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Juvenile Dependency Proceedings: Dismantling Families Without Probable Cause

Jamie Wilson*

I. INTRODUCTION

If someone's house is on fire, will they first grab their child or their personal effects as they run out the door? Of course, they will protect their child above all else because children are more important than property. Then why is it that law enforcement—or even a social worker—can remove a child from the home without so much as a court order?¹ Law enforcement cannot go into someone's home, go through their personal belongings, or take possession of their property without a search warrant authorized by the court.² So, why is it possible to remove children from the home without court approval?

RCW 13.34.050 governs when and how the state can take custody of a child and requires a court order to remove a child unless the child is in danger of imminent harm.³ In practice, however, requiring a court order before removal is not always enforced.⁴ In fact, recent data shows that children are overwhelmingly removed from the home prior to the issuance

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¹ WASH. REV. CODE § 26.44.050 (2017).

² See generally *State v. Maddox*, 98 P.3d 1199 (Wash. 2004).

³ WASH. REV. CODE § 13.34.050 (2005).

⁴ Emails from Jason Johnson, Lead Att'y, Dependency Unit, Pierce Cnty. Dep't of Assigned Council, to Jamie Wilson (Dec. 1, 2019, 12:19 PM PST, 12:56 PM PST; July 26, 2020, 1:30 PM PST, 6:09 PM PST, 6:59 PM PST; July 27, 2020, 7:17 AM PST) (on file with author).

of a court order.⁵ To promote the best interest of children, standards of removal must be reinforced to require the issuance of a court order before removal.

Currently, close to half a million children are in foster care in the United States.⁶ Each year the number of children entering foster care exceeds the number of children who exit the system.⁷ In Washington State alone, almost 9,000 children are in out-of-home care.⁸ Removing children from their homes can have a significant impact on their quality of life and overall development. For example, removing a child from their parents has traumatic and long-lasting effects on the child.⁹

Moreover, removal is the first step towards the termination of parental rights, which fundamentally impairs the family unit as a whole.¹⁰ Once a parent's rights have been terminated, "all rights, powers, privileges, immunities, duties, and obligations, including any right to custody, control, visitation, or support existing between the child and the parent shall be severed and terminated and the parent shall have no standing to appear at

⁵ A random sample of dependency cases in Pierce County, Washington showed that in 52.205% of cases a court order authorizing removal was signed after the child was taken into custody; in 43.382% of cases a court order authorizing removal was signed the same day the child was taken into custody (it is not clear if the court order was signed before or after the child was taken into custody on that day); and in 0.735% of cases the court order authorizing removal was signed prior to the child being taken into custody. Additionally, 3.676% of cases are classified as "other" and include circumstances in which children were returned home at the shelter care hearing, children were transferred out of state, or children were never actually removed from the home. *Id.*

⁶ CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. FOR CHILD. & FAMS., THE ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM REPORT 1 (2019), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport27.pdf> [<https://perma.cc/V3JS-6N2B>].

⁷ *Id.*

⁸ *Children in Out-of-Home Care (Count)*, CTR. FOR SOC. SECTOR ANALYTICS & TECH., <http://www.vis.pocdata.org/graphs/ooH-counts> [<https://perma.cc/4GCC-ECYN>].

⁹ Vivek Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than 30 Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211–12 (2016).

¹⁰ WASH. REV. CODE § 13.34.180(1)(a) (2018).

any further legal proceedings concerning the child.”¹¹ In other words, when a parent loses their parental rights, the relationship between parent and child is entirely severed.¹² The parent has no legal right to make any decisions regarding the child, to see the child, or to communicate with the child in any way.¹³ The consequences of terminating parental rights are severe; therefore, safeguards should exist to protect this relationship as a fundamental right.

The Washington State Legislature has attempted to address both of these concerns.¹⁴ RCW 13.34.020 states:

The legislature declares that the family unit is a fundamental resource of American life which should be nurtured. Toward the continuance of this principle, the legislature declares that the family unit should remain intact unless a child’s right to conditions of basic nurture, health, or safety is jeopardized. When the rights of basic nurture, physical and mental health, and safety of the child and the legal rights of the parents are in conflict, the rights and safety of the child should prevail. In making reasonable efforts under this chapter, the child’s health and safety shall be the paramount concern. The right of a child to basic nurturing includes the right to a safe, stable, and permanent home and a speedy resolution of any proceeding under this chapter.¹⁵

The legislature has recognized the importance of keeping the family unit intact and has made it clear that the court should not sever the legal rights of the parent unless those rights are in direct conflict with the rights of the child.¹⁶ The rights of the child should always prevail over the rights of the parent.¹⁷ Additionally, the legislature expanded on the notions of child

¹¹ WASH. REV. CODE § 13.34.200 (2007); *see also* WASH. REV. CODE § 13.34.215 (2018) (establishing how to petition to reinstate terminated parental rights).

¹² WASH. REV. CODE § 13.34.200 (2007).

¹³ *Id.*

¹⁴ WASH. REV. CODE § 13.34.020 (1998); WASH. REV. CODE § 74.14C.005 (2017).

¹⁵ WASH. REV. CODE § 13.34.020 (1998).

¹⁶ *Id.*

¹⁷ *Id.*

safety and protecting the family unit when it codified the following in RCW 74.14C.005:

(1) The legislature believes that protecting the health and safety of children is paramount. The legislature recognizes that the number of children entering out-of-home care is increasing and that a number of children receive long-term foster care protection. Reasonable efforts by the department to shorten out-of-home placement or avoid it altogether should be a major focus of the child welfare system. It is intended that providing up-front services decrease the number of children entering out-of-home care and have the effect of eventually lowering foster care expenditures and strengthening the family unit.

Within available funds, the legislature directs the department to focus child welfare services on protecting the child, strengthening families and, to the extent possible, providing necessary services in the family setting, while drawing upon the strengths of the family. The legislature intends services be locally based and offered as early as possible to avoid disruption to the family, out-of-home placement of the child, and entry into the dependency system. The legislature also intends that these services be used for those families whose children are returning to the home from out-of-home care. These services are known as family preservation services and intensive family preservation services and are characterized by the following values, beliefs, and goals:

- (a) Safety of the child is always the first concern;
- (b) Children need their families and should be raised by their own families whenever possible;
- (c) Interventions should focus on family strengths and be responsive to the individual family's cultural values and needs;
- (d) Participation should be voluntary; and
- (e) Improvement of family functioning is essential in order to promote the child's health, safety, and welfare

and thereby allow the family to remain intact and allow children to remain at home.¹⁸

Again, the legislature has acknowledged how important it is to protect the family unit.¹⁹ While the safety of the child will always be the top priority, the legislature has clearly indicated that out-of-home placement should be avoided if possible.²⁰ Indeed, the legislature encourages the use of family preservation services before removal in an effort to keep families intact.²¹

Section II of this article will outline the current structure of the dependency process, including a description of how, under the current system, children are removed from their parents' custody without a court order. This section will also address how removal disproportionality affects low-income families and non-white families and will scrutinize the procedures for removing children from their homes. Further, this section will include a discussion of how children who are removed from their homes and placed into foster care have worse outcomes than children in the general population. Section III will propose legislative changes that would require a court order to remove children, similar to the process required to obtain a search warrant. Next, this section will address criticisms of delaying removal by requiring a court order to remove, which will include a discussion of exceptions to the court-order requirement in extreme circumstances. Lastly, this article will address the current scholarship on the topic of child welfare and include a summary of Washington State child welfare programs that work to keep families together and to reunify separated families.

¹⁸ WASH. REV. CODE § 74.14C.005(1) (2017).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

II. BACKGROUND

In Washington State, statutes govern dependency and termination proceedings.²² Also governed by statute is the right to counsel for indigent individuals facing dependency proceedings.²³ The relevant statute, RCW 13.24.090, reads as follows:

At all stages of a proceeding in which a child is alleged to be dependent, the child's parent, guardian, or legal custodian has the right to be represented by counsel, and if indigent, to have counsel appointed for him or her by the court. Unless waived in court, counsel shall be provided to the child's parent, guardian, or legal custodian, if such person (a) has appeared in the proceeding or requested the court to appoint counsel and (b) is financially unable to obtain counsel because of indigency.²⁴

Dependency proceedings are lengthy and complicated because they consist of many actors and many court visits, most of which are highly emotional.²⁵ It is easiest to understand the process by simplifying it into four parts: (1) removal of the child from the home, (2) shelter care hearing; (3) fact-finding trial; and (4) parental rights termination trial.²⁶

A. Structure of the Current Juvenile Dependency System

The first significant component of a dependency proceeding is the removal of the child from the parent's custody, which is addressed in detail following a brief discussion of the other three components.²⁷

The second significant component of a dependency proceeding is a shelter care hearing.²⁸ A shelter care hearing occurs after a petition for

²² See WASH. REV. CODE § 13.34.

²³ WASH. REV. CODE § 13.34.090(2) (2017).

²⁴ *Id.*

²⁵ See generally *Child Protective Services (CPS) and Dependency Actions*, WASH. L. HELP, <https://www.washingtonlawhelp.org/resource/child-protective-services-cps-and-dependency-actions#a1> [<https://perma.cc/D96N-6APT>].

²⁶ *Id.*

²⁷ See WASH. REV. CODE § 13.34.050 (2005).

dependency has been filed with the court to claim that a child is dependent and that the superior court should address the matter.²⁹ After a child is taken into custody, a shelter care hearing must occur within seventy-two hours.³⁰ At the shelter care hearing, the court will determine whether the child can safely return home while the adjudication of the dependency is pending.³¹ Following a shelter care hearing, the Washington State Department of Children, Youth, and Families (hereinafter referred to as “the Department”) will convene a case conference.³² At this meeting, a written service agreement will be developed, which contains expectations for both the Department and the parents regarding voluntary services for the parents.³³

The third component of a dependency proceeding is a fact-finding trial, where the court will determine whether a child is dependent.³⁴ If a child meets one of the following three conditions, the child is considered dependent: (1) the child is abandoned; (2) the child is abused or neglected by a person legally responsible for caring for the child; or (3) no parent, guardian, or custodian exists to adequately care for the child.³⁵ The third prong allows for consideration of a child’s unique needs and limitations, which affect the parent’s ability to respond to those needs.³⁶ Thus, under this prong, it is not necessary to prove parental misconduct to find a child dependent.³⁷ If the child is not found dependent at this trial, the dependency case will not proceed.³⁸

²⁸ WASH. REV. CODE § 13.34.060 (2007).

²⁹ WASH. REV. CODE § 13.34.040(1) (2018).

³⁰ WASH. REV. CODE § 13.34.065(1)(a) (2019).

³¹ *Id.*

³² WASH. REV. CODE § 13.34.067 (2018).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *In re* Dependency of Schermer, 169 P.3d 452, 461 (Wash. 2007).

³⁸ WASH. REV. CODE § 13.34.130 (2010).

After a fact-finding trial, both review hearings and permanency plan hearings will take place.³⁹ Review hearings occur at least every six months after dependency is established; the court reviews the progress of the parties and determines whether court supervision should continue.⁴⁰ A permanency plan contains a lasting plan of care for the child, which provides primary and alternative goals for the placement of the child.⁴¹ Permanency plan hearings occur periodically until the goal is achieved or until the dependency is dismissed.⁴²

The last significant component of a dependency proceeding is a termination trial.⁴³ The Department may petition the court seeking termination of the parent-child relationship if it satisfies four requirements:⁴⁴ (1) the court has removed the child from the home;⁴⁵ (2) the Department recommends termination;⁴⁶ (3) termination is in the best interest of the child;⁴⁷ and (4) reasonable efforts to reunify the family are no longer required.⁴⁸ To terminate the parent-child relationship, the Department must prove six elements:⁴⁹ (1) the child is dependent;⁵⁰ (2) the court has entered a dispositional order regarding dependency;⁵¹ (3) the child is removed from their parent's custody for a period of at least six months

³⁹ WASH. REV. CODE § 13.34.138 (2019); WASH. REV. CODE § 13.34.136 (2018).

⁴⁰ WASH. REV. CODE § 13.34.138 (2019).

⁴¹ WASH. REV. CODE § 13.34.136 (2018).

⁴² *Id.*

⁴³ WASH. REV. CODE § 13.34.132 (2018).

⁴⁴ WASH. REV. CODE § 13.34.132(1)–(4) (2018); *see* WASH. REV. CODE § 13.34.180(3) (2018) (establishing termination of parental rights when whereabouts of a child's parents are unknown, or paternity has not been established); *see also* WASH. REV. CODE § 13.34.180(4) (2018) (establishing termination of parental rights when a child's parent has been convicted of a certain class of crimes).

⁴⁵ WASH. REV. CODE § 13.34.132(1) (2018).

⁴⁶ WASH. REV. CODE § 13.34.132(2) (2018).

⁴⁷ WASH. REV. CODE § 13.34.132(3) (2018).

⁴⁸ WASH. REV. CODE § 13.34.132(4) (2018).

⁴⁹ WASH. REV. CODE § 13.34.180(1) (2018).

⁵⁰ *Id.*

⁵¹ *Id.*

pursuant to a finding of dependency;⁵² (4) the Department has offered services to the family necessary to correct parental deficiencies;⁵³ (5) the likelihood that the parents will remedy the conditions in the near future, therefore prompting the return of the child, is minimal;⁵⁴ and (6) the continuation of the parent-child relationship diminishes the child's prospects for integration into a stable and permanent home.⁵⁵

Maintaining the parent-child relationship is not only crucial in preserving the family unit, but also a fundamental liberty protected by the Constitution.⁵⁶ The United States Supreme Court has acknowledged that the parent-child bond is so vital that the Constitution requires a finding of unfitness before termination can occur.⁵⁷ Parental deficiencies or temporary loss of custody are not enough to sever the parent-child relationship.⁵⁸ In *Santosky v. Kramer*, the court found that:

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. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.⁵⁹

Removing a child from their parent's custody is the first step in a dependency proceeding⁶⁰ and the first step towards a termination trial.⁶¹ Two statutes set out the standards to remove a child from the home.⁶² The court will sometimes issue a court order to remove if the following

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ WASH. REV. CODE § 13.34.050 (2005).

⁶¹ WASH. REV. CODE § 13.34.180(1)(a) (2018).

⁶² WASH. REV. CODE § 13.34.050 (2005); WASH. REV. CODE § 26.44.050 (2017).

conditions are met: (a) a dependency petition is filed with the court; (b) support for the petition is filed, showing factual information that the child is at risk of imminent harm; and (c) the court finds reasonable grounds to believe the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody.⁶³

Removal can also occur without a court order.⁶⁴ For example, a law enforcement officer may take a child into custody without a court order if probable cause exists to believe that the child is abused or neglected, and if the officer must take the time to obtain a court order, the child is at risk of imminent harm.⁶⁵ While the statutes require a court order to remove unless probable cause exists that the child would be injured if law enforcement does not intervene, in practice, children are routinely removed prior to a court order.⁶⁶ A court order authorizing removal is typically issued later when the Department files a dependency petition.⁶⁷ Removing a child without a court order bypasses statutory protections, such as providing factual information that the child is actually in danger, which aim to keep the family unit intact.⁶⁸

Additionally, without a court order and without parental consent, a child may be detained by a hospital administrator or a physician.⁶⁹ Reasonable cause must exist “to believe that permitting the child to continue in his or her place of residence or in the care and custody of the parent, guardian, custodian, or other person legally responsible for the child’s care would present an imminent danger to that child’s safety.”⁷⁰ The administrator or physician will then notify law enforcement or child protective services to

⁶³ WASH. REV. CODE § 13.34.050(1) (2005).

⁶⁴ WASH. REV. CODE § 26.44.050 (2017).

⁶⁵ *Id.*

⁶⁶ Johnson, *supra* note 4.

⁶⁷ *Id.*

⁶⁸ WASH. REV. CODE § 13.34.050(1) (2005).

⁶⁹ WASH. REV. CODE § 26.44.056(1) (1983).

⁷⁰ *Id.*

take the child into custody.⁷¹ Because RCW 26.44.056 applies to holding children at the hospital rather than removing children from the home,⁷² this article will not discuss the matter any further.

B. Socioeconomic Status and Racial Disparity

The statutes governing juvenile dependency are not facially discriminatory based on socioeconomic status.⁷³ Additionally, the statutes appear racially neutral.⁷⁴ In practice, however, both low-income families and non-white families are disproportionately affected by the application of juvenile dependency statutes and are overrepresented in the foster care system.⁷⁵ Because marginalized communities are disproportionately affected, removing children from the home under the current statutes constitutes a social justice issue which must be addressed. Rewriting the statutes to make removal more difficult should, in effect, decrease the disproportionate representation that exists in the foster care system.

While one would expect the primary predictive factor of child placement in foster care to be the presence of physical injuries, studies show that family income is the most predictive factor.⁷⁶ For instance, if a primary caregiver had part-time employment rather than full-time employment, their children were 2.78 times more likely to be removed and placed in foster

⁷¹ *Id.*

⁷² *Id.*

⁷³ See WASH. REV. CODE § 13.34.

⁷⁴ A racially neutral law is one that, on its face, does not discriminate based on race. See WASH. REV. CODE § 13.34.

⁷⁵ Alan J. Dettlaff et al., *Disentangling Substantiation: The Influence of Race, Income, and the Risk on the Substantiation Decision in Child Welfare*, 33 CHILD. & YOUTH SERVS. REV. 1630, 1630 (2011).

⁷⁶ Duncan Lindsey, *Factors Affecting the Foster Care Placement Decision: An Analysis of National Survey Data*, 61 AM. J. ORTHOPSYCHIATRY 272, 279 (1991); Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 784 (2001).

care.⁷⁷ Specifically, an unstable income is the best predictor of a child's removal from the home.⁷⁸ One study found that children in families whose only source of income came from family, friends, and alimony payments were over 120 times more likely to be placed in foster care than children in families where income was from self-support.⁷⁹ Under the current statutes, growing up in a low-income family is a better predictor of entering foster care than growing up in an abusive family.⁸⁰ Rewriting the statutes to make removal more difficult would, in turn, decrease the number of low-income families that are dismantled due to the placement of children into foster care.

While the socioeconomic status of the family plays a vital role in determining which children will be removed and placed into foster care, the race of the family also has a significant impact.⁸¹ Racial disparities in the child welfare system are not due to poverty alone but instead are related to a caseworker's assessment of risk.⁸² In other words, the disproportionately high number of Black families living in poverty is not the only factor that contributes to their disproportionate representation in the child welfare system.⁸³ For example, when caseworkers' assessments of risk are taken into account, race emerges as a significant explanatory factor in the substantiation of decisions.⁸⁴ This finding suggests that while income may influence caseworkers' assessment of risk, racial bias heavily influences their decisions to remove children from the home.⁸⁵ Low-income families

⁷⁷ Duncan Lindsey, *Adequacy of Income and the Foster Care Placement Decision: Using an Odds Ratio Approach to Examine Client Variables*, 28 SOC. WORK RSCH. & ABSTRACTS 29, 34 (1992).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Lindsey, *supra* note 76, at 279; Charlow, *supra* note 76, at 784.

⁸¹ Dettlaff et al., *supra* note 75, at 1634–35.

⁸² *Id.*

⁸³ *Id.* at 1634.

⁸⁴ *Id.* at 1634–35.

⁸⁵ *Id.* at 1635.

are more likely to be investigated by Child Protective Services (CPS), but whether children are removed from the home largely depends on the race of the family.⁸⁶

The decision to remove children from the home is not the only stage of child welfare at which racial disparity exists; racial disparities exist at every stage of the child welfare pathway.⁸⁷ The child welfare pathway generally consists of CPS doing the following: receiving a report of alleged abuse, identifying child victims, completing family intakes, providing services to families, removing children from the home, and placing children into foster care.⁸⁸

First, racial disparities exist at the initial reporting of maltreatment to CPS as well as CPS decisions on which reports to investigate.⁸⁹ Nationally, non-white children are identified by CPS as victims at rates disproportionate to their representation in the general population.⁹⁰ For instance, Black children are identified by CPS as victims of parental abuse or neglect at 1.6 times their rate in the general population.⁹¹ American Indian/Alaskan Native children are identified as victims at 1.5 times their

⁸⁶ *Id.*

⁸⁷ *Id.* at 1630.

⁸⁸ See DIANE DEPANFILIS, CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS, CHILD ABUSE AND NEGLECT USER MANUAL SERIES 14 (2018).

⁸⁹ Dettlaff et al., *supra* note 75, at 1630.

⁹⁰ *Investigations & Assessments (Count)*, CTR. FOR SOC. SECTOR ANALYTICS & TECH., <http://www.vis.pocdata.org/graphs/ia-counts#> [<https://perma.cc/G4RF-V3S9>]. To view racial data, click on the demographics button located on the left side of the page. Then, select race/ethnicity. Next, check each race/ethnicity listed. Click the update button in the top left corner of the page. Once the data is updated to reflect the demographic information, click the table tab located in the middle of the page.

⁹¹ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE 3 (2016), https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf [<https://perma.cc/RNB3-3YD2>]. In other words, while Black children make up 13.8% of the child population, they account for 22.6% of the population of children identified by CPS as victims. *Id.*

rate in the general population.⁹² In contrast, white children are underrepresented in the population of children identified by CPS as victims, as they are identified as victims at 0.9 times their rate in the general population.⁹³

In Washington, CPS intakes for Black children occur 1.5 times more than intakes for white children and intakes for American Indian/Alaskan Native children occur almost twice as often as intakes for white children.⁹⁴ Additionally, in Washington State, CPS investigates Black families at a rate of 123 out of 1,000 people and American Indian/Alaskan Native families at a rate of 255 out of 1,000 people.⁹⁵ White families, however, are only investigated at a rate of 62 out of 1,000 people.⁹⁶

Second, racial disparities exist in the types of services offered to families to either prevent removal or to encourage reunification.⁹⁷ For example, research suggests that Black families are less likely to receive family preservation services than white families.⁹⁸ Family preservation services are services provided in the home which attempt to remedy issues of parental defects to prevent the child from being placed in out-of-home care.⁹⁹ In

⁹² *Id.* Stated another way, while American Indian/Alaskan Native children make up 0.9% of the total child population, they make up 1.3% of the population of children identified by CPS as victims. *Id.*

⁹³ While white children make up 51.9% of the total child population, they constitute only 46.4% of the population of children identified by CPS as victims. *Id.*

⁹⁴ CHRISTOPHER J. GRAHAM, WASH. STATE DEP'T OF CHILD., YOUTH & FAMS., WASHINGTON STATE DCYF RACIAL DISPARITY INDICES REPORT (2018) 7 (2019), <https://www.dcyf.wa.gov/sites/default/files/reports/Washington%20State%20DCYF%20Racial%20Disparity%20Indices%20Report%20-%20202018.pdf> [https://perma.cc/458Q-9S5Y].

⁹⁵ *Investigations & Assessments (Count)*, *supra* note 90.

⁹⁶ *Id.*

⁹⁷ JOHN FLUKE ET AL., AM. HUMANE ASS'N, RESEARCH SYNTHESIS ON CHILD WELFARE DISPROPORTIONALITY AND DISPARITIES 36 (2010), https://casala.org/wp-content/uploads/2015/12/Disparities-and-Disproportionality-in-Child-Welfare_An-Analysis-of-the-Research-December-2011-1.pdf#page=11 [https://perma.cc/575E-U8LW]; Dettlaff et al., *supra* note 75, at 1634–35.

⁹⁸ Dettlaff et al., *supra* note 75, at 1636.

⁹⁹ *Id.* Services may include mental health programs or parenting classes. *Id.*

Washington, the Department has a statutory obligation to provide these services to families in child dependency cases.¹⁰⁰ The relevant portions of the statute, RCW 13.34.025, reads as follows:

(1) The department and agencies shall develop methods for coordination of services to parents and children in child dependency cases. . .

(2) The department shall coordinate within the administrations of the department, and with contracted service providers, to ensure that parents in dependency proceedings under this chapter receive priority access to remedial services recommended by the department in its social study or ordered by the court for the purpose of correcting any parental deficiencies identified in the dependency proceeding that are capable of being corrected in the foreseeable future. . .

(a) For purposes of this chapter, remedial services are those services defined . . . as family reunification services that facilitate the reunification of the child safely and appropriately within a timely fashion. Remedial services include individual, group, and family counseling; substance abuse treatment services; mental health services; assistance to address domestic violence; services designed to provide temporary childcare and therapeutic services for families; and transportation to or from any of the above services and activities.

(b) The department shall provide funds for remedial services if the parent is unable to pay to the extent funding is appropriated in the operating budget or otherwise available to the department for such specific services¹⁰¹

Third, racial disparities exist in the making of decisions regarding which children should be removed from the home and placed into foster care.¹⁰²

¹⁰⁰ WASH. REV. CODE § 13.34.025 (2019).

¹⁰¹ *Id.*

¹⁰² Dettlaff et al., *supra* note 75, at 1630; Fluke et al., *supra* note 97, at 1636–37.

Nationally, non-white children enter foster care at rates disproportionate to their representation in the general population.¹⁰³ For instance, Black children enter foster care at 1.6 times their rate in the general population, and American-Indian/Alaskan Native children enter foster care at 2.7 times their rate in the general population.¹⁰⁴ In contrast, white children enter foster care at 0.9 times their rate in the general population; in other words, white children are underrepresented in the population of children that enter foster care.¹⁰⁵ In Washington State, Black children are 2.2 times more likely to be placed in out-of-home care than white children.¹⁰⁶ Similarly, Native American children are 2.9 times more likely to be placed in out-of-home care than white children.¹⁰⁷

Fourth, the foster care system disproportionately represents racial minorities.¹⁰⁸ Nationally, Black children make up 24.3% of the children in foster care, yet constitute only 13.8% of the total child population.¹⁰⁹ Further, American-Indian/Alaskan Native children make up 2.4% of the children in foster care while making up only 0.9% of the total child population.¹¹⁰ In Washington, Black children are in out-of-home care at a rate of 10.3 out of 1,000 people, and American-Indian/Alaskan Native children are in out-of-home care at a rate of 11 out of 1,000 people.¹¹¹ In contrast, white children are in out-of-home care at a rate of only 4.6 out of

¹⁰³ CHILD WELFARE INFO. GATEWAY, *supra* note 91, at 3.

¹⁰⁴ *Id.* In other words, while Black children make up 13.8% of the total child population, they constitute 22.4% of the children who enter foster care. Similarly, American Indian/Alaskan Native children make up 0.9% of the total child population, yet they make up 2.3% of the children entering foster care. *Id.*

¹⁰⁵ *Id.* While white children make up 51.9% of the total child population, they constitute only 46.1% of the children entering foster care. *Id.*

¹⁰⁶ Partners for Our Children, *Child Welfare Data at a Glance*, UNIV. OF WASH. SCH. OF SOC. WORK, <https://partnersforourchildren.org/data/quickfacts> [<https://perma.cc/48HD-SMJJA>].

¹⁰⁷ *Id.*

¹⁰⁸ CHILD WELFARE INFO. GATEWAY, *supra* note 91, at 3.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Investigations & Assessments (Count)*, *supra* note 90.

1,000 people.¹¹² Under the current statutes, children from racially marginalized communities are disproportionately removed from the home. Making removal more difficult by rewriting the statute should help keep these traditionally marginalized families intact.

C. Scientific Research Supports Keeping Children in the Home

Research suggests that children placed in foster care are worse off than children in the general population.¹¹³ Additionally, research also suggests that children in foster care are, in some regards, worse off than similarly maltreated children who remain in abusive or neglectful homes.¹¹⁴

1. Research on Placement in Foster Care

Children placed in foster care have worse outcomes than children in the general population.¹¹⁵ Even children who are removed from the home and placed in foster care for a short time (thirty days or less) suffer significant trauma as a result of the removal.¹¹⁶ When children are removed, the

¹¹² *Id.*

¹¹³ See generally THE ANNIE E. CASEY FOUND., THE ECONOMIC WELL-BEING OF YOUTH TRANSITIONING FROM FOSTER CARE 1 (2017), <https://www.aecf.org/resources/the-economic-well-being-of-youth-transitioning-from-foster-care/> [<https://perma.cc/SL24-CTQA>]; Patrick J. Fowler et al., *Pathways to and from Homelessness and Associated Psychosocial Outcomes Among Adolescents Leaving the Foster Care System*, 99 AM. J. PUB. HEALTH 1453 (2009); Kristin Turney & Christopher Wildeman, *Adverse Childhood Experiences Among Children Placed in and Adopted from Foster Care: Evidence from a Nationally Representative Survey*, 64 CHILD ABUSE & NEGLECT 117 (2017); Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCH. 57 (2006); Ramseyer Winter et al., *An Investigation of the Association Between Foster Care, Body Image, and BMI: A Propensity Score Analysis*, 84 CHILD & YOUTH SERVS. REV. 82 (2018).

¹¹⁴ See generally Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007); Jennifer Yang et al., *Foster Care Beyond Placement: Offending Outcomes in Emerging Adulthood*, 53 J. CRIM. JUST. 46 (2017).

¹¹⁵ See generally THE ANNIE E. CASEY FOUND., *supra* note 113; Fowler et al., *supra* note 113; Turney & Wildeman, *supra* note 113; Lawrence et al., *supra* note 113; Winter et al., *supra* note 113.

¹¹⁶ Sankaran & Church, *supra* note 9, at 211–12.

connection between the child and birth parent or caregiver is interrupted.¹¹⁷ The child may be separated from their siblings and may have to transfer schools; often, the child is placed in an unfamiliar home with an unfamiliar caregiver.¹¹⁸ All of these factors, plus more, combine to create a traumatic situation outside the range of typical childhood experiences.¹¹⁹

Compared to the general population, children placed in foster care are worse off in a multitude of ways.¹²⁰ For example, foster care youth have unemployment rates between 47%-69% (depending on race and gender), whereas youth not placed in foster care have unemployment rates of 10%.¹²¹ Additionally, foster care youth are eight times more likely to experience homelessness than youth in the general population.¹²²

Further, children in foster care have poorer mental and physical health relative to both children in the general population and children in economically disadvantaged families.¹²³ For instance, studies have shown that children placed in foster care are three to five times more likely than children in the general population to experience mental health conditions such as depression and anxiety.¹²⁴ Similarly, a link exists between placement in foster care and an increase in behavior problems among maltreated children.¹²⁵ These behavior problems continue to exist even after exiting the foster care system.¹²⁶ Additionally, children in foster care have a higher average body mass index than children in the general population.¹²⁷

¹¹⁷ *Id.* at 211.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 211–12.

¹²⁰ See generally THE ANNIE E. CASEY FOUND., *supra* note 113; Fowler et al., *supra* note 113; Turney & Wildeman, *supra* note 113; Lawrence et al., *supra* note 113; Winter et al., *supra* note 113.

¹²¹ THE ANNIE E. CASEY FOUND., *supra* note 113, at 1.

¹²² Fowler et al., *supra* note 113, at 1457.

¹²³ Turney & Wildeman, *supra* note 113, at 118.

¹²⁴ *Id.*

¹²⁵ Lawrence et al., *supra* note 113, at 84.

¹²⁶ *Id.*

¹²⁷ Winter et al., *supra* note 113, at 84.

In some situations, children in foster care also tend to experience worse outcomes than similarly maltreated children who remain in the home.¹²⁸ For example, children in foster care are three times more likely to be involved in the juvenile justice system than their maltreated counterparts who were not placed in out-of-home care.¹²⁹ Additionally, placement in foster care also leads to a disproportionate likelihood of chronic reoffending in emerging adulthood.¹³⁰

2. Research on Placement in Relative Care

Children placed in foster care have worse outcomes than comparably maltreated children who are instead placed with relatives.¹³¹ The research shows that children placed with relatives have better placement stability and permanency.¹³² For instance, children placed with relatives have a lower risk of reentering foster care and have longer lengths of stay in that placement.¹³³ Further, children in relative care “experience better outcomes in regard to behavior problems, adaptive behaviors, psychiatric disorders, well-being, placement stability (placement setting, number of placements, and placement disruption), guardianship, and institutional abuse than do children in foster care.”¹³⁴

In Washington, the juvenile dependency statutes give placement preference to relatives.¹³⁵ For example, RCW 13.34.130 states that if a child is dependent and removed from the home, then the child should be placed

¹²⁸ See generally Doyle, *supra* note 114; Yang et al., *supra* note 114.

¹²⁹ Doyle, *supra* note 114, at 1599.

¹³⁰ Yang et al., *supra* note 114, at 47.

¹³¹ See generally Tessa Bell & Elisa Romano, *Permanency and Safety Among Children in Foster Family and Kinship Care: A Scoping Review*, 18 TRAUMA, VIOLENCE, & ABUSE 1 (2017); Marc A. Winokur et al., *Systematic Review of Kinship Care Effects on Safety, Permanency, and Well-Being Outcomes*, 28 RSCH. SOC. WORK. PRAC. 19 (2018).

¹³² Bell & Romano, *supra* note 131, at 12.

¹³³ *Id.*

¹³⁴ Winokur et al., *supra* note 131, at 26.

¹³⁵ WASH. REV. CODE § 13.34.130 (2019); WASH. REV. CODE § 13.34.260 (2011).

“into the custody, control, and care of a relative or other suitable person.”¹³⁶ Moreover, RCW 13.34.130 orders the Department to “follow the wishes of the natural parent regarding the placement of the child in accordance with RCW 13.34.260.”¹³⁷ RCW 13.34.260 reads, in part, as follows:

In an attempt to minimize the inherent intrusion in the lives of families involved in the foster care system and to maintain parental authority where appropriate, the department, absent good cause, shall follow the wishes of the natural parent regarding the placement of the child with a relative or other suitable person pursuant to RCW 13.34.130. Preferences such as family constellation, sibling relationships, ethnicity, and religion shall be considered when matching children to foster homes.¹³⁸

Despite the statute’s expressed preference for relative placement, placement in foster care is more common.¹³⁹ Nationally, only 32% of children removed from the home were placed with relatives.¹⁴⁰ In Washington, approximately 44% of children in out-of-home care were placed with relatives.¹⁴¹

III. PRESCRIPTIVE ELEMENT

To reinforce standards of removal, we must require that a court issues an order before a child can be taken from the home. The primary statute which currently governs removal in Washington is RCW 13.34.50, and it

¹³⁶ WASH. REV. CODE § 13.34.130(1)(b)(i) (2019).

¹³⁷ WASH. REV. CODE § 13.34.130(2) (2019).

¹³⁸ WASH. REV. CODE § 13.34.260(11) (2011).

¹³⁹ See generally CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUM. SERVS., CHILD.’S BUREAU, FOSTER CARE STATISTICS 2017 1 (2019); *Placements in Family Settings*, CTR. FOR SOC. SECTOR ANALYTICS & TECH., <http://pocdata.org/visualizations/family-settings> [https://perma.cc/9D5F-ZVLE].

¹⁴⁰ CHILD WELFARE INFO. GATEWAY, *supra* note 91, at 4. Forty-five percent of children removed from the home were placed in nonrelative foster family homes, seven percent were placed in institutions, six percent were placed in group homes, five percent were placed in trial home visits, four percent were placed in pre-adoptive homes, one percent had run away, and one percent were in supervised independent living situations. *Id.*

¹⁴¹ *Placements in Family Settings*, *supra* note 139.

explicitly requires a court order prior to removal.¹⁴² Court orders, however, are overwhelmingly issued after the child has already been removed from the home.¹⁴³ If the process of removing a child more closely resembled that of obtaining a search warrant, the added steps required to remove a child would likely dissuade the Department from preemptively removing children. In other words, the Department would be less likely to remove a child because removal would necessitate proving to the court why doing so is in the best interest of the child.

A. Legislative Solution: Rewrite the Statute

In Washington, two statutes govern the process of removing children from the home.¹⁴⁴ The first statute, RCW 13.34.050, outlines the process of taking a child into custody with a court order,¹⁴⁵ while the second statute, RCW 26.44.050, outlines the process of taking a child into custody without a court order.¹⁴⁶

1. The Current Statutes

The relevant statute, RCW 13.34.050, sets out the following requirements to take a child into custody with a court order:

(1) The court may enter an order directing a law enforcement officer, probation counselor, or child protective services official to take a child into custody if:

(a) a petition is filed with the juvenile court alleging that the child is dependent and that the child's health, safety, and welfare will be seriously endangered if not taken into custody;

¹⁴² WASH. REV. CODE § 13.34.050 (2005).

¹⁴³ Johnson, *supra* note 4.

¹⁴⁴ WASH. REV. CODE § 13.34.050 (2005); WASH. REV. CODE § 26.44.050 (2017).

¹⁴⁵ WASH. REV. CODE § 13.34.050 (2005).

¹⁴⁶ WASH. REV. CODE § 26.44.050 (2017).

(b) an affidavit or declaration is filed by the department in support of the petition setting forth specific factual information evidencing reasonable grounds that the child’s health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child. “Imminent harm” for purposes of this section shall include, but not be limited to, circumstances of sexual abuse, sexual exploitation as defined in RCW 26.44.020, [147] and a parent’s failure to perform basic parental functions, obligations, and duties as the result of substance abuse; and

(c) the court finds reasonable grounds to believe the child is dependent and that the child’s health, safety, and welfare will be seriously endangered if not taken into custody.

(2) Any petition that does not have the necessary affidavit or declaration demonstrating a risk of imminent harm requires that the parents are provided notice and an opportunity to be heard before the order may be entered.

(3) The petition and supporting documentation must be served on the parent, and if the child is in custody at the time the child is removed, on the entity with custody other than the parent. Failure to effect service does not invalidate the petition if service was attempted and the parent could not be found.¹⁴⁸

A child taken into custody without a court order is governed by RCW 26.44.050, which outlines the following requirements:

A law enforcement officer may take, or cause to be taken, a child into custody without a court order if there is probable cause to believe that the child is abused or neglected and that the child

¹⁴⁷RCW 26.44.020 defines sexual exploitation as “(a) allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.” WASH. REV. CODE § 26.44.020 (2019).

¹⁴⁸WASH. REV. CODE § 13.34.050 (2005).

would be injured or could not be taken into custody if it were necessary to first obtain a court order pursuant to RCW 13.34.050. The law enforcement agency or the department investigating such a report is hereby authorized to photograph such a child for the purpose of providing documentary evidence of the physical condition of the child.¹⁴⁹

To obtain a court order, CPS must first provide evidence to the court showing that the child is at risk of imminent harm if not taken into custody.¹⁵⁰ Then, the judge must find that evidence compelling enough to order the child's removal.¹⁵¹ In contrast, to remove a child without a court order, law enforcement need only believe that the child is at risk of imminent harm if not taken into custody; the officer need not prove the risk of harm to a judge.¹⁵² It is significantly easier to remove a child without a court order than it is to remove a child with a court order.¹⁵³

2. Critiques of the Current Statute

The primary issue with RCW 13.34.050, the statute governing removal of a child pursuant to a court order, lies in its implementation rather than how it is written. In its current form, in order to remove a child from the home, the statute requires a petition alleging dependency and an affidavit supporting the petition with specific factual information that the child is at risk of imminent harm.¹⁵⁴ In practice, however, both the dependency petition and the court order authorizing removal are typically issued after the child has already been removed.¹⁵⁵ In fact, in many cases, the court issues an order to remove after the child has already been taken from the

¹⁴⁹ WASH. REV. CODE § 26.44.050 (2017).

¹⁵⁰ WASH. REV. CODE § 13.34.050 (2005).

¹⁵¹ *Id.*

¹⁵² WASH. REV. CODE § 26.44.050 (2017).

¹⁵³ WASH. REV. CODE § 13.34.050 (2005); WASH. REV. CODE § 26.44.050 (2017).

¹⁵⁴ WASH. REV. CODE § 13.34.050 (2005).

¹⁵⁵ Johnson, *supra* note 4.

home, which means probable cause to remove is often never actually proven in court.¹⁵⁶

In other words, the Department is not required to allege dependency or prove that the child is at risk of imminent harm before they can take the child into custody. Once a child is already in custody, they are no longer facing imminent harm and it becomes irrelevant for CPS to prove to the court that they ever were. By taking a child into custody before obtaining a court order, the Department is bypassing the statutory requirements which are meant to provide protections that keep the family unit intact.¹⁵⁷ If both the Department and law enforcement have the ability to remove children without first obtaining a court order,¹⁵⁸ removing children from their homes becomes far easier than the legislature ever intended.¹⁵⁹

Rather than trying to force the courts to implement the current statute in a different way, it may be more effective to simply rewrite the statute and then enforce new standards of removal with the implementation of that new statute.

3. Proposed Change

The legislature should rewrite the statute so that it contains stricter requirements like those needed to obtain a search warrant. This section will first analyze the requirements necessary to obtain a search warrant and will then apply those requirements to the juvenile dependency context.

¹⁵⁶ *Id.*

¹⁵⁷ *See* WASH. REV. CODE § 13.34.020 (1998); *see also* WASH. REV. CODE § 74.14C.005 (2017).

¹⁵⁸ WASH. REV. CODE § 13.34.050 (2005); WASH. REV. CODE § 26.44.050 (2017).

¹⁵⁹ *See* WASH. REV. CODE § 13.34.020 (1998); *see also* WASH. REV. CODE § 74.14C.005 (2017).

a) Requirements to Obtain a Search Warrant

In Washington, extensive case law exists on the requirements for a search warrant.¹⁶⁰ In general, a court will issue a search warrant only where a neutral and detached magistrate makes a determination of probable cause based on oath or affirmation and when the warrant mainly describes the place to be searched and the items to be seized.¹⁶¹ Therefore, three main components are necessary to obtain a search warrant: a neutral magistrate, probable cause, and a particular description.¹⁶²

First, a neutral and detached magistrate is a judicial officer who is not biased, prejudiced, or in an adversarial position.¹⁶³ An adversarial position is one that involves people or sides which oppose each other.¹⁶⁴ Second, probable cause exists “where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.”¹⁶⁵ In determining whether probable cause exists, the magistrate can make reasonable inferences based on the facts presented to them in the search warrant affidavit.¹⁶⁶ While the information may have given rise to probable cause at an earlier time, it may become stale if, by the time the warrant is issued or executed, the relied upon information is unreasonably dated.¹⁶⁷

¹⁶⁰ See generally *State v. Maddox*, 98 P.3d 1199 (Wash. 2004); *State v. Chamberlin*, 162 P.3d 389 (Wash. 2017); *State v. Thein*, 977 P.2d 582 (Wash. 1999); *In re Pers. Restraint of Yim*, 989 P.2d 512 (Wash. 1999); *State v. Helmka*, 542 P.2d 115 (Wash. 1975); *State v. Chenoweth*, 158 P.3d 595 (Wash. 2007); *State v. Jackson*, 688 P.2d 136 (Wash. 1984); *State v. Stenson*, 940 P.2d 1239 (Wash. 1997); *State v. Ross* 4 P.3d 130 (Wash. 2000).

¹⁶¹ *Maddox*, 98 P.3d at 1205.

¹⁶² *Id.*

¹⁶³ See *Chamberlin*, 162 P.3d at 389.

¹⁶⁴ *Adversarial*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/adversarial> [<https://perma.cc/2ZG6-6LYC>].

¹⁶⁵ *Thein*, 977 P.2d at 589.

¹⁶⁶ *In re Pers. Restraint of Yim*, 989 P.2d 512, 527 (Wash. 1999).

¹⁶⁷ *State v. Maddox*, 98 P.3d 1199, 1205 (Wash. 2004).

In Washington, if the information used to obtain a search warrant came from an informant, then the information must pass the *Aguilar-Spinelli* test.¹⁶⁸ The *Aguilar-Spinelli* test has two major requirements: one focuses on the informant and the other focuses on the information.¹⁶⁹ The first requirement is that the information is reliable; in other words, the informant must have a factual basis for their allegations.¹⁷⁰ Second, the information must have veracity, which means the information must be reliable and credible.¹⁷¹ If the informant relies upon information obtained from a third party, then both parties are subject to the *Aguilar-Spinelli* test.¹⁷²

The third component necessary to obtain a search warrant is a particular description, which means that a search warrant must be sufficiently definitive so that the officer executing the warrant can identify the property sought with reasonable certainty.¹⁷³ For example, if the warrant allows police to search for things for which probable cause does not exist, then the warrant is too broad and does not meet the particular description requirement.¹⁷⁴

If an unlawful search occurs, either because a search warrant was not issued or because a search warrant was not issued properly, then the typical remedy is the suppression of the items seized,¹⁷⁵ and suppression of any other evidence obtained as a result of the unlawful search.¹⁷⁶ Evidence that is suppressed may not be used in court.¹⁷⁷

¹⁶⁸ *State v. Chenoweth*, 158 P.3d 595, 606 (Wash. 2007).

¹⁶⁹ *State v. Jackson*, 688 P.2d 136, 142 (Wash. 1984).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *State v. Stenson*, 940 P.2d 1239, 1242–43 (Wash. 1997).

¹⁷⁴ *State v. Maddox*, 98 P.3d 1199, 1208 (Wash. 2004).

¹⁷⁵ *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

¹⁷⁶ *State v. Ross*, 4 P.3d 130, 137–38 (Wash. 2000).

¹⁷⁷ *Id.*

b) Search Warrant Requirements in the Juvenile Dependency Context

To apply the requirements for a search warrant to the juvenile dependency context, minor edits to the process are necessary. First, the neutral and detached magistrate requirement would remain largely the same as for a search warrant.¹⁷⁸ The court order to remove a child would need to be issued by an unbiased and non-adversarial magistrate. In the juvenile dependency context, the probable cause requirement is met when a reasonable belief exists, based on facts presented to the court, that (1) the child's health, safety, and welfare would be endangered if not removed; and (2) the child is at risk of imminent harm. RCW 26.44.020 defines imminent harm as "circumstances of sexual abuse, sexual exploitation, [¹⁷⁹] and a parent's failure to perform basic parental functions, obligations, and duties as the result of substance abuse."¹⁸⁰

In the juvenile dependency context, like the search warrant context, probable cause would become stale if the information relied upon by the magistrate was unreasonably dated. This requirement would put a time constraint on prior allegations of abuse or neglect so that if those allegations were not sufficiently recent, they could not be used to establish probable cause to remove the child.

Additionally, any information obtained by a third party would need to pass the *Aguilar-Spinelli* test.¹⁸¹ Therefore, in analyzing allegations of abuse or neglect, two questions need to be answered: first, whether the individual who made the allegation has a factual basis for doing so; and second, whether the information is reliable and credible.¹⁸² If the allegations

¹⁷⁸ State v. Maddox, 98 P.3d 1199 (Wash. 2004).

¹⁷⁹ WASH. REV. CODE § 26.44.020 (2019) (defining sexual exploitation as "(a) allowing, permitting, or encouraging a child to engage in prostitution by any person; or (b) allowing, permitting, encouraging, or engaging in the obscene or pornographic photographing, filming, or depicting of a child by any person.").

¹⁸⁰ WASH. REV. CODE § 13.34.050 (2005).

¹⁸¹ See State v. Chenoweth, 158 P.3d 595, 606 (Wash. 2007).

¹⁸² See State v. Jackson, 688 P.2d 136, 142 (Wash. 1984).

used to establish probable cause are based on what someone who works for the Department directly witnessed or investigated, they should be able to answer the proposed questions by relying on information found in their reports on the incident. If the Department relies strictly on third party information, which no one from the Department directly witnessed or investigated, then the court should require the Department to prove that the information is reliable enough to warrant removal of the child from the home. The Department should not be able to remove children from the home without verifying the information provided to the court is true and accurate.

Third, the particular description requirement would be applied differently than it is applied in the search warrant context. For a search warrant, the particular description requirement means that a search warrant must be sufficiently definitive so that the officer executing the warrant can identify the property sought with reasonable certainty.¹⁸³ However, in juvenile dependency cases, the warrant is not for property; instead, it is for a child. It would not make sense to require a particular description element for the order of removal. Instead, this requirement would be applied to the affidavit or declaration filed by the Department, which explains why the child should be removed. The current statute, RCW 13.34.050, states:

An affidavit or declaration is filed by the department in support of the petition setting forth specific factual information evidencing reasonable grounds that the child's health, safety, and welfare will be seriously endangered if not taken into custody and at least one of the grounds set forth demonstrates a risk of imminent harm to the child.¹⁸⁴

The particular description requirement would ensure that the affidavit or declaration would be sufficiently definite, that is, clearly stated, unambiguous, and detailed. This standard is higher than what is currently

¹⁸³ State v. Stenson, 940 P.2d 1239, 1242–43 (Wash. 1997).

¹⁸⁴ WASH. REV. CODE § 13.34.050 (2005).

required by RCW 13.34.050. Therefore, the Department would be required to provide more detailed information explaining why it believes removing the child from the home is in the child's best interest.

The unlawful removal of a child would be functionally equivalent to an unlawful search of property in that it would occur when the statutory requirements are not met. Specifically, an unlawful removal would occur when the requirements to obtain an order of removal are not met before the actual removal of the child. In other words, an unlawful removal would occur either when a court order to remove was not issued or if the court order to remove was unlawfully issued. Removing the child first and then obtaining a court order to remove afterward would also constitute an unlawful removal. The remedy for an unlawful removal would be the immediate return of the child to the home. It would not be necessary nor appropriate for the Department to evaluate the home prior to returning the child to the home because the child was unlawfully removed in the first place.

Additionally, similar to the remedy for an unlawful search,¹⁸⁵ evidence obtained during the unlawful removal could not be used in future attempts to obtain a court order to remove. For instance, if law enforcement officers entered a home to remove a child unlawfully and witnessed evidence of drug usage in the home, allegations of that drug usage, based on what law enforcement officers witnessed during the unlawful removal, could not be used as the basis for removal in a future attempt to obtain a court order to remove.

B. Criticism of the Proposed Solution

The anticipated argument against reinforcing the requirements for removal of a child is that during the delay in removal, someone will

¹⁸⁵ See generally *Wong Sun v. United States*, 371 U.S. 471 (1963); *State v. Ross*, 4 P.3d 130 (Wash. 2000).

severely injure the child, or in a worst-case scenario, will kill the child by abuse or extreme neglect. In condemning this proposal for stricter removal requirements, critics will likely cite to the tragic events leading up to the deaths of the Powell children, as detailed in *Cox v. The Department of Social and Health Services*.¹⁸⁶ The facts of the *Cox* case are as follows: In 2009, Susan Powell disappeared from the home she shared with her husband, Joshua Powell, and their two sons.¹⁸⁷ Joshua was the lead suspect in Susan’s disappearance.¹⁸⁸ In 2011, the Powell children were taken into custody by the Department of Social and Health Services (DSHS) after evidence of child pornography was found in the home.¹⁸⁹ The child pornography did not belong to Joshua, it belonged to someone else.¹⁹⁰ The children were found dependent and placed with their maternal grandparents.¹⁹¹ In 2012, a social worker brought the children to Joshua’s home for a scheduled visit.¹⁹² The children ran inside the home and Joshua locked the social worker outside.¹⁹³ Joshua then bludgeoned both children to death, set the house on fire, and killed himself.¹⁹⁴ The maternal grandparents brought negligence claims against DSHS, alleging that the Department failed to investigate and monitor Joshua before and during visits and that the Department failed to train their employees.¹⁹⁵ The family also individually sued several social workers and alleged that the social workers disregarded facts showing that Joshua presented a serious risk of harm to the children.¹⁹⁶

¹⁸⁶ See *Cox v. Dep’t of Soc. & Health Servs.*, 913 F.3d 831 (9th Cir. 2019).

¹⁸⁷ *Id.* at 835.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 836.

¹⁹⁶ *Id.*

1. Response to Criticism

While the tragic deaths of the Powell children were undeniably atrocious, they were neither predictable nor an accurate representation of the juvenile dependency system. Therefore, this case should not provide a foundation for how dependency cases are addressed in the future. Reinforcing standards of removal would not have provided a better outcome for the Powell children. The court in *Cox v. The Department of Social and Health Services* reaffirmed this position when it stated:

In hindsight, family members' concerns about Joshua physically harming the two boys were heartbreakingly prescient. But entitlement to qualified immunity turns on whether the facts known at the time reasonably revealed this terrible risk. Regrettably, the facts did not. The initial visiting plan identified a potential safety issue related to the risk that Joshua might flee with the two boys, but not that he might cause them serious physical harm. Next, the reports by the Coxes, Joshua's sister and law enforcement expressed only generalized (albeit strongly voiced) fears about Joshua harming his sons. Further, the guardian ad litem reported that Joshua had a strong bond with the two boys and that the visits were going well. Lastly, while the two boys ran into their father's house ahead of the visitation supervisor on at least nine occasions prior to the final, fatal visit, the children's actions reasonably could be interpreted as indications that they were not afraid of and were excited to see their father, as opposed to indications of a risk of physical harm. Viewing the record in the light most favorable to the Coxes, there is insufficient evidence to show that the social workers recognized, or should have recognized, an objectively substantial risk that Joshua would physically harm his sons.¹⁹⁷

Despite being an inappropriate critique of the removal process, the concerns raised by the deaths of the Powell children remain valid and worth

¹⁹⁷ *Id.* at 838.

discussing in some detail. Situations will inevitably arise in which children truly are at risk of imminent harm and in need of emergency removal.

To address these concerns, an exception to removal without a court order will be written into the statute authorizing the removal of children from the home in emergency situations. This exception will look similar to the already existing exceptions that allow for a warrantless search to occur. The next section will first analyze exceptions for a warrantless search and then apply those exceptions to the juvenile dependency context.

a) Exceptions for a Warrantless Search

Two critical exceptions exist which allow for a lawful, warrantless search to occur. First, an exception exists for exigent circumstances.¹⁹⁸ This exception is only applicable where “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence.”¹⁹⁹ In determining whether exigent circumstances exist, courts look to the totality of the circumstances; mere convenience is not enough to justify a warrantless search under the exception for exigent circumstances.²⁰⁰

Second, an exception exists for emergency aid, which applies when law enforcement must render aid or assistance.²⁰¹ For this exception to apply, the State must prove three elements:²⁰² (1) that the officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) that a reasonable person in the same situation would similarly believe a need for assistance existed; and (3) that a reasonable basis existed to associate the need for assistance with the place searched.²⁰³ Law

¹⁹⁸ State v. Tibbles, 236 P.3d 885, 891 (Wash. 2010).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ State v. Schultz, 248 P.3d 484, 492 (Wash. 2011).

²⁰² *Id.*

²⁰³ *Id.*

enforcement must have a reasonable belief that all three elements are satisfied before conducting a warrantless search.²⁰⁴

b) Exceptions for a Warrantless Search in the Juvenile Dependency Context

For the exceptions of a warrantless search to apply to the juvenile dependency context, a slight alteration is necessary. These exceptions, if satisfied, would allow for the removal of a child without a court order. In the search warrant context, the State has the burden of proving that an exception applied and permitted a warrantless search.²⁰⁵ Similarly, in the juvenile dependency context, the Department would have the burden of proving that an exception applied which allowed for removal without a court order.

In the context of removing children from the home, it is most reasonable to apply the emergency aid exception. Currently, RCW 26.44.050 exists to address emergencies in the juvenile dependency context.²⁰⁶ This statute gives law enforcement the authority to remove a child “if there is probable cause to believe that the child is abused or neglected, and that the child would be injured or could not be taken into custody if it were necessary to first obtain a court order.”²⁰⁷ Accordingly, to be more effective, the legislature would need to slightly change RCW 26.44.050. The legislature should rewrite the statute so that law enforcement could not remove a child in the absence of probable cause that the child is at risk of imminent harm and in need of assistance due to health and safety concerns. Allegations of abuse or neglect without supporting evidence to suggest that the child was at risk of imminent harm would not be enough to prove that the exception applied.

²⁰⁴ *Id.* at 498.

²⁰⁵ *Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

²⁰⁶ WASH. REV. CODE § 26.44.050 (2017).

²⁰⁷ *Id.*

The most important difference between the current exception and the proposed exception is the burden of proof as to whether the exception for removal without a court order applies. The proposed exception places the burden on the Department. Under the proposed exception, the Department must produce evidence in court to prove the exception applied when a child was removed without a court order. The current exception does not require the Department to produce this evidence. Instead, children are removed without court orders, court orders are issued after the children have already been removed, and the Department is not required to prove that removal without a court order was justified.²⁰⁸

C. *Alternative Arguments*

The current structure of the child welfare system is highly criticized, and an extensive amount of scholarship exists which suggests alternative ways to address allegations of family abuse or neglect.²⁰⁹ Primarily, the scholarship suggests limiting state intervention in the juvenile dependency context and promotes the use of forums with minimal state intervention,

²⁰⁸ Johnson, *supra* note 4.

²⁰⁹ See generally William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM. L. 37, 64 (1992); Nancy Thoennes, *Mediation and the Dependency Court*, 29 FAM. & CONCILIATION CTS. REV. 258 (1991); Gregory Firestone, *Dependency Mediation: Where Do We Go from Here*, 35 FAM. & CONCILIATION CTS. REV. 223, 238 (1997); Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977); JOSEPH GOLDSTEIN ET AL., BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); Eileen Gambrill & Aron Shlonsky, *The Need for Comprehensive Risk Management Systems in Child Welfare*, 23 CHILD. & YOUTH SERVS. REV. 79 (2001).

such as mediation.²¹⁰ The scholarship overwhelmingly focuses on systematic change after the state has already taken the child into custody.²¹¹ In Washington, for example, two programs are in place to support the reunification of families once the dependency process has begun: (1) the Parents for Parents program and (2) the Best for Babies program.²¹²

1. Local Post-Removal Programs

First, several counties in Washington have implemented the Parents for Parents program.²¹³ The program “connects parents who have successfully navigated the child welfare system to parents who have recently become engaged with Child Protective Services.”²¹⁴ The goal of the program is to “provide early outreach, education and support to parents who have entered the dependency system so they can be reconnected to their children.”²¹⁵ To reach this goal, the program consists of three core elements: outreach at court hearings, educational Dependency 101 class, and ongoing peer mentoring support.²¹⁶

²¹⁰ See generally Patton, *supra* note 209; Thoennes, *supra* note 209; Firestone, *supra* note 209; Goldstein, *supra* note 209; GOLDSTEIN ET AL., *supra* note 209; Wald, *supra* note 209; Wald, *supra* note 209; Gambrell & Shlonsky, *supra* note 209.

²¹¹ See generally Patton, *supra* note 209; Thoennes, *supra* note 209; Firestone, *supra* note 209; Goldstein, *supra* note 209; GOLDSTEIN ET AL., *supra* note 209; Wald, *supra* note 209; Wald, *supra* note 209; Gambrell & Shlonsky, *supra* note 209.

²¹² *Parents for Parents, CHILD’S HOME SOC’Y OF WASH.*, <https://www.childrenshomesociety.org/parentsforparents#> [https://perma.cc/36FF-WYYQ]; *Best for Babies Program/Baby Court*, PIERCE CNTY., <https://www.co.pierce.wa.us/6336/Best-for-Babies-ProgramBaby-Court> [https://perma.cc/8DY8-UY96].

²¹³ *Parents for Parents*, *supra* note 212 (listing the Washington State counties which implement the Parents for Parents program as follows: King County, Benton County, Franklin County, Clallam County, Pierce County, Kitsap County, Grays Harbor County, Pacific County, Thurston County, Lewis County, Mason County, Snohomish County, Spokane County, and Whatcom County).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *How Does the Parents for Parents Program Help Parents Reunify?*, CASEY FAM. PROGRAMS (Aug. 20, 2018), <https://www.casey.org/parents-for-parents/> [https://perma.cc/G2H8-PQ87].

Second, Pierce County, Washington has implemented the Best for Babies Program.²¹⁷ The Best for Babies Program “ensure[s] that infants and toddlers entering foster care receive support and services to help ensure safety, well-being and an environment that supports early brain development.”²¹⁸ The program involves regular support and community meetings with children and parents; frequent court hearings with the same judge and social worker; increased family time for children and parents; and referrals for each child to early intervention services.²¹⁹ Children served by the program are more likely to exit foster care faster than other children in dependency, reach permanence with a family member, and access more intervention services.²²⁰ Since its inception in 2016, the program has closed seven dependency cases; of those seven cases, five resulted in reunification with the parents, and two resulted in adoption by relatives.²²¹

While programs that function to reunify families once they have already been separated serve a vital role in the child welfare system, a more effective approach to keeping families together is to intervene before the child is actually removed from the home. In Washington, some local programs exist which provide services to families that prevent children from being removed.²²²

²¹⁷ *Best for Babies Program/Baby Court*, *supra* note 212.

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *What We Do, HELP ME GROW PIERCE CNTY.*, <https://www.helpmegrowpierce.org/what-we-do> [https://perma.cc/FR7L-3E6P]; *Frequently Asked Questions for F.I.R.S.T. Clinic*, ABA L. GRP. LLP (Jul. 6, 2019), <https://the-abc-law-group.business.site/posts/3026311806041158856?hl=en-US> [https://perma.cc/GS5X-WAWV].

2. Local Pre-Removal Programs

Help Me Grow is a national program that has a pilot project in Pierce County, Washington.²²³ The program website describes itself as “a system model that utilizes and builds on existing resources in order to develop and enhance a comprehensive approach to early childhood system-building in any given community.”²²⁴ Essentially, the program provides a model that communities across the country can use.²²⁵ Four core components characterize the model.²²⁶ First, the model has a “centralized access point,” which works to connect children to the community resources that will help them thrive.²²⁷ Second, the model consists of “family and community outreach,” which aims not only to build an understanding of healthy child development and supportive community services, but also to show how family and community outreach play an important role in improving children’s outcomes.²²⁸ Third, the project engages in “child health care provider outreach” to detect concerns early on and then provide intervention efforts to more efficiently address those concerns.²²⁹ Fourth, the project has a “data collection and analysis” component, which aims to ensure the resource grid is working effectively by identifying gaps in the system.²³⁰

In 2017, Pierce County adopted the Help Me Grow model after community leaders identified that Pierce County, while having half the population of neighboring King County, had removed the same amount of

²²³ *HMG System Model*, HELP ME GROW NAT’L CTR., <https://helpmegrownational.org/hmg-system-model/> [<https://perma.cc/DY6G-9ZWV>]; *Home*, HELP ME GROW PIERCE CNTY., <https://www.helpmegrowpierce.org> [<https://perma.cc/3AYB-RB2Q>].

²²⁴ *HMG System Model*, *supra* note 223.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

children from homes as King County.²³¹ Community leaders selected three zip codes in which to enact the program; leaders chose these zip codes because they had high dependency filings, high poverty rates, and low life expectancy rates.²³² Help Me Grow Pierce County has identified three project goals.²³³ First, the project aims to “reduce dependency filings for children ages birth to three years old in target zip codes.”²³⁴ Second, the project hopes to “gain population information on services offered and needed.”²³⁵ Third, the project strives to “improve child health outcomes by reducing low and very low birth weight babies.”²³⁶ The project acknowledges how detrimental it is to remove children from the home when it states that “ensuring parents have the support they need to feel prepared as parents and provide a safe and healthy start for their children is imperative to preventing further separation and trauma.”²³⁷

Another program that provides family resources before removal and out-of-home placement is located in Snohomish County, Washington; this program is a legal clinic called the Family Intervention Response to Stop Trauma (F.I.R.S.T.) Clinic.²³⁸ Local attorneys created this clinic after they discovered that twelve to fifteen babies were removed from their homes every month in Snohomish County.²³⁹ The F.I.R.S.T. clinic’s goal is to

²³¹ *What We Do*, *supra* note 222; Ashley Gross, *Program Aims to Keep Pierce County Families Intact by Connecting Them with Resources*, KNKX (Jul. 2, 2019), <https://www.knkx.org/post/program-aims-keep-pierce-county-families-intact-connecting-them-resources> [<https://perma.cc/PNG2-UPG2>].

²³² Gross, *supra* note 231.

²³³ *What We Do*, *supra* note 222.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Frequently Asked Questions for F.I.R.S.T. Clinic*, *supra* note 222.

²³⁹ Tonya Wall & Adam Ballout, *Using Legal Services to Keep Children in Families: The F.I.R.S.T. Clinic*, ABA (Oct. 3, 2019), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2019/fall2019-using-legal-services-to-keep-children-in-families/> [<https://perma.cc/FYR7-QH4Y>].

work with mothers “before removal to change the traditional path of at-risk families to keep them from becoming involved with the Child Protection Services and court systems in the future.”²⁴⁰ The clinic offers the following support:

Free, confidential legal advice to moms facing the threat of family separation; support of a veteran parent ally (mentor) who has successfully been through the process; a community resource navigator who will help moms get connected with services; [and] a housing component where moms can stay rent-free for 12-18 months while they focus on their recovery and family.²⁴¹

The clinic recognizes the significant long-term trauma that removing a child from their parent causes and strives to provide preventative services to keep families together.²⁴²

Although local programs that strive to connect families with resources that will prevent CPS involvement and removal of children from the home are beneficial, they may not be the most effective way to keep families together. A top-down approach, such as rewriting the statute, rather than a bottom-up approach, such as implementing local programs like Help Me Grow Pierce County and the F.I.R.S.T. legal clinic, could give rise to a more widespread, systematic change that completely restructures the way the child welfare system operates in Washington. Legislative change, which alters the legal standards to remove a child from the home, should work in tandem with local programs that strive to both prevent family separation and reunify families who are already separated.

IV. CONCLUSION

Under the current statutes, a child can be removed from their parents and placed into protective care without a court order.²⁴³ While a law

²⁴⁰ *Frequently Asked Questions for F.I.R.S.T. Clinic*, *supra* note 222.

²⁴¹ *Id.*

²⁴² Wall & Ballout, *supra* note 239.

enforcement officer cannot come into someone's house and take their property without court approval,²⁴⁴ an officer can come into someone's house and take their child without court approval.²⁴⁵ Being taken from the family and placed in an unknown setting with an unknown caregiver is traumatic and has long-lasting effects on children.²⁴⁶ The profoundly flawed child welfare system does not affect all children equally; instead, it is children from low-income families and non-white families who are disproportionately investigated by CPS, removed from the home, and placed into foster care.²⁴⁷

Most of the scholarship that addresses these problems in the child welfare system focuses on solutions aimed at reunifying families that have already been torn apart.²⁴⁸ Some local programs attempt to provide services before removal, to keep families together, and to lower rates of dependency filings.²⁴⁹ While these programs are a step in the right direction, they may not be enough to encourage widespread, institutional change. Instead, we must rewrite the juvenile dependency statutes to reinforce standards of removal. If the Department wishes to remove a child from the home, it should be required to meet strict requirements similar to those which must be met to obtain a search warrant. The family unit is a fundamental component of life that deserves to be protected.

²⁴³ See WASH. REV. CODE § 13.34.050 (2005); WASH. REV. CODE § 26.44.050 (2017).

²⁴⁴ See generally *State v. Maddox*, 98 P.3d 1199 (Wash. 2004).

²⁴⁵ WASH. REV. CODE § 26.44.050 (2017).

²⁴⁶ See Sankaran & Church, *supra* note 9, at 211–12.

²⁴⁷ See Dettlaff et al., *supra* note 75, at 1630.

²⁴⁸ See generally Patton, *supra* note 209; Thoennes, *supra* note 209; Firestone, *supra* note 209; Goldstein, *supra* note 209; GOLDSTEIN ET AL., *supra* note 209; Wald, *supra* note 209; Wald, *supra* note 209; Gambrell & Shlonsky, *supra* note 209.

²⁴⁹ See *What We Do*, *supra* note 222; *Frequently Asked Questions for F.I.R.S.T. Clinic*, *supra* note 222.