PARENTS NOT *PARENS*: PARENTAL RIGHTS VERSUS THE STATE IN THE PRE-TRIAL DETENTION OF YOUTH

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ABSTRACT

Youth across the United States are held in juvenile detention facilities while awaiting trial in juvenile delinquency proceedings, despite the fact that detention is often both unnecessary and harmful to a child's mental health and development. This article endeavors to reduce this practice by positing an argument that children and their defense attorneys can use to oppose detention: that such detention implicates parental due process rights, and thus requires a judicial inquiry into why the government, acting as *parens patriae*, can supersede the parent's custody. The article surveys the parental liberty interest and the landscape of pre-trial detention in the juvenile justice system, explains how parents' liberty interests are implicated in the decision to detain, and lays out a three-part recommendation for reform.

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> "[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents." – J. White, *Stanley v. Illinois*[1]

I.
INTRODUCTION

Tonight, approximately 20,000 youth will be held in juvenile detention facilities across the country while awaiting trial.[2] Seventy percent of those children will be detained for non-violent offenses, and those detained are disproportionately youth of color.[3] They are separated from their parents[4] and communities, held in the factual equivalent of a jail, and have their physical and mental health put at risk. Our youth are being harmed because a judge, acting within the bounds of the State's *parens patriae*[5] and police powers,[6] determined that if released to their parents, the child posed a risk of engaging in criminalized behavior or a risk of failing to appear for their next court date. Often missing from that determination is whether the parent is actually unable to adequately supervise their child, such that State custody is necessary.

Juvenile delinquency courts were created and are generally examined through a children's rights framework, but youth facing delinquency proceedings are still presumed to be in their parents' custody and care. While the determination to detain a child naturally removes children from that custody, this determination has never been examined through the framework of parents' rights. Here, I endeavor

1. 405 U.S. 645, 652 (1972).

2. Richard A. Mendel, *Juvenile Detention Alternatives Initiative Progress Report: 2014*, THE ANNIE E. CASEY FOUNDATION 5 (2014), http://www.aecf.org/m/resourcedoc/aecf-2014JDAI ProgressReport-2014.pdf [https://perma.cc/NK7Z-KBYK].

3. Barry Holman & Jason Ziedenberg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INSTITUTE 3 (2006) http://www.justicepolicy.org/images/upload/06-11_rep_dangersofdetention_jj.pdf [https://perma.cc/2WBJ-YC2D].

4. "Parents" for the purpose of this article is meant to connote one or more biological parents, adoptive parents, or legal guardians without regard to sexual orientation or gender identity. The ways in which the identity of the parent(s) could change this inquiry are beyond the scope of this article.

5. The concept of *parens patriae* originated in the English common law as the State's power to protect those who could not protect themselves, and has been applied in the context of children's rights to represent the State's power to take custody of a child if that child's parents are not "effectively performing their custodial functions." *In re* Gault, 387 U.S. 1, 16–17 (1967).

6. *Police powers*, BLACK'S LAW DICTIONARY 1276 (9th ed. 2009) ("The inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.").

to explore how pre-trial detention implicates parental due process rights, and how parents can thus help their children avoid pre-trial detention. The initial appearance[7] is a missed opportunity for juvenile defense attorneys to strategically assert the parents' liberty interest in the custody of their children under the Fourteenth Amendment's Due Process Clause, which would weigh heavily in favor of releasing the child to their parents and avoiding the disastrous consequences of detention.

Throughout this article, I employ New York as a sample state through which to explore the conflict of parental custody and *parens patriae* in the pre-trial detention of children, primarily because the details of delinquency cases are best examined where they play out, at the local level. I have selected New York in particular for three reasons: because *Schall v. Martin*,[8] the Supreme Court case deeming juvenile detention constitutional, did so based on New York's pre-trial detention statute; because New York City already uses the risk assessment instruments and alternatives to detention that I find can be a helpful tool in reform; and because of my personal familiarity with the New York City Family Court.

Part II will present an overview of the parental liberty interest and the circumstances under which the government, acting as *parens patriae*, can infringe upon that interest, including the specific procedures for temporary removal and termination of parental custody in New York. Part III will first survey the origins and evolution of the juvenile justice system and the emergence of due process rights for children, before describing the phenomenon of pre-trial detention both nationally and in New York. Part IV will present and explore the conflict between parental custody and the *parens patriae* power in the initial appearance, including how parents' liberty interests are implicated in the decision to detain and the ramifications of that deprivation of liberty. Part V will present a three-part recommendation for reform, which endeavors to guard against unconstitutional and unnecessary detention of children. Part VI will conclude.

II.
A PRESUMPTION OF PARENTAL CUSTODY

A. Overview of the Presumption

The right to liberty, guaranteed by the Fourteenth Amendment, empowers adults to make all manner of decisions in their best interest without unreasonable interference by the government.[9] This liberty interest applies uniquely to parents,

7. "Initial appearance" in this article is meant to additionally encompass any other appearances at which a judge is considering whether to remand a child. In some jurisdictions, this hearing is called the detention hearing where detention is at issue.

8. 467 U.S. 253 (1984).

9. U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law."); Roe v. Wade, 410 U.S. 113, 152–53 (1973) (locating a constitutional right to privacy in the Fourteenth Amendment's Due Process Clause).

who are generally free to make decisions not only in their own best interests but in the best interests of their children, free from government intrusion.[10] The law allows parents to control everything from a child's education to their religion.[11]

The historical and judicial precedent for insulating parental decision-making from State intrusion is supported by three interwoven purposes. First is the development of close relationships that allow parents to provide for their child's physical, mental, and emotional needs.[12] Second is the importance of allowing these bonds to develop without interruption.[13] Third is the reality that the State, in its cumbersome power, can never truly replace the nuanced and complex role of parents; the State is "too crude an instrument to become an adequate substitute for flesh-and-blood parents."[14] If the government intends to employ its *parens patriae* or police power to usurp the parental role, that intrusion must at a minimum comport with the requirements of due process.

In an ideal world, every child would be raised by loving, attentive, supportive, and economically stable parents. However, the law does not require parents to be perfect; constitutional protections apply to even minimally adequate parents.[15] Parents are presumed fit; it is only if a parent falls below a minimum standard of care that the government can intervene, either with its *parens patriae* power on behalf of the child or its police power on behalf of society. At that point, the State

10. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (recognizing that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment" including the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that the Fourteenth Amendment's liberty interest includes a parent's right to raise their children, and setting the stage for further jurisprudents holding that governmental interference with certain aspects of family autonomy should be evaluated using strict scrutiny).

11. *See* United States v. Orito, 413 U.S. 139, 142 (1973) (noting that the constitutional right of privacy includes child rearing); Wisconsin v. Yoder, 406 U.S. 205, 230–35 (1972) (finding a parental right to the direct religious education of a child); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that "the custody, care and nurture of the child reside first in the parents"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925) (finding that parents have a right to control the education of their child because "[t]he 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"); *Meyer*, 262 U.S. at 399 (construing the Fourteenth Amendment to denote freedom to "establish a home and bring up children," here including the parent's freedom to direct the education of their children).

12. JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 90 (1996).

13. *Id*.

14. *Id*. at 91.

15. *See, e.g.*, David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failure of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 142 (1992) (noting that the typical statute governing termination of parental rights requires a showing that the parent is unfit and will not become a minimally fit parent within a length of time reasonable for the child to wait).

can determine which placement[16] is in the "best interests"[17] of the child. The custodial protections afforded and the procedures required by the Due Process Clause to supervene parental custody will be explored in turn.

First at issue is the question of which adults have custody over the child, and thus can make decisions concerning that child. While the exact standards vary based on state law, biological mothers and men married to biological mothers generally have a presumption of custody, which can only be overcome in extreme circumstances such as surrender, abandonment, or unfitness.[18] Unmarried romantic partners of the biological mother, on the other hand, have little to no presumption of custody.[19] Those with custody over the child are presumed fit to decide which other parties have standing to adopt or to claim visitation rights to the child.[20]

The government can only intrude on parental custody where it satisfies the balancing test made explicit in *Mathews v. Eldridge*, used to determine whether an individual has received adequate due process protections.[21] The test balances:

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16. I use the term "placement" as it is employed in GOLDSTEIN, SLONIT, GOLDSTEIN & FREUD, *supra* note 12 ("'Child placement' . . . is a term that encompasses all legislative, judicial, and executive decisions concerned with establishing, administering, or rearranging parent-child relationships. The term covers a wide range of variously labeled legal procedures for deciding who should be assigned or expected to seize the opportunity and the task of being 'parent' to a child. These procedures include birth certification, neglect, abandonment, battered child, foster care, adoption, and delinquency, as well as custody in annulment, separation, and divorce.").

17. The "best interests" doctrine is used in New York and a majority of other jurisdictions.

18. *See* Lehr v. Robertson, 463 U.S. 248, 267–68 (1983) (holding that an unwed biological father did not regain custody of child with whom mother ran away, because although father had a right to develop a relationship, without doing so his parental rights were not constitutionally protected); Michael H. v. Gerald D., 491 U.S. 110 (1988) (finding a presumption that a child born to two co-habiting married people is presumed to be the biological child of the husband, and a biological father does not have a right to custody of the child over the objection of married parents); *see, e.g.*, Bottoms v. Bottoms, 457 S.E.2d 102, 104 (Va. 1995) (finding that a presumption of parental custody can be overcome by "parental unfitness"); *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992) (finding that when biological father neither abandoned child nor terminated parental rights, adoption initially authorized by mother pursuant to state statute could not proceed); Bennett v. Marrow, 399 N.Y.S.2d 697, 699 (2d Dep't 1977) (holding that in a custody dispute between the child's biological mother and foster mother, the interests of child were paramount and certain extraordinary circumstances justified intervention in parental custody); Bennett v. Jeffreys, 356 N.E.2d 277, 280 (N.Y. 1976) (finding that the presumption of parental custody can be overcome by extraordinary circumstances such as surrender, abandonment, neglect, unfitness, or, as here, prolonged separation, if in the best interests of the child).

19. *See Lehr*, 463 U.S. at 267–68 (1983); *see, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 184 (N.Y. 2010) (finding that biological mother had the right to refuse to let her partner adopt her child, and the partner as a biological stranger had no standing to seek custody).

20. Troxel v. Granville, 530 U.S. 57 (2000) (finding a presumption of parental ability to decide which non-parents have visitation rights).

21. 424 U.S. 319, 335 (1976) ("[I]dentification 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.").

(1) the private interest at stake, (2) the risk of "an erroneous deprivation," and (3) the government's interest.[22] This inquiry could be used, for example, when a parent intends to make a medical decision on behalf of their child and requires judicial approval to do so. On one side of the balance, the parent has a private interest in choosing the medical procedures to which their child will be subjected—a highly personal decision often implicating religious and spiritual beliefs. On the other hand, the government has an interest in ensuring that a child's access to medical treatment does not fall below a minimum standard of care.[23]

In such circumstances, the heightened stakes of preserving a child's health or life could justifiably weigh against the parent's liberty and autonomy interests[24] and in favor of State intervention, but even in this context parents retain a presumption of control.[25] To transfer the decision-making power from the parent to the State, the parent must first be adjudged neglectful or temporarily unfit.[26] In determining what constitutes neglect in the medical context, one proposed standard is deference to parental decisions unless death of the child is a likely outcome.[27] Courts generally defer to the parent's preferred course of action, allowing alternative medical treatment or refusal of medical treatment that could result in the death of the child.[28] Thus, there is usually an incredibly strong presumption in favor of parental autonomy in making critical medical decisions

22. *Id*.

23. Parham v. J.R., 442 U.S. 584 (1979).

24. In addition to liberty and autonomy interests, there may be religious liberty interests at play in the context of medical decisions.

25. *Parham*, 442 U.S. at 603–04 (1979) (noting that the presumption of parental authority applies to medical decisions, unless there is a finding of neglect or abuse).

26. *See* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (noting that parents have a due process right to a hearing on their fitness as a parent); *see, e.g.*, *In re* Hofbauer, 393 N.E.2d 1009 (N.Y. App. Div. 1979).

27. *See generally* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 652, 664 (1977) (arguing that there is no justification for governmental intrusion on parental rights in cases where death is not a likely outcome, but that the State should be able to overcome the presumption when it can establish: "(a) that the medical profession is in agreement about what nonexperimental medical treatment is right for the child; (b) that the expected outcome of that treatment is what society agrees to be right for any child, a chance for normal healthy growth toward adulthood or a life worth living; and (c) that the expected outcome of denial of that treatment would mean death for the child").

28. *See, e.g.*, Newmark v. Williams, 588 A.2d 1108, 1110 (Del. 1991) (finding that the parents' choice to not give their child chemotherapy did not amount to neglect because the balance of risks of the treatment versus likelihood of success was unclear, and thus Child Protective Services could not prove that the intervention was "necessary to ensure the safety or health of the child, or to protect the public at large"); *In re* Green, 292 A.2d 387, 392 (Pa. 1972) (finding that a mother's choice to decline surgery for her child's scoliosis because of her opposition to the requisite blood transfusion did not amount to neglect because the child's life was not immediately in danger). *Compare Hofbauer*, 393 N.E.2d at 1013–15 (finding that the parents' choice to pursue an alternative medical treatment in lieu of chemotherapy and radiation did not amount to neglect because the treatment, not "totally rejected by all responsible medical authority" was above the minimum degree of adequate medical care), *with In re* Sampson, 317 N.Y.S.2d 641, 658 (N.Y. Fam. Ct. 1970) (finding a mother neglectful for refusing surgery and a blood transfusion to cure her child's facial deformity when necessary to insure the "well-being" of the child).

on behalf of a child, unless the decision is clearly below the minimum degree of care.[29]

The State generally intervenes as *parens patriae* when a child's safety and well-being are at immediate risk.[30] In the most severe instances of State intervention, the State endeavors to temporarily remove a child from parental care or permanently terminate parental custody. Because of the strong parental liberty interests at stake in suspension or termination of parental rights, due process requires a hearing.[31] In termination proceedings, the State bears the burden of showing that the parent is unfit[32] and must prove its case by clear and convincing evidence.[33] Even in the case of temporary removal, the child's "best interests" are not the focus of the inquiry;[34] the issue is whether the child is placed in imminent danger due to the conditions of parental custody. Only if a child has already been removed from the parent's custody and the parent fails to "remedy the circumstances that led to the child's removal from the home"[35] can the State pursue termination of parental rights. Reasons for termination include abuse, neglect, and abandonment. The standards for termination vary by state, but in light of the fundamental right to family integrity, there must be proof by clear and convincing evidence either of continued unfitness or of substantial harm to the child in order to terminate parental custody.[36]

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29. *See, e.g.*, Nicholson v. Scoppetta, 820 N.E.2d 840, 846 (N.Y. 2004) (noting that "the statutory test is '*minimum* degree of care' – not maximum, not best, not ideal" (citing *Hofbauer*, 393 N.E.2d 1009)).

30. Prince v. Massachusetts, 321 U.S. 158, 166 (1944); *see also* Sturges & Burn Mfg. Co. v. Beauchamp, 231 U.S. 320 (1913) (holding that the State could prohibit employment of minors in dangerous occupations).

31. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 849 (1977) (applying the *Mathews v. Eldridge* test to determine what procedures due process required for foster parents).

32. Stanley v. Illinois, 405 U.S. 645, 657–58 (1972) (noting that the State has almost no interest in how a fit parent raises their children). *See, e.g.*, *In re* L.M., 57 So. 3d 518, 530 (La. Ct. App. 2011) (finding child "in need of care" because after a number of months of non-compliance with state-provided services, "parent shows a repeated pattern of placing a child at risk"); *In re* Philip M., 624 N.E.2d 168 (N.Y. 1993) (holding that the burden of proving neglect lies with State); *In re* B.K., 429 A.2d 1331, 1331 (D.C. 1981) (finding child "neglected" by a preponderance of the evidence based on abandonment and hazardous house conditions).

33. Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

34. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'") (quoting *Smith*, 431 U.S. at 862–63 (1977) (Stewart, J., concurring)).

35. *See* Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1251 (1996); *see, e.g.*, *In re* Shirley B., 18 A.3d 40 (Md. App. 2011) (finding that the State met its burden to prove "reasonable efforts" to change goal of permanency plan from reunification to adoption based on resources available to agency).

36. Wanda Ellen Wakefield, *Annotation, Validity of State Statute Providing for Termination of Parental Rights*, 22 A.L.R.4TH 774 (2014).

The importance of these robust procedural protections is heightened by the reality of foster care, which in many cases is more harmful than the conditions that lead to the child's removal. In fact, most children are removed because of neglect, and specifically neglect that is a product of poverty.[37] Removing a child from their parents can be "at least as devastating and traumatic" as the conditions in the home, in part because of the trauma of the upheaval in stability.[38] Removal can also be directly harmful (if not deadly), as evidenced by the widely-documented abuse present in the foster care system these children enter if removed from their parents.[39] Not only do parents have a presumption of parental custody, but the state of the foster care system reinforces the practical need for such a presumption.

B. The Presumption in New York

New York statutorily allows the State to remove a child from their legal guardian in cases of suspected abuse or neglect, in a limited number of situations. Emergency removal of a child from their home without a court order is authorized only if that placement "presents an imminent danger to the child's life or health" and there is no time to apply for an order of removal.[40] In such circumstances, a petition must be filed no later than the next court day,[41] and a hearing must be held no later than the next court day following the day the petition was filed.[42] A potentially abused or neglected child can also be removed if her legal guardian gives written consent.[43] In such cases, the child protective agency must file a petition within three days of the removal, with a hearing following the next day.[44] In either of these cases, the purpose of the hearing is to determine whether "removal is necessary to avoid imminent risk to the child's life or health,"[45] and

37. Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 257–58 (2006).

38. *Id*. at 258.

39. *See, e.g.*, Kristin Turney & Christopher Wildeman, *Mental and Physical Health of Children in Foster Care: Abstract*, PEDIATRICS (Oct. 2016) (summarizing a study comparing the mental and physical health of children placed in foster care with those not placed in foster care, and finding that children in foster care are in worse health than other children), http://pediatrics.aappublications.org/content/pediatrics/early/2016/10/14/peds.2016-1118.full.pdf [https://perma.cc/TBX3-HAGW]; Nikita Stewart and Joseph Goldstein, *An 'Exemplary' Foster Father, a String of Suspicions and Sexual-Abuse Charges*, N.Y. TIMES (Apr. 1, 2016), http://www.nytimes.com/2016/04/02/nyregion/a-foster-father-on-long-island-a-string-of-suspicions-and-sexual-abuse-charges.html?_r=0 [https://perma.cc/826C-7M4H]; Evey Rosenbloom, *Where Do The Children Go When They Are Taken Away?*, HUFFINGTON POST (Dec. 7, 2015), http://www.huffingtonpost.com/evey-rosenbloom/where-do-the-children-go_1_b_8728758.html [https://perma.cc/PAE7-3MW6]; Aram Roston & Jeremy Singer-Vine, *Fostering Profits*, BUZZFEED NEWS (Feb. 20, 2015), http://www.buzzfeed.com/aramroston/fostering-profits#.onDqyVKw8 [https://perma.cc/4393-2U4N].

40. N.Y. Fam. Ct. Act § 1024(a)(i)–(ii) (2016).

41. N.Y. Fam. Ct. Act § 1026(c) (2016).

42. N.Y. Fam. Ct. Act § 1027(a)(i) (2016).

43. N.Y. Fam. Ct. Act § 1021 (2016).

44. *Id*.

45. N.Y. Fam. Ct. Act § 1027(b)(i) (2016).

if so, the Court must state its findings necessitating removal.[46] The most drastic and final of recourses, parental termination, can come about through permanent neglect, "severe or repeated child abuse," or abandonment,[47] where there is an imminent risk of physical or emotional harm to the child.[48] These robust procedural protections and limits to removal underscore the presumption we give to parental custody, and what the State must do to overcome that presumption.

III.
PRE-TRIAL DETENTION OF YOUTH

A. Origins of the Juvenile Justice System

The juvenile justice system was originally a momentous victory for children's rights advocates, providing a civil alternative to the adult-length sentences in adult prisons that resulted from trying children in the criminal system.[49] Juvenile courts abandoned punitive goals in favor of a holistic and rehabilitative process in which the State intervened as *parens patriae* to make decisions in the best interests of a child, allowing them to develop into a productive member of society.[50] Thus, the formalized procedures of the criminal justice system were renounced in hopes of allowing judges the flexibility to make individualized assessments and recommendations for each child.[51] The discretionary decision of whether or not to release the child was meant to allow the judge "the opportunity to consider the child's needs and welfare," with a presumption that release to parental supervision was preferable whenever possible.[52] Without explicit procedures in place,

46. N.Y. Fam. Ct. Act § 1027(b)(ii) (2016).

47. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 747–48 (1982) (noting that in New York, the standard for determination of neglect is "fair preponderance of the evidence" and termination is "clear and convincing evidence"); Spence-Chapin Adoption Serv. v. Polk, 29 N.Y.2d 196, 199 (N.Y. 1971) (finding that the "court was without power, absent abandonment of the child, statutory surrender outstanding, or the established unfitness of the mother, to deprive the mother of custody").

48. *See* Nicholson v. Scoppetta, 820 N.E.2d 840 (N.Y. 2004) (finding that to remove a child, the parent must have fallen below a minimum degree of care and there is an imminent risk of physical or emotional harm).

49. Ironically, the creation of the juvenile justice system did not eradicate this practice; there are currently fourteen states that have no minimum age for trying children as adults and 10,000 children incarcerated in adult prisons. *Children in Prison*, EQUAL JUSTICE INITIATIVE, http://www.eji.org/childrenprison [https://perma.cc/FKW2-RVTZ].

50. *See* RONALD GOLDFARB, JAILS: THE ULTIMATE GHETTO OF THE CRIMINAL JUSTICE SYSTEM 319 (1976); *In re* Gault, 387 U.S. 1, 15–16 (1967) (noting that instead of punishment, "[t]he child was to be 'treated' and 'rehabilitated' and the procedures . . . were to be 'clinical' rather than punitive"); Julian Mack, *The Juvenile Court*, 23 HARV. L. REV. 104, 119–20 (1909) ("The problem for determination by the judge is not, Has this boy or girl committed a specific wrong, but What is he, how has be become what he is, and what had best be done in his interest and in the interest of the State to save him from a downward career.").

51. David R. Barrett, William J.T. Brown & John M. Cramer, *Juvenile Delinquents: The Police, State Courts, and Individualized Justice*, 79 HARV. L. REV. 775, 775 (1966).

52. PAUL F. CROMWELL, JR., GEORGE G. KILLINGER, ROSEMARY C. SARRI & H. M. SOLOMON, TEXTS AND READINGS: INTRODUCTION TO JUVENILE DELINQUENCY 196 (1977) (quoting PRESIDENT'S

however, the juvenile courts morphed into possibly "the worst of both worlds": children were left with "neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[53] When a child was taken into State custody, there existed no statutory or constitutional guarantees that restricted the length of or conditions in which they could be held without probable cause[54] or in what circumstances the court would be required to release them to their parents in advance of trial.[55]

The landmark children's rights case *In re Gault* reflected on this history, noting that the well-intentioned flexibility built into the juvenile courts had devolved into "arbitrariness."[56] The discretion available to both police and juvenile court judges was generally resulting in detention, and not release, for the vast majority of children.[57] Furthermore, the conditions of pre-adjudicatory confinement of children were horrendous—there was rampant overcrowding in the juvenile detention facilities that existed, and where they did not exist, children were housed in "old-age homes, insane asylums, courthouses, or often in one or two cells of the local jails."[58] These conditions were clearly antithetical to proper child development and to the guiding principles of the juvenile justice system.

In an attempt to resuscitate the focus on the child's "needs and welfare,"[59] the court in *Gault*, led by children's rights champion Justice Abe Fortas, bestowed certain due process rights upon children in juvenile court: the right to adequate notice, assistance of counsel, confrontation of witnesses, and the privilege against self-incrimination.[60] Three years later, *In re Winship* added that if a child was charged with an act that, if they were an adult, would constitute a crime, proof beyond a reasonable doubt is required to sustain the charges.[61] Bestowing certain "adult" protections on children in juvenile delinquency proceedings was meant to protect against some of the aforementioned arbitrariness, while leaving undisturbed the rehabilitative intentions of the juvenile court.

COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE ON JUVENILE DELINQUENCY AND YOUTH CRIME 16 (1967)).

53. Kent v. United States, 383 U.S. 541, 556 (1966).

54. *Id*. (noting that sixteen-year-old petitioner was detained for almost one week without a determination of probable cause) (conviction reversed on other grounds).

55. *See* Barrett, Brown & Cramer, *supra* note 51, at n.792.

56. *In re* Gault, 387 U.S. 1, 18–19 (1967).

57. CROMWELL, KILLINGER, SARRI & SOLOMON, *supra* note 52 (noting vast variation in the number of children detained, from two out of one hundred in some districts to half, three quarters, or virtually all in others).

58. *Id*. at 197 (quoting D. FREED & P. WALD, BAIL IN THE UNITED STATES 97 (1964)).

59. CROMWELL, KILLINGER, SARRI & SOLOMON, *supra* note 52.

60. *Gault*, 387 U.S. at 55, 57.

61. *In re* Winship, 397 U.S. 358, 368 (1970).

B. The Remand Determination

Ever since *Gault* opened the Pandora's box to constitutional protections in juvenile court, the juvenile delinquency adjudicatory process has slowly morphed into the criminal system in all but name.[62] The pre-trial "initial appearance" became the equivalent of an arraignment, thanks in large part to *Schall v. Martin*, the New York case that found the pre-trial detention of children to be constitutional.[63]

The first appellee in *Schall* was fourteen-year-old Gregory Martin, who was arrested and detained overnight before his appearance in family court the next day.[64] The judge found a lack of supervision and ordered Martin detained under section 320.5(3)(b) of the Family Court Act, part of New York's juvenile delinquency statute.[65] Martin was then held for fifteen days while his case was tried. The second appellee, Luis Rosario, was fourteen years old and was held for almost a month before being released to his father.[66] The third appellee, Kenneth Morgan, also fourteen years old, was held for eight days between his initial appearance and fact-finding.[67]

The Supreme Court found section 320.5(3)(b) constitutional under the Due Process Clause of the Fourteenth Amendment, authorizing pre-trial detention of a child where there was a "serious risk" that they would reoffend before the next court date.[68] The Court stated that the statute served the legitimate interests of protecting the child and society from future crimes, and the existing procedural safeguards afforded by *Gault*[69] were enough to protect against the unnecessary deprivation of liberty.[70] This finding came in spite of the Second Circuit's recognition that preventative detention was mainly being used for punishment, not protection,[71] evidenced by the fact that the vast majority of children detained either had their petitions dismissed or were released directly after trial even where the court found they had committed the charged offense beyond a reasonable doubt.[72] The Supreme Court ignored these implications, and constitutionally cemented the equivalent of a criminal arraignment into juvenile delinquency proceedings.

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62. McKeiver v. Pennsylvania, 403 U.S. 528, 533 (1971).

63. 467 U.S. 253, 283 (1984); *see also* United States v. Salerno, 481 U.S. 739 (1987) (finding pre-trial detention of adults constitutional).

64. *Id*. at 257–58.

65. *Id*. at 258.

66. *Id*.

67. *Id*.

68. N.Y. Fam. Ct. Act. § 320.5 (McKinney 1983).

69. *See In re* Gault, 387 U.S. 1, 55 (1967).

70. Schall v. Martin, 467 U.S. 253, 274 (1984).

71. Martin v. Strasburg, 689 F.2d 365, 372 (1982), *rev'd sub nom. Schall*, 467 U.S. at 272 (noting that the statute "is utilized principally, not for preventative purposes, but to impose punishment for adjudicated criminal acts").

72. *Id*. at 369.

As noted in *Schall v. Martin*, every state has some equivalent of New York's juvenile detention statute,[73] and most (if not all) of those statutes authorize secure pre-trial detention of children.[74] At issue for a judge at the initial appearance is whether, if released, the child will either fail to appear for their next hearing, or will be a danger to themselves or to the community. Such a determination is understandably difficult if not impossible[75] for a judge to make in light of the limited information available about the child and the alleged incident at the initial appearance,[76] and presents real risks of arbitrariness and implicit bias that could result in the child being unnecessarily removed from their family and community, and detained.

A number of states have started to use risk assessment instruments (RAI) as one strategy to assist judges in making these detention decisions.[77] Risk assessment instruments evaluate an arrested minor by means of a checklist that assigns point values to different factors, such as the number of prior felony adjudications, that are statistically proven to correlate to risk of failure to appear for future court dates or re-arrest.[78] Certain factors, such as if a minor has previously been returned on warrants or been charged with violent offenses, can lead to mandatory detention, depending on the jurisdiction.[79] On the other hand, the absence of these factors can weigh heavily in favor of releasing the child to their parents. However, risk assessment instruments present certain problems, such as considering erroneous information and over-recommending secure detention of children with low risk scores.[80] Thus, such tools must be constructed carefully and scrutinized constantly. The following section will examine the realities of juvenile detention under New York's statute, and how risk assessment instruments are used within that context.

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73. *Id*. at 266–67 ("Every State, as well as the United States in the District of Columbia, permits preventative detention of juveniles accused of crime.").

74. David Steinhart, *Juvenile Detention Risk Assessment: A Practice Guide to Juvenile Detention Reform, Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUNDATION 7 (2006) [hereinafter *Juvenile Detention Risk Assessment*], http://www.aecf.org/m/resourcedoc/aecf-juveniledetentionriskassessment1-2006.pdf [https://perma.cc/D9SL-EC7L].

75. *See* Jeffrey Fagan & Martin Guggenheim, *Preventative Detention and the Judicial Prediction of Dangerousness for Juveniles: A Natural Experiment*, 86 J. CRIM. L. & CRIMINOLOGY 415, 416 (1996) (questioning the "predictive validity of judicial determinations of dangerousness inherent in preventative detention").

76. *See Schall*, 467 U.S. at 293 (Brennan, J., dissenting) ("Family Court judges are incapable of determining which of the juveniles who appear before them would commit offenses before their trials if left at large and which would not.").

77. *Juvenile Detention Risk Assessment*, *supra* note 74 (finding risk assessment instruments in use at Juvenile Detention Alternatives Initiative sites in more than fifteen states).

78. *Id*. at 33 (examples of state's RAI provided throughout).

79. *Id*. at 23.

80. *Id*. at 81.

C. The Determination in New York

When a child is arrested in New York, one of three things can happen: they can be brought directly to family court by the police, they can be detained overnight if court is no longer in session and brought to court the following day, or they can be released to their parent and given an appearance ticket to appear in court on a future day.[81] Section 320.5 of the New York Family Court Act provides that at that first court appearance, known as the initial appearance, the court must decide whether to "release the respondent or direct his detention" while the case is pending.[82]

Pre-trial detention of a child is only permitted where, based on an assessment of risk, "alternatives to detention, including conditional release, would not be appropriate" and the court finds there is either a "substantial probability" that without detention the child will not appear for their next court date, or there is a "serious risk" that before the next court date the child will commit an act equivalent to a crime.[83] If consideration of these factors weighs towards detention, the Family Court Act further directs the judge to note in their order directing detention if continued parental custody would be "contrary to the best interests" of the child, and whether "reasonable efforts" were made to avoid removing the child from their home.[84] In practice, based on my personal observations, family court judges generally do not put considerations specific to parental custody on the record.

The trial testimony in *Schall v. Martin* provides a rare picture of how family court judges might assess a child under section 320.5(3). Judge Quinones, the family court judge, testified that he considered factors including:

> [T]he nature and seriousness of the charges; whether the charges are likely to be proved at trial; the juvenile's prior record; the adequacy and effectiveness of his home supervision; his school situation, if known; the time of day of the alleged crime as evidence of its seriousness and a possible lack of parental control; and any special circumstances.[85]

In other words, Judge Quinones considered not only specific risk-related factors, but speculation about the child's parents and home life. Notably, he omitted a consideration of whether "reasonable efforts" could still be made to avoid removing the child—factors the statute did not explicitly direct the judge to consider.

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81. N.Y. Fam. Ct. Act § 320.2(1) (2014); *see also Juvenile Delinquency*, NEW YORK STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/courts/nyc/family/faqs_juvenile.shtml [https://perma.cc/6BKT-8YPF]. For the sake of simplicity, the following discussion assumes that a petition is filed at the initial appearance.

82. N.Y. Fam. Ct. Act § 320.5(1) (2014).

83. N.Y. Fam. Ct. Act § 320.5(3) (2014).

84. N.Y. Fam. Ct. Act § 320.5(5) (2014).

85. Schall v. Martin, 467 U.S. 253, 279 (1984).

Following the 2006 reform of the juvenile justice system,[86] New York's Family Court Act now requires use of an RAI to assist judges in determining whether a child presents a risk of not appearing for court or being re-arrested.[87] At the outset, four factors were found significant for assessing failure to appear (FTA):

> [1.] An open warrant for a previous juvenile delinquency case; [2.] No parent or responsible adult present at probation intake; [3.] School attendance of less than 30 percent in the last full semester of school; and [4.] A prior warrant for a juvenile delinquency or Persons in Need of Supervision (PINS) case.[88]

Concurrently, five factors were found to predict re-arrest prior to trial:

> [1.] Prior arrest(s) at the time of probation intake; [2.] Prior arrest(s) for a felony offense at the time of probation intake; [3.] Prior juvenile delinquency adjudication(s); [4.] Previous adjudication(s) for a designated felony offense; and [5.] Being on probation for a previous adjudication at the time of probation intake.[89]

During intake, probation officers assign a point for each applicable factor to two subtotals for risk of failure to appear and risk of re-arrest, which are then combined to place a child into low-, mid-, or high-risk categories.[90] Family court judges can, but are not required to, take this computed risk level into consideration in deciding whether or not to detain a child. Incorporating the RAI into the arraignment determination of risks of failure to appear and re-arrest has ostensibly improved outcomes for youth by enumerating explicit factors to be considered, and encouraging judges to detain only those whose scores suggest they present significant risk.[91] However, as previously stated, anecdotal evidence suggests that these RAI scores are frequently incorrect, either because relevant information has been excluded or incorrect information included.

New York City offers three levels of community-based alternatives to detention (ATDs), for which youth are eligible depending in part on how they score on the RAI. The three ATD options range from the lower-level community monitoring and after-school supervision to the higher-level intensive community

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86. Jennifer Fratello, Annie Salsich & Sara Mogulescu, *Juvenile Detention Reform in New York City: Measuring Risk through Research*, VERA INSTITUTE OF JUSTICE 2 (2011) http://www.vera.org/sites/default/files/resources/downloads/RAI-report-v7.pdf [https://perma.cc/5UKY-RN6X].

87. N.Y. Fam. Ct. Act § 320.5 (3) (a–b) (2011).

88. Fratello, Salsich & Mogulescu, *supra* note 86 at 7–8; *see also* NYC JUVENILE DETENTION RISK ASSESSMENT INSTRUMENTS, http://www.criminaljustice.ny.gov/ofpa/jj/docs/nys_juvdet_risk_assmt_insts.pdf [https://perma.cc/44UC-NWMA].

89. Fratello, Salsich & Mogulescu, *supra* note 86 at 8; *see also* NYC JUVENILE DETENTION RISK ASSESSMENT INSTRUMENTS, *supra* note 88.

90. Fratello, Salsich & Mogulescu, *supra* note 86 at 9–10.

91. *Id*. at 13.

monitoring.[92] Preliminary outcomes of the program suggest that low-risk youth are released, mid-risk youth are recommended to ATD programs, and high-risk youth are recommended for secure detention.[93] However, the categories are simply suggestions that leave room for judicial discretion, resulting in continued detention of low- and medium-risk youth after the initial appearance, despite numerical qualification for ATD programs.[94]

IV.
BALANCING THE PARENTAL AND STATE INTERESTS

As discussed in Part II, the State is generally only authorized to intervene in the relationship between parents and their children when parents have gone below the minimum standard of care.[95] Delinquency proceedings are an exception, at least officially. In some ways, delinquency is inherently different because of the State interests in protecting both the child and the community from delinquent acts. This article concedes that the government's police and *parens patriae* powers can outweigh parental liberty interests once a family court judge finds the child to have committed the charged act beyond a reasonable doubt. However, the balance of these countervailing interests is not as clear at a child's initial appearance, where the court has not found beyond a reasonable doubt that the child committed the act charged. This section addresses why parental liberty interests should be stronger than the *parens patriae* interest at the time a judge determines whether to detain a child pre-trial, and how juvenile defense attorneys can harness this right to the benefit of their clients.

A. Detention as a Deprivation of Parental Due Process

Parents' liberty interests in their children are both explicitly and implicitly at issue at the initial appearance. First, in deciding whether or not to detain the child, the judge is explicitly deciding whether or not to (at least temporarily) disrupt parental custody. Second, in making that determination, the judge assesses a variety of factors that implicitly pass judgment on the efficacy of that parent's supervision and care. In every other context, any disruption of a parent's custody triggers procedural due process protections.

Detention of a child by its very definition temporarily deprives a parent of custody. While no one case stands for the precise proposition that detention implicates parental rights, the case law expounding on parental liberty interests

92. Community monitoring consists of curfew checks and phone check-ins, after-school supervision consists of mandatory programming and supervision at a designated site between 3:00 p.m. and 7:00 p.m., and intensive community monitoring consists of curfew checks, phone check-ins, and home visits by a probation officer. *Id.* at 10–11.

93. *Id*. at 12.

94. *Id*. (noting that nine percent of youth scoring as low risk are being detained).

95. *In re* Hofbauer, 393 N.E.2d 1009, 1013–15 (N.Y. App. Div. 1979).

clearly supports such a presumption.[96] While there has been some "ambiguity in the Court's explanation of a parent's *role* in delinquency proceedings,"[97] *Gault* and its progeny "strongly distinguish between the custody of the State and the custody of parents."[98] *Gault* suggests that children are still in their parents' legal custody at the time of the initial appearance.[99] *Santosky* casts the transfer of the child from parental custody to the custody of the State as a significant event in which constitutional protections are triggered, suggesting that preventative detention is not an innocuous transfer of custody.[100] The transfer is constitutionally significant both because the nature of parental custody is fundamentally different than State custody, and because in most cases, the parent has not explicitly relinquished custody.[101] Although this transfer of custody is temporary, the length of such a deprivation has not been considered constitutionally relevant in analogous contexts.[102]

Schall arguably portrays the interests of the child and State in harmony at the time of remand,[103] juxtaposed against the "falter[ing] . . . of parental control."[104] This language insinuates that the parent has somehow already been found unfit by the mere *allegation* of a delinquent act, and that the impersonal and often dangerous detention facility is better than continued parental supervision. This misconstrues not only the presumption of innocence, but also the long line of precedent standing for the proposition that parental custody is the societal and legal default.[105] In New York, the statute itself suggests that this determination has not yet been made. Furthermore, *Schall*'s implication ignores the requisite standard of proof required to deprive a non-consenting parent of even temporary custody in other contexts: that the State must show "imminent risk" to the child, or show that the parent has failed to remedy the circumstances that led to earlier

96. *See supra* Part II(A).

97. Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 782 (2010) (emphasis added).

98. Jean Koh Peters, Schall v. Martin *and the Transformation of Judicial Precedent*, 31 B.C. L. REV. 641, 664 (1990).

99. *See In re* Gault, 387 U.S. 1, 33–34 (1967) (noting the "parents right to . . . custody" and requiring that parents be given written notice when their child is taken into custody, of the charges, and of the child's right to an attorney).

100. 455 U.S. 745, 747–48 (1982) ("Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.").

101. *See* Fedders, *supra* note 97 (noting that "parents have due process interests in delinquency proceedings because that right is threatened by the commencement of the delinquency case").

102. *See generally* Part II(B), explaining that when children are temporarily removed from their parents in child protective proceedings, the Family Court Act provides that the parent must receive notice, representation, and an opportunity to be heard.

103. *See* Peters, *supra* note 98.

104. *See id*. at 667; *see also* Schall v. Martin, 467 U.S. 253, 265 (1984) ("They are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*.").

105. *See* cases cited *supra* note 10.

removal.[106] To terminate parental rights by reason of neglect, due process requires even more: that the State prove the parent unfit by clear and convincing evidence.[107] In contrast, children are detained in delinquency proceedings before the charges are proven beyond a reasonable doubt, without any formal inquiry into a parent's capacity to supervise the youth, and without granting the parent an opportunity to be heard on this temporary deprivation of custody. Thus, parental due process rights are not currently considered in the initial appearance, but should be.

B. Deprivation of Custody at the Initial Appearance in New York

The factors which implicitly suggest that parental capacity is at issue at the initial appearance vary from jurisdiction to jurisdiction and court to court, based in part on the applicable statutory scheme and in part on the discretion of the judge. In *Schall v. Martin*, the opinion noted that, as part of the detention determination, the family court considered "school attendance"[108] and "adequacy and effectiveness of [their] home supervision."[109] In New York City, parental fitness is not made explicit, but is certainly at issue.

A judge's determination to remand a child rather than parole them to the custody of their parents is based primarily on the perceived severity of the charges—a child charged with a violent felony is more likely to be remanded than a child charged with a non-violent misdemeanor. But in addition to the charge and the other factors explicitly listed in the RAIs, judges in New York City are taking "parental involvement" into account in the determination of whether to remand.[110] Currently, there is no mechanism by which to measure the effect of perceived parental capacity on a judge's decision to remand. At the same time, judges are not consistently complying with the statutory requirement that, when detaining a child, they note why parental custody is insufficient and "contrary to the best interests" of the child, even with "reasonable efforts" to keep the child with their parents.[111]

Thus, judges are already considering parental fitness in practice, but are not making that consideration explicit as either part of the RAI or the requirements of 320.5. Proof of such considerations is largely anecdotal, precisely because judges

106. *See supra* notes 34–35 and accompanying text; *see also* N.Y. Fam. Ct. Act § 1027(b)(i) (2016).

107. *See* Wakefield, *supra* note 36; *see, e.g.*, N.Y. Fam. Ct. Act § 1046(b) (2016).

108. *Schall*, 467 U.S. at 276.

109. *Id.* at 279.

110. *Strong Families, Safe Communities: Recommendations to Improve New York City's Alternative to Detention Programs*, CENTER FOR COURT INNOVATION YOUTH JUSTICE BOARD, 9 (2009), http://www.courtinnovation.org/sites/default/files/YJBreportfinal_20091.pdf [https://perma.cc/7WMQ-TMT] (report based on research conducted by the Youth Justice Board, including interviews with practitioners).

111. *See supra* note 84 and accompanying text; *see also* N.Y. Fam. Ct. Act § 320.5(5) (2014).

are not stating such reasoning on the record.[112] RAI scores combined with the reasoning a judge puts on the record for detaining a child could provide a better picture of why a child is detained, and when parental fitness is at issue. ATDs can then provide a concrete option for the "reasonable efforts" judges should be making to avoid removing a child from their home.

C. Policy Implications of the Liberty Deprivation

The deprivation of parental custody at the initial appearance not only controverts the due process protections guaranteed to parents, but also implicates serious policy concerns akin to those previously discussed in the context of foster care. First, the care and supervision provided by parents is uniquely important to a child's growth and development, and cannot be replaced by the State. The time a child spends in a juvenile detention facility actively hinders that child's growth,[113] and consequently detention should only be required in the direst of circumstances, with the requisite burden of proof, and the correct record, if at all. Second, the demographics of detained youth suggest a troubling trend of the State disproportionately targeting low-income families and families of color.

Parental presence is crucial during a child's development. The family is well-documented as being "the fundamental unit responsible for and capable of providing a child on a continuing basis with an environment which serves his numerous physical and mental needs during immaturity."[114] Parents provide their children with the necessary tools for healthy development, including how to handle their fears and understand the consequences of their actions.[115] As Justice Marshall pointed out in his dissenting opinion in *Schall*, "[s]urely there is a qualitative difference between imprisonment and the condition of being subject to the supervision and control of an adult who has one's best interests at heart."[116] Given the troubling effects of detention on a young person's mental health, the

112. The few publicly available opinions regarding detention determinations under section 320.5 do not mention what factors were considered by the judge in making such a determination. *See, e.g.*, *In re* Luis T., 2012 N.Y. Slip Op. 50530(U), 4–5 (N.Y. Fam. Ct.); *In re* Kevin M., 85 A.D.3d 920 (2d Dep't 2011).

113. Holman & Ziedenberg, *supra* note 3, at 2 ("A recent literature review of youth corrections shows that detention has a profoundly negative impact on young people's mental and physical well-being, their education, and their employment."); NATIONAL JUVENILE DEFENDER CENTER, THE HARMS OF JUVENILE DETENTION (2016), http://njdc.info/wp-content/uploads/2016/10/The-Harms-of-Juvenile-Detention.pdf [https://perma.cc/W3FQ-BBMD] (noting that detention causes higher rates of depression, anxiety, and other mental health issues in youth, and leads to "increased involvement in the justice system").

114. GOLDSTEIN, SLONIT, GOLDSTEIN & FREUD, *supra* note 12, at 13.

115. *See* Margaret Beyer & Ricardo Urbina, *An Emerging Judicial Role in Family Court*, AMERICAN BAR ASSOCIATION 6 (1986) ("[A] reliable, caring adult is essential for the development of the child in five ways . . . forming a conscience . . . handling fears . . . understanding consequences . . . coping with frustration . . . [and] developing trusting relationships.").

116. Schall v. Martin, 467 U.S. 253, 289–90 (1984) (Marshall, J., dissenting).

care of a parent is, in practically all cases, significantly better than institutionalized supervision in a detention center.[117]

The decision to remove a child from the custody of their parents and into the custody of the State is monumentally disruptive to that child's development, and especially so when that child is placed in a juvenile detention center. The days, weeks, or even months a child could spend in detention are not conducive to proper childhood development.[118] While in detention, youth are subjected to neglect and violence,[119] and these conditions have "a profoundly negative impact on young people's mental and physical well-being, their education, and their employment."[120] For juvenile detention to be even slightly equivalent to parental custody, that parent's behavior would have to present a risk of harm equivalent to the levels authorizing a state to pursue at least emergency removal if not termination.

Thus, even minimally adequate parents are better for a child than detention.[121] Research shows that State programs most effective in reducing youth recidivism are those where treatment occurs while the child is under parental supervision and living at home.[122] Not only does detention violate parental due process, but it does so unnecessarily, often achieving the very outcomes State custody is intended to avoid.[123]

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117. *See* Peters, *supra* note 98, at 667.

118. Holman & Ziedenberg, *supra* note 3, at 2.

119. *Schall*, 467 U.S. at 289–90 (Marshall, J., dissenting) ("If you put [children] in detention, you are liable to be exposing these youngsters to all sorts of things. They are liable to be exposed to assault, they are liable to be exposed to sexual assaults. You are taking the risk of putting them together with a youngster that might be much worse than they, possibly might be, and it might have a bad effect in that respect.") (quoting trial testimony of Judge Quinones).

120. Holman & Ziedenberg, *supra* note 3, at 2; THE HARMS OF JUVENILE DETENTION, *supra* note 113.

121. *See* Beyer & Urbina, *supra* note 115, at 13 (1986) ("Often it is not recognized how much damage is done to the child by punishing the biological parents. Inadequate parents are not bad parents, but judges find that there are insufficient in-home support services for protecting children in their biological families. Removal from home threatens the child's lifeline and will have long-lasting consequences.").

122. Holman & Ziedenberg, *supra* note 3, at 2 (noting that numerous research institutes have shown that the elements of proven recidivism-reducing programs include treatment within the family or a family-like setting, treatment at home or close to home, services that are culturally respectful and competent, treatment that focuses on the youth's strengths, and the option of a variety of resources). Relatedly, research has shown that youth receiving family visitation while incarcerated have better behavior and school performance and suffer fewer psychological symptoms, suggesting the positive impact felt by even a small amount of parental contact. *See* SANDRA VILLALOBOS AGUDELO, VERA INSTITUTE OF JUSTICE, THE IMPACT OF FAMILY VISITATION ON INCARCERATED YOUTH'S BEHAVIOR AND SCHOOL PERFORMANCE (Apr. 2013), http://www.vera.org/pubs/impact-of-family-visitation-on-incarcerated-youth [https://perma.cc/A3LC-NKGJ]; Kathryn C. Monahan, Asha Goldweber, & Elizabeth Cauffman *The Effects of Visitation on Incarcerated Juvenile Offenders: How Contact with the Outside Impacts Adjustment on the Inside*, 35 LAW & HUM. BEHAV. 143 (2011).

123. *See* Holman & Ziedenberg, *supra* note 3, at 2–3 (finding that pre-trial detention of youth correlates with recidivism and not public safety); U.S. DEP'T OF JUSTICE, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, ALTERNATIVES TO THE SECURE DETENTION AND CONFINEMENT OF

The other troubling policy concern of depriving parents of their due process at the initial appearance is that the affected families are disproportionately low-income families of color.[124] That racial and ethnic minorities are overrepresented in the juvenile justice system is widely documented,[125] and "evident at nearly all contact points on the juvenile justice system continuum."[126] The same is true of families of low socio-economic status.[127] African American youth in particular are disproportionately arrested, referred to juvenile court, and processed.[128] After the initial appearance, youth of color are disproportionately more likely to be separated from their families and detained.[129] Thus detention determinations that unnecessarily separate children from their parents primarily affect parents and youth of color. Borrowing from Professor Marty Guggenheim's use of a Rawlsian theory of justice, "it is important to ponder the implications of a policy that would treat families without means differently from families with means."[130] The juvenile justice system must take serious and immediate steps to ensure that detention does not continue to be a de facto liberty tax on minority and poor families and communities.

JUVENILE OFFENDERS 2–3 (2005), https://www.ncjrs.gov/pdffiles1/ojjdp/208804.pdf [https://perma.cc/65M6-7DAM] (citing studies questioning effectiveness of detention, given that up to fifty to seventy percent of youth previously confined in a detention facility are rearrested within one to two years after release).

124. Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT (2014), http://www.sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf [https://perma.cc/X4XZ-HTXN].

125. *Id*. at 1 ("The extent to which jurisdictions experience racial and ethnic disparities has been exhaustively studied. Differences in arrest rates and processing of juvenile offenders are the residue of policies and practices that have disparate impact on communities of color. A litany of studies clarify the reasons [disproportionate minority contact] exists: selective enforcement, differential opportunities for treatment, institutional racism, indirect effects of socioeconomic factors, differential offending, biased risk assessment instruments, and differential administrative practices.").

126. *In Focus Fact Sheet: Disproportionate Minority Contact*, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION 1, http://www.ojjdp.gov/pubs/239457.pdf [https://perma.cc/KF4M-T8T9].

127. *See* Katayoon Majd & Patricia Puritz, *The Cost of Justice: How Low-Income Youth Continue to Pay the Price of Failing Indigent Defense Systems*, 16 GEO. J. POVERTY LAW & POL'Y 543, 545 (2009).

128. *See, e.g.*, Joshua Rovner, *Disproportionate Minority Contact in the Juvenile Justice System*, THE SENTENCING PROJECT (2014), http://sentencingproject.org/doc/publications/jj_Disproportionate%20Minority%20Contact.pdf [https://perma.cc/S267-2P35] (noting that black youth are twice as likely to be arrested, 269 percent more likely to be arrested for violating curfew laws, and 2.5 times more likely to be arrested for a property offense as white youth); Holman & Ziedenberg, *supra* note 3, at 3 ("Youth of color are disproportionately detained at higher rates than whites, even when they engage in delinquent behavior at similar rates as white youth.").

129. Mendel, *supra* note 2, at 5.

130. Martin Guggenheim, *Book Review: Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1744 (2000) (citing JOHN RAWLS, A THEORY OF JUSTICE 12, 17–22 (1971)).

V.
SOLUTIONS

Schall v. Martin held that the procedural safeguards of notice, an opportunity to be heard, and a statement of facts required by the Due Process Clause of the Fourteenth Amendment were enough to guard against the unnecessary deprivation of liberty brought about by detention. However, the court found these safeguards sufficient when inquiring solely into what due process must be provided to the *child*; not to the parent. To make detention constitutionally sufficient for parents, this article proposes a three-part recommendation. First, judges ordering the detention of a child should be required to put on the record *why* continued parental custody would be "contrary to the best interests" of the child, and whether "reasonable efforts" were made to avoid removing the child from their home, as provided for by the New York Family Court Act,[131] so that such determinations could be reviewed on appeal. Second, the Juvenile Detention Alternatives Initiative (JDAI) should be implemented nationwide, including the development of tailored and evidence-based risk-assessment instruments to make the decision to detain less discretionary, and the expansion of alternatives to detention. Third, juvenile defense attorneys should work with parents where appropriate to assert the parent's right to custody against state custody, and thus prevent detention where possible.

A. Making a Record

When ordering the pre-trial detention of a child, judges should be statutorily required to put on the record *why* continued parental custody would be "contrary to the best interests" of the child, and whether "reasonable efforts" were made to avoid removing the child from their home prior to a decision to remand. Such a finding is already statutorily required in New York, where a judge remanding a child pre-trial must state both "whether the continuation of the respondent in the respondent's home would be contrary to the best interests of the respondent" and "whether reasonable efforts were made to prevent or eliminate the need for removal of the respondent from his or her home."[132] Other states could benefit from adopting similar language.

However, based on anecdotal evidence, any such determinations made under the New York statute are currently conclusory, and the record does not reflect the rationale such that an appellate court could review the family court judge's determination.[133] Thus, in cases where a judge orders the child remanded in a state with such a statute, the attorney for the child should seek to clarify on the record why remand was in the child's "best interests" and whether reasonable efforts were made to keep a child in the community with their parents and prevent

131. N.Y. Fam. Ct. Act § 320.5(5) (2014).
132. *Id.*
133. *See supra* note 84 and accompanying text.

remand. By making a record, individual determinations to remand can be challenged on appeal, encouraging judges to explicitly rationalize why a child's parents are not able, or should not be given the chance to demonstrate they are able, to ensure the child's return to court and the safety of the community.

B. Juvenile Detention Alternatives Initiative

The JDAI is a two-decades-old model created by the Annie E. Casey Foundation, currently in use in nearly 300 counties in forty states, which aims to reduce detention populations.[134] The model uses eight core strategies: promoting collaboration among juvenile justice actors, using data-driven decision-making, using risk assessment instruments to reduce judicial discretion, expanding alternatives to detention programs, reforming the flow of cases, reducing numbers of children detained in certain categories, seeking to reduce the disproportionate impact on racial and ethnic minorities, and improving the conditions in juvenile detention facilities.[135] JDAI has been incredibly successful, reducing the number of youth in detention by more than fifty percent[136] and the number of youth of color in detention by forty percent[137] while youth crime rates stayed the same or decreased.[138]

While the model should be implemented nationwide in its entirety, counties and states should at a minimum focus on the implementation and constant adjustment of RAI. RAI, discussed in the context of New York City in Part III(C) *supra*, are, at their best, objective screening instruments that assign point values to certain factors to indicate the statistical risk that a child will either re-offend or fail to show up to court, including the charged offense, prior record, current supervision status, and any history of a failure to appear.[139] New York City's RAI serves as a practicable model in terms of taking into consideration only factors statistically correlated with re-offense or failure to appear, and allowing judges to exercise discretion where the recommended level of risk is not correct, or does not seem appropriate in light of individual circumstances.

Currently, RAI are utilized at intake to screen a child into one of three escalating risk categories, and that risk score is then taken into account by the judge. Where there is a robust and well-regarded RAI, judges will have some

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134. *Juvenile Detention Alternatives Initiative*, THE ANNIE E. CASEY FOUNDATION, http://www.aecf.org/work/juvenile-justice/jdai/ [https://perma.cc/5ZJC-AYA6] (click "strategies" tab).

135. *Id*.

136. Mendel, *supra* note 2, at 15.

137. *Id*. at 20.

138. Editorial, *Locking Up Fewer Children*, N.Y. TIMES, Aug. 13, 2009, at A18 ("These efforts show that it is possible to treat children humanely without compromising public safety and deserve to be replicated nationwide.").

139. *Objective Admissions*, JDAI SYSTEM ASSESSMENT FRAMEWORK 18 (Jul. 11, 2013), http://www.jdaihelpdesk.org/ [https://perma.cc/4VMZ-N9KT]; *Juvenile Detention Risk Assessment*, *supra* note 74.

assurance that they can with confidence release or recommend to ATD programs all low- and medium-risk youth. Judges should additionally be considering which high-risk youth could be successful in ATD programs, which would maximize the number of children released to parental custody.

At the same time, counties and states should also focus on creating more ATDs. JDAI has found that the most effective ATD programs are those directly linked to the child's type of risk (re-offense or failure to appear) and those that involve families in the creation and implementation of the plan.[140] The programs should be based in the community being served, with staff representative of racial, ethnic, and gender diversity and trained in cultural competency.[141] Furthermore, ATD programs must continually strive to tailor a youth's ATD to their needs. This could include involving the parents in creation and maintenance of the program, and providing the family with any services necessary to ensure successful adherence to the ATD program, like those provided to parents in abuse and neglect proceedings.[142]

By strengthening and expanding the JDAI, courts will optimize the extent to which ATDs are used to support parental custody and in lieu of detention, and provide an explicit way for the court to make "reasonable efforts" to keep a child with their parents. Strong, culturally competent ATDs will decrease the instances in which youth are re-offending or failing to appear, helping parents to fulfill the dual interests of the State. Judges will be incentivized to use tailored ATDs to fulfill the statutory requirement of showing "reasonable efforts" whenever objectively appropriate based on RAI recommendations.

C. Asserting Parents' Due Process Rights

Parents' liberty interests are implicated in a judge's decision to remand a child pre-trial and temporarily disrupt parental custody. Typically, that deprivation would mean that parents must be afforded certain procedural protections, including the right to be heard. In a juvenile delinquency case, a child, in consultation with their defense attorney, should decide when and how to assert a parent's right to retain custody, where appropriate. The power should reside with the child first because these rights are asserted within the context of the child's juvenile delinquency case, and decisions in the case should be made according to a child's expressed interests.[143] Additionally, there are circumstances in which parents are the complaining witness or do not wish for their child to return home for any number of reasons, and in these situations, the child is best situated to

140. *Id*.

141. *Id*.

142. *See supra* note 35 and accompanying text.

143. *See* NAT'L JUVENILE DEFENDER CTR., NATIONAL JUVENILE DEFENSE STANDARDS 1.2 (2012) ("Counsel's primary and fundamental responsibility is to advocate for the client's expressed interests.") http://njdc.info/wp-content/uploads/2013/09/NationalJuvenileDefenseStandards 2013.pdf [https://perma.cc/HLQ6-YWPL].

decide whether their parents will be willing to advocate for their child to return home, and thus be helpful participants in the detention hearing.[144] The parent's right to retain custody of their child could be asserted either by the child through third party standing,[145] or informally by the parent themselves. Defense attorneys will need to determine what strategy will work best in a particular case, courtroom, and jurisdiction.

When the child decides in consultation with their attorney that a parental custody argument should be made, defense attorneys can argue that since pre-trial detention infringes on the parents' liberty interest in their child, the parent has a right to be heard at the detention hearing. To not consider that right would be a violation of the procedural due process rights of both the parent and the child, as demonstrated through the *Mathews v. Eldridge* framework.[146] The test, as previously discussed, considers three factors: (1) the private interest at stake, (2) the risk of "an erroneous deprivation," and (3) the government's interest,[147] which will be discussed in turn below and then balanced.

First, the private interest affected by pre-trial detention is a parent's personal liberty and their interest in their child's deprivation of liberty. As noted in *Schall v. Martin*, this is a fundamentally important right, and thus "unnecessary abridgement should be avoided if at all possible."[148] This importance weighs strongly on the side of recognizing the due process rights of parents in the liberty of their child.

Second, there is a high risk of an erroneous deprivation through the current procedures simply because there is currently no explicit process for the parents to make a case for why the child can safely remain in their parents' custody prior to

144. Children should not be sent to detention simply because their parents are unwilling or unable to take them home, but solutions to this complicated scenario are beyond the scope of this article.

145. A party before the court can assert a third party's rights in particular circumstances, including when "it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." Barrows v. Jackson, 346 U.S. 249, 257 (1953). This was the case in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), where the schools bringing suit were permitted to assert the constitutional rights of parents and guardians. Although standing in state family court would be a statutory question, the child, not the parent, is before the court and is the one whose liberty is at stake. As a result, the child almost certainly has "the personal stake in the controversy needed to confer standing," and there is an argument to be made that the child could vicariously assert the parent's due process rights. H. L. v. Matheson, 450 U.S. 398, 406 (1981). *Cf.* Troxel v. Granville, 530 U.S. 57, 62–64 (2000) (affirming Washington Supreme Court decision finding that nonparent third parties had standing to assert visitation rights, but ultimately that this "independent third-party interest in a child . . . place[d] a substantial burden on the traditional parent-child relationship" and was therefore unconstitutional).

146. Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

147. *Id.* ("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.").

148. 467 U.S. 253, 305 (1984).

trial, especially with the external supports of an ATD program. Meanwhile, judges already have the discretion to detain a child and deprive their parent of custody based on any number of relevant or irrelevant factors. With an opportunity to be heard, parents or the defense attorney can assert the right to custody.

Third, the State's current process is motivated by the dual interests of avoiding a child's re-arrest and their failure to appear for future court dates, interests that are assumed to be legitimate for purposes of this article. A child's return to court is essential for subsequent adjudication of the case, and the State understandably has an interest in preventing any acts that, if committed by an adult, would constitute a crime. However, as long as these interests are attended to, the State has arguably no interest in *who* is responsible for ensuring these ends are achieved. The court should look to the parents, and ATD programs if necessary, as a first source to fulfill those dual interests.

Besides these two burdens, it is unclear why home-based services would not be a sufficient and less restrictive means to meet the government's interests. In an effort to avoid these burdens, the State may argue that, like the doctrine of *res ipsa loquitor* in child protective proceedings,[149] the delinquent act in itself creates an inference that the parent is not able to adequately fulfill the State's interests. However, no such inference is currently recognized in delinquency case law, nor should one be, given the evidentiary difference between an observable physical injury and an alleged but unproven act. Furthermore, ATD programs can provide additional monitoring to ensure that a child can be safely released to their parents, support that did not exist prior to the child's arrest.[150] On the other side of the balancing test, the liberty interests of parents are fundamental, and there should be an opportunity to assert that right where beneficial. Because parents' liberty interests are uniquely implicated at the initial appearance in a way not triggered in other parts of the delinquency proceeding, parents or defense attorneys must be able to assert this right.

During the initial appearance, the judge must be able to identify and state why the parent is unable to prevent re-arrest or failure to appear, and thus cannot retain custody of their child after arrest and prior to trial, discussed in Part V(B) *supra*. Similar to the State's obligation to show reasonable efforts were made to prevent removal of the child in abuse and neglect hearings,[151] the State would be required to state why the support provided through a targeted ATD program would not

149. N.Y. Fam. Ct. Act § 1046 (2016) (stating that "proof of injuries sustained by a child or of the condition of a child of such a nature as would ordinarily not be sustained or exist except by reason of the acts or omissions of the parent or other person responsible for the care of such child shall be prima facie evidence of child abuse or neglect, as the case may be, of the parent or other person legally responsible").

150. Some children may already be under the supervision of a court-mandated ATD when arrested, but given that there should exist ATD programs with more and less restrictions, the same argument applies with the caveat that the attorney and parents can argue for a more restrictive ATD program.

151. N.Y. Fam. Ct. Act § 1027 (b)(ii) (2016).

sufficiently aid the parents in controlling the risk their child presents, as measured by the RAI. If the judge cannot identify why the parents cannot meet the State's needs, the child must be released to parental custody, with the possibility of an ATD program to ensure adequate supervision.

Critics will likely object to these additional procedural protections as allowing greater opportunity for the release of a child accused of a serious crime. This objection, however, puts too little faith in judges' ability to recognize the cases in which a parent, in some cases assisted by the proper ATD program, is truly unable to adequately supervise a child, especially since judges tend to be overly cautious in these matters. For example, judges will still not release a child with a long history of re-arrests, violations of parole, and failures to appear, especially where that child has previously been released to their parents and referred to the most restrictive ATD program without success. Thus, providing an opportunity for the defense team to assert the parent's right to custody during the initial appearance will simultaneously satisfy the due process rights of parents and children, encourage the use of ATD programs, and authorize detention when the risk of re-offense or failure to appear is substantial.

VI.
CONCLUSION

By examining juvenile detention through a parents' rights framework, this article has endeavored to conceptualize the extent to which parental custody arguments can help a child to avoid pre-trial detention. The current system in New York illustrates how far juvenile justice reform has come, and the additional safeguards necessary to protect the due process rights of both children and parents: statistically-driven risk assessment instruments, dynamic and individualized alternatives to detention, and the assertion of procedural due process rights where appropriate. These reforms and strategies seek to prevent the disastrous short- and long-term consequences of extrajudicial deprivation of parental custody and the harms inherent in the detention of children. Ultimately this is a new proposal that can benefit from more nuance, extrapolation, and experimentation. But, the suggested reforms present an opportunity to keep more children in the community and in the custody of their parents during the pendency of delinquency proceedings, with the end goal of better outcomes for youth caught in the juvenile justice system.