPS investigators must afford deference to familial constitutional and due process rights. Requiring investigators to use the least restrictive solution necessary to ensure child safety provides this deference. Interfering in families' lives no more than is necessary safeguards parents' fundamental rights while supporting the government's interest in child protection. A "least restrictive solution necessary" standard, therefore, strikes the proper balance between familial and governmental interests by allowing governmental interference, but only to the extent necessary to ensure child safety. In practice, the least restrictive solution standard means investigators should consider the following in order: (1) whether the investigator has time to obtain a court order; (2) whether an in-home safety plan is appropriate; (3) whether an out of home safety plan is appropriate; (4) whether an emergency removal must be executed.

1. Is There Time to Obtain a Court Order?

If, after an initial safety assessment, an investigator believes that some restrictions are necessary, the investigator should determine whether there is time to obtain a court order to enforce the restrictions. Answering this question determines what type of solution is appropriate under the circumstances. If an investigator believes there is sufficient time to obtain a court order, it follows that the child must not be in imminent danger of abuse

165. See *infra* Part V.

or neglect.¹⁶⁶ Accordingly, if the answer to the question is yes, there is no need to remove the child from the home—whether by safety plan or otherwise. If there is no emergency, then an in-home safety plan is the appropriate solution to balance the government’s interest in child safety with the parent’s familial rights. On the other hand, if there is no time to obtain a court order because the child is in imminent danger of maltreatment, then the investigator should use either an out-of-home safety plan or execute an emergency removal.

2. Is an In-home Safety Plan Sufficient and Appropriate?

If the investigator determines there is time to obtain a court order, the next step is to consider an in-home safety plan. This is the least intrusive interference—with the exception of no interference—because in-home safety plans do not separate families during the remainder of the maltreatment investigation. Arizona’s five-question approach illustrates how investigators can determine whether an in-home safety plan is appropriate.¹⁶⁷ If the investigator answers “yes” to all five questions, they may offer an in-home plan to the parents. If parents agree to conditions imposed by an in-home safety plan, the investigator can avoid court and continue with their investigation.¹⁶⁸ In-home plan appropriateness is limited though.

In-home safety plans are necessarily limited to those circumstances where investigators see no emergency. Accordingly, in-home safety plans should not be used if, following an initial safety assessment, the investigator determines that the child is in “imminent” danger. Imminent danger of abuse or neglect constitutes an emergency, and in those situations an investigator will need to remove the child via either an out-of-home safety plan or an emergency removal. This distinction is important because removal is *only* appropriate when there is an emergency. This means threat of removal should *never* be used to obtain an in-home safety plan. The circumstances that underlie in-home and out-of-home safety plans are different in kind and should be treated accordingly. If an investigator uses removal as an ultimatum for an in-home plan, the ultimatum falls subject to the same coercive trap mentioned above.¹⁶⁹ Even if investigators avoid coercive tactics, not all parents will agree to an in-home plan.

If a parent is unwilling to agree to the proposed in-home safety plan, the investigator should seek a court order. Any short delay that might result from

166. There is no defined standard for what constitutes “sufficient time to obtain a court order,” but obtaining an order would be like obtaining a search warrant. How long it takes depends on the date, the judge, the time of day, or other general factors, but as long a child is not at risk of immediate danger, between the time the investigator leaves the home and returns with the court order, then there should be sufficient time.

167. See *supra* Section III.C.

168. This Note does not consider what types of restrictions are appropriate for the state to impose absent a court order.

169. See *supra* Section III.A.

obtaining a court order is justified because the parent is entitled to due process and because the child is not in imminent danger of abuse or neglect. A court order ensures that an impartial party has an opportunity to review the facts. This further protects families from arbitrary, unwarranted interference by state officials. If the court says the in-home restrictions are warranted, then the state will know it made the right decision, and future litigation will be minimized. If not, then the family will not be deprived of any rights. Nevertheless, not all cases provide sufficient time to obtain a court order, under those circumstances, an investigator may need to separate families.

3. Offer an Out-of-home Safety Plan

If, during the initial safety assessment, the investigator determines that there is no time to obtain a court order because a child is at immediate risk of maltreatment *requiring* separation from the parent, then the investigator should utilize an out-of-home safety plan. If used properly, the out-of-home plan should be a collaborative effort. The investigator and parent should work together to agree on a place for the child to stay—preferably with a trusted friend or family member. A number of studies have shown the positive effects of staying with kin over being placed, even temporarily, in foster care.¹⁷⁰ Moreover, this approach reflects and promotes the growing trend toward using more collaborative efforts like differential response to resolve maltreatment investigations.¹⁷¹

By offering the out-of-home safety plan before resorting to an emergency removal the investigator can adequately address her safety concerns by temporarily separating the child from the parent (furthering the government's interests) while simultaneously collaborating with the parent to achieve a mutual solution.¹⁷² Moreover, as long as a parent is guaranteed a hearing to contest the safety plan, the parent will be afforded adequate due process—even if the hearing occurs after the separation.¹⁷³

170. See, e.g., Marc Winokur et al., *Kinship Care for the Safety, Permanency, and Well-Being of Children Removed from the Home for Maltreatment (Review)*, COCHRANE DATABASE OF SYSTEMATIC REVIEWS, Jan. 31, 2014, at 20 (“[C]hildren in kinship care experience better outcomes in regard to behaviour problems, adaptive behaviours, psychiatric disorders, well-being, placement stability[,] . . . guardianship, and institutional abuse than do children in foster care.”).

171. See *supra* text accompanying notes 60–65.

172. Some out-of-home plans might require another adult living in the home, such as a paramour, to remain out of the house pending the outcome of a maltreatment investigation. The investigator should first try to exhaust all options which will allow the parent and child to remain together. Separating a child by removing a paramour better protects familial rights than separating the child from the parent because it keeps the actual family together.

173. See *Hernandez ex rel. Hernandez v. Foster*, 657 F.3d 463, 486 (7th Cir. 2011) (describing a removal based on an ex parte order).

4. Executing an Emergency Removal

Only when both the in-home and out-of-home options have been exhausted should an investigator resort to an emergency removal where court authorization is obtained *after* the removal has occurred. If ever the investigator has adequate time to obtain a court order authorizing the child's removal from the parent, the investigator should do so. Moreover, if the investigator has time to obtain a court order before separating the family, perhaps there is not an emergency.¹⁷⁴ As the Second Circuit recognized in *Tenenbaum v. Williams*:

If the danger to the child is not so imminent that there is reasonably sufficient time to seek prior judicial authorization, *ex parte* or otherwise, for the child's removal, then the circumstances are not emergent; there is no reason to excuse the absence of the judiciary's participation in depriving the parents of the care, custody and management of their child. If, irrespective of whether there is time to obtain a court order, all interventions are effected on an "emergency" basis without judicial process, pre-seizure procedural due process for the parents and their child evaporates.¹⁷⁵

Accordingly, if an investigator has time to obtain a court order before removing a child, then there may be no need to remove the child. This again suggests that out-of-home safety plans should *only* be utilized in those situations that constitute an emergency. Where a parent is unwilling to agree to an out-of-home safety plan, then an investigator can resort to an emergency removal.

By requiring the least restrictive solution necessary, investigators defer to familial constitutional rights while still being allowed to exert their authority to ensure child safety. This requirement balances the government's interest with familial rights which makes it superior to the current system.

B. PROVIDING NOTICE

In order to effectuate one's rights, it is important to understand those rights. Whether an initial safety assessment reveals a need for an in-home or out-of-home safety plan, parents must be apprised of their rights. "No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."¹⁷⁶ To provide adequate notice there are several things investigators should be required to do: (1) explain what a safety plan is and explain any and all alternatives the parent has to the safety plan, (2) explain the investigator's

174. See *supra* Section V.A.2.

175. *Tenenbaum v. Williams*, 193 F.3d 581, 594-95 (2d Cir. 1999) (footnote omitted).

176. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

basis for wanting a safety plan, (3) provide parents a list of attorneys who can help, and (4) use TDM meetings to affirm parents' rights after a hearing.

First, an investigator should clearly explain what a safety plan is. This can be done both verbally and by utilizing "Rights and Responsibilities" forms like those used in Illinois.¹⁷⁷ Unless parents are intimately familiar with the child maltreatment process it is unlikely a parent knows what the investigator is proposing when they suggest a safety plan. Parents should also be informed what, if any, safety plans alternatives or arrangements exist so the parents can make the best decision for their family. There may be no alternatives other than getting a court order to enforce the restrictions, but that is precisely the information parents should have in order to make a fully-informed decision.

Second, parents must be informed of the investigator's basis for implementing the safety plan (whether it is in-home or out-of-home) so the parent can work toward resolving any perceived problems which caused it. Failing to clearly inform parents of the basis for the safety plan deprives them of information necessary to contest the safety plan, undermining their procedural due process rights. Before a safety plan is signed, investigators should clearly explain what facts justify the need for a safety plan and provide parents a copy of these facts. Admittedly, safety plan forms often include a space for investigators to list the bases of their decisions¹⁷⁸ but without external mechanisms ensuring compliance with safety plan procedures, investigators fail to adequately explain their basis to parents.¹⁷⁹ Furthermore, without codification, investigators may not be legally required to provide this information. Without adequate information, parents cannot fairly contest the investigator's determinations rendering due process meaningless.

Third, investigators should provide parents with a list of available attorneys who can help them advocate on their behalf. Ideally, the state would guarantee parents access to an attorney who can explain the decision and advocate on the parents' behalf. However, requiring an attorney to be present will likely slow down the process too much. Moreover, rather than relying on safety plans, investigators might instead err on the side of caution and just remove kids, taking their chances with the subsequent hearing owed to parents. A realistic solution will again balance the state's desire to efficiently and effectively keep children safe, with parents' need for notice. An option that balances these interests is to provide a list of attorneys the parents can contact. Attorneys who are interested can file to have their name and contact information placed on this list. Then parents know there are attorneys who can help, and the investigator will not have to wait on the parent to contact an attorney before a safety plan is signed. Providing parents both a list of

177. See FORM CFS 1441-D, *supra* note 80; FORM CFS 1441-E, *supra* note 140; FORM CFS 1441-F, *supra* note 140.

178. See FORM CFS 1441-A, *supra* note 76.

179. See *supra* text accompanying note 76.

attorneys and something comparable to Illinois' Rights and Responsibilities Forms is a balanced way to provide parents additional notice of their rights.

Finally, Arizona's TDM meetings are an opportunity for parents to be reminded both what prompted the safety plan and to try and find a less restrictive alternative to removal. During the meeting, the state and parents can collaborate to amend the previous plan and ensure it is the least restrictive option for all parties. A TDM facilitator can also detail what a parent must do to end the safety plan. Parents are afforded greater due process when the state provides adequate notice of both the basis for the safety plan and what is needed to bring the plan to a close. Before discussing when a TDM meeting should be held, it is important to first discuss a parent's ability to contest the safety plan or the removal.

C. OPPORTUNITY TO BE HEARD

An opportunity to be heard is what currently distinguishes parents' procedural rights under safety plans from their rights under the emergency removal process. As discussed throughout this Note, safety plans are coercive—not voluntary.¹⁸⁰ Accordingly, parents subjected to safety plans are owed a hearing by the state—the same as if their child was removed under emergency circumstances. Had a state official not shown up in their home, nobody would have deprived the parents of any liberties. Because this Note argues that safety plans and emergency removals are functionally equivalent deprivations, parents should be granted a hearing under both scenarios. This way, if the out-of-home safety plan is unwarranted, the parent retains an opportunity to have the plan terminated. If, on the other hand, the judge believes the out-of-home plan is warranted, it is the court, not the investigator making the final determination—guaranteeing due process for the parent.

Currently, there are two potential outcomes after the parent's hearing to contest the safety plan: (1) the safety plan is removed entirely, the child is returned, and the case is dismissed, or (2) the out-of-home safety plan is enforced via court order. Perhaps, however, there should be a third possibility. As mentioned above, the alternative to in-home safety plans should be for the investigator to either drop the case or obtain a court order to enforce in-home restrictions.¹⁸¹ Instead of having an investigator start the entire investigatory process again after the first outcome, this hearing is an opportunity for the investigator to obtain a court order to enforce lesser, in-home restrictions. Not only would this be more efficient for all parties, but it would guarantee due process for any in-home plan where an out-of-home plan was attempted. Moreover, because the parent is present at the hearing, they have an opportunity to be heard on these grounds as well. By allowing officials to obtain in-home restrictions at this hearing, the system continues to

180. See *supra* Section III.A.

181. See *supra* Section V.A.

account for the government's interest in child safety. If the hearing results in either the second or third outcome, then a TDM meeting should be scheduled between a TDM facilitator and the parent to determine what must be done in order to end the safety plan.

D. POST-HEARING PROCESS

TDMs are a great tool to encourage continued collaboration throughout the entire investigatory process. Recall that Arizona's approach encourages parents to have family and friends present to help negate perceived power imbalances between CPS and the parent.¹⁸² By showing parents respect, parents will be more likely to actively help resolve the state's concerns. This makes the process run more smoothly and more efficiently for all parties. During the TDM meeting, the parents and an independent TDM meeting facilitator can lay out a plan of action to end the safety plan early.

In addition to apprising parents of their rights, TDM facilitators can also help identify a family's needs and recommend assistance organizations that can help support the family. This also moves the child welfare system toward public health models proposed by child welfare scholars leading to preventative rather than reactionary solutions.¹⁸³ Stopping maltreatment before it happens eliminates the need for investigations, safety plans, and removals altogether.

The TDM facilitator should not be the investigator. The facilitator's job should be to work with parents to meet the conditions necessary to remove the safety plan. TDM facilitators should help parents meet the safety plan's conditions, and upon doing so, the TDM facilitator should recommend to the official overseeing the safety plan that the plan be removed. This will help parents feel like they have someone on their "team" in this process, which will help decrease the adversarial nature of the investigatory process.

E. EFFECTUATING THIS SYSTEM

It is also important to determine the best means of implementing this proposed system. A good system will either reward compliance, or disincentivize system abuse. Rather than allowing safety plans to remain an ambiguous creature of policy and procedure manuals,¹⁸⁴ state legislatures should work to outline this system legislatively. Without delving too deeply into state administrative rule-making processes, at least this way state administrative agencies do not have full discretion to arbitrarily create a system without legislative and judicial oversight. Under a legislative system, parents and attorneys alike have a means of holding CPS agencies accountable for their actions by challenging the agency's interpretation of a

182. See *supra* Section IV.C.

183. See Gupta-Kagan, *supra* note 7, at 925.

184. See *supra* note 130 and accompanying text.

given statute.¹⁸⁵ Relative to a CPS policy manual, a legislative framework will better define investigator's authority and create meaningful consequences for failing to abide by the required process. In turn, a legislative system will promote this ideal framework's third and final requirement: ensuring compliance.

F. DATA COLLECTION

Finally, this Note encourages states to collect better data on safety plans usage and prevalence, so scholars can better research their effects on the child welfare system as a whole. Ideally, safety plan data will be an additional section included in annual child welfare data reported by states.¹⁸⁶ Collecting data will help lawyers, legislators, researchers, and other scholars improve the child welfare system moving forward. Without sufficient data, it is difficult to propose solutions that will have measurable effects on the lives of CPS workers, parents, and children alike. Additional data benefits everyone irrespective of their views on the child welfare system. Tracking the number of safety plans utilized, the length of these safety plans, and whether they are in-home, or out-of-home will help illustrate the current landscape of safety plans around the country.

VI. CONCLUSION

The child welfare system is filled with difficult choices. Each and every day, pediatricians, social workers, CPS investigators, lawyers, and legislators work to improve the system for kids and families. Safety plans are a by-product of well-intentioned efforts to bridge the gap between family and state interests, but they currently fall short of this lofty goal. Although safety plans are a helpful tool in child maltreatment investigations, they allow child welfare investigators to side-step procedural protections that parents under investigation are rightfully owed through the guise of voluntariness. By extending the already-guaranteed protections for parents and children subjected to emergency removals to parents subjected to safety plans, the safety plan system will better balance the interests of the government with familial due process rights.

185. See, e.g., *Kirby of Norwich v. Adm'r, Unemployment Comp. Act*, 176 A.3d 1180, 1186 (Conn. 2018) (noting that although administrative agency's interpretations are generally given deference, when a particular construction has not been subjected to judicial scrutiny, the court will not defer to an agency's statutory construction); see also *Brakke v. Iowa Dep't of Nat. Res.*, 897 N.W.2d 522, 533 (Iowa 2017) (acknowledging that although agency interpretations are granted deference, statutory interpretation remains an issue for the judiciary).

186. See, e.g., *supra* notes 21–25 and accompanying text (listing child welfare statistics in an annual report).