

**On the Clock: Should State Law Require Child Welfare
Workers to Consider Whether There is Sufficient Time to Obtain
Judicial Authorization When Effecting Emergency Removals of
Children From Their Parents?**

After speaking with Sarah, her teacher suspected Sarah's father was sexually abusing her. On a Friday morning, Sarah's school guidance counselor notified the Department of Social Services (DSS) about Sarah's teacher's suspicions. Later that evening, two caseworkers went to Sarah's home to examine her for bruises or marks, inspect her home and discuss the developmental difficulties Sarah suffered from. Instructions were given to the caseworkers not to raise the issue of sexual abuse with Sarah's parents. The caseworkers advised Sarah's parents to call DSS on Monday regarding the home visit. Sarah's parents later denied that the caseworkers gave them this instruction. The caseworkers reported they observed no signs of maltreatment and Sarah's home was neat. Sarah remained at home with her parents over the weekend. On Monday, one of the caseworkers met with Sarah's teacher about her suspicions. The caseworker also tried to talk to Sarah about it, but Sarah was uncooperative. On Tuesday, the caseworker reported this to her supervisor and based upon his review of the case and Sarah's parents' failure to contact him, he recommended removal of Sarah from her home to have her examined physically to rule out suspicions of sexual abuse. On Tuesday around noon, a caseworker effected an "emergency removal" of Sarah from school without judicial authorization or the consent of Sarah's parents. Sarah's parents claim that the judicially unauthorized removal of Sarah was a violation of their Due Process rights under the Fourteenth Amendment.¹

I. INTRODUCTION

The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty or property, without due process of the law."² Parents have a liberty interest in raising, caring for and maintaining custody of their children.³ Although parents have a liberty interest

1. Tenenbaum v. Williams, 193 F.3d 581, 588-91 (2d Cir. 1999).

2. U.S. CONST. amend. XIV, § 1.

3. Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (defining rights of parents); see also May v. Anderson, 345 U.S. 528, 533 (1953) (stating children more valuable than property rights); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (declaring state cannot intervene in family life); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (stating parents' right to custody and care of children); Skinner v.

in the custody of their children, the state has the power to restrict parental freedom in matters affecting the welfare of a child.⁴

The state may intervene when a child's welfare is at risk.⁵ A child's welfare is at risk when the child's physical or mental health is in danger and when the child is abused or neglected.⁶ As a matter of due process under the Fourteenth Amendment, parents are entitled to a hearing before removal of children from their custody.⁷

The majority of circuit courts have held that the state, because of the state's interest in protecting the welfare of children, may remove children from their parents without judicial authorization when the child is threatened with imminent harm.⁸ To justify removal of a child, the determination that a child is in danger or at risk of imminent harm must be supported by reasonable belief, probable cause, or the equivalent.⁹ The mere possibility of danger does not justify removal of a child without judicial authorization.¹⁰

Are parents' due process rights violated if there is sufficient time to obtain

Oklahoma, 316 U.S. 535, 541 (1923) (arguing procreation basic civil right of man); Jessica A. Graf, Note, *Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement*, 30 SUFFOLK U. L. REV. 81, 84-89 (1996) (discussing right of parents to custody of their children); Pamela McAvay, Note, *Families, Child Removal Hearings, and Due Process: A Look at Connecticut's Law*, 19 QUINNIPIAC L. REV. 125, 135-37 (2000) (detailing parents' rights regarding their children).

4. See *Prince*, 321 U.S. at 167 (holding state may restrict parental freedom in things affecting child's welfare).

5. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (affirming state's right to intervene with parents' liberty interests when child's welfare at risk); see also *Prince*, 321 U.S. at 167 (maintaining state may interfere with parents' liberty interest in custody of their children); cf. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (declaring state does not have affirmative duty to protect Fourteenth Amendment rights of its citizens).

6. *Parham*, 442 U.S. at 603 (discussing circumstances justifying removal of child). See generally *Robison v. Via*, 821 F.2d 913, 921 (2d Cir. 1987) (discussing circumstances when state may remove child).

7. U.S. CONST. amend. XIV, § 1. No state shall "deprive any person of life, liberty, or property, without due process of law." *Id.*; see also *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982) (declaring state must provide parents fundamentally fair procedures when family intervention occurs). In *Santosky*, the Supreme Court noted "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S. at 753-53; see also *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 37 (1981) (recognizing state intervention into parent-child relationship must meet Due Process Clause of Fourteenth Amendment); *Stanley v. Illinois*, 405 U.S. 645, 649 (1972) (declaring parents entitled to hearing prior to removal of children based on due process rights).

8. See *infra* notes 69-73 and accompanying text (examining majority of circuit courts' holdings regarding emergency removals without judicial authorization).

9. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 457-58 (2003) (determining standard to use when considering if child in emergency circumstances); see also *infra* notes 61-65 and accompanying text (discussing standards state agents use to measure if child in emergency situation).

10. See *Roska v. Peterson*, 304 F.3d 982, 993 (10th Cir. 2002) (explaining how to measure degree of danger warranting removal without judicial authorization); see also *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) (recognizing exigent circumstances justify removal of child without judicial authorization).

judicial authorization in an emergency situation?¹¹ The majority of circuit courts do not consider if there is time for child welfare workers to obtain judicial authorization or simply dismiss claims by parents that the child welfare worker should have considered time.¹² The Second Circuit and the Ninth Circuit, however, have upheld due process challenges by parents of children removed without judicial authorization in situations where the state determined the child to be in imminent harm, because there was sufficient time for the state to obtain judicial authorization.¹³

This Note will analyze whether a violation of the due process rights of parents occurs when the state removes their children without judicial authorization, and whether courts should even consider if there was time to obtain judicial authorization.¹⁴ Part II of this Note discusses the rights of parents to custody of their children.¹⁵ Part III examines the Due Process Clause and how it affects the removal of children from their parents.¹⁶ Part IV reviews the state's right to intervene with the rights of parents, and the circumstances in which the state may remove a child from his parents.¹⁷ Part V examines emergency removal and the emergency removal statutes of three jurisdictions.¹⁸ Part VI explores the circuit split regarding the consideration of time to obtain judicial authorization when effecting an emergency removal of a child and the due process rights of parents.¹⁹

This Note argues that the welfare of a child is more important than the due process rights of a parent.²⁰ Where there is probable or reasonable cause to believe the welfare of a child is in danger, the removal of a child without judicial authorization is reasonably necessary to prevent injury to the child.²¹ The welfare of a child at risk is more critical than the consideration of sufficient

11. See *infra* notes 69-70 and accompanying text (examining consideration of time to obtain judicial authorization when removing child from parents in emergency).

12. See *infra* notes 69-76, 114-17 and accompanying text (examining circuit court holdings).

13. See *Tenenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999) (upholding due process rights of parents when state removes child without judicial authorization); see also *Mabe v. San Bernardino County Dept. of Pub. Soc. Servs.*, 237 F.3d 1101, 1109 (9th Cir. 2001) (upholding due process challenge by parent based on warrantless removal of child).

14. See *infra* Part VII (analyzing whether state workers should consider time when effecting an emergency removal).

15. See *infra* Part II (discussing parental rights).

16. See *infra* Part III (explaining Due Process Clause and its application to parental rights).

17. See *infra* Part IV (discussing states' rights to intervene with parental rights when child's welfare at risk).

18. See *infra* Part V (examining issue of emergency removal of children).

19. See *infra* Part VI (considering circuit split regarding consideration of time to obtain judicial authorization in emergencies).

20. See *infra* notes 40-41, 48-51, 56-61, 79-84, 93-99 and accompanying text (suggesting welfare of child more important than parents' due process rights in emergencies).

21. See *infra* notes 40-41, 48-51, 56-61, 79-84, 93-99 and accompanying text (reasoning justifiable emergency circumstances make removal of children without judicial authorization necessary and constitutional).

time to obtain judicial authorization.²² Additionally, requiring child welfare workers to consider whether there is sufficient time to obtain judicial authorization is unduly burdensome.²³

II. HISTORY OF PARENTAL RIGHTS

The Due Process Clause of the Fourteenth Amendment of the United States Constitution provides that no state shall “deprive any person of life, liberty or property, without due process of the law.”²⁴ In addition to guaranteeing fair process, the Due Process Clause affords heightened protection against governmental interference with fundamental rights and liberties.²⁵ The Supreme Court of the United States affords broad protection to parents under the Fourteenth Amendment.²⁶

The Supreme Court first addressed the rights of parents in two landmark cases in the 1920s. In *Meyer v. Nebraska*,²⁷ the Court interpreted the word “liberty” in the Fourteenth Amendment to include parents’ rights to raise their children.²⁸ In *Pierce v. Society of Sisters*,²⁹ the Court re-affirmed the right of

22. See *infra* notes 51, 58, 90-92, 99-100, 114-16 and accompanying text (arguing whether consideration of time to obtain judicial authorization should be factor).

23. See *infra* notes 58, 111-12, 114-15 and accompanying text (noting requiring agents to consider time requirement burdensome).

24. U.S. CONST. amend. XIV, § 1.

25. *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997) (analyzing Fourteenth Amendment). See generally *Meyer v. Nebraska*, 262 U.S. 390 (1923) (stating individuals have certain fundamental rights that state must respect).

26. *Meyer*, 262 U.S. at 399 (stating Fourteenth Amendment protects right to raise children). In *Meyer*, the Court held that liberty in the Fourteenth Amendment included the right of an individual “to marry, establish a home and bring up children” and “generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Id.* at 399; see *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534-35 (1925) (declaring Fourteenth Amendment protects liberty interest of parents to raise and care for their children). In affirmation of the rights of parents, the *Pierce* Court stated that “the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.” 268 U.S. at 535; see also *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972) (explaining parental rights); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (stating Constitution protects right of parents to custody of their children). An individual’s interest in maintaining custody of their child is substantial. *Stanley*, 405 U.S. at 615; *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (affirming liberty interest of parents to raise and care for their children). The *Prince* Court stressed the importance of parental rights by declaring “it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” 321 U.S. at 166. See generally U.S. CONST. amend. XIV, § 1.

27. 262 U.S. 390 (1923).

28. *Meyer*, 262 U.S. at 399 (reasoning liberty includes right of individual to raise children). The issue in *Meyer* was a Nebraska law forbidding the teaching of any foreign language in public and private schools. *Id.* at 396. The Supreme Court held that the law violated the Fourteenth Amendment of the Constitution because parents are free to educate their children as they choose. *Id.* at 402. The *Meyer* Court also reasoned that the Fourteenth Amendment protects the right of an individual “to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Id.* Additionally, the state may not hinder the liberty of parents by using the excuse of protecting the public interest or by action deemed subjective or without rational relation to a legitimate state

parents to raise their children.³⁰ Building on the *Meyer* decision and the right of parents to raise their children, the *Pierce* Court declared that the custody, care, and nurture of children resides with the parents.³¹ In addition to protecting parents' right to raise and care for their children, the Court has routinely stressed the importance of the family unit and a family's right to be free from government intrusion.³² In *Prince v. Massachusetts*,³³ the Court acknowledged the private realm of family life cannot be entered by the state.³⁴

The Due Process Clause protects the fundamental right of parents to make choices about the care, custody, and control of their children.³⁵ This belief reflects a common understanding in our society that parents have broad authority over their children.³⁶ The law recognizes the presumption that the

purpose. *Id.* at 399-400.

29. 268 U.S. 510 (1925).

30. *Pierce*, 268 U.S. at 534-35 (affirming Fourteenth Amendment protects parents' right to raise their children). In *Pierce*, the Court debated an Oregon Act requiring parents having custody of a child between the ages of eight and sixteen to send the child to public school. *Id.* at 530-31. If a parent failed to do so, the parent would be charged with a misdemeanor. *Id.* The Court held that the Oregon Act unconstitutional because it interfered with the liberty of parents to raise and educate their children as they see fit. *Id.* at 534-35 (holding Act unconstitutional because it violated Fourteenth Amendment rights of parents). "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additionally obligations." *Id.* at 535.

31. *Id.* (enhancing liberty interest of parents); see also *Prince*, 321 U.S. at 166 (discussing rights of parents to care for and nurture children).

32. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (observing Court's continuing emphasis on importance of family); see also *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating "freedom of personal choice in matters of family life" historically protected under Fourteenth Amendment); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) (detailing history of familial rights and matters in judicial system). The *Parham* Court, remarking on the historical context of the right of parents to custody of their children, stated "our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children." 442 U.S. at 602; *May v. Anderson*, 345 U.S. 528, 533 (1953) (commenting right to care, custody and management of child more precious than property rights); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (discussing privacy and family life); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1923) (stressing importance of marriage and procreation); Chill, *supra* note 9, at 458 (discussing fundamental right to "family integrity"). "The Supreme Court has held that the Due Process Clause of the 14th [sic] Amendment to the U.S. Constitution provides a fundamental right to 'family integrity,' a right of parents and children to be free of unwarranted governmental interference in matters of child rearing." Chill, *supra* note 9, at 458; McAvay, *supra* note 3, at 132 (declaring rights of parents to care for and raise children fundamental).

33. 321 U.S. 158 (1944).

34. *Prince*, 321 U.S. at 166 (declaring state cannot intervene in family life). In *Prince*, the Commonwealth convicted a Jehovah's Witness of violating Massachusetts child labor laws by permitting her children to assist her in offering copies of Jehovah's Witness publications to pedestrians on the street. *Id.* at 163 (discussing facts of case). *Prince*, the children's guardian, argued that the Commonwealth violated her First Amendment and Fourteenth Amendment parental rights. *Id.* at 164. The Court, rejecting *Prince's* argument that the Commonwealth had violated her rights and upholding the conviction, announced that a state may enforce child labor laws because the state has broad authority over activities that affect the welfare of children. *Id.* at 168-69.

35. *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (affirming Due Process Clause protects parents' right to make decisions about their child); see also *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (detailing parent-child relationship traditions and role of parents); *Stanley*, 405 U.S. at 651 (recognizing parents have protected right to make decisions about their children).

36. *Parham*, 442 U.S. at 602 (reciting Western traditions involving parent-child relationship); see also

strong bonds that form between children and parents guide parents to act in the best interests of their children by using the maturity, experience, and capacity for judgment children lack.³⁷ Provided parents sufficiently care for their children, there are generally no grounds for the state to intervene into the family unit and question the capability of parents to raise their children.³⁸

III. DUE PROCESS AND THE REMOVAL OF CHILDREN

Due process mandates limitations on governmental decisions in which the government puts liberty interests in jeopardy.³⁹ Due process is a flexible concept, thus, there are no fixed or rigid requirements in order to satisfy it.⁴⁰ When ascertaining what due process requires, one must establish the individual's private interests that the government function affects.⁴¹ While due process is flexible, the Supreme Court has held that the right to be heard "at a meaningful time and in a meaningful manner" is the basic requirement of due process.⁴²

The state may not remove children from their parents without providing the parents with due process of law because the Fourteenth Amendment protects

Yoder, 406 U.S. at 205 (citing tradition of Western civilization for parents to raise their children).

37. *Parham*, 442 U.S. at 602 (recognizing parent-child bond guides parents to act in best interests of child); *see also Yoder*, 406 U.S. at 232 (remarking on long-standing Western tradition of parental concern for raising of children). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Yoder*, 406 U.S. at 232; Graf, *supra* note 3, at 88 (identifying parents act in best interest of their children). *But see Parham*, 442 U.S. at 624 (Stewart, J., concurring) (arguing rebuttable presumption of parents acting in best interests of child). Some parents are selfish and they do not act in the best interests of their children. *Id.*

38. *Troxel*, 530 U.S. at 68-69 (identifying circumstances when state should not intervene into family unit); *see also Hodgson v. Minnesota*, 497 U.S. 417, 448 (1990) (discussing how fit parents entitled to raise children free from government interference); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (reiterating parents' interest in child custody remains even if not perfect parents). "The fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody to the State." *Santosky*, 455 U.S. at 753.

39. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (defining when Constitution guarantees due process); *see also Santosky*, 455 U.S. at 753-54 (affirming due process required when state interferes in familial relations). "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally sound procedures." *Santosky*, 455 U.S. at 753-54.

40. *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972) (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 894-95 (1961)) (explaining due process is flexible concept); *see also Santosky*, 455 U.S. at 775 (Rehnquist, J., dissenting) (stating due process flexible); *Parham v. J.R.*, 442 U.S. 584, 632 (1979) (Brennan, J., dissenting) (declaring demands of due process flexible); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (arguing due process flexible concept); *McAvay*, *supra* note 3, at 133 (declaring due process flexible "in order to address the nature of loss threatened").

41. *Stanley*, 405 U.S. at 650-51 (determining how to establish due process procedures).

42. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (describing requirements of due process); *see also LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (interpreting due process to include notice and opportunity to be heard); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (discussing requirements of Due Process Clause). Before an individual can be deprived of their "life, liberty or property" they must receive notice and opportunity to be heard. *Loudermill*, 470 U.S. at 542 (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)).

the right to raise and care for children.⁴³ In *Stanley v. Illinois*,⁴⁴ the Supreme Court held that a parent is entitled to a hearing before a court can remove a child from the parent's custody.⁴⁵ The *Stanley* Court stressed that the liberty interest of parents in the care, custody, and management of their children does not dissolve simply because the parents have been less-than-perfect parents.⁴⁶ Given that parents' right to custody is so valuable all parents, "perfect parents," and "not-so-perfect parents," are entitled to due process and fair procedures when the custody of their children is at stake.⁴⁷

IV. THE RIGHT OF THE STATE TO INTERVENE WITH PARENTS' RIGHT TO CUSTODY OF THEIR CHILD

The right of parents to raise, care for, and maintain custody of their children is not absolute.⁴⁸ The state has a compelling interest in the general welfare of children.⁴⁹ Due to its compelling interest, the state has extensive power to limit parents' rights when the welfare of a child is at stake.⁵⁰ The welfare of a child

43. *Stanley*, 405 U.S. at 649 (holding parent entitled to hearing prior to removal of children); *see also Santosky*, 455 U.S. at 753-54 (requiring due process for parents if state intervenes). The *Santosky* Court emphasized the importance of due process during child custody matters stating that "when the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures." 455 U.S. at 753-54; *see also Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 37 (1981) (declaring state must terminate parent-child relationship by measures meeting requirements of due process); *Mathews*, 424 U.S. at 333 (providing test to determine if due process proper). Summarizing past due process analysis, the *Mathews* Court remarked:

[O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 333.

44. 405 U.S. 645 (1972).

45. *Id.* at 657-58 (holding Due Process Clause entitles father to hearing before removal of children from his custody).

46. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982) (stating liberty interest of parents does not dissolve if not model parents).

47. *Santosky*, 455 U.S. at 753-54 (declaring all parents, good and bad, entitled to due process); *see also Graf*, *supra* note 3, at 90-92 (1996) (explaining all parents possess right to due process).

48. *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) (holding state possesses power to limit parental freedom when welfare of child affected); *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1019 (7th Cir. 2000) (stating right to "familial integrity" not absolute). *See generally Santosky*, 455 U.S. at 771 (Rehnquist, J., dissenting) (explaining familial unhappiness when state interferes into domestic relations but noting necessity of inference). States are free to test different remedies to confront the problem of child abuse and child neglect. *Id.*

49. *Hodgson v. Minnesota*, 497 U.S. 417, 443 (1990) (discussing state's strong interest in welfare of children); *see also Parham v. J.R.*, 442 U.S. 584, 603 (1979) (recognizing state may limit parental control when child's physical or mental health at risk); *Wisconsin v. Yoder*, 406 U.S. 205, 240 (1972) (White, J., concurring) (affirming state's interest in welfare and upbringing of children); *Prince*, 321 U.S. at 166 (declaring state protects welfare of youth); *Tenenbaum v. Williams*, 193 F.3d 581, 593-94 (2d Cir. 1999) (stating interest of state in welfare of child profound).

50. *See Prince*, 321 U.S. at 167 (affirming state may limit parental freedom when welfare of child in

is in danger when the child's mental or physical health is in jeopardy.⁵¹

While the state may intervene into the rights of parents when the welfare of a child is at risk, the state is not required "to protect the life, liberty and property of its' citizens against invasion by private actors."⁵² The Supreme Court, in *DeShaney v. Winnebago County Department of Social Services*,⁵³ held that there is no language in the Due Process Clause that implies that the Constitution requires states to protect the "life, liberty and property" of its citizens.⁵⁴ The Court noted that although there are situations when the Constitution requires states to affirmatively act to protect its citizens from invasion by private actors, the protection of a child from his parent is not one of those circumstances.⁵⁵

V. EMERGENCY REMOVAL: DETERMINING WHEN A CHILD MAY BE CONSTITUTIONALLY REMOVED BY THE STATE: A SURVEY OF THREE STATES

In an emergency, a state may constitutionally remove children from their parents without first obtaining judicial authorization and providing due process to the parents.⁵⁶ Judicial authorization often involves a hearing, court order, or

danger). To protect the welfare of children "the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways." *Id.* at 166; *see also Parham*, 442 U.S. at 603 (affirming state's right to intervene with parents' right to custody of child); Graf, *supra* note 3, at 92-93 (discussing right of state to intervene with parents' liberty interest). *But see Santosky*, 455 U.S. at 753 (reasoning parents' right to custody of child does not dissolve when parent not perfect). The *Santosky* Court, emphasizing the liberty interest of all parents in the custody of their children, noted "the fundamental liberty interest of natural parents in the care, custody and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." *Id.*

51. *See Parham*, 442 U.S. at 603 (holding state may interfere with parent's rights when child in danger); *see also Graf*, *supra* note 3, at 92-93 (discussing right of state to intervene into parents' rights when child's welfare at risk). "Specifically, *parens patriae* enables the state to intercede on behalf of a child exposed to abuse, neglect or surrender." Graf, *supra* note 3, at 93.

52. *See DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989) (holding state does not have affirmative duty to protect Fourteenth Amendment rights of citizens). "The clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal safety and security." *Id.*

53. 489 U.S. 189 (1989).

54. *See DeShaney*, 489 U.S. at 195 (analyzing language of Fourteenth Amendment). *See generally* U.S. CONST. amend. XIV, § 1.

55. *DeShaney*, 489 U.S. at 198-202 (noting situations in which protection or services constitutionally guaranteed to individuals). For example, the Due Process Clause requires the state to supply involuntarily committed mental patients with services essential to guarantee safety from themselves and others. *Id.* at 199.

56. *Doe v. Kearney*, 329 F.3d 1286, 1293 (11th Cir. 2003) (affirming states may constitutionally remove children in imminent danger from parents); *see also Roska v. Peterson*, 304 F.3d. 982, 993 (10th Cir. 2002) (holding no judicial authorization required when child in danger of imminent harm); *Hatch v. Dep't for Children, Youth and Their Families*, 274 F.3d 12, 22 (1st Cir. 2001) (upholding constitutionality of removal without hearing when reasonable suspicion child in danger); *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (holding extraordinary situations may warrant removal without judicial authorization); *Weller v. Dep't of Soc. Servs. of Baltimore*, 901 F.2d 387, 396 (4th Cir. 1990) (recognizing no constitutional requirement to hearing prior to removal in emergency situation); *Lossman v. Pekarske*, 707 F.2d 288, 291 (7th Cir. 1983) (arguing threat to child safety justifies "action first and hearing afterward").

warrant. In emergency situations the government does not deny a parent due process, it is simply delayed until after the removal of the child.⁵⁷

An emergency is an exigent situation when the welfare and safety of a child is in imminent danger.⁵⁸ State laws set guidelines for when the government may remove a child on an emergency basis.⁵⁹ The government must support the decision to remove a child from his parents with reasonable or probable cause to believe the child is in imminent danger.⁶⁰ The “mere possibility” of danger is not enough to justify a removal without judicial authorization.⁶¹

In Florida, for example, the state may take a child into custody if the authorized state officer or agent has probable cause that the parent has abused, neglected, abandoned, or placed the child in imminent danger.⁶² A New York statute allows removal of a child from the custody of their parents by an authorized state employee if there is reasonable cause to believe the child is in

57. See *Weller*, 901 F.2d at 396 (holding no constitutional requirement to pre-deprivation hearing under emergency circumstances). After the emergency removal of a child, “the state has the burden to initiate prompt judicial proceedings to ratify its conduct.” *Id.*; see also *Jordan v. Jackson*, 15 F.3d 333, 345 (4th Cir. 1994) (holding state may delay due process in emergency circumstances provided post-deprivation due process prompt).

58. See *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (citing *Robison v. Via*, 821 F.2d 913, 922 (2d Cir. 1987)) (defining emergency circumstances); see also *Kearney*, 329 F.3d at 1295 n.10 (asserting term emergency synonymous with exigency and imminent danger); *Mabe v. San Bernardino County Dep’t of Pub. Soc. Servs.*, 237 F.3d 1101, 1106 (9th Cir. 2001) (stating emergency circumstances constitute imminent danger for child); *Brokaw v. Mercer County*, 235 F.3d 1000, 1020 (7th Cir. 2000) (defining emergency as exigent circumstances); *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 1999) (affirming state may remove child if child in imminent danger of serious bodily injury); *Weller*, 901 F.2d at 396 (stating state may remove child without hearing under emergency circumstances).

59. Chill, *supra* note 9, at 460 (describing who determines when state can remove child in emergency).

60. See CONN. GEN. STAT. § 17a-101g (2003) (calling for “reasonable cause”); FLA. STAT. ch. 39.401(1) (2002) (stating probable cause must support determination to remove child); MASS. GEN. LAWS ch. 119, §§ 24, 51A (2003) (requiring “reasonable cause”); N.Y. SOC. SERV. LAW § 417(1)(a) (McKinney 2003) (same).

61. *Tenenbaum*, 193 F.3d at 594 (2d Cir. 1999) (citing *Hurlman v. Rice*, 927 F.2d 74, 79 (2d Cir. 1991)) (reasoning mere possibility of danger insufficient to forgo judicial authorization). In order for the state to take a child into custody, the child must be “immediately threatened with harm.” *Id.*; see also *Roska v. Peterson*, 304 F.3d 982, 990, 993-94 (10th Cir. 2002) (holding lack of exigent circumstances necessitate obtaining warrant). In *Roska*, the court decided the circumstances surrounding the removal of the child were not exigent or an emergency, thus the warrantless removal of the child was unconstitutional. 304 F.3d at 993-94.

62. See FLA. STAT. ch. 39.401(1) (2002). The statute allows officers or authorized agents to remove a child if they have “probable cause to support a finding that the child has been abused, neglected, or abandoned, or is suffering from or is in imminent danger of illness or injury as a result of abuse, neglect, or abandonment.” *Id.* The statute also provides that an officer or authorized agent may take a child into custody if “that parent or legal custodian of the child has materially violated a condition of placement imposed by the court; or that the child has no parent, legal custodian, or responsible adult relative immediately known or available to provide proper supervision and care.” *Id.*; see also *Doe v. Kearney*, 329 F.3d 1286, 1291 (11th Cir. 2003) (analyzing Florida’s statute concerning emergency removal of children). “DCF’s [Department of Children and Family Services’] policy is to remove a child from a parent or legal guardian without prior judicial authorization when there is probable cause to believe the child has been abused or is in imminent danger of abuse.” *Kearney*, 329 F.3d at 1291; cf. CONN. GEN. STAT. § 17a-101g (stating “reasonable cause” needed to remove child in emergency); DEL. CODE ANN. tit. 16, § 907(a) (2003) (requiring authorities to have “reasonable suspicion”); 325 ILL. COMP. STAT. 5/5 (2003) (requiring “reasonable belief” to effect an emergency removal of child).

danger.⁶³ Similarly, in Massachusetts, if after petition by an authorized individual the court has reasonable cause to know a child is suffering from serious abuse or neglect or is in immediate danger of serious abuse or neglect, the court is permitted to authorize the appropriate state agency to effect an emergency removal of the child.⁶⁴

VI. CIRCUIT COURT SPLIT: SHOULD STATES REQUIRE CHILD WELFARE WORKERS TO CONSIDER IF THERE IS SUFFICIENT TIME TO OBTAIN JUDICIAL AUTHORIZATION PRIOR TO EFFECTING AN EMERGENCY REMOVAL OF A CHILD?

A state may constitutionally remove children from their parents if a child's welfare or safety is in danger.⁶⁵ Before the state may remove a child from a parent, however, a hearing in accordance with the Due Process Clause of the Fourteenth Amendment must be held.⁶⁶ When the state determines that there is probable or reasonable cause to believe the child's welfare is in imminent risk, the state may constitutionally remove the child from his/her parents without judicial authorization.⁶⁷ The unresolved question is whether there is sufficient time during the emergency removal to adhere to due process requirements.⁶⁸

63. N.Y. SOC. SERV. LAW § 417(1)(a). An authorized individual may remove a child if there if there is "reasonable cause to believe the circumstances or condition of the child are such that continuing in his or her place of residence or in the care and custody of the parent, guardian, custodian or other person presents an imminent danger to the child's life or health." *Id.*; *Cf.* CONN. GEN. STAT. § 17a-101g (requiring "reasonable cause" for removal); FLA. STAT. ch. 39.401(1) (requiring "probable cause").

64. MASS. GEN. LAWS ch. 119, § 24; *see also id.* § 51A.

Any physician, medical intern, hospital personnel engaged in examination, care or treatment persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, osteopath, public or private school teacher, educational administrator, guidance or family counselor, day care worker or any person paid to care for or work with a child in any public or private facility, or a home or program funded by the provisions of chapter twenty-eight a, which provides day care or residential services to children, probation officer, clerk/magistrate of the district courts, social worker, foster parent, firefighter or policeman, who in his professional capacity shall have reasonable cause to believe under the age of eighteen years is suffering from serious physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth shall immediately report such condition to the department.

Id. § 51A; *see also* CONN. GEN. STAT. § 17a-101g (requiring "reasonable cause"); N.Y. SOC. SERV. LAW § 417(1)(a) (same).

65. *See supra* notes 47-54 and accompanying text (discussing state's ability to intervene with parent's right to custody of child); *see also* *Hollingsworth v. Hill*, 110 F.3d 733, 739 (10th Cir. 1997) (affirming state may intervene with parents' liberty interest when child's welfare in danger). "[T]he state's interest in the health and welfare of its children constrains a parent's liberty interest in the custody, care, and management of her children." *Hollingsworth*, 110 F.3d at 739.

66. *See supra* notes 39-46 and accompanying text (stating due process required when state deprives parents of liberty interest in custody of children).

67. *See supra* notes 55-65 and accompanying text (discussing when state may remove child from parents without judicial authorization).

68. *Tenenbaum v. Williams*, 193 F.3d 581, 607 (2d Cir. 1999) (holding emergency child removal without judicial authorization with sufficient time to obtain such unconstitutional); *see also* *Mabe v. San Bernardino County Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1104 (9th Cir. 2001) (requiring judicial authorization when time available to obtain). *But see* *Doe v. Kearney*, 329 F.3d 1286, 1295 (11th Cir. 2003) (reasoning removal of

The majority of circuit courts uphold the removal of children from the custody of their parents in emergency circumstances without judicial authorization, regardless of whether the state determines that there may be sufficient time to obtain judicial authorization.⁶⁹ In *Hollingsworth v. Hill*,⁷⁰ the Tenth Circuit held that state officials may remove a child from the custody of his parents without judicial authorization if there is reasonable cause to believe the child is in imminent danger of harm and the interference with parental custody is essential to prevent injury.⁷¹ In *Brokaw v. Mercer County*,⁷² the Seventh Circuit held that emergency circumstances posing imminent danger to the well-being of a child justify a warrantless removal, while the mere chance of danger does not.⁷³ The analysis and holdings of the Second Circuit in *Tenenbaum v. Williams*⁷⁴ and the Ninth Circuit in *Mabe v. San Bernardino County Department of Public Social Services*,⁷⁵ however, depart from the analysis and holdings of the majority of circuit courts.⁷⁶ When considering if there was a violation of parents' due process rights during emergency removals, both circuit courts considered whether the child welfare worker had sufficient time to obtain judicial authorization prior to removing the child.⁷⁷ The majority of circuit courts either reject or fail to address the time consideration factor

children without judicial authorization constitutional in true emergency circumstances); *see also* *Roska v. Peterson*, 304 F.3d 982, 993 (10th Cir. 2002) (holding only in emergency situations can state remove child from parents without judicial authorization).

69. *Kearney*, 329 F.3d at 1299 (holding child removal without warrant in emergency circumstances not violation of parents' due process rights); *see also* *Brokaw v. Mercer County*, 235 F.2d 1000, 1020 (7th Cir. 2000) (holding removal of child without hearing constitutional in emergency circumstances); *Hollingsworth*, 110 F.3d at 739 (allowing for removal of child without warrant in emergency circumstances); *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994) (holding removal of child from parents constitutional in emergencies); *Weller v. Dep't of Soc. Servs. of Baltimore*, 901 F.2d 387, 393 (4th Cir. 1990) (arguing due process does not require hearing in emergency circumstances when children need protection).

70. 110 F.3d 733 (10th Cir. 1997).

71. *See id.* at 739 (defining when child can be removed without judicial authorization). When the circumstances involved are not extraordinary and when the government's interest in protecting the welfare and health of children is at stake, removal of children requires notice and a hearing. *Id.* The *Hollingsworth* court held that there is no violation of due process when there is an emergency situation and the welfare of a child is at risk. *Id.*

72. 235 F.3d 1000 (7th Cir. 2000).

73. *Id.* at 1020 (stating justifications of warrantless removal of child). The court did not address whether a child welfare worker should consider if there is sufficient time to obtain judicial authorization when removing a child in emergency circumstances; the court simply stated that a child may not be removed from his parents without a hearing, "absent exigent circumstances." *Id.*

74. 193 F.3d 581 (2d Cir. 1999).

75. 237 F.3d 1101 (9th Cir. 2001).

76. *Tenenbaum*, 193 F.3d at 596 (performing analysis of due process rights of parents when state removes child in emergency); *see also* *Mabe*, 237 F.3d at 1108-09 (analyzing due process rights of parents).

77. *Tenenbaum*, 193 F.3d at 596 (holding removal unconstitutional if sufficient time to obtain judicial authorization and none obtained); *see also* *Mabe*, 237 F.3d at 1108-09 (holding if state workers can obtain warrant prior to removal they should). *But see supra* note 69 and accompanying text (discussing holding of majority of circuit courts).

discussed by both the *Tenenbaum* and *Mabe* courts.⁷⁸

In *Tenenbaum*, the parents of a child removed from them without prior court authorization brought suit alleging several constitutional violations including, a violation of their procedural due process rights.⁷⁹ Child welfare caseworkers investigated Sarah Tenenbaum and her parents after Sarah's school reported to the state child welfare department a suspicion that Sarah's father sexually abused her.⁸⁰ The caseworkers spoke with Sarah's parents and inspected Sarah's partially uncovered body for marks, uncovering no signs of maltreatment.⁸¹ The caseworkers reported their findings to their supervisor and the state took no action during the weekend.⁸² After one of the caseworkers visited Sarah at school on Monday, the supervisor decided on Tuesday to have Sarah removed from school "in order to have her physically examined to rule out the possibility of sexual abuse."⁸³

Neither the caseworkers nor their supervisor made an effort to obtain parental consent to further examine Sarah.⁸⁴ Additionally, no one sought legal advice on how to proceed, nor contemplated seeking a court order for Sarah's removal or examination.⁸⁵ The Tenenbaums sued, arguing the removal of Sarah without their consent and without a court order violated their Fourteenth Amendment due process rights.⁸⁶

The Second Circuit found a violation of the Tenenbaums' Fourteenth Amendment due process rights.⁸⁷ The court recognized that in emergency circumstances the state may take a child into custody without judicial authorization or parental consent.⁸⁸ Nevertheless, the *Tenenbaum* court declared it was unconstitutional for a state to remove a child based on emergency circumstances when the authorized state employee determines there

78. *Doe v. Kearney*, 329 F.3d 1286, 1295-96 (11th Cir. 2003) (reiterating holdings of majority of circuit courts regarding considering time in emergency removals of children).

79. *Tenenbaum*, 193 F.3d at 587 (listing all of parents' claims).

80. *Tenenbaum v. Williams*, 193 F.3d 581, 588 (2d Cir. 1999) (discussing Sarah's medical issues). After speaking with Sarah when she had been crying, Sarah's teacher, Mary Murphy, discovered that her father was hurting her. *Id.* at 588. Murphy initially asked if anyone in class had hurt her and Sarah shook her head "no." *Id.* Murphy proceeded to ask if anyone at home had hurt her and Sarah nodded. *Id.* Murphy went through a list of people she knew to be in Sarah's life, eventually asking if her father had hurt her, to which Sarah responded by shaking her head "yes." *Id.* When the teacher asked Sarah to indicate on a doll where she was being hurt, Sarah pointed to the groin area. *Id.* Murphy proceeded to report this to her supervisor and the New York State Department of Social Services' Central Register of Child Abuse and Maltreatment. *Id.* at 588.

81. *Id.* at 589 (discussing caseworkers physical examination). The state assigned two caseworkers to go to the Tenenbaums' home on a Friday evening to investigate the issue. *Id.*

82. *Id.* at 589-90 (indicating state took no action to protect Sarah over weekend).

83. *Id.* at 590 (describing events leading to removal of Sarah from school).

84. *Tenenbaum*, 193 F.3d at 590 (explaining what actions caseworkers failed to take prior to removing Sarah).

85. *Id.* (affirming no consideration given to obtain order for removal).

86. *Id.* at 592 (addressing Sarah's parents' argument).

87. *Id.* at 607 (determining removal violated parents' Fourteenth Amendment rights).

88. *Tenenbaum v. Williams*, 193 F.3d 581, 594 (2d Cir. 1999) (citing *Hurlman v. Rice*, 927 F.2d 74, 80 (2d Cir. 1991)) (describing and defining emergency circumstances).

is reasonable time to obtain a judicial order.⁸⁹ The court reasoned that if after consideration there is sufficient time to obtain judicial authorization, then there is no emergency.⁹⁰

In support of its holding, the court stated that it was common for the New York City Child Welfare Administration (CWA) not to deliberate if there was sufficient time to gain judicial authorization prior to removing a child.⁹¹ The Second Circuit reasoned that while the state's strong interest in protecting the welfare of children can be maintained only by impressing upon state officials the knowledge that they have the power to act without delay in critical circumstances and that the law will protect their decisions, there is a distinction between "necessary latitude and infinite license."⁹² The court noted "if officers of the state come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is evitable that they will eventually inflict harm on the parents, the State and the child."⁹³

89. *Id.* at 596 (arguing state must consider if reasonable time to obtain judicial authorization exists). *But see id.* at 608 (Jacobs, J., concurring in part and dissenting in part) (stating in no prior cases did workers determine emergency by considering time to obtain judicial authorization). "The error of the majority opinion is to recast a child-welfare emergency in terms of a procedural emergency, i.e. whether the danger to the child is so pressing that no court order is feasible." *Id.* *But see also* Doe v. Kearney, 329 F.3d 1286, 1297 (11th Cir. 2003) (analyzing dissenting opinion in *Tenenbaum*). "The dissenting member of the panel in *Tenenbaum* argued that the unintended consequence of the majority's rule would be to force child welfare workers to always obtain a warrant, tipping the constitutional balance away from the state's paramount interest in protecting children." *Id.*

90. *Tenenbaum*, 193 F.3d at 594-95 (reasoning if time exists to obtain order, then no emergency). "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." *Id.* *But see id.* at 608 (Jacobs, J., concurring in part and dissenting in part) (criticizing majority's holding). "The majority opinion announces a new and incompatible principle: that there is no such emergency, notwithstanding exigency, if there is or may be time to obtain a court order." *Id.* "Each of our prior cases requires only that an emergency exist, a fact that is determined by reference to the child's peril, not the case worker's schedule or the court's calendar." *Id.*

91. *Tenenbaum*, 193 F.3d at 591 (stating state welfare workers often do not consider if sufficient time exists). *See generally* Russ Buettner, *Group Sees Lax Child Welfare Training*, DAILY NEWS (NY), December 13, 1995, at 19 (discussing lack of training New York City Child Welfare Administration's caseworkers receive); Joe Sexton, *In Lawsuit, Portrait of Agency in Crisis*, N.Y. TIMES, February 2, 1996, at B6 (reporting problems with New York City Child Welfare Administration, including lack of case reviews).

92. *Tenenbaum*, 193 F.3d at 595 (analyzing dangers of giving state welfare workers "infinite license" to remove children).

93. *Tenenbaum*, 193 F.3d at 595. "And while the paramount importance of the child's well-being can be effectuated only by rendering State officials secure in the knowledge that they can act quickly and decisively in urgent situations and that the law will protect them when they do, there is a critical difference between necessary latitude and infinite license." *Id.* *But see id.* at 611 (Jacobs, J., concurring in part and dissenting in part) (stating majority's opinion will force child welfare workers to always obtain judicial authorization).

Every time a child welfare worker has reason to suspect child abuse, she will have to consider (i) whether there is reason to believe the child is in imminent danger (which until now has been all that was required) and (ii) whether there is time to get to court and obtain a court order (the majority's new requirement) as well as (iii) whether a court or jury will second-guess that decision on the basis that more efficient decision-making would have been afforded sufficient time to obtain the court

In *Mabe*, the warrantless removal of a fourteen year old minor (MD) from her parents occurred because information surfaced that her step-father molested her.⁹⁴ The Department of Social Services (DSS) assigned a social worker to interview MD and her mother.⁹⁵ The social worker believed there was child abuse present in the home and after presenting these findings to the DSS case review committee, the committee recommended the removal of MD from the home.⁹⁶ The social worker, along with a sheriff's deputy, went to the house without a warrant and removed MD.⁹⁷

MD's mother filed the lawsuit on state and federal grounds, alleging a violation of her due process rights under the Fourteenth Amendment.⁹⁸ The court upheld the due process challenge to the warrantless removal of MD.⁹⁹ In reaching its holding, the Ninth Circuit considered several factors which it determined damaged the belief of urgency and emergency, including the fact that case workers left MD in the home after interviewing her about the alleged molestation, the gap in time between the last alleged molestation incident and time of investigation, and that the alleged molestation only occurred at night.¹⁰⁰ After analyzing these factors, the court reasoned that if the social worker "could obtain a warrant the same day as the case review committee recommended that MD be removed, it is difficult to understand how the further delay of a few hours necessary to obtain the warrant would have been put MD in imminent danger of serious physical injury."¹⁰¹ Though, unlike *Tenenbaum*, the *Mabe* court does not imply that the law requires the social worker to determine whether there is time to obtain judicial authorization before removing a child from immediate danger.¹⁰²

order.

Id. "In terms of litigation, individual liability and damages, an error on the side of removal is risky, while an error on the other side is safe." *Id.*

94. *Mabe v. San Bernardino County Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1104 (9th Cir. 2001) (detailing case background). The San Bernardino County Sheriff's Department received a call that a stepfather had molested his fourteen year-old stepdaughter (MD). *Id.* MD's stepsister had placed the call to the Sheriff's Department. *Id.* The deputy sheriff spoke with both MD's mother and stepfather about the allegations and both stated MD was lying. *Id.* at 1105.

95. *Id.* at 1104 (describing assignment of case worker).

96. *Id.* at 1105 (detailing actions of social worker).

97. *Id.* (detailing how removal of MD occurred).

98. *Mabe*, 237 F.3d at 1106 (outlining case claims).

99. *Mabe*, 237 F.3d at 1109 (holding warrantless removal of MD violated MD's mother's constitutional rights).

100. *Mabe v. San Bernardino County Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1108 (9th Cir. 2001) (considering factors undermining belief of emergency circumstances).

101. *Id.* at 1109 (analyzing timing of obtaining warrant). In making its decision, the court also considered that the state did not remove MD from the home once the state was aware of the alleged molestation and the fact that no improper touching had occurred in over a month. *Id.* at 1108. *But see* *Tenenbaum v. Willaims*, 193 F.3d 581, 610 (2d Cir. 1999) (Jacobs, J., concurring in part and dissenting in part) (arguing harm will occur by forcing child welfare workers to obtain judicial authorization in emergencies). If state law forces child welfare workers to seek and then wait for court orders, "some children will be left too long in abusive situations." *Id.*

102. *Mabe*, 237 F.3d at 1108-09 (noting court opinion does not state social worker must determine if there

In *Doe v. Kearney*,¹⁰³ the Florida Department of Children and Family Services (DCF) received a report of sexual abuse by T.O. who accused her uncle, John Doe, of abusing her four years earlier.¹⁰⁴ After investigation, DCF determined that John Doe lived with his wife and three young children.¹⁰⁵ DCF's investigation also concluded that it had investigated John Doe in 1995 for sexual abuse of a child and that he had a criminal record involving crimes of a sexual nature.¹⁰⁶ The state caseworker assigned to the case, at the recommendation of her supervisor and DCF's legal counsel, took the children into state custody without judicial authorization.¹⁰⁷ John Doe and his wife alleged that the Florida statute authorizing the warrantless removal of their children violated the Due Process Clause of the Fourteenth Amendment because the removal was not supported by emergency circumstances.¹⁰⁸

In its analysis, the Eleventh Circuit addressed the flexibility of due process.¹⁰⁹ Following *Stanley*, the court reasoned that due process requirements depend upon the nature of the government function involved and the private interest affected.¹¹⁰ The *Kearney* court declared that the analysis of due process depends upon the circumstances involved and not whether the court has sufficient time to issue judicial authorization.¹¹¹

Based on this analysis of due process, the *Kearney* court held that state courts should be permitted to weigh all relevant factors of a specific situation, including "the state's reasonableness in responding to a perceived danger as well as the objective nature, likelihood, and immediacy of danger to the child."¹¹² After consideration of all applicable factors, including the interests

is time to obtain warrant). *But see Tenenbaum*, 193 F.3d at 596 (stating social worker must determine if there is time to obtain court order before removing child from danger).

103. 329 F.3d 1286 (11th Cir. 2003).

104. *See id.* at 1290 (detailing facts of case).

105. *Id.* (providing details of John Doe's personal life). At the time of the investigation John Doe's children were thirteen, nine and six years old. *Id.*

106. *Id.* at 1290 (analyzing prior investigations by DCF regarding John Doe and John Doe's past crimes). In 1995, DCF investigated John Doe for accusations of "placing his penis in the rectum of a three-year-old boy whom Jane Doe was baby-sitting." *Id.* Additionally, in 1989, the state convicted John Doe of "two counts of lewd and lascivious behavior stemming from an incident in which he exposed himself and fondled himself in front of children at a bus stop." *Id.*

107. *Kearney*, 329 F.3d at 1290 (explaining how children were removed from parental custody).

108. *Id.* at 1292 (stating parents' allegations). The Does' claimed "emergency must be defined by reference to the feasibility of obtaining a court order before effecting a removal." *Id.* at 1294.

109. *Id.* at 1295 (arguing due process flexible); *see also supra* note 40 and accompanying text (discussing flexibility of due process).

110. *Id.* (citing *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972)) (explaining how courts should analyze due process claims).

111. *Doe v. Kearney*, 329 F.3d 1286, 1295-97 (11th Cir. 2003) (affirming due process flexible).

112. *Id.* at 1295; *see also Brokaw v. Mercer County*, 235 F.3d 1000, 1020-21 (7th Cir. 2000) (discussing factors courts should consider in removal of child). "Deciding what process is due in any given case requires a careful balancing of the interests at stake, including the interests of parents, children, and the state." *Kearney*, 329 F.3d at 1297. "Those interests may be implicated to varying degrees depending upon the facts of an individual case, which will necessarily affect the degree of procedural due process required." *Id.*

of the parents, children and the state, the court should then decide if the imminent danger to the child warranted state removal without judicial authorization.¹¹³ After analysis of all the interests involved and the circumstances of the case, the *Kearney* court concluded that the state did not violate the due process rights of John and Jane Doe.¹¹⁴

The court reasoned that requiring child welfare agencies to consider whether there is sufficient time to obtain judicial authorization prior to effecting an emergency removal of a child places a difficult burden on state agents.¹¹⁵ Additionally, the court stressed that in emergencies, child welfare workers should not focus solely on whether there is time to obtain judicial authorization.¹¹⁶ Following the holdings of other circuit courts and rejecting *Tenenbaum* and *Mabe*, the *Kearney* court held that child welfare agencies should not have to determine if there is time to obtain judicial authorization prior to removing a child in circumstances that the agents determine to be an emergency.¹¹⁷

VII. ANALYSIS

The liberty interests of parents often collide with the interests of the state.¹¹⁸

113. *Kearney*, 329 F.3d at 1295 (suggesting court's reasoning). The balancing of the delicate interests at stake, including that of the parents, children, and the state, "cannot be properly accomplished when courts blunt the inquiry by simply asking whether there was time to get a warrant." *Id.* at 1297-98.

114. *Id.* at 1298-99 (holding no due process violation). The court noted the case worker acted reasonably and recognized the potential danger to the Doe children. *Id.* at 1298. The case worker investigated the case thoroughly and consulted her supervisor, as well as DCF legal counsel, before effecting the emergency removal. *Id.*

115. *Id.* at 1298-99 (arguing that requiring agencies to consider time would place difficult burden upon state agents). "It is almost always possible to criticize an official's conduct in hindsight." *Id.*; see also *Tenenbaum v. Williams*, 193 F.3d 581, 608 (2d Cir. 1999) (Jacobs, J., concurring in part and dissenting in part) (arguing requiring agency to consider time diverts caseworker's focus from child's welfare). Also, by requiring child welfare workers to make the decision whether there is sufficient time to secure judicial authorization, courts will expose them to personal liability for their decision. *Id.* The determination of whether there is sufficient time to obtain judicial authorization is highly subjective. *Id.* at 609. See generally Colin Poitras, *Pink Elephants, Hidden Truths*, HARTFORD COURANT, February 22, 2004, at A19 (discussing enormous pressures child welfare workers face daily and difficulty of job). "The clock is ticking all the time" for child welfare workers. *Id.* "It has been said that a DCF investigator's job amounts to the impossible: predicting human behavior." *Id.*

116. *Kearney*, 329 F.3d at 1297 (reasoning time consideration should not be only factor in determining if child may be removed). See generally Richard Lezin Jones, *New Jersey Plan Would Hire 1,000 in Child Welfare*, N.Y. TIMES, February 19, 2004, at A1 (discussing changes in New Jersey child welfare system). According to New Jersey Governor James E. McGreevey, the focus of child welfare agencies is on protecting the children. *Id.*

117. *Doe v. Kearney* 329 F.3d 1286, 1295 (11th Cir. 2003) (analyzing holdings of other circuit courts). The majority of the circuit courts, with the exception of the Second and the Ninth, support the idea that child welfare workers do not have to determine if there is time to obtain judicial authorization prior to removing a child in an emergency. *Id.*; see also *Tenenbaum*, 193 F.3d at 608 (Jacobs, J., concurring in part and dissenting in part) (maintaining child welfare worker should be focused on welfare of children).

118. See *supra* notes 48-51, 56-61 and accompanying text (affirming state can intervene with parental right to custody of children).

States have a strong interest in protecting children from danger, while parents have a constitutionally protected liberty interest in maintaining custody of their children.¹¹⁹ When a child's welfare is in imminent danger, the state's interest often supersedes the liberty interest of parents, and the state is able to effect an emergency removal of the child.¹²⁰

The state entrusts child welfare workers with the difficult task of investigating and determining whether there is reasonable or probable cause to believe a child is at risk of imminent harm.¹²¹ After investigation, child welfare workers may not effect an emergency removal of a child based upon the "mere possibility of danger;" they must have reasonable or probable cause to believe a child is in imminent danger.¹²² Additionally, child welfare workers must consider all the interests involved including those of the child, the parents and the state.¹²³

When presented with exigent circumstances, the procedural requirements of due process change.¹²⁴ Due process is a flexible concept, no firm standards determine the procedural requirements of due process.¹²⁵ The flexibility of the notion of due process should allow courts to determine appropriate procedures by analyzing and balancing the interests of the state, the parents and the child.¹²⁶ Therefore, a determination of a due process violation should not rest solely upon one factor, but rather on the totality of the circumstances and interests involved.¹²⁷ When the appropriate state agency properly determines a child is in imminent danger, the interests of the state and the child substantially outweigh the liberty interest of the parents.¹²⁸

When the state removes a child from his or her parents without prior judicial authorization because the state deems the situation to be an emergency, there is no violation of the due process rights of the parents.¹²⁹ The state is not denying

119. See *supra* notes 26-35, 49-51 and accompanying text (discussing parents' interests in custody of children and state's interest in welfare of children).

120. See *supra* notes 56-61 and accompanying text (declaring state may remove child from parents in emergency without prior judicial authorization).

121. See *supra* notes 59-64 and accompanying text (discussing how and who may remove a child in emergency).

122. See *supra* notes 56, 61-64 and accompanying text (assessing criteria for when child welfare worker may effect emergency removal of child).

123. See *supra* notes 112-13 and accompanying text (considering interests of child, parents, and state when determining whether state should remove child).

124. See *supra* note 56 and accompanying text (allowing states to constitutionally remove child from parents in emergencies).

125. See *supra* notes 40-41 and accompanying text (discussing flexibility of due process and analyzing due process requirements).

126. See *supra* notes 41, 111-12 and accompanying text (arguing courts should consider all interests when determining due process).

127. See *supra* notes 40-41, 111-12 (considering all factors involved in possible removal of child).

128. See *supra* notes 49-51, 56-58 and accompanying text (holding state may remove children from parents without judicial authorization).

129. See *supra* note 56 and accompanying text (discussing state may remove child in emergency without

parents due process; rather, it is simply delaying a hearing until the state has removed the child.¹³⁰ If a judicial proceeding occurs promptly after removal, the state has met the constitutional requirement that parents be heard “at a meaningful time and in a meaningful manner.”¹³¹ The government only violates a parent’s right to due process if a welfare worker invokes a removal without probable cause to believe the child is in imminent danger, or if the subsequent hearing is not prompt.¹³²

In *Tenenbaum* and *Mabe*, the courts reviewed serious circumstances involving child abuse, yet it was questionable whether a “true emergency” existed.¹³³ In both cases, the parents argued that there was no emergency due to the lack of immediate action the state welfare workers took after evaluating, reviewing and interviewing the child.¹³⁴ The Second and Ninth Circuits determined that the circumstances did not warrant an emergency removal, and held that child welfare workers should consider whether there is sufficient time to obtain judicial authorization before effecting an emergency removal of a child.¹³⁵

The holdings of the Second and Ninth Circuit courts reflect a concern regarding “emergency removals” of children when it is questionable whether there is an absence of legitimate exigent circumstances or urgency.¹³⁶ The debatable emergency circumstances in the *Tenenbaum* and *Mabe* cases demonstrate that courts are losing sight of the reason why emergency removals without prior judicial authorization are necessary.¹³⁷ Emergency removals are necessary because the welfare and safety of an innocent and helpless child is in immediate danger.¹³⁸ In reaching their holdings, the Second and Ninth Circuit pushed aside the well-established principle that the state has a profound interest in the welfare of children, in favor of minimizing the risk of error and procedural laziness by child welfare workers.¹³⁹ While these are legitimate concerns courts should address, the establishment of a new factor to consider

prior judicial authorization).

130. See *supra* notes 56-57 and accompanying text (stating post-removal hearing acceptable in emergency circumstances).

131. See *supra* notes 42, 57 and accompanying text (reasoning prompt judicial proceeding post-removal does not violate due process).

132. See *supra* notes 61-62 and accompanying text (asserting imminent danger as standard for removal).

133. See *supra* notes 79-84, 93-99 and accompanying text (summarizing circumstances believed to qualify each case as emergency).

134. See *supra* notes 80-83, 100 and accompanying text (discussing delays from when state evaluated child to when state effected emergency removal).

135. See *supra* notes 88, 100-01 and accompanying text (discussing holdings of *Tenenbaum* and *Mabe*).

136. See *supra* notes 90-92, 99-100 and accompanying text (explaining dangers of removal in non-emergency circumstances).

137. See *supra* note 58 and accompanying text (defining circumstances under which state may remove children without prior judicial authorization).

138. See *supra* notes 51, 58 and accompanying text (describing circumstances considered emergency).

139. See *supra* notes 91-92, 100, 114-16 and accompanying text (discussing how much freedom child welfare workers have when making child removal determinations).

when state agents determine whether to remove a child in an emergency is unnecessary and burdensome.¹⁴⁰

Requiring child welfare workers to consider whether there is time to obtain judicial authorization defeats the purpose of affording state child welfare workers the power to effect emergency removals.¹⁴¹ An emergency is a situation requiring fast action and the focused attention of the state actors involved.¹⁴² The determination of an emergency situation should not rest on the mere consideration of whether there is time to obtain judicial authorization.¹⁴³ Child welfare workers are required to make quick decisions about whether children are at immediate risk in their present environment.¹⁴⁴ Requiring child welfare workers to consider if there is time to obtain judicial authorization, in addition to considering all the other factors and interests involved in each case, deters the focus of child welfare workers away from the actual welfare of the child.¹⁴⁵

Additionally, requiring child welfare workers to determine if there is sufficient time to obtain judicial authorization makes their job more burdensome and difficult.¹⁴⁶ A timing determination is inherently subjective, and hence cases with similar facts can have different outcomes.¹⁴⁷ If there is a chance child welfare workers may be subjected to personal liability as a result of their determination, the effectiveness and efficiency of child protective services may diminish due to fear of personal liability for errors or mistakes.¹⁴⁸ As a result, not only will the welfare of the child and the issue of whether there is sufficient time to obtain judicial authorization be on the mind of child welfare workers when contemplating effecting an emergency removal, but so too will the question of whether a court would consider their decision reasonable.¹⁴⁹

It is always possible to second-guess the decisions and actions of child welfare workers when effecting an emergency removal of a child.¹⁵⁰ Because

140. See *supra* note 114 and accompanying text (arguing consideration of timing burdensome).

141. See *supra* note 58 and accompanying text (defining emergency).

142. See *supra* notes 114-15 and accompanying text (asserting requiring workers to consider time would shift focus away from child).

143. See *supra* notes 111-12 (arguing totality of circumstances as standard).

144. See *supra* note 58 and accompanying text (explaining purpose of emergency removal).

145. See *supra* note 115 and accompanying text (emphasizing importance of keeping child welfare worker's focus on children's best interests).

146. See *supra* note 114 and accompanying text (reasoning burden too great).

147. See *supra* note 114 and accompanying text (arguing determination about whether sufficient time exists subjective).

148. See *supra* note 93 (Jacobs, J., concurring in part and dissenting in part) (discussing how consideration of personal liability will effect child welfare worker's decision to remove child).

149. See *supra* note 93 (Jacobs, J., concurring in part and dissenting in part) (arguing consequences of child welfare workers considering own liability).

150. See *supra* note 114 and accompanying text (noting possibility of second-guessing decisions of child welfare worker). *But see supra* notes 91-92 and accompanying text (discussing dangers of leading child welfare workers to believe their decisions unquestionable).

the decision is subjective, however, there may never be a perfect decision.¹⁵¹ When child welfare workers make the decision to remove a child, the decision frequently hurts the interests of the parents.¹⁵² The most effective way for state child welfare departments to achieve their mission of protecting children is to give child welfare workers the confidence and knowledge that they can act quickly in emergencies by using their best judgment, and that the law will continue to protect them.¹⁵³

VIII. CONCLUSION

Of all Americans, children perhaps are the most innocent and helpless. Children do not possess the same strength, knowledge or independence as adults. They rely upon their parents and guardians for all the necessities of human life including a home, food, clothing, security, and love.

When parents or guardians neglect, abuse, or endanger their child, the welfare and future of the child is in immediate risk. Our society entrusts the important task of evaluating whether a child is in imminent danger to state child welfare departments and their employees. Child welfare workers are trained to act quickly when there is probable cause to believe that a child is in danger. Therefore, our judicial system must allow them to be pro-active and make the crucial decision of whether to remove children from their parents. If the state does not protect children whose parents are not acting in their best interests, who will?

Allowing child welfare workers to make the quick decision to remove a child in an emergency is essential. They protect the dreams, aspirations and future of not only our children, but also of the future leaders of our country. The welfare of an innocent child is more important than the due process rights of parents in emergency situations. When it is probable that a child may be in danger, the due process rights of parents must be delayed.

The courts and the law should not burden child welfare workers with additional considerations and requirements when they face a decision of whether to remove a child. While it is imperative that child welfare workers make the correct decision in every case, requiring child welfare workers to consider whether there is adequate time to obtain judicial authorization would be too onerous. Deterring the focus of an emergency room doctor away from a patient often leads to mistakes, scrutiny, imperfection, or under-performance. Deterring the focus of child welfare workers away from the best interests of the

151. *See supra* note 114 and accompanying text (arguing decisions made by child welfare workers subjective).

152. *See supra* notes 48-51 and accompanying text (holding parents' interest in raising and maintaining custody of children not absolute in exigent circumstances).

153. *See supra* note 91 and accompanying text (noting child welfare worker's quick decisions must receive legal protection). *But see supra* note 92 and accompanying text (reasoning if child welfare workers believe courts will never question their decisions harm could occur).

2004]

ON THE CLOCK

167

child leads to the same: mistakes, scrutiny, imperfection, and under-performance. Child welfare workers must focus on the welfare of children and not on time considerations and potential personal liability for their own actions.

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