

CUNY LAW REVIEW

Edited by the Students of the City University of New York School of Law

Scholarship for Social Justice

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STEWARDED THE CITY AS COMMONS: PARKS CONSERVANCIES AND COMMUNITY LAND TRUSTS

John Krinsky & Paula Z. Segal†

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INTRODUCTION

Civil society is a battleground.

If we understand civil society to mean the whole panoply of voluntary associations that are neither governmental nor “market” organizations—i.e. not organizations oriented toward profit—we immediately understand how vast a field for battle it really is. It comprises parent-teacher associations and mosques, unions, environmental advocacy groups, evangelical churches, rifle clubs, and much, much else. Alexis de Tocqueville noted the importance of a robust civil society for democratic governance, stating that Americans’ penchant for civic association developed the interpersonal trust necessary for the nonviolent resolution of conflict.¹ But, it has also become clear that a robust civil society *eases* the work of formal governing by effecting a division of labor between governmental and private organizations in the matter of social welfare provision and of social integration, and does so beyond the democratic context. A robust and independent civil sphere reduces the costs of governance by forming a complex context of consent, wherein the very intersecting networks of group membership and participation help keep both discourses of support for and opposition to the state and its policies within bounds and render civic groups unlikely to organize as an alternative claimant to state power.²

Because civil society is so diverse, it contains groups of all persuasions and of many, often-shifting, functions, and they often come into conflict. Civil society organizations, such as unions, come into conflict with other civil society organizations, such as chambers of commerce, over minimum wages, and tenant organizations come into conflict with landlord lobbying groups. Equally, tenant organizations sometimes become nonprofit landlords, as they did in great numbers during the 1980-90s in New York City, when the municipal government sought to dispose of thousands of tax-foreclosed properties it had taken from landlords who

¹ See 2 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 895-902 (James T. Schliefer trans., Eduardo Nolla ed. 1835).

² See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (ElecBook London, Quentin Hoare & Geoffrey Nowell Smith trans. & eds. 1999) 236-38 (1971). See also IRA KATZNELSON, *CITY TRENCHES: THE PATTERNING OF CLASS IN THE UNITED STATES* 19 (1981) (adapting Gramscian understandings to contemporary institutional divisions in urban politics); Joseph Buttigieg, *The Contemporary Discourse on Civil Society: A Gramscian Critique* 32 *BOUNDARY 2*, at 33, 40-41 (2005) (discussing the relation of civil society and the state).

abandoned them.³ The government looked to tenant organizations and turned them into partners, paying them to be part of a solution for the blossoming housing crisis. Similarly, the City mobilized and consolidated existing volunteer efforts to care for its parks when the fiscal crisis of the late 1970s led to steep cuts in parks maintenance and the layoffs of hundreds of parks workers.⁴ These efforts, especially those galvanized in the late 1990s, after another round of layoffs in the early 1990s, became an array of parks conservancies, “Friends of” various parks, and additional similar organizations, which the City government coordinated.⁵ In parallel, residents of neighborhoods dotted with vacant lots in the wake of a building collapse transformed them into spaces that functioned as parks without municipal support or, frequently, without permission. Decades later, as a result of protest and litigation, the City government finally recognized that these open spaces, created by residents and stewarded independently of the City, were as valuable to New Yorkers as the parks that the City itself had created (and abandoned).⁶

This paper considers efforts to steward urban land in the distinct forms of affordable housing and public parks in the shared context of their growth in New York City from the 1980s until today.

The stewardship efforts for affordable housing take the form of community land trusts (CLTs), which are nonprofit organizations that own and lease land. In so doing, CLTs use the lease mechanism to enforce restrictions on the use and affordability of housing.⁷ Boards of directors, made up of individuals selected to represent different community constituencies, run CLTs.

³ See COREY ROSSI, UNIV. AT BUFFALO LAW SCH., *MARKETING CITY-OWNED PROPERTIES* 12-14 (2008), <https://perma.cc/MB47-F2RP>; see also generally DOUG TURETSKY & MARGARET MITTLEBACH, *WE ARE THE LANDLORDS, NOW: A REPORT ON COMMUNITY-BASED HOUSING MANAGEMENT* (1993); Desirée Fields, *Contesting the Financialization of Urban Space: Community-Based Organizations and the Struggle to Preserve Affordable Rental Housing in New York City* 37 J. URB. AFF. 144 (2015); Laura Wolf-Powers, *New York City’s Community Housing Movement: Achievements and Prospects*, in *COMMUNITY ACTION AND PLANNING: CONTEXTS, DRIVERS AND OUTCOMES* (Nick Gallent & Daniela Ciaffi eds., 2014).

⁴ JOHN KRINSKY & MAUD SIMONET, *WHO CLEANS THE PARK? PUBLIC WORK AND URBAN GOVERNANCE IN NEW YORK CITY* 5, 52, 156-61 (2017); see generally KIM PHILLIPS-FEIN, *FEAR CITY: NEW YORK’S FISCAL CRISIS AND THE RISE OF AUSTERITY POLITICS* 4-7 (2017) (providing a detailed account of New York City’s fiscal crisis and how austerity politics continue to impact New York today).

⁵ KRINSKY & SIMONET, *supra* note 4, at ch. 5.

⁶ See, e.g., Camille Bautista, *34 Community Gardens Saved from Demolition After City Makes Them Parks*, DNA INFO, <https://perma.cc/U64V-C93V> (last updated Jan. 3, 2016, 9:10 AM).

⁷ John Emmeus Davis, *Common Ground: Community-Led Development on Community-Owned Land*, ROOTS & BRANCHES (June 1, 2015), <https://perma.cc/G7Q4-CQ46>.

Stewardship efforts for parks take the forms of, on the one hand, conservancies and “Friends of” groups—which are self-perpetuating non-profit organizations that coordinate volunteer efforts in parks and sometimes contract with the City to provide staff and capital improvements—and, on the other, unincorporated associations self-anointed as creators of new park spaces.⁸

Organizations engaged in the stewardship of land for housing and of land as open space in the City can be understood—and sometimes understand themselves—in the context of “the commons” and its governance. Each organization struggles with its own dilemmas with respect to their role in governing the commons, dilemmas typical of other groups that have been the subject of commons scholarship. But there are contrasts between their approaches to these dilemmas that suggest that a variety within and between each form of commons is consequential from a political and a policy standpoint. In addition, these contrasts illustrate that not all “commoning” is alike, in part because the relationship of the organizations to place-based capital—in this case, urban land—diverges in critical, and even opposed, ways.⁹

This article examines the mechanisms for commoning the city itself. It begins with a brief introduction to an understanding of the commons and of commoning, following the lead of Elinor Ostrom’s “design principles” for governing common pool resources (CPRs). The article then discusses the ways in which urban land can be understood as a CPR but locates the discussion of commons governance more clearly in a critical reading of the recent history of neoliberal governance. An introduction to CLTs and parks conservancies in some more historical detail follows, presenting their governance strategies against the background of Ostrom’s principles, and discussing their typical governance dilemmas and results. Lastly, the article discusses ways in which both CLTs and conservancies diverge from others of their same class (some conservancies from others; some CLTs from others), largely based upon their respective effects on urban land values, and hence, on the ability of each of the organizations to steward resources *for the commons* and *in common*.

⁸ KRINSKY & SIMONET, *supra* note 4, at 156-60.

⁹ See generally JOHN R. LOGAN & HARVEY L. MOLOTCH, *URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE* 147-99 (1987) (arguing that the interests of place-based capital, which is capital dependent on the intensified use of urban land for profit, create sometimes strange-bedfellow coalitions that dominate urban decision-making). Conservancies and CLTs differ in that CLTs explicitly seek to remove land from capital circulation.

Throughout, John Krinsky and Maud Simonet's *Who Cleans the Park?*¹⁰ will be used for a discussion of conservancies; the authors' ongoing research and participation in community land trust (CLT) activism in New York City forms the foundation for the discussion of CLTs.

I. GOVERNING THE (NEOLIBERAL) COMMONS

The "commons" is best understood as a set of collective practices that support collective rights.¹¹ Elinor Ostrom further specifies that the commons applies to the management of common pool resources (CPRs).¹² A common pool resource is a "natural or man-made resource system that is sufficiently large as to make it costly (but not impossible) to exclude potential beneficiaries from obtaining benefits from its use."¹³ Commons stewardship mediates the clash between private and public interests: there is a public interest in the continued availability of the resource, but a private interest in appropriating and using the resource to the exclusion of others. In this way, CPRs are both similar and different from public goods, such as clean air, which is available to all, but not divisible into appropriable and depletable portions. Hence, while there are free-rider problems in preserving CPRs, in the same way as there are with public goods, the possibility of preserving *some* private appropriation *while helping to renew, preserve, and expand the resources* remains a key theme in efforts at "commoning."¹⁴ Commons are less about the right to the *use* of a resource, and more about the right to participation in how a resource is preserved and expanded.¹⁵ Commoning is thus an inherently expansionist and future-oriented project.

David Harvey describes the process of creating shared value in commoning:

There is, in effect, a social practice of *commoning*. This practice produces or establishes a social relation with a common whose

¹⁰ KRINSKY & SIMONET, *supra* note 4, *passim*.

¹¹ See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 20, 27 (Dec. 10, 1948) ("Everyone has the right freedom of peaceful assembly and association . . . Everyone has the right freely to participate in the cultural life of the community . . ."); see also Michael Freeman, *Are There Collective Human Rights?*, 43 POL. STUD. 25, 28-29, 32-35 (1995).

¹² ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 30 (1990).

¹³ *Id.*

¹⁴ See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 2 (1965) (detailing more information on the cost of collective action to preserve individual interests in public goods).

¹⁵ See DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION 72-73 (2012) [hereinafter HARVEY, REBEL CITIES].

uses are either exclusive to a social group or partially or fully open to all and sundry. At the heart of the practice of commoning lies the principle that the relation between the social group and that aspect of the environment being treated as a common shall be both collective and non-commodified—off-limits to the logic of market exchange and market valuations.¹⁶

When applied to real property in the urban context, this appears “absurdly optimistic” because the market captures the value created by new amenities, such as more stable neighborhoods, lower crime, cleaner parks, commercial activity, and “people living in proximity and creating art and culture”: the market translates all of that into “land value.”¹⁷ Capturing that value interrupts the function of a city as a commons.¹⁸ “As long as land can be bought, the enclosure of the *common wealth* created by people in proximity of that land is a certainty.”¹⁹ Even when the land is a private house purchased by a single buyer, “its market value is the sum total of its context; that value (with) draws from the collaborative and parallel efforts of people other than the buyer, seller, and [even] public entities and the infrastructure that they provide.”²⁰

It may seem like a truism of the real estate industry that collective assets near a marketable “private” property make that property worth more to prospective buyers. But, that calculation of worth is itself an enclosure: [the] privatization of shared labor that threatens to displace the very individuals whose labor resulted in the creation of the asset that drives prices up.²¹

¹⁶ *Id.* at 73.

¹⁷ Amy Laura Cahn & Paula Z. Segal, *You Can't Common What You Can't See: Towards a Restorative Polycentrism in the Governance of Our Cities*, 43 *FORDHAM URB. L.J.* 195, 230 (2016).

¹⁸ *See generally* Sheila Foster & Christian Iaione, *The City as a Commons*, 34 *YALE L. & POL'Y REV.* 281, 313 (2016) (arguing that real estate markets cannot be relied upon “to assemble urban participants optimally or to maximize the positive agglomeration benefits of urban common space”).

¹⁹ Cahn & Segal, *supra* note 17, at 230 (citing Nicholas Blomley, *Enclosure, Common Right and the Property of the Poor*, 17 *SOC. & LEGAL STUD.* 311 (2008)) (discussing how the dynamics of inner-city gentrification constitute an enclosure of urban poor commons).

²⁰ *Id.* at 230-31; *see* Sheila R. Foster, *The City as an Ecological Space: Social Capital and Urban Land Use*, 82 *NOTRE DAME L. REV.* 527, 529 (2013) (“Legal scholars have yet to fully grapple with the costs imposed on the social networks and ties, or social fabric of a community, arising from land use and development decisions.”).

²¹ Cahn & Segal, *supra* note 17, at 231. *Cf.* JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 146-83 (Vintage Books ed., 1992).

This is exactly “what David Harvey terms, ‘accumulation by dispossession,’”²² and “what John Davis describes as ‘immoral’: the private capture of community-generated value and its transformation into individual ‘wealth.’”²³

There is optimism in the reality that institutions have arisen that challenge and distort this market logic by their stewardship of land outside this system of immoral dispossession. Yet, how well they succeed is a question of how much they actually manage to transform urban land into a commons.

Understanding housing as a traditional CPR is fairly straightforward: given our conventions of domesticity, after a certain point, when someone lives on a parcel of land, another person cannot. Thus, not only is the *availability* of the resource depleted, but once appropriated, there is no common right to occupy a given parcel.

The issue of urban land as a common pool resource is less clear when one thinks about parks. Instead, parks seem to be more of a public good—indivisible and non-exclusive. But, there are uses of the parks—including in their administration—that either result in the generation of excludable goods or are excludable and private goods in themselves.

In New York State, where the inquiry here is focused, the public trust doctrine protects the public’s recreational enjoyment of land that has been set aside as parkland.²⁴ Courts affirm that once land has been dedicated to use as a park, it cannot be diverted for uses other than recreation, in whole or in part, temporarily or permanently, even for another public purpose, without legislative approval.²⁵ In order to convey parkland to a non-public entity, or to use parkland for another purpose, even temporarily, “a municipality must receive [prior] authorization from the State” in the

²² Cahn & Segal, *supra* note 17, at 231 (citing DAVID HARVEY, *Capital Bondage*, in *THE NEW IMPERIALISM* 87-136 (Oxford Univ. Press ed. 2003)).

²³ *Id.* (quoting Davis, *supra* note 8).

²⁴ The law recognizes that some lands deserve protection because the government explicitly dedicates them for use as a park, and some lands gain protection because the totality of government action is sufficient to induce the public’s reliance on the open space, even without a formal dedication. *See* Appellants’ Brief at 25-27, *State v. City of New York*, Nos. 200-02038, 2000-02678, 2000 WL 34551035 (N.Y. App. Div. Mar. 29, 2000) (filed to protect community gardens from being auctioned by the City). The standard for implied dedication was reiterated by the New York Court of Appeals in *Glick v. Harvey*, 25 N.Y.3d 1175, 1180 (2015) (“A party seeking to establish such an implied dedication and thereby successfully challenge the alienation of the land must show that (1) ‘[t]he acts and declarations of the land owner indicating the intent to dedicate his land to the public use [are] unmistakable in their purpose and decisive in their character to have the effect of a dedication’ and (2) that the public has accepted the land as dedicated to a public use.”) (alterations in original) (citations omitted).

²⁵ *United States v. City of New York*, 96 F. Supp. 2d 195, 202 (E.D.N.Y. 2000) (citing *Williams v. Gallatin*, 229 N.Y. 248, 253 (1920)).

form of legislation enacted by the New York State Legislature and the Governor.²⁶ Local government holds municipal parkland in trust for the public; the State Legislature must approve its sale or conveyance, as the representative of the people.²⁷ This rule is based on “the importance of parks to a community’s health and the happiness of its citizens.”²⁸ This has been the law in New York since at least 1871.²⁹

Krinsky and Simonet urge an understanding of parks not just as places of leisure, but also as sites of both direct and indirect accumulation and as worksites.³⁰ Here, they draw attention to the ways in which New York City’s municipal government has degraded the labor contracts of city workers, on one hand—staffing the department increasingly with “workfare,” “trainees,” and people sentenced to community service, as well as relying increasingly on individual, civic-group-organized, and corporate volunteers—and privatized the management of many parks through nonprofit conservancies on the other.³¹ Thus, within the context of the regulated non-exclusive use of parks as places of leisure, there are

²⁶ N.Y. STATE OFFICE OF PARKS, RECREATION & HISTORIC PRES., HANDBOOK ON THE ALIENATION AND CONVERSION OF MUNICIPAL PARKLAND 3 (2017) [hereinafter ALIENATION HANDBOOK], <https://perma.cc/DT3D-DZDJ>; Thomas Honan, Comment, *These Parks Are Our Parks: An Examination of the Privatization of Public Parks in New York City and the Public Trust Doctrine’s Protections*, 18 CUNY L. REV. 107, 123-24 (2015).

²⁷ ALIENATION HANDBOOK, *supra* note 26, at 3, n.4 (citing *People v. New York & Staten Island Ferry Co.*, 68 N.Y. 71, 78 (1877)) (“The State, in place of the crown, holds the title, as trustee of a public trust, but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide-waters, or authorize a use inconsistent with the public right, subject to the paramount control of congress, through laws passed, in pursuance of the power to regulate commerce, given in the federal Constitution.”); *see also* *Brooklyn Park Comm’rs v. Armstrong*, 45 N.Y. 234, 243 (1871) (“It was within the power of the legislature to relieve the city from the trust to hold it for a use only, and to authorize it to sell and convey.”).

²⁸ ALIENATION HANDBOOK, *supra* note 26, at 3 (citing *Williams*, 229 N.Y. at 254) (“[Parklands] facilitate free public means of pleasure, recreation and amusement and thus provide for the welfare of the community.”); *see also* *Aldrich v. City of New York*, 208 Misc. 930, 940 (N.Y. Sup. Ct. Queens Cty. 1955) (“Parks play a vital role in the health of a community, which ‘has more to do with the general prosperity and welfare of a State than its wealth or its learning or its culture.’”).

²⁹ ALIENATION HANDBOOK, *supra* note 26, at 3. Simultaneously to the development of this legal doctrine, Central Park was developed in the years between 1857 and 1873. Site selection, design and construction were managed by the State of New York (not the City). Increases in property tax revenue to the City were one of the incentives that the State presented to NYC residents as flowing from the project.

³⁰ *See* KRINSKY & SIMONET, *supra* note 4, at 219-30 (contrasting direct accumulation as getting value out of the labor process, which in the public sector, usually means paying workers less, while indirect accumulation means deriving value from trade in the products whose value the workers enhance, such as land values and concessions).

³¹ *Id.* at 20-25, ch. 2.

divisible goods—mostly bad jobs, but occasional access to good ones—on the labor side. On the conservancy side, there is contest over City contracts and their terms, especially over the amount of money that conservancies can retain for their own operation from food and other concessions located in the parks that they manage. For the concessionaires, moreover, parks are sites for employment *and* for sales. When parks give concessions to more expensive vendors—by replacing a hot dog stand with an artisanal barbecue vendor, for example—it puts the full experience of the park out of reach for anyone unable to afford the new concession.³²

Crucially, for people owning property in close proximity to parks that are well cared for, there is a significant premium on their real-estate value that they get to appropriate privately and nearly in its entirety.³³ Ironically, even as it gives explicit protection to a process of commoning, the public trust doctrine can also be viewed as a mechanism to protect the pecuniary interests of property owners who purchase marketable property near parks.³⁴ By preventing the private appropriation of parkland for non-park uses, it protects the park-enhanced market value—or “exchange value,” in Marx’s terms—of neighboring properties.

The labor-cost saving imperative of conservancies, combined with issues concerning a park’s retention of concession revenues, can lead to several situations in which parks take on the character of CPRs. For example, it is an increasingly common practice to preserve the appearance

³² See *id.* at 164-66.

³³ In community gardens, the Parks Department abdicates all responsibility for care, shifting it to residents who have survived decades of disinvestment in every kind of local infrastructure. It may seem that the Department is only lured back by evidence that well-appointed gardens increase property values, see Ioan Voicu & Vicki Been, *The Effect of Community Gardens on Neighboring Property Values*, 36 REAL EST. ECON. 241, 268 (2008), as opposed to the evidence that they improve quality of life. Similarly, as KRINSKY & SIMONET, *supra* note 4, at 221-30, find, recent justifications for the care of parks focus on their role as economic engines. See also APPLESEED, INC., *THE CENTRAL PARK EFFECT: ASSESSING THE VALUE OF CENTRAL PARK’S CONTRIBUTION TO NEW YORK CITY’S ECONOMY* 35-43 (2015), <https://perma.cc/8HN5-LQNM>. Even in the 1850s, the State touted the potential bump to property taxes as a reason that New Yorkers should embrace Central Park; some then did not believe it, opposing the seizure of occupied private land by eminent domain because its dedication as parkland would permanently remove it from the tax rolls. Those New Yorkers were right to concern themselves with the communities, like Seneca Village, that lost their place so that the whole City could have a park. But they were mistaken to worry about the fiscal health of the City as a whole—what the creation of the park took away in terms of individual property tax accounts it gave back by increasing what was due on neighboring properties.

³⁴ See, e.g., *THE TRUST FOR PUB. LAND, THE ECONOMIC BENEFITS OF PARKS, TRAILS, AND CONSERVED OPEN SPACES IN BEAUFORT COUNTY, SOUTH CAROLINA* 2 (2018), <https://perma.cc/4TDT-JERB> (“Parks, trails, and conserved open spaces increase[d] the value of nearby residential properties in Beaufort County because people enjoy these amenities and are willing to pay for this proximity.”).

and health of lawns in parks by fencing them off from the public for significant periods of time.³⁵ One can imagine that the pristine appearance of parks accrues to land values around it, even when this is linked to the public's inability to access significant areas of the park itself. Similarly, controversy has recently arisen around whether ticketed events, such as concerts and galas—themselves a kind of concession—amount to “alienation” of public access;³⁶ this has even extended to *non-ticketed* events such as weddings—for which the wedding party pays—and to free, but closed events, such as barbecues for community-garden members, in gardens that are administered under the Parks Department's Green Thumb program.³⁷

None of this, of course, means that parks are technically a CPR *all the time*, but in their everyday hybridity—and certainly for land that is *not yet but could be* parkland—there are similar problems of governance that civil society organizations face. In an idealized world, the totality of urban land itself *would be* a CPR and everyone—or, at least, the members of the

³⁵ See *Raritan Baykeeper, Inc. v. City of New York*, 42 Misc. 3d 1208(A) (N.Y. Sup. Ct. Kings Cty. 2013). Filed in 2006, this long-running litigation involves a 20-acre composting facility operated by the City Department of Sanitation in Spring Creek Park in Old Mill Creek, Brooklyn. The facility was intended to process leaves and other organic waste collected from around the City for use as fertilizer in Spring Creek Park and other parks. Petitioners alleged that the placement and operation of the composting facility within Spring Creek Park without State approval violated the public trust doctrine, on the basis that a solid waste management facility could not be considered an appropriate park use and that the public was deprived of recreational access to the area of the facility. The City argued that the composting facility fell within the meaning of a legitimate “park use” under the public trust doctrine because the compost would be used in park maintenance. Interpreting the term “park use,” the Court focused on whether the use was consistent with the public's recreational enjoyment of the park and held that the composting facility was not. Other examples of uses that require alienation by the State Legislature include museums, roads, public works facilities and storage space, parking for municipal vehicles, and housing. ALIENATION HANDBOOK, *supra* note 26, at 6-7. Uses incidental to parks are not considered alienation; these include public libraries, monuments, zoos, playgrounds, rest houses, parking lots for park patrons, restaurants and snack bars, bike share stations and recreational facilities (e.g., batting cages, golf courses, skating rinks, boat launches and marinas, and the associated equipment concessions). *Id.* at 7, 7 n.34 (citations omitted). Is the cordoning off of grass really incidental to park use? Or is it more akin to storage space? No court has yet considered this question.

³⁶ See *SFX Entm't, Inc. v. City of New York*, No. 124059/01, 2002 WL 1363372, at *8-10 (N.Y. Sup. Ct. N.Y. Cty. 2002) (finding a violation of public trust doctrine and City concession regulations where an amphitheater hosting events with average \$30 ticket price was to be built on parkland on Randall's Island and confirming that it did not serve a park purpose because not all members of the public could afford it), *rev'd* 297 A.D.2d 555, 555 (N.Y. App. Div. 2002); see also Honan, *supra* note 27, at 107-09 (discussing ticketed events and amenities).

³⁷ Phone Interviews with Gardeners and Staff Members of NYC Parks Department (Aug. 10-12, 2018).

common governance body—would have a say in its allocation and its potential for expansion and renewal. Sectarianism and the inheritance of a neoliberal body politic has kept this ideal world from becoming our entire reality by 2019, but the seeds are planted. To some degree, this is a justification for urban land-use regulations and zoning: there is a common interest that must be safeguarded that supersedes the private interests of appropriation.³⁸

In the background to all of this over much of the last half century is massive disinvestment of private capital from urban space coupled with disinvestment by the state in its social infrastructure and its selectively making urban space available for targeted reinvestment. What this has amounted to is akin to an “enclosure” of the commons, ensnaring both common pool resources and public goods under what is still best described as “actually existing neoliberalism.”³⁹ Here, “neoliberalism” is not simply a stand-in for a fully realized program of for-profit marketization, but rather a variegated strategy to *refashion* institutions of labor, capital, and the state, as well as their relationships with each other. As Marxist scholars of the state have repeated, states grapple with the problem of needing to support capital accumulation on one hand, and the need for popular legitimacy on the other.⁴⁰ In the context of a post-1970s world with rapidly increasing inequality and increased frequency of bubble-driven crises that lead to mass economic displacement, the turn to non-profit civil-society organizations as a critical adjunct to urban governance has been a strongly legitimizing move. It has provided some real benefits to the dispossessed, and, even while significantly empowering organized philanthropy,⁴¹ has also created new terrains of contest over urban

³⁸ Additionally, there is a tension between uses: if a given parcel is to be assigned a use as publicly accessible open space, it cannot simultaneously be used for housing, and vice versa. Yet, it is indisputable that cities need both.

³⁹ See generally Neil Brenner & Nik Theodore, *Cities and the Geographies of “Actually Existing Neoliberalism,”* 34 *ANTIPODE* 349 (2002) (discussing “a critical geographical perspective on neoliberalism that emphasizes (a) the path-dependent character of neoliberal reform projects and (b) the strategic role of cities in the contemporary remaking of political-economic space.”).

⁴⁰ See, e.g., JAMES O’CONNOR, *THE FISCAL CRISIS OF THE STATE* 6-10 (Routledge ed. 2017) (1973).

⁴¹ See generally DAVID CALLAHAN, *THE GIVERS: WEALTH, POWER, AND PHILANTHROPY IN A NEW GILDED AGE* (2018) (describing how major donors’ charitable giving overlaps with their political aims).

power.⁴² These contests, in turn, often focus on the extent of commodification, on the right to common pool and public goods, and on the exclusion of entire groups of people and the neighborhoods they live in from the benefits appropriated by others.⁴³

Ostrom proposes eight “design principles” for the governance of CPRs.⁴⁴ They are as follows:

- (1) CPRs are clearly defined and users with the right to appropriate CPR units are clearly defined;
- (2) Rules of appropriation of CPR units are defined according to the ability to replenish the common pool;
- (3) People with a right to withdraw from the pool have a say over the governance arrangements and their modification;
- (4) Collectively accountable monitoring of the system;
- (5) System of escalating sanctions for violating the rules that get more severe with each violation or with the seriousness of the violation;
- (6) Easy-to-access conflict resolution mechanisms;
- (7) Users have a “minimal right to organize” a body to govern the CPR without interference from a government entity; and
- (8) For more complex systems of common pool resources, these functions exist throughout a nested set of organizations.

As we will see in the next section, individual CLTs and conservancies differ in the extent to which they fulfill these governing tasks. And for land that goes to housing as opposed to land that goes to parks, the clarity of categories of users, of rules, of the prospect of resources to renew the pool, and of accountability and dispute mechanisms diverge considerably. Moreover, the support for conservancies by the City—and its almost intrusive encouragement of “independent initiative”—contrasts with its much more suspicious and less facilitative stance toward CLTs. Choices that activists in each group face, however, center around questions of public or governmental support and of whether the goods that they steward are, in their estimation, best protected through processes of *decommodification* or through processes that *deepen commodification*.

⁴² See, e.g., Alan S. Oser, *Perspectives: The Cooper Square Plan; Smoothing the Path to Redevelopment*, N.Y. TIMES (Jan. 27, 1991), <https://perma.cc/8DT7-58BQ> (stating that the city agreed to rehabilitate 430 units that were once taken for urban-renewal development).

⁴³ See Cahn & Segal, *supra* note 17, at 199-200.

⁴⁴ Ostrom, *supra* note 12, at 90.

II. MANIFESTATIONS OF COMMONING

A. *Community Land Trusts*

Community Land Trusts (CLTs) are a form of nonprofit organization that owns land and leases it for housing and other uses as a way to keep the property from foreclosure.⁴⁵ A CLT is more than a deed and a ground lease, however: it is an organization designed to steward property.⁴⁶ Typical CLT ground leases are renewable 99-year leases that contain significant restrictions on resale and use of the buildings on the land it owns.⁴⁷ Based originally on the economics of Henry George, who identified private land ownership and speculation as the key source of exploitation,⁴⁸ CLTs have roots in Civil Rights-era struggles over land access in the rural South and in urban areas throughout the United States, Britain, and several countries in Europe as a way to “common” land and housing for community use.⁴⁹

CLTs are typically governed by a “tripartite” board, with representatives of three groups with interests at stake: (1) residents and leaseholders of the housing on CLT land, whose interest is in the ongoing stewardship of the CLT’s resources; (2) community residents, whose interest is in the CLT’s expansion to control more property in the area; and (3) other “outside” directors whose expertise is in housing and other skills of possible use to the CLT board, and whose interest is in the ongoing functioning of the CLT.⁵⁰ Some CLTs have elected boards, others have self-perpetuating appointed ones, but most still follow some general version of this model.⁵¹

However they are set up, CLTs largely fulfill the demands of most of Ostrom’s “design principles.” The basic tripartite governance structure is itself based on a definition of boundaries among classes of interested

⁴⁵ Davis, *supra* note 8, at 2.

⁴⁶ *Id.*

⁴⁷ *Id.* at 2 n.5.

⁴⁸ See generally HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH, THE REMEDY* bks. III-X (50th ed. 1935).

⁴⁹ See generally GROUNDED SOLUTIONS NETWORK, <http://cltnetwork.org/> (last visited July 26, 2019). See JOHN EMMEUS DAVIS, *LINCOLN INST. OF LAND POL’Y, THE COMMUNITY LAND TRUST READER* 6-7 (2010); EBENEZER HOWARD, *GARDEN CITIES OF TO-MORROW* 76-84 (2d ed. 1902); DENNIS HARDY, *UTOPIAN ENGLAND: COMMUNITY EXPERIMENTS 1900-1945*, at 85-97 (2000). See also JOHN KRINSKY & SARAH HOVDE, *BALANCING ACTS: THE EXPERIENCES OF MUTUAL HOUSING ASSOCIATIONS AND COMMUNITY LAND TRUSTS IN URBAN NEIGHBORHOODS* 19-22 (1996), <https://perma.cc/B24S-UAGU>.

⁵⁰ Davis, *supra* note 7, at 2 n.4.

⁵¹ *Id.* at 3.

parties—e.g. residents, leaseholders, the larger community—and builds in a kind of arbiter within a third category. CLT boards that are *unelected* are nearly always drawn from a larger neighborhood organization whose directors *are* elected or include nested organizations (as in design principle 8) that have elected governance, as with housing cooperatives and mutual housing associations.⁵² The idea is to maintain democratic control over the land resource and to balance that control with mechanisms that would prevent opening the CPR to exploitation by outsiders like private developers or their agents, and that therefore would preserve the governance arrangements over the long term.

There are more than two hundred CLTs across the United States,⁵³ but most individual CLTs have fewer than fifty housing units under their control.⁵⁴ Many are rural, and even those that are urban often focus on leasing land to owners of single-family houses.⁵⁵ In New York City, two CLTs were formed in the 1980s and 1990s with a mission of keeping housing affordable: Cooper Square and Rehabilitation in Action to Improve Neighborhoods (“RAIN”) CLTs, both based in New York’s traditionally working-class but now gentrified Lower East Side neighborhood.⁵⁶ They have been doing so at different scales for decades.⁵⁷ Four CLTs formed to steward community gardens in the early 2000s.⁵⁸

⁵² *Id.* at 2-4.

⁵³ See MICHAEL ZONTA, CTR. FOR AM. PROGRESS, COMMUNITY LAND TRUSTS: A PROMISING TOOL FOR EXPANDING AND PRESERVING AFFORDABLE HOUSING 5 (2016), <https://perma.cc/V7CD-8CPB>.

⁵⁴ TOM ANGOTTI, COMMUNITY LAND TRUSTS AND LOW-INCOME MULTIFAMILY RENTAL HOUSING: THE CASE OF COOPER SQUARE, NEW YORK CITY 9 (2007), <https://perma.cc/9YMR-Q8JQ>.

⁵⁵ *Id.* at 1.

⁵⁶ ANGOTTI, *supra* note 54, at 5-7 (Cooper Square CLT); KRINSKY & HOVDE, *supra* note 49, at B-6, B-15 (1996) (Cooper Square and RAIN). Oksana Mironova, *The Value of Land: How Community Land Trusts Maintain Housing Affordability*, URB. OMNIBUS (Apr. 29, 2014), <https://perma.cc/R5BG-3RZ4> (discussing Rehabilitation in Action to Improve Neighborhoods (“RAIN”) CLT, which was also formed via residential efforts and organizers in the 1970s and 1980s).

⁵⁷ See, e.g., KRINSKY & HOVDE, *supra* note 49, at B-6, B-15.

⁵⁸ See Elissa Sampson, *A Flowering of Resistance: The Gardens of the East Village*, SIXTH STREET CENTER (Aug. 12, 2009), <https://perma.cc/KH8P-5NG2> (describing how the Manhattan Land Trust came to own gardens); *About Us*, BROOKLYN QUEENS LAND TRUST, <https://perma.cc/9L2P-Z5V2> (last visited July 26, 2019) (describing the history of the Brooklyn Queens Land Trust); *Five Local Gardens Working Together Towards The Same Green Mission = B.A.N.G.*, WARREN ST. MARKS COMMUNITY GARDEN, <https://perma.cc/K8D8-BSS7> (last visited July 26, 2019) (describing the Brooklyn Alliance of Neighborhood Gardens (“BANG”) land trust); *NYC Community Gardens Turned Over to Local Land Trusts*, THE TR. FOR PUB. LAND (June 28, 2011), <https://perma.cc/LHQ2-84G2> (describing the history of Manhattan Land Trust and Bronx Land Trust). In addition, the El Sol Brillante garden is owned

Today, the larger, more active, and more expansionist housing CLT, the Cooper Square CLT, owns the land under twenty-three buildings with over 600 apartments organized into a scatter-site mutual housing association (MHA) and cooperative, and is in the process of acquiring two more buildings.⁵⁹ The Cooper Square Committee is the Cooper Square CLT's and MHA's parent organization; the Committee was organized in 1959 to fight Robert Moses' urban renewal plans for the neighborhood. Cooperative residents elect the MHA board. The CLT board members appoint themselves and their replacements: one-third of the members of the CLT board are selected by the MHA and must be shareholders in the cooperative; the others are chosen via a traditional board search to represent the interests of the local community.

CLTs and MHAs gained some early traction in the late 1980s and early 1990s, as tenant cooperatives that had been formed by people inhabiting vacant tax-foreclosed housing ran into physical repair and governance problems, and as many of the tenant groups-turned-community-development-corporations began to realize that they had become the targeted "agency" or "landlord" to tenants for whom they used to fight.⁶⁰ Some community development corporations and cooperatives had never invested in the development of democratic accountability and stewardship mechanisms that might have fulfilled Ostrom's fourth, fifth, and sixth principles. Further, low-balled repair budgets in the initial development and handover from City ownership (design principle 2) meant that cash-strapped housing groups began to look for organizational forms that could provide economies of scale, democratic accountability mechanisms, and the corrective functions of stewardship. Yet, by the end of 1993, with the election of Rudolph Giuliani as mayor, and over the next twenty years as his two terms were followed by Michael Bloomberg's subsequent three terms, planned MHAs and CLTs were put on hold and generally withered on the vine.⁶¹ The City reoriented its redevelopment by stopping the rehabilitation of the housing supply by ceasing tax foreclosures entirely and

by a non-profit incorporated under the New York State Housing Development Fund Corporation law, which permits community management and stewardship. See *El Sol Brillante*, LIVING LOTS NYC, <https://perma.cc/AF8W-AYW2> (last visited July 26, 2019).

⁵⁹ Press Release, NYC Hous. Pres. & Dev., *Enterprise Awards New York City \$1.65 Million to Support the Formation and Expansion of Community Land Trusts* (July 19, 2017), <https://perma.cc/8TW4-ZAXV>.

⁶⁰ See Krinsky & Hovde, *supra* note 49, at 6-7 (detailing the history of CLTs and MHAs nationally and in New York City).

⁶¹ Although some of the ongoing Mutual Housing Associations and Community Land Trusts inventoried by Krinsky and Hovde in 1996 continued to develop housing, no new efforts in New York City were undertaken for twenty years, and several groups folded, after a flurry of organizational foundings in the late 1980s and early 1990s.

by overwhelmingly selecting for-profit developers of affordable housing, even when non-profit ones were willing and able to do the work.⁶²

In 2012, partially in anticipation of a promised new opening in housing policy, a coalition formed among homeless activists, economic justice advocates, housing developers and advocates for resident-controlled, affordable housing.⁶³ The New York City Community Land Initiative (NYCCLI)⁶⁴ coalition now has more than two dozen member groups.⁶⁵ Despite rhetoric that suggested that a new mayor in 2014 would bring support for a commoning of New York City, Bill de Blasio's mayoral administration has been, at best, lukewarm to NYCCLI's advocacy for CLTs, particularly for CLTs that develop and preserve housing for people who are poorer than those generally served by the City's "affordable" housing programs and most at risk from gentrification and the City's rezoning plans. Yet, in response to a funding opportunity created out of settlement dollars from a subprime lending lawsuit brought by the State Attorney General's office against a major banking institution, the City applied to be part of a short-term arrangement to support the development of CLTs.⁶⁶ It funded the seminar series for nine CLTs-in-formation, Cooper Square CLT's operations, and property acquisitions by two additional CLTs (one formed as a pilot project for NYCCLI in the East Harlem neighborhood, closely modeled on Cooper Square, and Interboro CLT, formed by several members of NYCCLI and allied groups to focus on using existing City programs to develop cooperatives and homeownership for moderate-income residents on a CLT spread across the city).⁶⁷

In June 2019, the City of New York dedicated its first ever funding for groups organizing to create and sustain CLTs.⁶⁸

⁶² See STEPHANIE SOSA, ASS'N FOR NEIGHBORHOOD & HOUS. DEV., *THE FOR-PROFITIZATION OF AFFORDABLE HOUSING DEVELOPMENT AND THE DE BLASIO PLAN 1* (2017), <https://perma.cc/4KJ3-CMDJ>.

⁶³ See Hillary Caldwell et al., *Learning a New Politics of Land and Housing in New York City*, ACME: INT'L J. FOR CRITICAL GEO. (forthcoming); Abigail Savitch-Lew, *The NYC Community Land Trust Movement Wants to Go Big*, CITY LIMITS (Jan. 8, 2018), <https://perma.cc/C6NA-9WME>.

⁶⁴ Pronounced "nicely."

⁶⁵ Savitch-Lew, *supra* note 63.

⁶⁶ See Oscar Perry Abello, *Momentum for NYC Community Land Trusts Gets \$1.65 Million Boost*, NEXT CITY (July 26, 2017), <https://perma.cc/TJ9M-UJVN>; see also Emma Whitford, *City Just Made Its Biggest Commitment Ever to a Radical Affordable Housing Model*, GOTHAMIST (Aug. 4, 2017, 1:23 PM), <https://perma.cc/26LW-XLHA>.

⁶⁷ Abello, *supra* note 66.

⁶⁸ Caroline Spivack, *Community Land Trusts Score Crucial Funds in City Budget*, CURBED N.Y. (June 18, 2019, 8:50AM), <https://perma.cc/25ZJ-VHNG>.

Among the CLTs that took part in the seminar series, and others in their infancy now,⁶⁹ there is a wide range of goals for their commoning efforts, from preservation and development of deeply affordable housing, to job-creation, gaining space for arts and health programming to environmental stewardship. Many do not yet have boards in place or formal legal status that would allow them to become owners of real property.⁷⁰ The different impeti for these discrete efforts range from being a grass-roots response to the destabilizing effects of capital influx into a specific neighborhood to a strategic decision by an existing organization with a housing development history to incorporate a CLT into its project portfolio. None, save Cooper Square, have control over land and housing at the time of this writing.⁷¹

B. *Parks Conservancies*

If CLTs are in their relative toddlerhood in New York City, conservancies are at least in late adolescence. The fiscal crisis of the 1970s was a turning point for NYC parks, just as it was for housing. In its aftermath, the City began to experiment with new ways of adhering to the austerity mantra of “doing more with less.” But it was equally true that the loss of city workers during the crisis revealed how parlous a condition the parks had fallen into. And the fact was that, after Robert Moses was replaced as parks commissioner by Mayor Robert F. Wagner, Jr. in 1960, the department’s management systems became unmoored.⁷²

Mayor Edward I. Koch’s parks commissioner, Gordon Davis, reconstituted a system of managers that had become autonomous in each of New York’s five boroughs and introduced several other management innovations.⁷³ Among them was to draw on a report done in 1976 by E.S. Savas, a proponent of privatization, and funded by the Central Park Community Fund, founded by liberal financier George Soros and conservative

⁶⁹ NYCCLI is also in contact with several that do not; one of the authors is also counsel to several seminar series member CLTs and several others that are emerging from grassroots efforts not recognized by HPD; the other author is on the curriculum development team for the series.

⁷⁰ Authors are involved in these efforts as counsel and advisors.

⁷¹ Interboro CLT and the East Harlem El Barrio CLT are approaching property acquisition. Abigail Savitch-Lew, *City Limits: City Dips Toe into Funding Community Land Trusts*, NEW ECON. PROJECT (July 19, 2017), <https://perma.cc/2DL6-ATXN>.

⁷² KRINSKY & SIMONET, *supra* note 4, at 136-39 (discussing two main park conservancy administrators’ recounting of the context into which they were hired). The centralized system for administering parks, which Moses put in place, did not work without a strong leader in the center. For twenty years, management suffered system-wide under Moses’ successors.

⁷³ *See id.* at 138-39; *see also* CENT. PARK CONSERVANCY, *CENTRAL PARK: A RESEARCH GUIDE* 15, 28 (2016), <https://perma.cc/6P2G-GCT8>.

investor and lawyer Richard Gilder.⁷⁴ Savas' report suggested that a philanthropic body be founded to steward Central Park, which would consolidate and expand volunteer and philanthropic efforts already directed to the park, and be run by a "Board of Guardians."⁷⁵ Davis shed the pretentious language but tapped an urban planner and biographer of Frederick Law Olmsted, Elizabeth Barlow (later Elizabeth Barlow Rogers), to become the "Administrator" of Central Park, who founded the Central Park Conservancy, selected its Board of Directors and systematized restoration operations in the park.⁷⁶ The Central Park Conservancy was founded in 1980, and it soon began to hire its own staff once the Parks Department allowed the unionized municipal workforce to diminish in the park.⁷⁷ As it did so, the Conservancy expanded the scope of its work, its branding, and its fundraising, so that by the time it got a contract to manage Central Park on its own in 1998, it effectively had been running the park for ten years, and had a workforce as large as the City's workforce in the park. By 2008, just ten years later, it would pay for seventy-five percent of the park's operations and employ nearly ninety percent of its workforce.⁷⁸

Around the same time that the Central Park Conservancy was founded, two other early conservancies were founded: Prospect Park Alliance and Bryant Park Restoration Corporation.⁷⁹

Davis hired Tupper Thomas, a liberal planner with experience in affordable housing, as the Administrator for Prospect Park.⁸⁰ Like Barlow, Thomas was brought onto the city payroll but also expected to launch a nonprofit that would support the park.⁸¹ In 1980 Brooklyn, Prospect Park

⁷⁴ KRINSKY & SIMONET, *supra* note 4, at 138; *see also* TED SMALLEY & ADAM STEPAN, COLUMBIA UNIV. SCH. OF INT'L AFFAIRS CASE CONSORTIUM, *Public-Private Partnerships for Green Space in NYC* 3 (2014), <https://perma.cc/G9ZA-D9NE> ("[F]inance mogul George Soros and investor Richard Gilder co-founded the Central Park Community Fund, which commissioned chemist-turned-urban administrator and Columbia University management Professor E.S. Savas to study the park and make recommendations.").

⁷⁵ *See generally* EMANUEL S. SAVAS & JOHN BENSON, *A STUDY OF CENTRAL PARK* 44-46 (1976). This language curiously echoed the British workhouse of the 19th century. The Poor Law of 1834 formed "unions"—administrative districts—for the governance of poverty relief, mainly done "indoors" through the work-house. The unions were overseen by "Boards of Guardians." Timothy Besley et al., *Understanding the Workhouse Test: Information and Poor Relief in Nineteenth-Century England* 4, 11 (Econ. Growth Ctr., Yale Univ., Working Paper No. 701, 1993).

⁷⁶ KRINSKY & SIMONET, *supra* note 4, at 138-39.

⁷⁷ *Id.* at 131-32, 136-47 (describing the formation of conservancies).

⁷⁸ *Id.* at 143-44, 155-56 (detailing the personnel shifts from 1980-2008 and the budgetary arrangements with the City).

⁷⁹ *Id.* at 131-32.

⁸⁰ *Id.* at 136-37.

⁸¹ *Id.* at 144-45 (stating that this would become the Prospect Park Alliance).

did not have neighbors with the wealth that Central Park's neighbors had at the time; so Thomas could rely less on philanthropy and on having her own staff, and more on city workers, involving local civic organizations, and creating extensive volunteer programs.⁸²

If Central Park Conservancy represented a philanthropic model for conservancies, and the Prospect Park Alliance a civic model, the third early conservancy, the Bryant Park Corporation, represented a more corporate model. Located next to the main branch of the New York Public Library in midtown Manhattan near Times Square, Bryant Park was decried as a "public urinal" by Mayor Koch in the late 1970s.⁸³ Under Koch, the City had no money to fix up the park nor to begin redeveloping the porn-theater-, prostitution-, and drug-dominated economy of Forty-Second Street. Instead, the Rockefeller Brothers Fund, a philanthropy of the Rockefeller family, which owned a great deal of west-Midtown property, agreed to provide funds to renovate the main branch of the public library abutting the park as long as the park itself was rehabilitated.⁸⁴ To protect its investments in both the library and the neighborhood as a whole, the Fund required the City to create and initially fund an organization, then called the Bryant Park Restoration Corporation (BPRC), to redevelop and manage the park.⁸⁵ The Koch administration accepted the terms of the Fund, and soon, the BPRC closed the park for three years while it underwent a total renovation (and through which it could close the park to drug dealers and users), then reopened the park in such a way as to promote its

⁸² KRINSKY & SIMONET, *supra* note 4, at 144-45. *See generally* BETSY BRADLEY ET AL., N.Y.C. LANDMARKS PRESERVATION COMMISSION: UPPER WEST SIDE/CENTRAL PARK WEST HISTORIC DISTRICT DESIGNATION REPORT VOLUME I (Marjorie Pearson & Elisa Urbanelli eds., 1990) (stating that the promises of increased property values made to the New Yorkers by the State in its efforts to get approval for the construction of Central Park in the 1850s had been realized).

⁸³ The main branch of the Public Library is now, tellingly, named the Schwarzman Building, after the CEO of the private equity "vulture" fund, Blackstone, which has made a mint in property speculation and evictions--a kind of post-crisis enclosure of what otherwise could have returned to the commons. David J. Madden, *Revisiting the End of Public Space: Assembling the Public in an Urban Park*, 9 CITY & COMMUNITY 187, 193-95 (2010).

⁸⁴ Gayle Berens, *Bryant Park, New York City*, in URBAN PARKS AND OPEN SPACE 46 (Washington DC: Urban Land Institute et al., 1998) ("[I]n the late seventies, when the Rockefeller Brothers Fund began to consider contributing money to renovate the library, the fund concluded that the library renovations should proceed only if the park's problems and derelict condition were dealt with."); *see also* ROBERT FITCH, THE ASSASSINATION OF NEW YORK 152-55 (1993) (detailing the role of the Rockefeller Brothers Fund in financing and influencing redevelopment of some New York City areas like 42nd Street).

⁸⁵ *See* Terry Benoit, *Bryant Park Before BPC*, MIDCITY NEWS (Mar. 7, 2012), <https://perma.cc/637A-PDM4>.

use in both the daytime and evening. It also allowed permanent concessions, including two full restaurants on the east side of the park and an increasing number of food kiosks and even an outdoor bar on the west side. It funds its operations largely through these concessions, as it was able, from the start, to keep the full amount of concession money in the park.⁸⁶

All three models have had a significant impact on the form of later conservancies.⁸⁷ But in the late 1980s, frustrated that only Central Park Conservancy had the private staff and recreational activities, Henry Stern, the parks commissioner during Mayor Koch's third term, formed the City Parks Foundation to raise money for activities in other parks.⁸⁸ Several years later, when parks commissioner again under Mayor Giuliani, Stern spearheaded the formation of Partnerships for Parks, a public-private partnership between the Parks Department and the City Parks Foundation—itsself set up by the *public* Parks Department—to organize volunteers in parks across the city and to encourage them to form “Friends of” groups to raise funds and coordinate volunteer activities in their local parks. Some of these groups would be encouraged to become conservancies themselves, and the city has hundreds of arrangements, some formal and contractual and others not, with “Friends of” groups and conservancies. They have no uniformity and, on some level, conservancies are as flexible an organizational form as CLTs.⁸⁹

Seen from the standpoint of Ostrom's design principles for governing the commons, however, conservancies and “Friends of” groups' distinctions from CLTs emerge. The obvious difference in dealing with land as parks and as housing means that fewer people are excluded from enjoying the goods in or of parks. To the extent that a specific person's enjoyment of a park is curtailed, it is usually due to cultural differences from other users or by the high price of amenities offered there as concessions.

But there are other differences, as well. The units appropriating goods are *not* as well defined in parks because parks are generators of private real-estate value, commercial income, and jobs. Perhaps ironically, this is because the *corporate* and *philanthropic* models of conservancies are best positioned to set rules of appropriation defined by the local ability to replenish the goods. “Friends of” groups and civic conservancies, on the other hand, which rely far more on partnering with municipal

⁸⁶ KRINSKY & SIMONET, *supra* note 4, at 142.

⁸⁷ See generally Honan, *supra* note 26 (describing the Brooklyn Bridge Park and Hudson River Park as progeny of the Central Park Conservancy, Bryan Park Conservancy, and Prospect Park Alliance).

⁸⁸ KRINSKY & SIMONET, *supra* note 4, at 159.

⁸⁹ See *id.* at 159-61.

workers, are much more at the mercy of larger budgeting processes that may not take their parks into consideration. It is also the case that there is nothing in *any* of the conservancy models that necessitates participation in governance—or even representation of different interests—on a board of directors.⁹⁰ Even so, the baseline protections offered by the public trust doctrine only work if the legislative process is able to adequately represent the interests of those impacted by the stewardship of parkland under conservancy care.⁹¹ Needless to say, there are no real mechanisms to ensure this representation.

Even “Friends of” groups may have self-selecting members and directors and yet, if chosen by the Partnerships for Parks as an official group, are under no obligation to expand their representativeness. Accordingly, too, there may not be *internal* mechanisms to punish violators or air grievances; instead, these tend to get deflected up to the Parks Department, addressed via police or security guard intervention, or simply handled by conservancy staff. On the other hand, parks conservancies may be seen as *nested within* a Parks-Department-coordinated governance *system* in which conservancies’ “minimal right to organize” (design principle 8) affords them specific and defined roles within the system, even while bringing some subsidiarity to the operations of the Department, i.e. the principle that those closest to the situation should have some say in its governance.⁹²

⁹⁰ *See id.*

⁹¹ *See, e.g.,* Cyane Gresham, *Improving Public Trust Protections of Municipal Parkland in New York*, 13 FORDHAM ENV'T'L L.J. 259, 284-86 (2002) (discussing the local community's ability to prevent legislation if legislative approval is required).

⁹² The relationship between parks development and accumulation by dispossession is nowhere clearer than in the legislative enactments that created New York's High Line, a private/public venture and relatively new park that is built atop an abandoned elevated railway. The City partially funded the creation of this amenity on the explicit understanding that it would lead to uses around the former rail for which property owners would pay more in taxes. New zoning encouraged the transfer of air rights from parcels under the line to those on the adjacent corridor, allowing high rise luxury development where it had previously prohibited. *See* DEP'T OF CITY PLANNING, WEST CHELSEA ZONING PROPOSAL 8 (2005), <https://perma.cc/JF2J-AJ57>. This new permission to build up put pressure on land owners in the corridor to sell to investors who could take advantage by building hotels and outrageously priced housing. *See* N.Y.C., N.Y., ZONING RESOL. § 98-33 (2017) (“Transfer of Development Rights to the High Line Transfer Corridor.”). Displacing the low-rise tenements and businesses that stood on the lots in the corridor at the time of the rezoning was part of the park-creation plan. In other words, as Honan explains, “The Highline . . . has helped to promote some of the most rapid gentrification in the City's recent history. The Highline has been attributed to increasing the property values in the neighborhood by 103 percent.” Honan, *supra* note 28, at 112 (citations omitted). The park itself is operated by the Friends of the High Line, a not-for-profit organization that relies heavily on contributions from the real estate concerns that own the properties along its edges, the same properties that have their values driven up

III. PROBLEMS OF COMMONING BY CLT OR CONSERVANCY

The historical enclosure of the commons that serves as a departure for much of commons scholarship are physical places: pastures in the centers of English towns and woodlands at the towns' peripheries that landless peasants relied upon as crucial places to grow food for their families, to collect firewood, and to graze any livestock that they owned for meat and milk.⁹³ The enclosure of those commons was done quite literally, by evicting the peasants and fencing their land to divide it and facilitate treating formerly commonly-accessible sites as private property. In the context of the city as commons, enclosure of land is the privatization of resources that have been, or should be, publicly accessible. When applied to land-based resources (homes, parks, gardens, farms), this privatization is enclosure both literally (fences, eviction) and by analogy (the capture of publicly-created value by private actors who can then trade it as a commodity).⁹⁴

A CLT's ambition to keep acquiring property in a given area—even when largely unfulfilled—is a way to limit the effects of community development's basic contradiction in the wake of the City's disinvestment and abandonment of its property and related services in the 1970s and 1980s. This contradiction was that, to the extent that groups rooted in low-income communities could attract government and private funds to rehabilitate housing and generally make their neighborhoods better and safer

by proximity to the High Line. Lisa W. Foderaro, *Record \$20 Million Gift to Help Finish the High Line Park*, N.Y. TIMES (Oct. 26, 2011), <https://perma.cc/KH4P-5EYH>. Further evidence coupled improvement of the park with the increased monetary value of nearby property: the new zoning includes an “improvement bonus” of bulk that would otherwise be prohibited, allowing property owners who pay for elevator access, restrooms, small plazas, and structural repair and remediation of the High Line open space, or stairs up to the High Line to then build larger buildings full of luxury units that can be priced to reflect these nearby amenities. See N.Y.C., N.Y., ZONING RESOL. §§ 98-25, 98-70, Appendix E (2017) (outlining the “High Line Improvement Bonus” and “Special Regulations for Zoning Lots Utilizing the High Line Improvement Bonus and Located Partially Within Subareas D, E, G or I”). Even the founders of Friends of the High Line recognize that the close coupling of real estate interests and park development has not been a boon for low-income neighbors and businesses that pre-existed the transformation. See, e.g., Eleanor Gibson, *High Line Creators Launch Website to Advise on Avoiding Gentrification*, DEZEEN (June 22, 2017), <https://perma.cc/C5Q9-5WAY> (“[Robert] Hammond, who co-founded the High Line in 1999 with Joshua David, want[ed] to help others avoid the gentrification and inequality that occurred in its surrounding Chelsea neighbourhood as a result.”); see also Mirna Nashed, *The Gentrification of West Chelsea*, NYCROPOLIS (May 3, 2018), <https://perma.cc/HJ4Z-TNC4>.

⁹³ 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 510 (Progress Publishers, Samuel Moore et al. trans., 1890) (1867); see also E.P. THOMPSON, THE MAKING OF THE ENGLISH WORKING CLASS 198 (Vintage Books) (1964).

⁹⁴ See Foster & Iaione, *supra* note 1, at 324-25.

for their residents, they risked demonstrating to investors that the area was again safe for investment. This put the neighborhood—and all of their efforts—at risk of gentrification and displacement and allowed new investors to enclose the value of the improvements they made.

In fact, CLTs remove land from the speculative market to preserve the value of whatever public investment initially goes into its acquisition and improvement and to prevent others from appropriating it.⁹⁵ Thus, a CLT translates initial government subsidies into something comparable to a long-term CPR. But, a CLT can only succeed in doing so only to the extent that it can expand the governance of neighboring land as a CPR and enforce clear rules about withdrawal and membership to an ever-growing geographic area.

The requirement of expansion, in turn, puts CLTs in a difficult position because it requires the City to change the course of its land policies in broader ways. As Harry DeRienzo, a longtime housing advocate and developer observed then, by 1994 nonprofit housing organizations had begun to “manage the crisis” for the City but were not well positioned to push the city to expand low-income housing more generally.⁹⁶ Indeed, as the City under Mayors Giuliani and Bloomberg reoriented its housing policy toward for-profit developers, the nonprofit housing developers and low-income cooperatives found themselves to have been a historically transitional organizational mediation of the neoliberalizing state.

Further, CLTs may be compelled to agree to commodification of neighborhood resources in order to secure some land to common. The Cooper Square Committee, for example, agreed to let the City sell a large lot in the neighborhood, instead of transferring it as an additional development site to the CLT and MHA, as a way of capitalizing the already-built housing to which the CLT and MHA were taking title from the City so that it could be used as housing for very low income residents.⁹⁷ These buildings were in need of expensive repairs—due to their disinvestment and neglect by the City itself—and the sale brought in funds that the City earmarked to enable the repairs to happen.⁹⁸

Finally, CLTs have to figure out several other problems of commoning. For example, *before* they have land, to whom must they be accountable? Who are the users, in Ostrom’s terms, if acquisition of actual land that can actually be used is still in the organization’s future? Or who can

⁹⁵ See, e.g., JOHN EMMEUS DAVIS, NAT’L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE RESTRICTED, OWNER -OCCUPIED HOUSING 7-8 (2006), <https://perma.cc/M6YV-ZR9X>.

⁹⁶ See Harold DeRienzo, *Managing the Crisis*, CITY LIMITS, Dec. 1994, at 25.

⁹⁷ See, e.g., Oser, *supra* note 42, at R5.

⁹⁸ See *id.*

be a member of the CLT, with control of the corporation's governance, in nonprofit law terms?⁹⁹ Or, how does the CLT think about the tradeoff between paying decent construction wages and the affordability of the housing it stewards?

Conservancies, by contrast, never take ownership of the land; they *manage it*, often through an exclusive contract with the City.¹⁰⁰ This, combined with their not having to have any mechanism of accountability to parks users beyond the quality of the service they provide,¹⁰¹ has pushed at least the corporate and philanthropic conservancies toward an embrace of independence. Interestingly, such independence means something quite different for parks conservancies and CLTs. Instead of independence for conservancies, meaning that the direct users of the CPR gain greater control over the resource (as it does for a CLT), independence can lead to the abandonment of the conservancy's role as a steward of the *public* trust. Even though the City, as the land's owner, is still the ultimate policy-setter, conservancy independence provides cover to the City's practices that limit even the public's recreational enjoyment of land, as well as uniform and equitable access to the other valuable goods which parks provide. The *providers* of the funds that enable the renewal of parks after the long period of disinvestment, whether philanthropists or real-estate owners who pay into a business improvement district (as is the case for Bryant Park) become the *de facto* stewards of the public trust, but do so in ways that clearly increase their power *over* the public. Their resources give them outsized power to determine the uses of, and labor practices in, public park land through funding and participation in conservancies. If one abandons all hope of a functioning democracy as a means of distributing the assets of the city as commons, such a management paradigm starts to appear quite attractive.¹⁰² While the New York City of 2019 is a distorted democracy, leaning in this and other ways toward plutocracy, representative government does still operate here.

⁹⁹ See NOT-FOR-PROFIT CORP. LAW § 601 (McKinney 2019).

¹⁰⁰ KRINSKY & SIMONET, *supra* note 4, at 147-48 (stating this distinction is important, too, to the defenders of conservancies, as it mitigates critics' claims that public goods have been privatized).

¹⁰¹ *Id.* at 178-84. Even here, the City would be unlikely to take over management of a park from a contracted conservancy even when maintenance lags in quality, in part because the City would need staff to manage it.

¹⁰² See, e.g., Michael Murray, *Private Management of Public Spaces: Nonprofit Organizations and Urban Parks*, 34 HARV. ENVTL. L. REV. 179, 199 (2010) (NPOs assume sole physical responsibility for the public space, becoming ultimately answerable for the success or failure of its management . . . "This clear line of responsibility contrasts strongly with the diffuse accountability within governmental organizations").

To get a sense of the way in which this distortion has played out, we can look at a proposal made in 2013 by then-State Senator Daniel Squadron. Squadron drafted a bill that would require well-financed conservancies to share 20 percent of their revenue to be placed in a common pool to help other parks with less capacity to raise funds.¹⁰³ Large conservancies opposed the bill vociferously.¹⁰⁴ They argued, variously, that the amount of sharing required would have real operational consequences for the rich conservancies, but could not be spread around in such a way that they would have commensurate operational benefits for the poorer ones, and that the bill would erect a significant barrier for any conservancy's fundraising efforts and staffing.¹⁰⁵ Former Parks Commissioner Adrian Benepe spoke against the proposal before Mayor de Blasio took office:

If we said to the Brooklyn Museum, "You know you've done a great job fund-raising, but you know, we're gonna take 10 or 20 percent of your money and reallocate it to the Queens Museum, because they haven't done quite as good of a job of fund-raising," or "Jennifer Raab has done an extraordinary job raising money for Hunter College, and you know what, let's take some of that \$40 million she brought in this year and reallocate to the Bronx Community College because they need the money more . . ." That's not the way democracy works. They're both public institutions. One raises money, the other doesn't as much.¹⁰⁶

Further, while CLTs may balk at their lessees' hiring union or prevailing-wage labor rate—as cost of a project done with fairly paid labor can push against the goal of deep affordability—in principle and sometimes in fact, they can embrace paying higher wages for construction in recognition of its importance in other ways, to the project of commoning. Corporate and philanthropic conservancies, however, have actively resisted organizing among their workers, to dodge real accountability to

¹⁰³ KRINSKY & SIMONET, *supra* note 4, at 183.

¹⁰⁴ *Id.* at 183-84.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 186. On the other hand, he allowed that, "if you become dependent on that revenue, then you start to exploit the parks as much as you can for that revenue. I think the risk is that if a lot of our budget is dependent on how much revenue we bring in, that will start to turn the parks into a cash cow. We have a little bit of that now. We have some parks where revenue stays in the parks. As a long-term model it's hard to say. Is it a good model or a bad model? I suppose that depends on who's in charge, who's running things, and how much oversight there is." *Id.* at 245; see Dan Rosenblum, *Is the Revenue-Generating Park a Good Thing? Commissioner Benepe Says It "Depends on Who's in Charge,"* POLITICO (Aug. 11, 2011, 5:28 PM), <https://perma.cc/UFD3-DFF9>.

their labor force.¹⁰⁷ In fact, one of the Central Park Conservancy management's stories about why the Conservancy hired its own staff was that union workers refused to do work outside of their union job descriptions without further compensation when the fish in a large pond in the park died suddenly *en masse* and needed to be removed.¹⁰⁸ Similarly, Elizabeth Barlow Rogers, Central Park Conservancy's founding president, spoke of calling the conservancy's first non-managerial staff "interns" in order to skirt union objections.¹⁰⁹

By way of partial contrast, civic conservancies such as the Prospect Park Alliance and many of the "Friends of" groups that it had a significant role in training, are more embedded in the complex systems of the Parks Department and rely more on public workers.¹¹⁰ Even so, they rely heavily on volunteers, whose work itself both accrues to the value of the surrounding land and buildings, which goes up with increased park maintenance *and* constitutes, in some ways, a *use* of the park resource, as well. As feminist sociologists have noted in other contexts, like several other forms of "free labor," volunteer work creates value that others may partially appropriate, but achieves this by calling work something other than work: civic engagement, giving back to the community, etc.¹¹¹ This is further complicated by the fact that, in Prospect Park, city workers might work under the supervision of Prospect Park Alliance staff.¹¹² Thus, clearly classifying the constituencies with interest in the park as a CPR gets more difficult.

Yet, at the same time, civic conservancies and "Friends of" groups are more likely to connect with other local, civil society organizations. Tupper Thomas, who went from being Prospect Park's City Administrator to the founding president of the Prospect Park Alliance, hired an anthropologist to help the group identify the organizations in the communities surrounding the park and inviting them to serve on a policy-making "community committee," which still meets twenty years after it was organized.¹¹³ Thomas's emphasis on organizing for community support of Prospect Park became a model for the Partnerships for Parks' efforts to organize more "Friends of" groups and conservancies around the city.

¹⁰⁷ KRINSKY & SIMONET, *supra* note 4, at 143-44, 150-51.

¹⁰⁸ *Id.* at 144.

¹⁰⁹ *Id.* at 143.

¹¹⁰ *Id.* at 145-46.

¹¹¹ See generally *id.* at ch. 7 (contrasting four types of free labor, including volunteers, workfare and JTP workers, and out-of-title work to demonstrate how the Parks Department and nonprofits use this vocabulary to manage and justify their use of free labor).

¹¹² KRINSKY & SIMONET, *supra* note 4, at 146.

¹¹³ *Id.* at 145-46, 270 n.11.

Nevertheless, it is still important that not even the civic conservancies nor the “Friends of” groups treat the parks *as* part of a larger city or community beyond parks, wherein, for example, the value added to surrounding real estate could be pooled and shared according to rules that are collectively devised by the *various* interests in the CPR.¹¹⁴ At the same time, these proposals are all limited to funding parks, not to ensuring, for example, that neighboring residents and businesses can share enough of the increase in value so as to be able to continue to enjoy the parks equitably.¹¹⁵

Of course, “philanthropic,” “corporate” and “civic” are rough types; no conservancy completely embodies one or the other. But the typology is useful in drawing out differences both among the conservancies and their “commoning” or “anti-commoning” approaches to parks stewardship, and between them and nascent NYC CLTs’ approaches and problems in commoning. The table below summarizes some of the ways in which the problems of governance of the commons characterizes CLTs and the three types of conservancy. Understanding the types allows us to forecast possible futures for the CLTs that we are working with and observing: we can see clearly from the path that conservancies have followed that who is at the table at the start, who creates the menu and what motivations animate the endeavor go a great distance in determining how well the entity formed will do as a steward of the commons. We can at least attempt to use this history as a guide to the possible futures of CLTs.

¹¹⁴ There have been several ideas close to this floated in the last decade. *See, e.g.*, NEW YORKERS FOR PARKS, SUPPORTING OUR PARKS: A GUIDE TO ALTERNATIVE REVENUE STRATEGIES 1-2, 14 (2010), <https://perma.cc/KTH8-R8LE> (suggesting the possibility of funding parks with a tax on the incremental benefit to property owners who live close to parks). This is also fairly close to “Parks Improvement Districts” based on the Business Improvement District or BID model. *Id.* at 14. Battery Park works through this model to some degree. *Id.*

¹¹⁵ *Id.* at 6, 14, 23.

<i>Commons Design Principle</i>	<i>Community Land Trust</i>	<i>Parks Conservancy</i>		
		<i>philanthropic</i>	<i>corporate</i>	<i>civic</i>
(1) common pool resource (CPR) is clearly defined	yes - in an expansionist view, the resource is the neighborhood itself that falls into the CLT catchment area; in the limited view of City agencies, the resource is the specific properties under CLT ownership	yes but no - the resource is mis-defined as ending at the boundary of the park	yes but no - the resource is mis-defined as ending at the boundary of the park	yes but no - the resource is mis-defined as ending at the boundary of the park
(1 cont'd) users with the right to appropriate CPR units are clearly defined	no - potential residents of CLT housing or renters of commercial space are infinite and undefined; yes - those with current leases are known	yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown	yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown	yes - the property owners who get benefit in the form of increased value are known and finite no - who will visit the park is unknown
(2) rules of appropriation of CPR units defined according to the ability to replenish the common pool	yes - e.g. Cooper Square uses a lottery system for distributing scarce housing units	no	no	no

<i>Commons Design Principle</i>	<i>Community Land Trust</i>	<i>Parks Conservancy</i>		
		<i>philanthropic</i>	<i>corporate</i>	<i>civic</i>
(3) modifiable governance arrangements	yes	yes but very difficult to change	yes but very difficult to change	yes
(3 cont'd) people with a right to withdraw from the pool have a say over the governance arrangements and their modification	yes - residents have right to select some board members of formal organization	not usually - unless park users or nearby property holders secure seats on board	not usually - unless park users or nearby property holders secure seats on board	sometimes - park users and neighbors are likely to have seats on board
(4) collectively accountable monitoring of the system	sometimes - this is up to how the founders set up the structure of the organization	no	no	sometimes - this is entirely up to the discretion of the actual people who have self-selected to be the stewards of a public space
(5) system of escalating sanctions for violating the rules that get more severe with each violation or with the seriousness of the violation	no sanctions for enclosure of common wealth; yes attempts to violate the ground lease can lead to loss of the lease	no sanctions for enclosure of common wealth	no sanctions for enclosure of common wealth	no sanctions for enclosure of common wealth

<i>Commons Design Principle</i>	<i>Community Land Trust</i>	<i>Parks Conservancy</i>		
		<i>philanthropic</i>	<i>corporate</i>	<i>civic</i>
(6) easy-to-access conflict resolution mechanisms	maybe - this is up to how the founders set up the structure of the organization	no	no	maybe - this is entirely up to the discretion of the actual people who have self-selected to be the stewards of a public space
(7) users have a "minimal right to organize" a body to govern the CPR without interference from a government entity	partly - CLT efforts can organize independently and could possibly get land independently, but city agencies are highly involved in current CLT efforts in NYC through land disposition and subsidy programs	no - users are not the ones organizing	no - users are not the ones organizing	no - city agencies directly help to create "Friends of" groups and conservancies and continue to own the land and grant access
(8) For more complex systems of common pool resources, these functions exist throughout a nested set of organizations	yes	no	no	sometimes - they certainly can, but this is, again, up to the participants

IV. DIVERGENT PATHS, CONTESTED FUTURES

In New York City, parks conservancies and CLTs, divergent as they are, share roots in city-dwellers' response to the fiscal and social collapse of the city in the mid-1970s, when job-loss, federal disinvestment, and local land-use policy combined to push the City to near-bankruptcy. The late Robert Fitch argued that a significant cause of New York City's industrial decline in the 1960s was due to machinations by the Rockefeller family, whose early 20th-century speculative bets on real estate would otherwise have gone bad.¹¹⁶ With David, one Rockefeller brother as the chairman of Chase Manhattan Bank, and Nelson, another brother, in the Governor's mansion in Albany, these socially liberal Republicans oversaw the decimation of New York City's thriving port (they had long advocated moving port functions to Newark and Elizabeth, New Jersey) and with it, its diverse and small-scale manufacturing base.¹¹⁷ As the Rockefellers and other real-estate owners pushed out manufacturing uses in order to make way for more lucrative commercial and residential space—their deep pockets allowing them to do so with long-term strategies—the City's loss of more than half a million jobs between 1965 and 1975 also meant that its population was shrinking, its tax base was shrinking, and its increasingly poor population needed more public services.¹¹⁸ This, and the combination of the Oil Crisis in 1973 and President Nixon's "new federalism," pushed the City to spend well beyond its means and into its epochal fiscal crisis. Under the new, banker-led neoliberal regime in Washington, New York became more dependent on owners of real estate as its diversified tax-base collapsed into a finance, insurance, and real-estate (so-called "FIRE" sector) monoculture.¹¹⁹

The range of efforts that we describe above emerged out of this context. Until recently, the language of the "commons" and "commoning" was, well, uncommon to describe land stewardship projects led by regular citizens and by local state-civil society hybrid efforts. CLTs and other nonprofit housing models served the dual task of helping to rehabilitate some of the housing that had been decimated by neglect and ensuring that

¹¹⁶ See generally FITCH, *supra* note 84.

¹¹⁷ *Id.*; see also JOSHUA B. FREEMAN, WORKING-CLASS NEW YORK: LIFE AND LABOR SINCE 1945 11 (2000) (calling New York City's early postwar economy a "non-Fordist city in the age of Ford" and considering New York City had a flexible manufacturing base characterized by significant innovation and small firm size, in contrast to the massive factories of the Rust Belt).

¹¹⁸ WILLIAM K. TABB, THE LONG DEFAULT: NEW YORK CITY AND THE URBAN FISCAL CRISIS 43-45, 75-80 (1982).

¹¹⁹ See generally PHILLIPS-FEIN, *supra* note 4. See also generally KIM MOODY, FROM WELFARE STATE TO REAL ESTATE: REGIME CHANGE IN NEW YORK CITY, 1974 TO THE PRESENT (2007).

the new or existing low-income tenants would not be able to reap a private windfall from the application of public funds toward their housing. Here, there is some recognition of *what was lost and then rehabilitated* as some kind of common pool resource that needs sustaining and renewal into the future. CLTs, of all the organizational forms applied in this arena, make this most explicit.

Similarly, conservancies and “Friends of” parks groups *also* recognize the need for the ongoing renewal and sustenance of recreational spaces that had similarly been decimated by neglect—and, in the case of community gardens, often *generated* by this neglect as buildings were torn down after falling victim to arson or structural abandonment. All of these groups, in their diverse ways, seek to manage publicly owned resources in ways that ensure their openness to a wide range of users, even if this means closing off the spaces, selectively, from time to time, or giving some space to vendors whose prices are hardly in line with a “general” public’s ability to pay to enjoy all the park’s amenities.

The conservancies’ compromises, however, differ in several important ways from those of CLTs, such as Cooper Square’s, noted above. First, many conservancies have *not* been formed in a context of neglect, but in the context of a newly privatizing and corporate-oriented local state. It is not that the City *cannot* pay for park maintenance and improvement, but rather that successive administrations have found that park stewardship can be farmed out to civil society, on one hand, and that the residual public staff can be largely supplanted with contingent and precarious workers, on the other. Second, and closely related, the City has found that many Manhattan and Brooklyn parks can be maintained with significant funds generated in their local areas from businesses and private citizens. Aside from the enormous gifts that it sometimes receives, such as the \$100 million gift from private-equity mogul John Paulson in 2012,¹²⁰ the Central Park Conservancy has over 40,000 donors, many making small donations.¹²¹ Neighbors of conservancy-run parks who own property reap private rewards through the premiums—running into the hundreds of millions of dollars in aggregate—on their real estate values (while renters get pushed further away from such parks because they get

¹²⁰ KRINSKY & SIMONET, *supra* note 4, at 140; Lisa W. Foderaro, *A \$100 Million Thank-You for a Lifetime’s Central Park Memories*, N.Y. TIMES (Oct. 23, 2012), <https://perma.cc/ATQ5-JXYC>.

¹²¹ KRINSKY & SIMONET, *supra* note 4, at 140; *see also* Jason Sheftell, *Central Park: The World’s Greatest Real Estate Engine*, N.Y. DAILY NEWS (June 3, 2010), <https://perma.cc/9D6G-X6K8>.

priced out of the area).¹²² The City, in turn, reaps tax benefits both from the commercial activity prompted by parks and from the significant increment in raised real-estate values. Indeed, as New Yorkers For Parks, a parks advocacy organization, argued, “smart parks investment pays its way.”¹²³ Third, and most obviously, civil-society-based parks stewardship rarely contains specific provisions for the commoning of land *outside* of the parks, and indeed partly relies on the *intensified commodification of this land*.¹²⁴

By ignoring the impact that management of the open space has outside its physical edge, and treating *parks only* as “the commons”—to the extent that they do—conservancies’ commoning projects hypostatize the boundaries of the park in ways that work against larger projects of urban commoning in the wake of neoliberal enclosure. In so doing, they threaten to deepen the dynamic of enclosure itself.

The compromises facing both conservancies and CLTs suggest that the language of commoning is much as Marx describes religious suffering: it is, he wrote, “*an expression of real suffering and a protest against real suffering*.”¹²⁵ Commoning strategies are, similarly, both an expression of contemporary neoliberalizing urban life and a protest against it. But the form and content of the protest matters lest it become a simple amplification of the conditions themselves.

We conclude by noting that, in the Partnerships for Parks, the City created a public-private partnership with a private entity that it set up itself. It did so in order to put resources behind community organizing and education around what *could be described* as commoning strategies for local “Friends of” groups, but that can *also* be described as an indirect way of promoting private accumulation as a way of paying for a once-publicly managed resource. By contrast, the City has supported the formation of a CLT “learning exchange”—with far less money and none for

¹²² The former administrator of Prospect Park, Tupper Thomas, suggested that the communities of color that used to be prevalent on the park’s east side have largely been pushed further east, and laments that people in poor communities—with some reason—suspect that parks improvements are part of a plan to gentrify their neighborhoods and displace them. See KRINSKY & SIMONET, *supra* note 4, at 257.

¹²³ See generally NEW YORKERS FOR PARKS, ANALYSIS OF SECONDARY ECONOMIC IMPACTS NEW YORK CITY PARKS CAPITAL EXPENDITURES (2002), <https://perma.cc/ZJW3-GXHN> (researching the secondary economic impacts of investment in parks and finding that strategic capital investment results in positive economic gains for neighborhoods, investors, and the City).

¹²⁴ See generally *id.*

¹²⁵ JOHN VAN DER HOEVEN, KARL MARX: THE ROOTS OF HIS THOUGHT 35 (1976) (alterations in original) (quoting KARL MARX, CONTRIBUTION TO THE CRITIQUE OF HEGEL’S PHILOSOPHY OF RIGHT (1844), reprinted in KARL MARX: EARLY WRITINGS (T.B. Bottomore & Maximilien Rubel eds., T.B. Bottomore trans., 1963)).

organizers—only through money generated through a legal settlement between an investment bank and the State Attorney General’s office. In many respects, the imbalance between government support for the two efforts is unsurprising; governments rely on private accumulation, and local governments rely specifically on real estate taxes, and CLTs push against each by both removing land from the tax rolls and trying to depress local land values through expanded presence in areas otherwise ripe for speculation and reinvestment. On the other hand, governments also have to legitimize their policies and to respond to pressure from the governed. We have not yet abandoned the promise or the reality of a democratic urbanity.

By pushing the commoning efforts of CLTs—and also devising ways to re-common conservancies—advocates for an urban commons can better show where the battle lines are drawn, who is included among those with a say over common pool resources, where the accountability lies, and how the resources themselves are embedded in the complex organizations of the state.

**STILL SEPARATE, STILL UNEQUAL:
LITIGATION AS A TOOL TO ADDRESS NEW
YORK CITY’S SEGREGATED PUBLIC SCHOOLS**

Andrea Alajbegović[†]

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INTRODUCTION

It is a false narrative that school segregation only exists in southern states.¹ In fact, New York City (“NYC”) is one of the most segregated school districts in America.² NYC public schools have failed—and still fail—to provide Black and Latinx³ students with the same resources and opportunities as white students.⁴ These racial disparities have persisted in NYC for as long as the South has dealt with federally mandated desegregation.⁵ In the late 1950s, while the federal government tried to enforce the Supreme Court’s *Brown v. Board of Education*⁶ decision in Southern schools, white families in NYC actively fought against a citywide integration plan.⁷

¹ E.g., Rebecca Klein, *The South Isn’t the Reason Schools Are Still Segregated*, *New York Is*, HUFFPOST (Apr. 1, 2016, 5:05 AM), <https://perma.cc/MK8X-AF5U>.

² JOHN KUCSERA & GARY ORFIELD, UCLA CIVIL RIGHTS PROJECT, *NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE*, at vi (2014), <https://perma.cc/6U37-BEVB>.

³ This Note uses the term “Latinx” to encompass folks who have been described as Latino and/or Hispanic as a way to recognize both a gender-neutral and an anti-Spanish colonialist depiction of people who are from Latin America and/or speak Spanish, unless a source specifically uses a different term. For more information, see Yara Simón, *Hispanic vs. Latino vs. Latinx: A Brief History of How These Words Originated*, REMEZCLA: CULTURE (Sept. 14, 2018, 2:27 PM), <https://perma.cc/AA4G-GYMU> and Terry Blas, *I’m Latino. I’m Hispanic. And They’re Different, So I Drew a Comic to Explain.*, VOX, <https://perma.cc/J8GC-QWR6> (last updated Aug. 12, 2016, 8:42 AM).

⁴ KUCSERA, *supra* note 2, at 24, 29.

⁵ See MICHAEL F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION 29-30* (2016); Klein, *supra* note 1.

⁶ *Brown v. Board of Education* was a landmark decision in which the Supreme Court ruled that racial segregation in public schools was unconstitutional. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)). However, schools did not integrate immediately after this decision. Instead, it took legislative interventions from Congress to galvanize the process. See Ian Millhiser, ‘*Brown v. Board of Education*’ Didn’t End Segregation, Big Government Did, *NATION* (May 14, 2014), <https://perma.cc/V3G2-3BMU> (explaining that Southern lawyers used the Civil Rights Act of 1964 to challenge schools that refused to integrate).

⁷ See, e.g., DELMONT, *supra* note 5, at 32-34; Nikole Hannah-Jones, *Choosing a School for My Daughter in a Segregated City*, *N.Y. TIMES MAG.* (June 9, 2016), <https://perma.cc/6A4D-T362>; Yasmeen Khan, *Demand for School Integration Leads to Massive 1964 Boycott — in New York City*, *WNYC* (Feb. 3, 2016), <https://perma.cc/W7CJ-DV4W>; Christina Veiga, *New York City Students Share Why They’re Fighting for School Integration*, *CHALKBEAT* (Dec. 26, 2017), <https://perma.cc/3SFX-ZRP6>. See generally Southern Manifesto, 102 CONG. REC. 4459 (1956). The NYC Board of Education formed the Commission on Integration in 1955 to create an integration plan in compliance with the Supreme Court’s order in *Brown I*. Khan, *supra*. The integration plan sought to rezone a small percentage of schools to prevent overcrowding and to improve the quality of education for predominantly Black and Latinx schools. *Id.*

School segregation has worsened in the last twenty years.⁸ Schools have resegregated in the South and have stayed segregated in the North.⁹ In fact, the number of segregated schools nationwide nearly doubled between 1996 and 2016.¹⁰ As of 2014, more than one-third of Black students in the South attend an “intensely segregated” (ninety to one hundred percent minority) school.¹¹ The most segregated school systems, however, are in the North. In 2010, close to seventy-five percent of Black students attended a school in NYC where less than ten percent of their peers were white.¹² Northern urban districts, which never officially enforced school segregation, have maintained dual systems of education through decades of redlining and strategic and exclusionary zoning.¹³ School districts in NYC, Newark, Philadelphia, and Washington D.C. are made up of a majority of minority and low-income students and are heavily segregated.¹⁴ Half of NYC’s schools are at least ninety percent Black or Latinx,¹⁵ while Black and Latinx students comprise only about sixty-seven percent of the City’s public school population.¹⁶

⁸ See Will Stancil, *School Segregation Is Not a Myth*, ATLANTIC (Mar. 14, 2018), <https://perma.cc/AK6C-CD6S>. See generally GARY ORFIELD ET AL., UCLA CIVIL RIGHTS PROJECT, BROWN AT 60: GREAT PROGRESS, A LONG RETREAT AND AN UNCERTAIN FUTURE (2014), <https://perma.cc/679R-L7KV> (providing a statistical analysis to demonstrate that segregation has substantially increased in school districts and offering recommendations to adhere to the promise articulated in *Brown*).

⁹ See, e.g., ERICA FRANKENBERG ET AL., UCLA CIVIL RIGHTS PROJECT & CTR. FOR EDUC. & CIVIL RIGHTS, SOUTHERN SCHOOLS: MORE THAN A HALF-CENTURY AFTER THE CIVIL RIGHTS REVOLUTION 7-8 (2017), <https://perma.cc/T9XZ-A89G>; Mimi Kirk, *Southern Schools Are Resegregating*, CITYLAB (May 31, 2017), <https://perma.cc/ZA9A-CCT3>.

¹⁰ Stancil, *supra* note 8 (defining a segregated school as a school where less than forty percent of students are white); see also U.S. GOV’T ACCOUNTABILITY OFFICE, K-12 EDUCATION: BETTER USE OF INFORMATION COULD HELP AGENCIES IDENTIFY DISPARITIES AND ADDRESS RACIAL DISCRIMINATION (2016), <https://perma.cc/CVT8-YAJW> (“From school years 2000-01 to 2013-14 . . . the percentage of all K-12 public schools that had high percentages of poor and Black or Hispanic students grew from nine to sixteen percent . . .”).

¹¹ ERICA FRANKENBERG ET AL., *supra* note 9, at 8.

¹² See JOHN KUCSERA, UCLA CIVIL RIGHTS PROJECT, *New York Metro, Summary in NEW YORK STATE’S EXTREME SCHOOL SEGREGATION: INEQUALITY, INACTION AND A DAMAGED FUTURE* 3 (2014), <https://perma.cc/8VXM-CUES>.

¹³ Emily Lieb, *How Segregated Schools Built Segregated Cities*, CITYLAB (Feb. 2, 2017), <https://perma.cc/94PD-P9FC>; Abel McDaniels, *A New Path for School Integration*, CTR. FOR AM. PROGRESS (Dec. 19, 2017 9:01 AM), <https://perma.cc/8352-5EHE>.

¹⁴ Alvin Chang, *We Can Draw School Zones to Make Classrooms Less Segregated. This Is How Well Your District Does.*, VOX, <https://perma.cc/WD58-FHHE> (last updated Aug. 27, 2018, 8:46 AM) (providing graphs that illustrate demographics of school attendance zones in major cities).

¹⁵ Yasmeen Khan & Beth Fertig, *School Integration 2.0: How Could New York City Do It Better?*, WNYC (June 9, 2016), <https://perma.cc/U6GQ-EQJL>.

¹⁶ NICOLE MADER & ANA CARLA SANT’ANNA COSTA, THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, NO HEAVY LIFTING REQUIRED: NEW YORK CITY’S UNAMBITIOUS SCHOOL

School segregation perpetuates white supremacy, a mechanism that ensures white students are afforded better teachers, facilities, and opportunities than Black and Latinx students.¹⁷ Research clearly shows that integrated schools positively impact all students regardless of their race.¹⁸ Students who attend racially diverse schools have smaller test score gaps and develop enhanced critical thinking, problem-solving skills, and creativity from working with peers who have different experiences from their own.¹⁹ It is for these reasons that students, parents, and activists have fought and are fighting to change school policies, in an effort to improve the current academic reality for Black and Latinx students.

While this article focuses on litigation as a way to address educational inequality in NYC public schools, litigation is only one tool in a broader effort to remedy the impact of segregation. In order to integrate NYC public schools, the students and families most impacted by segregation must organize their communities, local politicians must enact responsive local legislation, and privileged parents must shift their views of public education.²⁰

Litigation has been used successfully to challenge segregation since the landmark decision of *Brown v. Board of Education*.²¹ Those negatively impacted by school segregation, however, must be the ones who push for a lawsuit to address the ramifications of segregated schools, in order to ensure their needs are met and their desired outcomes are

'DIVERSITY' PLAN (2018), <https://perma.cc/5R6R-HFRU>; *NYC Public Schools at a Glance*, N.Y. ST. EDUC. DEP'T, <https://data.nysed.gov/profile.php?instid=7889678368> [<https://perma.cc/XE58-D2QR>] (last visited May 9, 2019).

¹⁷ See Madina Toure, *NYC Has the Most Segregated Schools in the Country. How Do We Fix That?*, OBSERVER (June 14, 2018, 5:03 PM), <https://perma.cc/GZ2T-4TBE> (highlighting that NYC public schools have always been segregated due to white resistance and backlash); Veiga, *supra* note 7.

¹⁸ See AMY STUART WELLS ET AL., THE CENTURY FOUND., *HOW RACIALLY DIVERSE SCHOOLS AND CLASSROOMS CAN BENEFIT ALL STUDENTS* 11-15 (2016), <https://perma.cc/3EUV-CPEQ> (discussing the benefits of children attending diverse schools, including closing the "achievement gap," positive learning outcomes, and an increased interracial understanding of other students).

¹⁹ *Id.* at 14.

²⁰ See GERALD P. LÓPEZ, *REBELLIOUS LAWYERING: ONE CHICANO'S VISION OF PROGRESSIVE LAW PRACTICE* 67-68 (1992); Derrick A. Bell Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 512 (1976). I developed this understanding, and the need for community organizing, in my experience as a former educator in NYC public schools.

²¹ See Nikole Hannah-Jones, *School Districts Still Face Fights—and Confusion—on Integration*, ATLANTIC (May 2, 2014), <https://perma.cc/X9C3-RHBM> ("The pace of the change brought by the federal courts was breathtaking. In 1963, about [one] percent of [B]lack children in the South attended school with white children. By the early 1970s . . . [ninety] percent of [B]lack children attended desegregated schools.").

reached.²² In NYC, it is Black and Latinx students who decide whether to initiate a lawsuit to challenge their school system's failure to provide them with equal opportunities and resources to their white counterparts. It is incumbent on attorneys who represent students in desegregation litigation to make decisions that are driven by the desired outcomes of the community they serve. For example, the Legal Defense Fund ("LDF")²³ has been successful in obtaining court orders that require districts to comply with the mandate of *Brown v. Board of Education*.²⁴ However, in the aftermath of *Brown*, a central critique of this strategy is that civil rights attorneys have considered the desires of and the litigation's impact on "constituents," who may have had a disconnected interest in the outcome of the lawsuit but had more access to civil rights lawyers to address school segregation, rather than the desires of and impact on "clients," whom their lawsuits purportedly served.²⁵ In addition to meeting their burden of proof in court, lawyers must stay rooted in understanding and advocating for the needs of students and families in segregated communities.

The options for challenging school segregation in federal courts, however, are limited, particularly in Northern school districts like NYC. According to the standard set by the Supreme Court, NYC public schools have never experienced *de jure*—intentional or "by law"—segregation.²⁶ Instead, "school officials, politicians, and parents" who are against desegregation speak about segregation in NYC schools in such a way that it is "innocent, natural, and lawful."²⁷ While school segregation is in part a

²² See Bell, *supra* note 20, at 471-72 ("[Civil rights lawyers] have not waived in their determination to implement *Brown* using racial balance developed in the hard-fought legal battles of the last two decades Now that traditional racial balance remedies are becoming increasingly difficult to achieve or maintain, there is tardy concern that racial balance may not be the relief actually desired by the victims of segregated schools," whose "educational interests may no longer accord with the integration ideals of their attorneys.").

²³ For more information about the LDF, see *Our Mission*, LDF, <https://perma.cc/JKB9-C6JT> (last visited June 1, 2019).

²⁴ See *Desegregation Cases / Issues*, LDF, <https://perma.cc/QJM6-FL92> (last visited June 1, 2019).

²⁵ Ronald Edmonds provides an example of this dynamic: low-income Black students may be the particular clients in a class action desegregation lawsuit, but the constituents are white and middle-class Blacks who drive the lawsuit forward with more access to civil rights attorneys and often "categorically oppose[] majority Black schools." Ronald R. Edmonds, *Advocating Inequity: A Critique of the Civil Rights Attorney in Class Action Desegregation Suits*, 3 NAT'L BLACK L.J. 176, 178-79 (1974); see also Bell, *supra* note 20, at 490-91 (discussing the problem—articulated by Edmonds—that civil rights attorneys face when white supporters, who contribute financially to a civil rights organization, do not share the same social outlook as the client, who is typically from a majority-Black school district).

²⁶ "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation . . . is purpose or intent to segregate." *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973).

²⁷ DELMONT, *supra* note 5, at 32.

result of housing segregation caused by state action, in the eyes of the judicial system, school segregation in New York exists “by fact” and without action by the state.²⁸ In 1974, the Supreme Court made clear that, in order to successfully challenge a school district for school segregation, state action must be the cause of that segregation.²⁹ For this reason, as an alternative to challenging school segregation in federal courts, advocates and plaintiffs have used school finance litigation in state courts across the country, including in New York, to address the unequal funding schemes that are permissible under state constitutions and that, in turn, negatively impact schools with high concentrations of low-income students and high percentages of minority students.³⁰ Unfortunately, school finance litigation has not been a successful tool for plaintiffs in New York, as the New York Court of Appeals has interpreted Article XI of the New York State Constitution, the State’s Education Article, only to require public schools to provide a low standard of education quality.³¹

Due to the New York Court of Appeals’ articulation that schools only need to provide a minimum standard of education quality to its students under the Education Article, challenges brought under the New York State Constitution are unlikely to be successful. Thus, advocates must be creative. This Note demonstrates how the NYC Human Rights Law (“NYCHRL”), a powerful civil rights act, can be used to address racial segregation in NYC public schools and to fight for equality, since the New York Court of Appeals has blocked all other judicial avenues for relief.³² Combined with ongoing grassroots and legislative advocacy, the NYCHRL can be utilized to effectively address school inequality and integrate NYC public schools. Litigation is a tool to be used in conjunction

²⁸ The Supreme Court has issued rulings that essentially only allow challenges under the Constitution for de jure, not de facto, segregation in federal court cases. *See infra* Section II.A. “De jure” means according to law; “de facto” means existing in fact. *De Jure*, BLACK’S LAW DICTIONARY (10th ed. 2014); *De Facto*, BLACK’S LAW DICTIONARY (10th ed. 2014). Richard Rothstein has described the idea that neighborhoods are de facto segregated as a “myth.” Richard Rothstein, *The Reason America’s Schools Are So Segregated – and the Only Way To Fix It*, WASH. POST (Dec. 16, 2016), <https://perma.cc/F4PK-LYFT>. For a deeper analysis of the close relationship between state action and residential segregation in America, see RICHARD ROTHSTEIN, *THE COLOR OF LAW* 215-17 (2017) (“Residential segregation was created by state action If school boards had not placed schools and drawn attendance boundaries to ensure the separation of black and white pupils, families might not have had to relocate to have access to education for their children.”) (emphasis in original).

²⁹ *Milliken v. Bradley*, 418 U.S. 717, 745 (1974) (“[I]t must be shown that racially discriminatory acts of the state or local school districts, or of a single school district[,] have been a substantial cause of interdistrict segregation.”)

³⁰ James E. Ryan, Sheff, *Segregation, and School Finance Litigation*, 74 N.Y.U. L. REV. 529, 537 (1999).

³¹ *See infra* Sections III.B and IV.B.

³² *See infra* Sections III.B and IV.B.

with organizing to address school segregation because, as stated by Louis Menand of the *New Yorker*, “[d]e-facto discrimination—we now call it ‘institutional racism’ or ‘structural racism’—is much harder to address. It requires more of people than just striking down a law.”³³

Part I of this Note provides an overview of the foundation of desegregation litigation in federal courts. Part II briefly outlines the process for desegregation litigation in federal court and explains why federal litigation is not a viable option for plaintiffs in NYC. Part III discusses school finance litigation strategies in New York and other states. Part IV then examines litigation in Minnesota that has sought to persuade courts to read in an anti-segregation mandate into the state constitution and outlines how the New York Court of Appeals has instead interpreted the Education Article as holding schools to a weak standard. Part V focuses on the NYCHRL and argues that it provides plaintiffs with a creative avenue to seek relief for educational inequity by examining current litigation challenging unequal sports access for high school students in NYC. Finally, Part VI discusses how grassroots movements are persistently organizing to integrate the NYC public school system and provides suggestions for future litigation under the NYCHRL.

I. THE FOUNDATIONS OF DESEGREGATION LITIGATION

On May 17, 1954, the Supreme Court issued its decision on *Brown v. Board of Education (Brown I)*, which struck down the “separate but equal” doctrine established in *Plessy v. Ferguson*.³⁴ *Brown I* consolidated four cases, with students and parents from school districts in Kansas, South Carolina, Virginia, and Delaware as plaintiffs, represented by the LDF.³⁵ In this monumental decision, the Supreme Court abolished state-sponsored segregation in public schools across United States by ruling that school segregation deprived the plaintiffs of equal protection of the laws under the Fourteenth Amendment of the U.S. Constitution.³⁶

If only it were that simple. In *Brown I*, the Supreme Court did not order school districts to desegregate.³⁷ Instead, one year after the *Brown I* decision, the Supreme Court returned to the issue of school segregation in *Brown v. Board of Education (Brown II)*, which ordered school districts

³³ Louis Menand, *The Supreme Court Case that Enshrined White Supremacy in Law*, *NEW YORKER* (Feb. 4, 2019), <https://perma.cc/YM9P-T9DA>.

³⁴ *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (*Brown I*) (overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

³⁵ *Brown I*, 347 U.S. at 486 n.1; *Case: Landmark: Brown v. Board of Education*, LDF, <https://perma.cc/8SYQ-HQVN> (last visited Apr. 17, 2019).

³⁶ *Brown I*, 347 U.S. at 495.

³⁷ *See id.*

to desegregate “with all deliberate speed.”³⁸ This vague phrase allowed segregationists to continue delaying integration for years.³⁹ After *Brown II*, plaintiffs spurred lawsuits in federal district courts across the country, asking courts to issue orders forcing segregated school districts to integrate.⁴⁰ As a result, courts issued orders mandating that states establish concrete integration plans, which included “busing, facilities upgrades, and compliance monitoring.”⁴¹ The impact on schools was drastic: in 1963, “[one] percent of black children in the South attended school with white children. By the early 1970s . . . [ninety] percent of Black children attended desegregated schools.”⁴²

Unfortunately, the Supreme Court’s precedent after *Brown I* and *Brown II* has not made the battle to integrate schools easier for students and families. After forcing school districts with de jure segregation to integrate their public schools, the Supreme Court began to chip away at families’ capacity to hold school districts and government actors accountable for allowing segregation in other schools to continue. In 1974, in *Milliken v. Bradley*, the Court held that a federal district court may not impose a multidistrict remedy for “a single-district de jure segregation problem absent any finding that the other included school districts have failed to operate unitary school systems within their districts.”⁴³ *Milliken* affected urban school districts’ ability to desegregate their schools

³⁸ *Brown v. Bd. of Educ. II*, 349 U.S. 294, 301 (1955) (*Brown II*). See Arthur E. Sutherland, *Segregation by Race in Public Schools Retrospect and Prospect*, 20 L. & CONTEMP. PROBS. 169 n.1 (1955), for a discussion of states that had de jure segregation at the time *Brown II* was decided.

³⁹ This delay manifested itself in racist violence. For example, in 1957, Governor Orval Faubus of Arkansas called on the state’s National Guard to forcibly prevent Black students from integrating Central High School in Little Rock, Arkansas. Only after President Dwight D. Eisenhower deployed federal troops were the Black students able to enter the school as angry protesters harassed them. Richard Kreitner, *September 4, 1958: Arkansas Governor Calls Out the National Guard to Prevent Public School Integration*, NATION (Sept. 4, 2015), <https://perma.cc/E5QH-HPGU>; David Smith, *Little Rock Nine: The Day Young Students Shattered Racial Segregation*, GUARDIAN (Sept. 24, 2017, 7:00 AM), <https://perma.cc/X6WD-BS9V>.

⁴⁰ See generally Frank T. Read, *Judicial Evolution of the Law of School Integration Since Brown v. Board of Education*, 39 L. & CONTEMP. PROBS. 10-49 (1975) (providing a discussion of the implementation of the *Brown I* mandate by federal courts).

⁴¹ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., DESEGREGATION LITIGATION: AN OVERVIEW 1, <https://perma.cc/RG53-NU9K> (last visited June 1, 2019).

⁴² Hannah-Jones, *supra* note 21.

⁴³ *Milliken v. Bradley*, 418 U.S. 717, 721 (1974). In *Milliken*, the Court highlighted that the evidence only demonstrated a de jure segregation problem in the Detroit school district, rather than a constitutional violation in any of the fifty-three outlying school districts or an interdistrict violation thereof. *Id.* at 745. Further, urban school districts like Detroit could not set aside arbitrary district lines on the basis of race. *Id.* at 745.

through the use of busing measures⁴⁴ involving white suburban districts.⁴⁵ Justice Thurgood Marshall, who was one of the counsel for plaintiffs in *Brown I*, dissented in *Milliken*, stating that the Court had taken a “giant step backward” in the fight to integrate public schools.⁴⁶ Further contextualizing the negative impact of *Milliken*, Michael F. Delmont describes the decision in *Milliken* as “plac[ing] a nearly impossible burden of proof on those seeking school desegregation across city and suburban lines by requiring evidence of deliberate segregation across multiple school districts.”⁴⁷ Robert A. Sedler additionally observes that, after *Milliken*, “[t]he substantive right that has emerged is not a right to attend a racially integrated school, but only a right to attend school in a school system in which there are no vestiges of de jure segregation.”⁴⁸

Then, in the 1990s, a series of cases curtailed a plaintiff’s power to challenge de facto school segregation,⁴⁹ by making “it easier for [school] districts to be released from court oversight.”⁵⁰ These cases increased the rate at which school districts were released from court supervision, as “more than twice as many districts were released [from judicial supervision] in the 2000s as in the 1990s.”⁵¹ By 2007, 193 of 480 Southern school

⁴⁴ Busing was one tactic used to desegregate public schools by transporting primarily Black students into white districts. Michael F. Delmont describes the white parents’ uproar against “busing” in his book and corresponding website. DELMONT, *supra* note 5, at 3 (“Describing opposition to “busing” as something other than resistance to school desegregation was a choice that obscured the histories of racial discrimination and legal contexts for desegregation orders.”).

⁴⁵ See Robert A. Sedler, *The Profound Impact of Milliken v. Bradley*, 33 WAYNE L. REV. 1693, 1695-96 (1987).

⁴⁶ *Milliken*, 418 U.S. at 782 (Marshall, J., dissenting).

⁴⁷ DELMONT, *supra* note 5, at 17.

⁴⁸ Sedler, *supra* note 45, at 1694,-95.

⁴⁹ Hannah-Jones, *supra* note 21.

⁵⁰ Sean F. Reardon et al., *Brown Fades: The End of Court-Ordered School Desegregation and the Resegregation of American Public Schools*, 31 J. POL’Y ANALYSIS & MGMT. 876, 877-78 (2012). In *Board of Education v. Dowell*, the Supreme Court ruled that desegregation orders were intended to be a “temporary measure” and that, in deciding whether to dissolve the orders, courts should consider whether schools “had complied in good faith with the desegregation degree since it was entered” and “whether the vestiges of past discrimination had been eliminated to the extent practicable.” *Bd. of Educ. v. Dowell*, 498 U.S. 237, 247, 249-50 (1991). In *Freeman v. Pitts*, the Court ruled that courts could withdraw supervision over certain aspects in which school district has achieved partial unitary status, since “[a] district court need not retain active control over every aspect of school administration until a school district has demonstrated unitary status in all facets of its system.” *Freeman v. Pitts*, 503 U.S. 467, 471 (1992). Finally, in *Missouri v. Jenkins*, the Court held that desegregation orders must be a limited remedy for victims of de jure segregation. *Missouri v. Jenkins*, 515 U.S. 70, 137 (1995). See Reardon, et al., *supra*, at 877-78.

⁵¹ Reardon et al., *supra* note 50, at 899.

districts that were under court ordered supervision were granted unitary status.⁵²

Finally, in the 2007 *Parents Involved* decision, the Supreme Court struck down voluntary racial integration plans in Louisville, Kentucky, and Seattle, Washington, on the basis that these school districts lacked a compelling interest for using race-based assignments and, further, that alternative race-neutral methods would be effective in achieving each district's integration goals.⁵³ *Parents Involved* has prevented school districts from considering race when implementing voluntary school integration plans.⁵⁴ While *Brown I*'s monumental decision opened the door for many students and families to challenge segregation in their districts, the Supreme Court's subsequent legal precedent has left few options for advocates who are trying to integrate public schools through the federal courts.

II. SUING IN FEDERAL COURT: A DEAD END FOR SCHOOL DISTRICTS EXPERIENCING DE FACTO SEGREGATION

A. *The Process of Federal Desegregation Litigation*

Desegregation litigation in federal district court is an arduous process.⁵⁵ As previously mentioned, federal courts can only order integration (or school desegregation) of a school district that once experienced—or is experiencing—state-mandated, de jure segregation.⁵⁶ De jure segregation is found when “a current condition of segregation result[s] from *intentional state action directed specifically* to the [allegedly segregated] school[.]”⁵⁷ Thus, a plaintiff must prove either that state-mandated intentional segregation is present in the school district or that a state policy

⁵² *Id.* at 878 (discussing data from the U.S. Commission on Civil Rights, which was obtained after reviewing the status of desegregation orders in Alabama, Georgia, Florida, Louisiana, Mississippi, North Carolina, and South Carolina).

⁵³ See *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 730-31, 733 (2007) (plurality opinion); Erwin Chemerinsky, *Making Schools More Separate and Unequal: Parents Involved in Community Schools v. Seattle School District No. 1*, 2014 MICH. ST. L. REV. 633, 635-37 (2014).

⁵⁴ Chemerinsky, *supra* note 53, at 638.

⁵⁵ See generally *School Desegregation and Integration: De Jure*, UNIV. MO. SCH. LAW, <https://perma.cc/5ARP-Z4Z7> (last updated May 27, 2016, 9:27 AM) (outlining the process of desegregation litigation in federal court and noting key Supreme Court cases in school desegregation jurisprudence).

⁵⁶ See, e.g., *Bd. of Educ. v. Dowell*, 498 U.S. 237, 240 (1991) (initiating District Court supervision upon finding that “Oklahoma City was operating a ‘dual’ school system – one that was intentionally segregated by race.”).

⁵⁷ *Missouri v. Jenkins*, 515 U.S. 70, 115 (1995) (Thomas, J., concurring) (alteration in original) (emphasis in original) (quoting *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205-06 (1973)).

which has led to de facto segregation has a discriminatory intent.⁵⁸ While post-*Brown* state-mandated segregation is clearly impermissible, it is extremely challenging for plaintiffs to prove that a policy's underlying intent is discriminatory.⁵⁹ If the plaintiff is successful, however, the district court will find that the school district unconstitutionally segregates students in violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, as per *Brown I*.⁶⁰ The district court will then issue a desegregation order that requires the school board to implement remedial measures that will desegregate the school district.⁶¹ Usually, the district court gives the school board and other interested parties the opportunity to present a desegregation plan.⁶² The school district can also appeal the decision.⁶³ After the district court issues a final desegregation order, the court then monitors the execution of that order, which could include requiring the school board to provide reports about its compliance with the plan or appointing a compliance officer.⁶⁴ Once a school district eliminates all traces of intentional segregation, it will achieve "unitary status" and judicial oversight will end.⁶⁵

B. *The Impact of Desegregation Litigation*

The U.S. Department of Justice has not been forthcoming in providing up-to-date data on active desegregation orders.⁶⁶ Further, some federal courts are unaware of the number of segregation orders in their dockets or are simply releasing districts from judicial oversight, even where segregation continues.⁶⁷ To this extent, even students that attend school in districts that experience de jure segregation face frustrating battles to integrate their schools.

⁵⁸ See Derrick Darby & Richard E. Levy, *Postracial Remedies*, 50 U. MICH. J.L. REFORM 387, 437 (2017).

⁵⁹ *Id.*

⁶⁰ *Brown I*, 347 U.S. 483, 495 (1954).

⁶¹ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., *supra* note 41, at 1.

⁶² *Id.* It is unclear how desegregation orders are monitored today. See Hannah-Jones, *supra* note 21.

⁶³ See, e.g., Eliot C. McLaughlin, *Mississippi School District Ends Segregation Fight*, CNN, <https://perma.cc/R4MX-SHYD> (last updated Mar. 14, 2017, 5:41 PM).

⁶⁴ COWEN INST. FOR PUB. EDUC. INITIATIVES, TULANE UNIV., *supra* note 41, at 2.

⁶⁵ *Id.* For example, in order for the New Kent School Board to have achieved unitary status as a desegregated school system, the school district needed to demonstrate a good faith elimination of all traces of intentional segregation in student assignment, faculty assignment, staff assignment, transportation, extracurricular activities, and facilities. See *Green v. Cty. Sch. Bd. of New Kent*, 391 U.S. 430, 435 (1968).

⁶⁶ Hannah-Jones, *supra* note 21.

⁶⁷ *Id.*

As a result of current desegregation jurisprudence, students and parents who initiate new lawsuits against their school districts are unlikely to succeed in federal court because it has become increasingly difficult to prove intentional discrimination by the state.⁶⁸ Specifically, this is because plaintiffs must prove more than a mere discriminatory effect, and school boards are able to mask their discriminatory motives.⁶⁹ “Given its illegality, discriminatory intent is seldom, if ever, explicit,” and “nearly impossible to prove in practice.”⁷⁰ This is because, even if a court orders a school district to desegregate, it is highly likely that the district will not comply or properly oversee desegregation, or will resegregate.⁷¹

Despite the improbability of obtaining relief through federal desegregation litigation, a *Brown*-era case in Cleveland, Mississippi recently reached a hopeful conclusion. In 2017, after the U.S. District Court for the Northern District of Mississippi ordered the Cleveland School District to desegregate its school system, the school district voted to end its appeal.⁷² Instead, the court accepted the parties’ proposal: to combine the two segregated high schools in the district into one integrated school.⁷³ The case had been active since 1969, when a judge initially ordered the Cleveland School District to desegregate, but the district had failed in its attempts to follow the court’s order.⁷⁴ The newly integrated Cleveland Central High School opened its doors in the fall of 2017.⁷⁵

⁶⁸ Eric S. Stein, *Attacking School Segregation Root and Branch*, 99 YALE L.J. 2003, 2004 (1990).

⁶⁹ *Id.*

⁷⁰ Darby & Levy, *supra* note 58, at 437. “We emphasize that the differentiating factor between de jure segregation and so-called de facto segregation . . . is purpose or intent to segregate.” *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 205-06 (1973); see *Milliken v. Bradley*, 418 U.S. 717, 755 (1974); *Why Is This Happening? with Chris Hayes: Investigating School Segregation with Nikole Hannah-Jones*, NBC (July 31, 2018), <https://perma.cc/XDU3-FVLV> (discussing the rise of de facto segregation despite the fact that racially restrictive covenants and mandated segregation have been outlawed).

⁷¹ See Stancil, *supra* note 8.

⁷² McLaughlin, *supra* note 63; see *Cowan v. Bolivar Cty. Bd. of Educ.*, No. 2:65-CV-00031-DMB, 2017 WL 988411 (N.D. Miss. Mar. 13, 2017).

⁷³ *Cowan*, 2017 WL 988411, at *1-2 (“Under this agreement, the District will consolidate its ninth through twelfth grade students into a single comprehensive high school housed in the current facilities at Cleveland High School and Margaret Green Junior High School.”); Edwin Rios, *A Mississippi Town Finally Desegregated Its Schools, 60 Years Later*, MOTHER JONES, Nov.-Dec. 2017, <https://perma.cc/7M88-RJ98>.

⁷⁴ “In 1989, a court ordered the Cleveland school district to bus students between the two high schools for shared classes.” Rios, *supra* note 73. In 2011, the Justice Department found that the district “failed to make good faith efforts to eliminate the vestiges of its former dual school system.” *Id.* In 2013, a court ordered the Cleveland school district to allow students to enroll in whichever school they wanted. *Id.*

⁷⁵ Kelsey Davis & Aallyah Wright, *Cleveland Central High Opens New Era for School District*, MISSISSIPPI TODAY (Aug. 7, 2017), <https://perma.cc/SZ8X-795B>.

The outcome of the Cleveland litigation is a best-case scenario for challenging ongoing school segregation that is a result of prior de jure segregation. To challenge de facto segregation, however, creative litigation strategies are required. In places like New York City, one litigation option is to address school funding schemes that lead to unequal distribution of resources between predominantly Black and Latinx schools and those of their white peers, in what is dubbed “school finance litigation.” Another option is to ask courts to “read in” anti-segregation language into the New York State constitution, a strategy that has been successful in other states. And finally, as this Note argues, advocates can use the local Human Rights Law as a tool to address inequality that is a symptom of school segregation.

III. SCHOOL FINANCE LITIGATION IN STATE COURTS: SUCCESS REMAINS TO BE SEEN

For decades, state finance litigation has been an attractive strategy for plaintiffs fighting de facto segregation, including plaintiffs who bring claims in state courts.⁷⁶ Plaintiffs have used school finance litigation to challenge funding schemes of school districts with predominantly students of color, who are provided with fewer resources than students of predominantly white schools.⁷⁷ The premise of state financial litigation is that unequal or inadequate school funding violates both the equal protection and the education clauses of a state’s constitution.⁷⁸ Originally, litigants sought equalized funding for school districts under state constitutions; however, their losses outnumbered their successes.⁷⁹ As a result, litigants then shifted “their focus from equitable funding to inadequate funding.”⁸⁰

A. *Connecticut: The Slow Aftermath of Sheff*

A line of cases arising out of Hartford, Connecticut, illustrates the successful use of state finance litigation to address unequal funding schemes. In 1977, in *Horton v. Meskill*, the Connecticut Supreme Court

⁷⁶ See James E. Ryan, *Schools, Race, and Money*, 109 YALE L.J. 249, 252-53 (1999).

⁷⁷ See *id.* at 253.

⁷⁸ James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1229 (2008). For more information about state finance litigation in states across the United States, see *School Finance Litigation, by Year, Case, and Status, by State: 1970-2009*, NAT’L CTR. FOR EDUC. STAT., <https://nces.ed.gov/edfin/litigation.asp> (last visited Apr. 2, 2019).

⁷⁹ Ryan, *supra* note 78.

⁸⁰ *Id.*

held that unequal school financing violates a student's right to "a substantially equal educational opportunity," as required by the education clause of the Connecticut State Constitution.⁸¹ In 1996, in *Sheff v. O'Neill*, the same court expanded on the *Horton* decision and declared that de facto school segregation in Hartford public schools violated Connecticut's constitutional mandate to provide the city's children with a "substantially equal" education.⁸² The court read two clauses of the Connecticut Constitution together: "the education clause, which guarantees 'free public elementary and secondary schools in the state' and the segregation clause, which guarantees that no person shall 'be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil rights because of . . . race [or] ancestry.'"⁸³ The Court found that Connecticut's segregation clause informed the state's education clause.⁸⁴ As such, "the existence of racial and ethnic isolation in the public school system deprive[d] school children of a substantially equal educational opportunity" and violated the state's constitution.⁸⁵ The court then ordered the Connecticut legislature to take remedial measures and to develop a plan to address segregation in Hartford public schools.⁸⁶

Despite this monumental decision, only eleven percent of Hartford students attended integrated schools during the 2007–2008 school year.⁸⁷ Advocates on behalf of the plaintiffs in *Sheff* returned to court in an attempt to hold the state and the city accountable.⁸⁸ In 2015, Connecticut settled with the plaintiffs to add more seats in suburban school districts

⁸¹ *Horton v. Meskill*, 376 A.2d 359, 374-75 (Conn. 1977).

⁸² *Sheff v. O'Neill*, 678 A.2d 1267, 1280-86 (Conn. 1996) ("We therefore hold that, textually, [the education clause] . . . requires the legislature to take affirmative responsibility to remedy segregation in our public schools, regardless of whether that segregation has occurred de jure or de facto In summary, under our law, which imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren, the state action doctrine is not a defense to the plaintiffs' claims of constitutional deprivation."); see also Ryan, *supra* note 30, at 530.

⁸³ Ryan, *supra* note 30, at 530 (alteration in original) (quoting *Sheff*, 678 A.2d at 1270 n.1, n.2).

⁸⁴ *Sheff*, 678 A.2d at 1283; Ryan, *supra* note 30, at 530.

⁸⁵ *Sheff*, 678 A.2d at 1281, 1281-83; Ryan, *supra* note 30, at 530.

⁸⁶ *Sheff*, 678 A.2d at 1290.

⁸⁷ An integrated school is one where "less than three-quarters of a school's student population are minorities." Jacqueline Rabe Thomas, *Nearly Half the Students from Hartford Now Attend Integrated Schools*, CT MIRROR (Nov. 26, 2013), <https://perma.cc/B447-2S9A>.

⁸⁸ See Denisa R. Superville, *New Settlement Reached in Hartford, Conn., Desegregation Case*, EDUC. WEEK: DISTRICT DOSSIER (Feb. 27, 2015, 5:05 PM), <https://perma.cc/XK3P-G238>.

for inner-city students and to work towards having fifty percent of Hartford students in magnet schools.⁸⁹ Twenty-two years after *Sheff*'s original ruling, Hartford is still not fully integrated, but substantial improvement has been made. By the fall of 2016, forty-nine percent of Hartford minority students attended integrated schools.⁹⁰ Hartford now faces, however, a common problem that school systems across the country are facing since *Brown I*: white parents are not convinced that it is in their children's best interests to attend integrated magnet schools outside of their neighborhoods or their zones.⁹¹ In 2017, 45.6% of Hartford minority students attended integrated schools, a drop from 49% in 2016 and below the recent settlement-mandated percentage of 47.5%.⁹²

B. *New York: Still Waiting for Funds*

Similar to the strategy used by the plaintiffs in *Sheff*, school finance litigation has been used to address school inequity in New York as well. The Education Article of the New York State Constitution provides that "the legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated."⁹³ In the 1982 *Levittown* decision, the New York Court of Appeals, the State's highest court, interpreted New York State's Education Article to entitle students to a "sound basic education."⁹⁴

Subsequently, in 1993, the Campaign for Fiscal Equity ("CFE"), an interest group comprised of parents,⁹⁵ filed a lawsuit against the state alleging that the "State's educational financing scheme fail[ed] to provide

⁸⁹ *Id.* A system of magnet schools, which parents could voluntarily opt their children into, was the method that Hartford employed to desegregate its schools. Carmen Baskauf & Lucy Nalpathanchil, *With Sheff Back in Court, A Look at School Integration in Hartford*, CONN. PUB. RADIO (Oct. 23, 2018), <https://perma.cc/GB8V-MVBB>. This method has been recognized as a model for integration across the country, yet the Hartford district still faces its own challenges to achieve integration. *Id.* For more information about magnet schools, see Ali Trachta, *Charter Schools vs. Magnet Schools*, NICHE, <https://perma.cc/7VPJ-PX66> (last visited May 2, 2019).

⁹⁰ Kathleen Megan & Matthew Kauffman, *Under New Rules, State Says More Hartford Students Attend Integrated Schools*, HARTFORD COURANT (Dec. 1, 2016, 5:46 PM), <https://perma.cc/P7HR-L38A>.

⁹¹ *This American Life: The Problem We All Live With - Part Two*, CHI. PUB. MEDIA (Aug. 7, 2015), <https://www.thisamericanlife.org/563/the-problem-we-all-live-with-part-two> [<https://perma.cc/98WU-ZWVU>].

⁹² Matthew Kauffman, *Number of Hartford Students in Integrated Schools Drops by Hundreds*, HARTFORD COURANT (Dec. 20, 2017, 1:45 PM), <https://perma.cc/KF35-GKF5>.

⁹³ N.Y. CONST. art. XI, § 1.

⁹⁴ Bd. of Educ., *Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27, 48 (1982).

⁹⁵ A group of parents formed an interest group called the Campaign for Fiscal Equity ("CFE") and filed a lawsuit alleging that their children were not being provided access to an adequate education. CFE no longer exists as a non-profit. The Alliance for Quality Education

public school students in the City of New York . . . [with] an opportunity to obtain a sound basic education as required by the State Constitution.”⁹⁶ The State filed a motion to dismiss the claim for failure to state a cause of action, and the New York Court of Appeals eventually denied the motion, holding that the plaintiffs did have a viable cause of action under the Education Clause.⁹⁷ Affirming the underlying principles of *Levittown*, the court clearly stated that “a system which failed to provide for a sound basic education would violate the Education Article.”⁹⁸ The court articulated that a “sound basic education” “should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury” and “minimally adequate physical facilities and classrooms.”⁹⁹ The court concluded that, to prove their case, plaintiffs must establish “a causal link between the present funding system and any proven failure to provide a sound basic education to New York City school children.”¹⁰⁰

After years of preparing for trial and organizing with community groups, the trial court found that the State’s method for funding education in NYC violated students’ rights under the State Education Article.¹⁰¹ However, the Appellate Division reversed the trial court, articulating further that the Education Article only mandates an opportunity to receive the “skills necessary to obtain employment, and to competently discharge one’s civic responsibilities”¹⁰² and that the facilities and resources in NYC’s public schools were not “so inadequate as to deprive students of the opportunity to acquire the skills that constitute a sound basic education.”¹⁰³ Further, the Appellate Division determined that the State is not responsible for the demographic factors facing certain students, such as “poverty, high crime neighborhoods, single parent or dysfunctional homes, homes where English is not spoken, or homes where parents offer

was created in 2000 to provide support for CFE and continues to work for educational equity in New York state. *Equity*, ALLIANCE FOR QUALITY EDUC., <https://perma.cc/PP4F-3YF2> (last visited May 2, 2019).

⁹⁶ Campaign for Fiscal Equity, Inc. v. State, 86 N.Y.2d 307, 314 (1995) (*CFE I*).

⁹⁷ Campaign for Fiscal Equity, Inc. v. State, 295 A.D.2d 1, 4 (N.Y. App. Div. 1st Dep’t 2002) (discussing *CFE I*, 86 N.Y.2d 307 (1995)). In denying the state’s motion to dismiss, the New York Court of Appeals established a framework for the trial court to determine whether the state was providing NYC public school students with a sound basic education. Campaign for Fiscal Equity, Inc. v. State, 187 Misc. 1, 6 (N.Y. Sup. Ct. N.Y. Cty. 2001).

⁹⁸ *CFE I*, 86 N.Y.2d at 316.

⁹⁹ *Id.* at 316, 317.

¹⁰⁰ *Id.* at 318.

¹⁰¹ Campaign for Fiscal Equity v. New York, No. 111070/93, 2001 WL 35912269 (N.Y. Sup. Ct. N.Y. Cty. January 31, 2001) (per curiam); ALLIANCE FOR QUALITY EDUC., *supra* note 95.

¹⁰² Campaign for Fiscal Equity, Inc. v. State, 295 A.D.2d 1, 8 (App. Div. 1st Dep’t 2002).

¹⁰³ *Id.* at 11.

little help with homework and motivation.”¹⁰⁴ Ultimately, the court stated that this was because the appropriate “cure lies in eliminating the socio-economic conditions facing certain students.”¹⁰⁵

The New York Court of Appeals reversed this decision in 2003, holding that the plaintiffs had demonstrated a causal link between the state’s current funding system and its failure to provide NYC school children with “better teachers, facilities, and instrumentalities of learning.”¹⁰⁶ The court noted:

Plaintiffs have prevailed here owing to a unique combination of circumstances: New York City schools have the *most* student need in the state and the *highest* local costs yet receive some of the *lowest* per-student funding and have some of the *worst* results. Plaintiffs in other districts who cannot demonstrate a similar combination may find tougher going in the courts.¹⁰⁷

As a result, the court directed the Legislature and the Governor to articulate a funding scheme as a way to reform the education funding system in NYC.¹⁰⁸ In 2006, the New York Court of Appeals accepted the state’s minimum funding amount recommendation as reasonable,¹⁰⁹ which the State still owes today.¹¹⁰

The CFE line of cases demonstrate that, even when plaintiffs successfully prove a causal link between a lack of funding for schools and students’ access to the constitutionally-mandated level of education, this is still not enough to ensure educational equality in NYC.

¹⁰⁴ *Id.* at 16. The Appellate Division relied on the plaintiffs’ expert, who “conceded that investing money ‘in the family’ rather than the schools ‘might pay off even more.’” *Id.*

¹⁰⁵ *Id.* For more information about how socio-economic status of students is linked to school funding, see MATTHEW M. CHINGOS & KRISTEN BLAGG, DO POOR KIDS GET THEIR FAIR SHARE OF SCHOOL FUNDING? (2017), <https://perma.cc/89SP-EHJV>.

¹⁰⁶ Campaign for Fiscal Equity, Inc. v. State, 100 N.Y.2d 893, 919 (2003) (*CFE II*). The trial court concluded that, for example, that teacher certification rates “are too low” in NYC, based on evidence that established a correlation between teacher certification and increased student performance. *Id.* (citing Campaign for Fiscal Equity, Inc. v. State, 187 Misc. 2d 1, 26-27 (N.Y. Sup. Ct. N.Y. Cty. 2001)).

¹⁰⁷ *Id.* at 932 (emphasis in original).

¹⁰⁸ *Id.* at 930, 958; ALLIANCE FOR QUALITY EDUC., *supra* note 95. Between 2004 and 2006, the state failed to establish a minimum funding amount per the court’s order. Then, the trial court appointed a Panel of Judicial Referees to make recommendations to the court, the State’s Governor appealed that decision, and the Appellate Division ordered the state to comply. ALLIANCE FOR QUALITY EDUC., *supra* note 95.

¹⁰⁹ Campaign for Fiscal Equity, Inc. v. State, 8 N.Y.3d 14, 19-20 (2006).

¹¹⁰ Joint Legislative Hearing on the Executive Proposal 2018-2019, Testimony by Alliance for Quality Education (Jan. 31, 2018), <https://perma.cc/3NAG-6UHU>.

IV. A STRATEGY IN STATE COURT: INTEGRATION AS CONSTITUTIONAL MANDATE

State finance litigation, as it pertains to challenging unequal resources, has largely fallen out of use because success in court has not translated to the full integration of school districts. In many states, including New York, advocates have tried to persuade state courts that integration is a mandate required by their respective state constitutions.

A. *Minnesota: A New Attempt*

Advocates in Minnesota are trying a new strategy that frames segregation not only as an issue of unequal resources but also as an issue that violates the state constitution itself.¹¹¹ In 2016, seven parents and guardians filed a lawsuit against the State of Minnesota in Hennepin County District Court, claiming that state officials violated the Education Clause of the Minnesota Constitution by denying them an “adequate education” and enabling a segregated education.¹¹² The plaintiffs argued that, under the seminal Minnesota state case *Skeen v. State*, the Supreme Court of Minnesota had interpreted its education clause to mean that schools must meet “baseline level of adequacy and uniformity” of education, and that a separate but equal education system does not meet that requirement.¹¹³ The Minnesota Court of Appeals dismissed the plaintiffs’ case on the grounds that it was not justiciable (able to be litigated) because it is the state legislature’s responsibility to establish “qualitative educational standards,” not the judiciary’s.¹¹⁴

In January 2018, the Minnesota Supreme Court heard oral arguments on the issue of justiciability.¹¹⁵ The plaintiffs argued that the judiciary has the power to determine whether the legislature violated its constitutional obligation under Minnesota’s Education Clause, and the court concluded that the plaintiffs’ claims could be litigated.¹¹⁶ The plaintiffs’ supporters believe that a victory in this case could be used as persuasive precedent to support efforts to make school segregation an issue under other state

¹¹¹ Brandie Burris-Gallagher, *The Court’s Role in Education: Why the Cruz-Guzman Lawsuit Is a Big Deal*, EDALLIES (Jan. 9, 2018), <https://perma.cc/QXQ8-C5VJ>.

¹¹² Appellants’ Brief at 3, *Cruz-Guzman v. State*, 892 N.W.2d 533 (Minn. Ct. App. 2017) (No. A16-1265), 2016 WL 10894525.

¹¹³ Plaintiffs-Petitioners’ Brief and Addendum at 12-13, 27, *Cruz-Guzman v. State*, 892 N.W.2d 583 (Minn. Ct. App. 2017) (No. A16-1265), 2017 WL 7550718; *see also Skeen v. State*, 505 N.W.2d 299, 312 (Minn. 1993).

¹¹⁴ *Cruz-Guzman*, 892 N.W.2d at 541; *see also* Burris-Gallagher, *supra* note 111.

¹¹⁵ Burris-Gallagher, *supra* note 111.

¹¹⁶ *Cruz-Guzman v. State*, 916 N.W.2d 1, 9 (Minn. 2018).

constitutions throughout the United States.¹¹⁷ However, charter school interest groups, who support the State of Minnesota in this case, claim that state constitutional protections against school segregation would impede on parents' rights to school choice.¹¹⁸ This same argument could be made in NYC, where research shows that, while segregation was caused by red-lining and housing discrimination, school choice has exacerbated the problem.¹¹⁹ Advocates for integration in New York, however, face a similar obstacle as those in Minnesota: convincing the New York Court of Appeals that segregation violates the New York State Constitution.

B. *New York: A Weak Education Article*

Advocates in New York have taken the fight against school segregation to the New York Court of Appeals under the State's Education Clause.¹²⁰ The New York Court of Appeals, however, has effectively prevented advocates from using the Education Clause to remedy school segregation by articulating a low standard of quality education that a school system must provide to its students.¹²¹

To fulfill its constitutional obligation and provide a sound basic education, the state must provide certain educational "inputs" to ensure that required student "outputs" are met.¹²² In other words, the state must provide "the physical facilities and pedagogical services and resources . . . to provide students with the opportunity to obtain these essential skills" and

¹¹⁷ Rachel M. Cohen, *School Desegregation Lawsuit Threatens*, AM. PROSPECT (Jan. 26, 2016), <https://perma.cc/UCY9-9HR9>; Dana Goldstein, *How Do You Get Better Schools? Take the State to Court, More Advocates Say*, N.Y. TIMES (Aug. 21, 2018, 6:00 AM), <https://perma.cc/7M2W-AD6N>.

¹¹⁸ Cohen, *supra* note 117; Goldstein, *supra* note 117.

¹¹⁹ While the term "school choice" may seem like it has nothing to do with the government action, policy decisions have allowed charter schools to flourish and parents to flee their zoned schools, which leaves poor, underperforming, and segregated schools in their wake. See NICOLE MADER ET AL., THE NEW SCH., CTR. FOR N.Y.C. AFFAIRS, THE PARADOX OF CHOICE: HOW SCHOOL CHOICE DIVIDES N.Y.C. ELEMENTARY SCHOOLS 4 (May 2018), <https://perma.cc/B2FK-G3ET>; Elizabeth A. Harris, *First Test for New York Chancellor: A Middle School Desegregation Plan*, N.Y. TIMES (May 1, 2018), <https://perma.cc/6F3Y-ZJWF>; Kate Taylor, *A Manhattan District Where School Choice Amounts to Segregation*, N.Y. TIMES (June 7, 2017), <https://perma.cc/U3MD-75CG>.

¹²⁰ *New York Civil Liberties Union (NYCLU) v. New York*, 4 N.Y.3d 175 (2005); *Paynter v. New York*, 100 N.Y.2d 434 (2003).

¹²¹ See generally *NYCLU*, 4 N.Y.3d 175; *Paynter*, 100 N.Y.2d 434.

¹²² *Paynter*, 100 N.Y.2d at 440 ("[T]he State fails to provide [students] a sound basic education in that it provides deficient inputs--teaching, facilities and instrumentalities of learning--which lead to deficient outputs such as test results and graduation rates.") (discussing the pleading standard elaborated in *CFE I*, 86 N.Y.2d 307, 317-18 (1995)); see also Bran C. Noonan, *The Fate of New York Public Education is a Matter of Interpretation: A Story of Competing Methods of Constitutional Interpretation, the Nature of Law, and a Functional Approach to the New York Education Article*, 70 ALB. L. REV. 625, 630-31 (2007).

achievements, as required by the New York State Constitution.¹²³ Thus, to succeed, plaintiffs must clearly demonstrate that there is a causal connection between the deficient state input and subsequent deficient student output.¹²⁴ While the strength of that link is difficult to measure, it can be proven through evidence demonstrating how poor facilities, overcrowded school buildings, and outdated curriculums lead to low graduation rates and test scores.¹²⁵

After the New York Court of Appeals mandated the state to establish a minimum funding amount for NYC Public Schools in 2003,¹²⁶ advocates tried to use the Education Article to address inequitable funding and school segregation in other parts of the State outside of New York City. Two New York Court of Appeals cases, *Paynter v. State of New York* and *New York Civil Liberties Union v. State of New York*, demonstrate that the Education Article fails to protect students against school segregation in New York, including New York City.¹²⁷ Further, these cases demonstrate how the New York Court of Appeals has limited the scope of its remedy in *Campaign for Fiscal Equity*.

The New York Civil Liberties Union (“NYCLU”), representing the plaintiffs, sought to extend the rulings of *Campaign for Fiscal Equity* and alleged “that students in 27 named schools outside of New York City [were] being denied the opportunity for a sound basic education.”¹²⁸ Since the New York Court of Appeals had mandated a funding scheme to make up for inequities in the NYC public schools in the *Campaign for Fiscal Equity* cases, NYCLU maintained that the State must put in place corrective measures to address “impoverished education in schools outside of New York City.”¹²⁹ The New York Court of Appeals disagreed, stating that the “New York Constitution does not require equality in educational offerings throughout the state.”¹³⁰ The Constitution does, however, require the state to meet the minimum standards of educational quality.¹³¹ In doing so, the court emphasized that local governments should maintain

¹²³ *CFE I*, 86 N.Y.2d 307, 316 (1995).

¹²⁴ *CFE I*, 86 N.Y.2d at 318; *CFE II*, 100 N.Y.2d 893, 919 (2003).

¹²⁵ *CFE II*, 100 N.Y.2d at 908.

¹²⁶ See sources cited *supra* notes 106-108 and accompanying text.

¹²⁷ *NYCLU v. New York*, 4 N.Y.3d 175 (2005); *Paynter v. New York*, 100 N.Y.2d 434 (2003).

¹²⁸ *NYCLU*, 4 N.Y.3d at 178.

¹²⁹ Appellants’ Brief at 1, *NYCLU v. New York*, 3 A.D.3d 811 (N.Y. App. Div. 2004) (No. 93834), 2003 WL 25793131.

¹³⁰ *NYCLU*, 4 N.Y.3d at 178 (citing Bd. of Educ., *Levittown Union Free Sch. Dist. v. Nyquist*, 57 N.Y.2d 27 (1982)).

¹³¹ *Id.*

control over their local school districts and limited how retroactive funding could be provided to remedy inadequate resources in individual public schools across the state.¹³²

In *Paynter v. New York*, fifteen students in the Rochester City School District alleged that racial and socioeconomic segregation—by the State’s action or inaction—deprived them of a sound basic education under the New York State Constitution.¹³³ The case never went to trial, as the New York Court of Appeals affirmed the State’s motion to dismiss the claim.¹³⁴ The plaintiffs did not claim that the State provided deficient “teaching, facilities, or instrumentalities of learning.”¹³⁵ Rather, they argued that the State’s practices and policies resulted in a segregated demographic composition of the schools, which led to “some of the lowest test scores and graduation rates in the state.”¹³⁶ The court stated that proof of “academic failure” alone, without proof that the State had failed in their duty under the New York State Constitution, does not rise to a cause of action under the Education Article.¹³⁷ Further, the court articulated that New York State has no constitutional responsibility to change the demographics of school districts with high concentrations of poverty and racial isolation in order to improve academic performance.¹³⁸ This holding reinforces the notion that if the state merely provides “adequate resources,” it “satisfies its constitutional promise under the Education Article, even though student performance remains substandard,” segregated student body notwithstanding.¹³⁹

Paynter and *NYCLU* reveal that the Education Article provides a limited avenue for students and their families to address persistent inequities in school systems across the state. The New York Court of Appeals remains hesitant to expand the holdings of the *CFE* cases to address inequality that is unrelated to school funding outside of the NYCs public schools. Further, the court refuses to apply the Education Article in such a way that could remedy the segregation that exists in NYC and throughout the state. In effect, the New York Court of Appeals has essentially closed off the state constitution as a way for students and parents in segregated school districts to seek relief throughout the state. And, while NYC public schools have achieved some success and received a judgment

¹³² *See id.* at 181.

¹³³ *Paynter v. New York*, 100 N.Y.2d 434, 437-38 (2003).

¹³⁴ *Id.* at 439.

¹³⁵ *Id.* at 437-38.

¹³⁶ *Id.* at 438, 440-41.

¹³⁷ *Id.* at 441.

¹³⁸ *Paynter*, 100 N.Y.2d at 442-43.

¹³⁹ *Id.* at 441.

establishing a minimum funding scheme to provide students with an adequate education, the system remains deeply segregated.

V. A CREATIVE LITIGATION FRONTIER: THE NEW YORK CITY HUMAN RIGHTS LAW

A. *Background on Litigation Under the NYCHRL*

Because the New York Court of Appeals held that segregated schools do not violate the Education Article in *Paynter*, advocates are, and should be, looking for other ways to seek relief. The New York City Human Rights Law (“NYCHRL”) may be a promising tool for advocates to use in challenging aspects of educational inequity that are facets of school segregation, such as discrimination based on race, color, or national origin in public accommodations.¹⁴⁰

The NYCHRL was created in 1965 after incorporating two local laws: Local Law 80, which banned discrimination in private housing, and Local Law 55, which created the Commission on Intergroup Relations.¹⁴¹ The NYC Commission on Human Rights is the administrative body charged with enforcing the NYCHRL and educating the public about the law.¹⁴² Today, the Human Rights Law is “one of the most comprehensive civil rights laws in the nation” and “prohibits discrimination in employment, housing, and public accommodations”¹⁴³ based on “race, color, religion/creed, age, national origin, alienage or citizenship status, gender (including sexual harassment), gender identity, sexual orientation, disability, pregnancy, marital status, and partnership status.”¹⁴⁴ Since its inception, the NYCHRL has protected New Yorkers against discrimination on the basis of race, sex, age, and national origin, while the other classes were added later over time.¹⁴⁵ The NYCHRL has generally been used to

¹⁴⁰ N.Y. ADMIN. CODE § 8-101 (2019).

¹⁴¹ Marta B. Varela, *The First Forty Years of the Commission on Human Rights*, 23 *FORDHAM URB. L.J.* 983, 984 n.11, 985 (1996); *Commission’s History*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/Q7SP-KN25> (last visited Jan. 7, 2018).

¹⁴² *Inside the NYC Commission on Human Rights*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/NZ49-22L6> (last visited Jan. 7, 2018).

¹⁴³ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142. Private entities that are considered public accommodations include “a nursery, elementary, secondary, undergraduate, or post-graduate private school, or other place of education,” as long as their operations affect commerce. 42 U.S.C. § 12181(7)(J) (2019).

¹⁴⁴ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142.

¹⁴⁵ In 1970, an Executive Order expanded the NYCHRL to include “creed,” “color,” and “ancestry.” Varela, *supra* note 141, at 985-86. In 1972, Local Law added “religion” to the list of protected classes. *Id.* at 986. In 1981, Local Law included “disabilities,” including both mental and physical disabilities. *Id.* at 987. In 1984, Local Law included “sexual orientation” as a protected class, which was unique in the United States at the time. *Id.* In 1989, Local Law

combat discriminatory practices by employers, such as retaliation and harassment, to offer “additional protections in housing,” and to protect against “bias-based profiling by law enforcement.”¹⁴⁶

Until recently, state and federal courts in New York have not taken litigation under the NYCHRL seriously. Specifically, state and federal courts previously declined to develop a unique legal standard under the NYCHRL.¹⁴⁷ If courts did engage in an analysis of the NYCHRL, judges chose to follow “rote parallelism”¹⁴⁸ because the courts viewed the NYCHRL as a carbon copy of its corresponding state and federal law, instead of liberally construing the NYCHRL to reach its potential in providing New Yorkers with more protection against various forms of discrimination.¹⁴⁹ Federal law even supports liberal construction of local law. For example, Title VII, the federal counterpart to the NYCHRL, states that nothing in the law exempts a person from liability under any present or future local law.¹⁵⁰

Recognizing this problem, the NYC Council passed the Local Civil Rights Restoration Act in 2005 to combat this prevailing practice in the judiciary.¹⁵¹ The NYC Council envisioned that the NYCHRL would be the ceiling of protection and not the floor, as state and federal laws are treated.¹⁵² Therefore, the Restoration Act mandates that “the provisions of [the NYCHRL] are to be *construed independently* from similar or identical provisions of New York state or federal statutes.”¹⁵³ In this way, the NYCHRL is intended to “meld the broadest vision of social justice with the strongest law enforcement deterrent” and to protect the rights of all people to be free from discrimination, in a way that the federal civil rights law and state human rights law have not been able to accomplish.¹⁵⁴

added “alienage” and “citizenship status.” *Id.* at 988. Finally, in 1991, “sex” was changed to “gender.” *Id.* at 989.

¹⁴⁶ N.Y.C. COMM’N ON HUMAN RIGHTS, *supra* note 142.

¹⁴⁷ Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255, 255-56 (2006).

¹⁴⁸ “Rote parallelism” refers to the judicial practice of automatically applying a federal or state legal standard to similar local laws. *Id.* at 262.

¹⁴⁹ *See id.* at 262-63.

¹⁵⁰ 42 U.S.C. § 2000e-7 (2005).

¹⁵¹ Gurian, *supra* note 147, at 256; *see also* 2005 N.Y.C. Local Law No. 85, § 7 (revising N.Y.C. Admin. Code § 8-130).

¹⁵² Gurian, *supra* note 147, at 257 (citing 2005 N.Y.C. Local Law No. 85, § 7).

¹⁵³ Jyotin Hamid & Mary Beth Hogan, *The New York City Civil Rights Restoration Act Grows Teeth*, N.Y. ST. B.J., 34, 35 (July-Aug. 2009) (alterations in original) (emphasis in original) (quoting 2005 N.Y.C. Local Law No. 85, § 7).

¹⁵⁴ Gurian, *supra* note 147, at 262; *see Williams v. N.Y.C. Housing Auth.*, 61 A.D.3d 62, 74 (N.Y. App. Div. 2009).

The power of the NYCHRL has come to fruition in employment discrimination and sexual harassment cases.¹⁵⁵ In these contexts, both state and federal courts have acknowledged that the NYCHRL requires a different analysis than the New York State Human Rights Law (NYSHRL) and Title VII.¹⁵⁶ For example, under the NYSHRL and Title VII, plaintiffs must prove that the harassment or discrimination is either severe or pervasive.¹⁵⁷ However, under the NYCHRL, plaintiffs must demonstrate only that they were treated less well than other employees based on a protected class.¹⁵⁸ In cases involving discrimination based on race, if a defendant has put forth “one or more nondiscriminatory motivations for its actions,”¹⁵⁹ a plaintiff must respond “with some evidence that at least one of the reasons proffered . . . is false, misleading, or incomplete.”¹⁶⁰ In addition, in some jurisdictions, employers can successfully assert a defense under NYSHRL and Title VII by demonstrating that they maintain anti-harassment policies and reporting avenues and promptly address complaints.¹⁶¹ However, employers are strictly liable for harassment by managers and supervisors under the NYCHRL.¹⁶² Overall, the NYCHRL provides greater protections to plaintiffs than its state or federal counterparts.¹⁶³ Since neither federal equal protection laws nor the federal or state constitutions have proven useful in protecting against segregation, the Human Rights Law is a promising new frontier for NYC advocates to use in desegregation litigation.

B. Litigation Against School Inequity Under the NYCHRL

In the realm of education discrimination, school equity advocates have not used the NYCHRL as an avenue to combat school segregation in the same way as it has been used to seek relief from workplace discrimination and harassment. To that end, school equity advocates have little jurisprudence to draw from to craft their positions under the NYCHRL. Broadly, however, the NYCHRL protects individuals from discrimination

¹⁵⁵ See Hamid & Hogan, *supra* note 153, at 34-35; Kate Webber Nuñez, *Toxic Cultures Require A Stronger Cure: The Lessons of Fox News for Reforming Sexual Harassment Law*, 122 PENN ST. L. REV. 463, 466 (2018).

¹⁵⁶ *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479-81 (2010); *Morse v. Fidessa Corp.*, 165 A.D.3d 61, 62, 65-70 (N.Y. App. Div. 2018); *Williams*, 61 A.D.3d at 66-71; Hamid & Hogan, *supra* note 153, at 34-35.

¹⁵⁷ *Williams*, 61 A.D.3d at 77; Nuñez, *supra* note 155, at 476.

¹⁵⁸ *Williams*, 61 A.D.3d at 78; Nuñez, *supra* note 155, at 500.

¹⁵⁹ *Bennett v. Health Mgt. Sys., Inc.*, 92 A.D.3d 29, 39 (N.Y. App. Div. 2011).

¹⁶⁰ *Id.* at 45; See *Cadet-Legros v. New York Univ. Hosp. Ctr.*, 135 A.D.3d 196, 201 (N.Y. App. Div. 2015).

¹⁶¹ Nuñez, *supra* note 155, at 497.

¹⁶² *Id.*; *Zakrzewska v. New Sch.*, 14 N.Y.3d 469, 479-81 (2010).

¹⁶³ See Hamid & Hogan, *supra* note 153, at 34-35.

in the area of public accommodations.¹⁶⁴ Since public schools are public accommodations, the NYC public school system must meet, and is subject to, the requirements of this law.¹⁶⁵

Despite the lack of jurisprudence, advocates have started to explore using the NYCHRL to combat educational discrimination in NYC public schools. In 2018, four Black and Latinx public high school students, on behalf of a class of all Black and Latinx students who attend segregated NYC schools, and IntegrateNYC, a student-led advocacy organization, filed *L.P. v. New York City Department of Education*, a lawsuit against the NYC Department of Education (“DOE”), the Public Schools Athletic League (“PSAL”),¹⁶⁶ and PSAL’s Executive Director, Donald J. Douglas, as defendants.¹⁶⁷ The plaintiffs, represented by the New York Lawyers for the Public Interest (“NYLPI”), argued that the defendants violated the NYCHRL by maintaining “discriminatory policies that deny Black and Latin[x] students equal access to the life-changing possibilities of sports,”¹⁶⁸ which negatively impacts their physical health, mental health, teamwork skills, community ties, and friendships, and negatively influences their college opportunities.¹⁶⁹ While this lawsuit is not particularly addressing school segregation at large, it addresses a facet of school inequality—sports access—that disproportionately affects students of color in NYC public schools.¹⁷⁰

Importantly, the students brought the case against the defendants as providers and managers of NYC public school accommodations.¹⁷¹ The students claimed that, as managers, the defendants withheld and denied

¹⁶⁴ *Law: Overview*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/9MWP-PPDP> (last visited May 12, 2019).

¹⁶⁵ Examples of public accommodations that are impacted by the NYCHRL are stores, banks, medical or dental offices, government agencies, hair salons, hotels, hospitals, theaters, restaurants, schools, and taxis. *Law: In Public Places*, N.Y.C. COMM’N ON HUMAN RIGHTS, <https://perma.cc/BCM9-CYSZ> (last visited May 2, 2019); see also Class Action Complaint at 35, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (June 21, 2018) [hereinafter *L.P. v. N.Y.C. Dep’t of Educ. Complaint*], <https://perma.cc/YU5H-RXXW>.

¹⁶⁶ PSAL is a DOE-created body that provides and regulates sports teams for all NYC public high schools. *What We Do*, PUB. SCH. ATHLETIC LEAGUE, <https://perma.cc/6QV6-3ACA> (last visited May 12, 2019).

¹⁶⁷ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 2. The New York Lawyers for the Public Interest (“NYLPI”) represents IntegrateNYC and the plaintiffs. Press Release, N.Y. Lawyers for the Pub. Interest, *NYLPI Files Discrimination Lawsuit Against N.Y.C. Dep’t of Educ. and Public Sch. Athletic League Calling for Equal Access to Sch. Sports* (June 21, 2018), <https://perma.cc/H7RB-V8UV>.

¹⁶⁸ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 2.

¹⁶⁹ *Id.* at 2, 5, 35.

¹⁷⁰ See generally *id.*

¹⁷¹ *Id.* at 35.

their rightful access to “accommodations, facilities, advantages, and privileges related to sports teams on account of [their] race” and promulgated and maintained “practices that result in a disparate impact [based upon race] to the detriment of the [students].”¹⁷² The students demonstrated their claims with evidence of the disproportionate lack of access to sports teams for Black and Latinx students, and the disparate impact on them resulting from policies that benefit schools with established sports teams.¹⁷³ These policies include “‘grandfathering’ established teams,” which favors established schools with fewer Black and Latinx students, “maintaining an opaque and discretionary team-granting system” which leads to a lower grant rate of sports teams in schools with higher proportions of Black and Latinx students, and “preventing students from participating on PSAL teams outside the school where they are enrolled.”¹⁷⁴

This lawsuit was filed after years of legislative and grassroots advocacy from students and teachers impacted by the lack of access to sports teams. Over two decades ago, NYC began dismantling many large, underperforming high schools to create smaller high schools,¹⁷⁵ with the idea that smaller educational settings would foster better academic relationships between students and their teachers and increase graduation rates.¹⁷⁶ These schools, however, were primarily comprised of people of color and immigrant students and, thus, these same populations now comprise the newer, smaller schools as well.¹⁷⁷ PSAL did not adapt their policies to permit creating and maintaining sports teams at these smaller schools.¹⁷⁸ Thus, “[t]he schools with the least access to sports teams ‘have the highest numbers of students of color, or for whom English is not their

¹⁷² *Id.* at 35-36.

¹⁷³ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 14-16. The complaint cites data showing that, on average, Black and Latinx students attend a school with “nearly ten fewer teams than students of other races.” *Id.* at 14. Further, “[a]pproximately 7.9% of Black and Latin[x] students in the city are currently enrolled at schools with no PSAL teams—more than twice the rate for students of other races (3.4%).” *Id.*

¹⁷⁴ *Id.* at 20-21.

¹⁷⁵ Jim Dwyer, *In Schools Where Sports May Be Most Vital, New York City Offers Least Help*, N.Y. TIMES (May 27, 2014), <https://perma.cc/C5UJ-AMYJ>.

¹⁷⁶ Taylor McGraw, *Episode 3: Who Gets to Play?*, MISEDUCATION (July 1, 2018), <https://www.bellvoices.org/season1/2018/7/1/episode-3-who-gets-to-play> [<https://perma.cc/D43X-C5EX>].

¹⁷⁷ *See* Dwyer, *supra* note 175.

¹⁷⁸ *Id.*

first language.”¹⁷⁹ As a result, students of color in these smaller schools who wanted to play on particular sports teams suffered.¹⁸⁰

In 2011, David Garcia-Rosen, a teacher and an activist, other school administrators, and high school students in the Bronx created the Small Schools Athletic League to provide these students with access to sports teams, with virtually no support from the Education Department or PSAL.¹⁸¹ Unfortunately, this proposal did not steadily increase access to sports teams, since students in predominantly Black and Latinx schools across the city still did not have equal access to sports teams.¹⁸² The Fair Play Coalition, a collection of students, teachers, coaches, and lawyers, are using the lawsuit to expand access to school sports across NYC and guarantee that all students have an opportunity to play a sport that PSAL offers students.¹⁸³

The students in *L.P.* are seeking declaratory and injunctive relief against defendants, yet also offer as solutions alternative policies that the defendants should implement for less discriminatory outcomes, such as “mandat[ing] that every small New York City high school be considered part of an ‘umbrella program’ with co-located or nearby schools” such that each group would have the same number of students.¹⁸⁴ PSAL, then, “could grant each program an equal number of PSAL teams,” to ensure that all NYC public high school students have an equal opportunity to access sports teams.¹⁸⁵ The defendants have responded and denied the claims.¹⁸⁶

In 2019, the NYC Department of Education unveiled a pilot program entitled “PSAL-All Access.”¹⁸⁷ Twenty-six schools from Manhattan, the

¹⁷⁹ *Id.* (quoting David Garcia-Rosen, a history teacher and dean at International Community High School in the Bronx, N.Y.).

¹⁸⁰ McGraw, *supra* note 176. This podcast episode is dedicated to highlighting voices of advocates and students of color from smaller public high schools who did not have access to sports such as, for example, a basketball team, baseball team, soccer team, or track team. *Id.*

¹⁸¹ *Id.* After pressure from the Fair Play Coalition, the Department of Education provided funding, adding 214 teams since 2014. Jim Dwyer, *New York’s Playing Fields Aren’t Level, Students Say*, N.Y. TIMES (June 28, 2018), <https://perma.cc/SK2T-Y8B6>. However, upon creation of the league, the principals of the small schools used their own in-house budgets to fund the teams, including hiring referees and getting equipment, until the Department provided a one-time grant of \$250,000. Dwyer, *supra* note 175; McGraw, *supra* note 176.

¹⁸² Dwyer, *supra* note 175.

¹⁸³ Amelia Harper, *New York City Students File Lawsuit Demanding Equal Access to Sports in High School*, EDUC. DRIVE (July 10, 2018), <https://perma.cc/A4E7-Q87S>.

¹⁸⁴ *L.P. v. N.Y.C. Dep’t of Educ. Complaint*, *supra* note 165, at 32.

¹⁸⁵ *Id.*

¹⁸⁶ *See generally* Answer, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (Aug. 27, 2018).

¹⁸⁷ Ben Chapman, *NYC Takes a Swing at Unequal School Sports System Long Accused of Racism*, N.Y. DAILY NEWS (Mar. 15, 2019, 5:30 AM), <https://perma.cc/WZ2Z-PE6L>.

Bronx, and Brooklyn that enroll 8,500 students will have access to nineteen PSAL sports teams.¹⁸⁸ The program will also permit students from these participating schools to join sports teams at nearby schools if their respective school does not provide a certain sports team.¹⁸⁹ However, Melissa Iachan, Senior Staff Attorney at NYLPI and a lead lawyer in *L.P.*, stated that the program “is too small to make a dent in the issue” before the court, as “the pilot program does not change the pervasive systematic racial inequality in the current PSAL system.”¹⁹⁰

At this point, the parties have entered a settlement negotiation agreement and the court has granted the plaintiffs an extension to move for class certification.¹⁹¹ It is conceivable that the students could be successful if the New York Supreme Court of Bronx County views that they are treated “less well” than their white student counterparts—who have access to PSAL sports teams—because of their race and ethnicity, taking the NYCHRL to the “furthest reaches of what is constitutionally permissible.”¹⁹² In this case, the court will have to ensure that NYC public schools are no longer separate and unequal, but have equal sports resources, taking a step towards integration.

The lawsuit against the DOE and PSAL under the NYCHRL is an example of litigation advocacy that looks beyond federal and state law and takes advantage of a local law that could finally safeguard plaintiffs against a form of discrimination that they would not originally be protected from—school segregation. This lawsuit advises advocates to strategize and challenge individual aspects of educational inequity, whether it be access to sports teams, extracurricular activities, or after-school programs.

VI. BEYOND LITIGATION

Underlying any litigation effort must be a desire to truly serve the needs of communities affected by educational inequity. *Brown I* made school segregation a national issue after the LDF constructed a decades-

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Stipulation and Order at 1, *L.P. v. N.Y.C. Dep’t of Educ.*, No. 155825/2018 (May 16, 2019). Additionally, ongoing organizing efforts have led to the passage of Res. No. 85-B, a City Council bill that will require PSAL to make public its “policies, procedures, resource-allocation and decision-making criteria,” an issue that is addressed in the NYCHRL litigation. Press Release, N.Y. Lawyers for the Pub. Interest, Public High School Students at City Hall to Celebrate Unanimous Passage of Sports Equity Legislation (May 29, 2019), <https://perma.cc/KL3D-TB7J>; Res. No. 85-B, 2019 N.Y.C. Council Sess. (N.Y. 2019).

¹⁹² Gurian, *supra* note 147, at 262.

long strategy to combat racial discrimination in education.¹⁹³ In NYC, grassroots organizing around integrating schools has been a long-standing tradition that is in full force today.¹⁹⁴ Unlike pre-*Brown* efforts, however, it is incumbent on attorneys to work with the specific communities impacted by school segregation and not to solely litigate on behalf of marginalized groups.¹⁹⁵

One way to practice this type of lawyering is to follow the advocacy that led to the NYLPI's complaint against the DOE and PSAL. Advocates, including students and teachers from segregated schools in NYC, organized for years before the complaint was even filed.¹⁹⁶ After addressing the lack of sports access through organizing, the complaint was filed in continuation of the ongoing fight. Thus, litigation stemmed from the organizing, and in turn was tailored to address only a portion of school inequity that results from school segregation. In this way, a suggested strategy could be to fight inequalities piece by piece, while confronting the whole systemic problem of racial segregation in NYC public schools.

A recommendation for future litigation is to address the high rates of school suspensions that impact Black and Latinx students. Advocates are currently organizing to reduce the maximum number of days that students can be suspended from school.¹⁹⁷ A potential claim under the NYCHRL could be that the disproportionate rate at which Black and Latinx students are suspended in NYC public schools, as compared to other races, results in disparate impact on those students.¹⁹⁸ Advocates may have additional leverage with this argument because, as of 2011, the DOE must report discipline and suspension data to the NYC Council as mandated by the

¹⁹³ Bell, *supra* note 20, at 472-73.

¹⁹⁴ See, e.g., FAIR PLAY COALITION, <https://perma.cc/26NC-BPPQ> (last visited Mar. 19, 2019) (youth-led coalition with a goal of equalizing sports access for all NYC students); INTEGRATE NYC, <https://perma.cc/B6BA-6ENU> (last visited Mar. 19, 2019); NEW YORK APPLESEED, <https://nyappleseed.org> <https://perma.cc/7GYH-5GVZ> (last visited Mar. 19, 2019) (organization working to integrate schools with stakeholders and advocacy groups); *Enrollment Equity Campaign*, TEENS TAKE CHARGE, <https://perma.cc/J4TT-FMH2> (last visited Mar. 19, 2019) (student-led coalition that is working to shift power in the education system to young people and calling on Mayor de Blasio to integrate NYC public schools).

¹⁹⁵ LÓPEZ, *supra* note 20, at 28-32.

¹⁹⁶ See *supra* Section V.B.

¹⁹⁷ *School to Prison Pipeline*, OFENY, <https://perma.cc/K4ES-YNU5> (last visited June 3, 2019); Sara Mosle, *In Offshoot of Black Lives Matter Movement, Students Push for Changes in New York City Schools*, CHALKBEAT (Feb. 8, 2019), <https://perma.cc/F24F-RR89>.

¹⁹⁸ See, e.g., Sarah D. Sparks & Alyson Klein, *Discipline Disparities Grow for Students of Color*, *New Federal Data Show*, EDUC. WEEK (Apr. 24, 2018), <https://perma.cc/22FP-WA4V>; Patrick Wall, *Black and Hispanic Students in New York City Most Likely To Be Arrested and Handcuffed, Data Shows*, CHALKBEAT (Sept. 26, 2017), <https://perma.cc/7QV4-CRJ3>; Alex Zimmerman, *Suspensions Continue to Fall in New York City Schools Under de Blasio*, CHALKBEAT (Mar. 31, 2017), <https://perma.cc/ZW5Y-Z4X2>.

NYCHRL.¹⁹⁹ In sum, lawyers must work in conjunction with communities impacted by racial segregation in school to determine the best course of action to fit their needs.

CONCLUSION

Before the U.S. Supreme Court decided *Brown I*, Ella Baker, an organizer and civil rights leader, expressed her frustration with the general ignorance surrounding school segregation in New York.²⁰⁰ With the NAACP's focus on remedying segregation in the South, she commented, "[W]hat do you do about the poor children right here?"²⁰¹ Students, parents, and advocates are still asking that same question today and, like Baker, are actively trying to remedy school segregation in NYC. Educational inequity, as a function of school segregation, is a persistent problem in NYC that is gaining political traction but is long overdue to be readily fixed.

It goes without saying that all children in NYC, regardless of race, should be provided access to an excellent education. As one option, advocates should creatively initiate litigation that challenges facets of unequal school systems under the NYCHRL. But, it is important to acknowledge that this tactic will not solve education inequality, as there is no single solution to this problem. To ensure that all children in NYC receive the education that they deserve, advocates must: challenge funding schemes, access to sports and after-school programs, and distributions based on race, gender, and test scores across the city; understand the effect that white supremacy has had on keeping our schools separate and unequal; and listen to the realities of NYC public school students and follow their lead.²⁰²

¹⁹⁹ N.Y. ADMIN. CODE § 8-101 (2019).

²⁰⁰ DELMONT, *supra* note 5, at 30.

²⁰¹ *Id.*

²⁰² *Enrollment Equity Plan*, TEENS TAKE CHARGE, <https://perma.cc/4NWU-XVUG> (last visited June 16, 2019); *Real Integration*, INTEGRATENYC, <https://perma.cc/MZJ4-BLHH> (last visited Mar. 19, 2019).

LIMITED ACCESS LETTERS: HOW NEW YORK CITY SCHOOLS ILLEGALLY BAN “UNRULY” PARENTS OF COLOR AND PARENTS OF STUDENTS WITH DISABILITIES

Andrew Gerst[†]

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INTRODUCTION: “WHITE PARENTS DON’T KNOW”

“It’s a damn shame the school made these kids stand in the pouring rain,” Latasha Battle said.¹

Battle stood in a downpour with other parents and students outside Success Academy (“Success”) of Cobble Hill before the school opened its doors.² It was a little before 7:35 A.M. one morning in the spring of 2017.³

The word “damn” caused problems.⁴ A few hours later, Success Academy’s principal, Brittany Davis-Roberti, banned Battle from the school grounds.⁵ The ban came in the form of a letter from Principal Davis-Roberti.⁶ In order to ever set foot on the campus again, the principal

¹ Ben Chapman & Greg B. Smith, *Mom Banned from Brooklyn Success Academy Charter School Until She Says Sorry to Principal for Saying ‘Damn’ Near Kids*, N.Y. DAILY NEWS (June 14, 2017, 4:00 AM), <https://perma.cc/FDE7-HXY3>.

² *Id.*

³ *Id.*

⁴ Aaron Holmes et al., *Mom Banished from Brooklyn Success Academy for Cursing Refuses to Say Sorry – and Pulls Her Kids Out of Charter School*, N.Y. DAILY NEWS (June 14, 2017, 5:25 PM), <https://perma.cc/5N5Q-JD9N>. The school, which is a charter school and part of the larger Success Academy network, claims that Battle also used the word “fuck” and that she screamed rather than speaking. *Id.*

⁵ *Id.*

⁶ *Id.*

required Battle to “schedule an appointment . . . to apologize for [her] behavior.”⁷ Principal Davis-Roberti also required Battle to “pledge that it [would] never happen again.”⁸

After the *New York Daily News* wrote about the incident, Success defended Principal Davis-Roberti’s decision: “When an adult frightens children and staff by screaming profanities, we absolutely support our principals in taking necessary steps to ensure a respectful, safe school environment,” a Success spokesperson said.⁹ Battle has said she won’t apologize, and she has pulled her children from Success.¹⁰ “I’m leaving. I’m taking my children and I’m never coming back,” she said. “At 8:15 a.m. it’s graduation and then I’m out of here. It’s ridiculous.”¹¹

In Connecticut, meanwhile, Norman Johnson—the father of Janai, a high school student—had a dispute with his daughter’s principal over the basketball team.¹² The two had a meeting, and words were exchanged.¹³ A few days later, Johnson received the following email:

This letter is to inform you that as of February 10, 2013, you are tres[pa]ssed from the Capital Preparatory Magnet School and its events, (including but not limited to sports both on and off campus), with the exception of commencement exercises on May 21, 2013; after which the trespass will be reinstated. Disregarding this correspondence by coming to school grounds or to an event in which Capital Prep is a participant, will result in your immediate removal.

Your verbal altercations, physical intimidation and direct threats to staff have created an unsafe environment for staff, students and other parents and will no longer be tolerated.

A copy of this letter is being sent to the Hartford Board of Education and the Hartford Police Department as well as other communities and venues where the Capital Preparatory Magnet School’s activities may occur.¹⁴

⁷ *Id.*

⁸ *Id.*

⁹ Chapman & Smith, *supra* note 1.

¹⁰ Holmes et al., *supra* note 4.

¹¹ *Id.*

¹² Johnson v. Perry, 859 F.3d 156, 161-64 (2d Cir. 2017); Vanessa De La Torre & Matthew Kauffman, *Acclaimed Capital Prep Magnet School Bypassed Normal Lottery Process for Athletes, Other Students*, HARTFORD COURANT (May 3, 2017, 6:00 AM), <https://perma.cc/8ZM8-SVWZ>.

¹³ Johnson v. Perry, 140 F. Supp. 3d 222, 225 (D. Conn. 2015), *aff’d in part, rev’d in part, dismissed in part*, 859 F.3d 156 (2d Cir. 2017).

¹⁴ Johnson, 859 F.3d at 163 (emphasis omitted).

More than eighty percent of the students at the school—known as a high-performing¹⁵ school for low-income families in Hartford, Connecticut—are identified as Black or Latinx.¹⁶

* * *

What Principal Perry gave Johnson—and what Principal Brittany Davis-Roberti of Success gave Latasha Battle—is known in the New York City Department of Education (DOE) as a “limited access” letter.¹⁷ And in New York City, home to the largest school system in the country (which covers all five boroughs),¹⁸ “unruly” parents of children receive these letters.

These limited access letters allow a principal to ban a parent from school grounds, apply modified security protocols, or strictly enforce already-existent security policies. Officially, a principal is only supposed to issue these letters after an incident at the school that was serious enough to require that a School Safety Agent (SSA) be involved.¹⁹ In practice, however, principals have apparently given these letters even for less serious incidents that do not involve SSAs.²⁰

The content of limited access letters varies. Some have modified procedures for student pick-up and drop-off.²¹ Other letters include modified security procedures, such as schools stating that parents cannot pass a

¹⁵ See Marwa Eltagouri, *Hartford's Capital Prep Graduates 32*, HARTFORD COURANT (June 7, 2013), <https://perma.cc/8DFP-ZK59> (“Capital Prep, which claims it sends 100 percent of its graduates to a four-year college, met that goal again, an accomplishment the school’s founder and principal, Steve Perry, calls ‘not what you’d expect of Hartford children.’”).

¹⁶ *Principal's Tough Love, High Expectations Get Kids into College*, CNN (July 22, 2009, 1:28 PM), <https://perma.cc/QTY7-BWDN>.

¹⁷ See Amy Zimmer, *'Limited Access Letters' Used Unfairly to Ban Parents from Schools: Critics*, DNAINFO (Sept. 9, 2016, 7:23 AM), <https://perma.cc/7CBL-2KML>.

¹⁸ NAT'L CTR. FOR EDUC. STAT., CHARACTERISTICS OF THE 100 LARGEST PUBLIC ELEMENTARY AND SECONDARY DISTRICTS IN THE UNITED STATES: 2000-2001 app. a, <https://perma.cc/24MN-V6MG> (last visited Apr. 24, 2019); Christina Veiga, *The Country's Largest School System – and One of the Most Segregated – Just Released Its 'School Diversity' Plan. Here Are the Highlights*, CHALKBEAT (June 6, 2017), <https://perma.cc/V2GP-JUPM>.

¹⁹ Zimmer, *supra* note 17. Importantly, “[l]imited access letters,” which an Education Department staffer advised should only be used in case of a “serious incident at the school that required the involvement of School Safety Agents,” have been given out without any apparent oversight or supervision to parents across the city . . .” *Id.*

²⁰ Based on the author’s experience. In discussing this issue with other MFJ attorneys, it is apparent that principals may issue these letters for a variety of reasons.

²¹ Based on the author’s experience. For instance, some letters may require a parent to give notice to a principal in advance if the parent intends to pick up her, his, or their child from school.

school's security desk.²² The text of a typical letter prevents a child's parent from meeting with any of the child's teachers without a principal's approval. For example, a letter may say something like: "You [the parent] are required to call me [the principal] before scheduling a meeting with your child's teacher." But some parents say SSAs and other school staff may incorrectly interpret this type of letter and refuse to let a parent on campus, even if a parent already has called the principal to schedule a meeting with a teacher.²³

The reality of which parents receive the letters (and which do not) suggests that they are another tool of discrimination and oppression. Although no formal data exist on limited access letters, the limited anecdotal evidence available strongly suggests that nearly all the banned parents who have received these letters are Black or Latinx.²⁴ The DOE does not keep track of the race of the parent receiving the letter, the race of the principal giving the letter, or anything else related to the limited access letter practice.²⁵ But those intimately familiar with the letters know who the letters target; as Stephanie Thompson, a twenty-five-year-old Black mother in New York City, put it in a recent article: "[w]hite parents don't know about [these] letters."²⁶ Furthermore, some of these banned parents have children with disabilities, which is unsurprising given the overrepresentation of Black students and other students of color in special education.²⁷

Black students—rather than parents—have received most of the attention in discussions of the school-to-prison pipeline. Black students have also faced disproportionate amounts of school discipline throughout the country. These rates, according to an April 2018 federal report, are only worsening.²⁸ In 2013-2014, for instance, Black students constituted

²² *Id.*

²³ *Id.*

²⁴ For a discussion of how limited access letters are used "to unfairly silence outspoken parents in low-income Black and Hispanic schools," see Zimmer, *supra* note 17.

²⁵ See *id.* ("In response to a Freedom of Information Law request seeking data on the letters, the DOE's FOIL request officer was unable to provide any information, stating[] that 'diligent searches and inquiries for data in response to your request have been conducted. I am informed, however, that responsive data is not tracked or compiled in a computer storage system, as the letters in question are maintained by individual schools.'").

²⁶ *Id.*

²⁷ See, e.g., Int'l Socialist Org., *Don't Let an Abusive Principal Ban Parents*, SOCIALIST WORKER (May 1, 2017), <https://perma.cc/34G9-XNKQ> (discussing two parents of children with disabilities who received limited access letters and describing the "heartbreaking" effect of limited access letters on the two children); Kelly Kreskow, *Overrepresentation of Minorities in Special Education* (Apr. 2013) (unpublished M.S. in Literacy Education thesis, St. John Fisher College), <https://perma.cc/3WHP-L3YL>.

²⁸ Moriah Balingit, *Racial Disparities in School Discipline Are Growing, Federal Data Show*, WASH. POST (Apr. 24, 2018), <https://perma.cc/FW8J-TMHM>.

sixteen percent of the nation's students but accounted for twenty-seven percent of all arrests at schools.²⁹ Two years later, in 2015-2016, Black students constituted fifteen percent of the nation's students—a smaller percentage—but accounted for thirty-one percent of all arrests at schools.³⁰ Race-conscious policies on school discipline were introduced by the Obama administration—and then later rescinded by Trump—but they focused on disciplining students, not parents.³¹

Parents of children with disabilities, regardless of race, may be more likely to receive limited access letters than parents of children without disabilities. Students with disabilities in New York already receive a disproportionate amount of student discipline. In 2017-2018, students with disabilities comprised approximately twenty percent of students in New York City and roughly forty percent of suspensions.³² Nationally, the trends are similar: students with disabilities receive school suspensions at approximately twice the rate of non-disabled peers.³³ This link is hardly shocking; “[s]o intertwined are these oppressions that any attempt to rid the nation of racism without doing away with ableism yields practically nothing.”³⁴

New York State has also tracked similar discipline data for students of color, but not for parents.³⁵ New York City, too, tracks data on student

²⁹ *Id.*

³⁰ *Id.*

³¹ Collin Binkley, *Trump Officials Cancel Obama-Era Policy on School Discipline*, AP NEWS (Dec. 21, 2018), <https://perma.cc/4MUW-VMYE>. In 2014, then-President Barack Obama implemented race-conscious policies on school discipline to emphasize restorative justice and other measures to counteract racial disparities. *Id.* In 2018, President Donald Trump rescinded these policies. *Id.* Autonomy was the word: “Our decision to rescind that guidance today makes it clear that discipline is a matter on which classroom teachers and local school leaders deserve and need autonomy,” said Education Secretary Betsy DeVos at the time. *Id.*

³² Alex Zimmerman, *Suspensions in New York City Rise for the First Time Since de Blasio Took Office*, CHALKBEAT (Oct. 31, 2018), <https://perma.cc/TYA2-6XFQ>.

³³ Courtney Perkes, *Report: Students with Disabilities Disciplined Twice as Often as Peers*, DISABILITY SCOOP (Feb. 28, 2018), <https://perma.cc/N84C-PCV7>.

³⁴ Talila A. Lewis, *Emmett Till & the Pervasive Erasure of Disability in Conversations about White Supremacy & Police Violence*, TALILAALewis.COM (Jan. 28, 2017), <https://perma.cc/XV65-XN2M>.

³⁵ In December 2018, the New York Equity Coalition released a major report addressing school suspensions in New York called “Stolen Time.” THE N.Y. EQUITY COALITION, *STOLEN TIME: NEW YORK STATE’S SUSPENSION CRISIS* (2018), <https://perma.cc/XHV6-4E2Y>. This report provides critical data on race and school suspensions. For example, we know that, statewide, Black students comprise 15% of all students, but 33% of all students who have been suspended at least once. *Id.* at 11. We know that outside of New York City, only 2.7% of white students have received at least one out-of-school suspension, and that for Black students in the same region, the percentage is 11.4%. *Id.* at 4. We also have details about specific school districts. For instance, the data show that in Buffalo, New York, Black students are more than

suspension, but not parental exclusion from campus.³⁶ The DOE collects and publishes disaggregated data of every suspension and other removals from class by race and more.³⁷

The data on student suspensions are robust, detailed, and granular. They speak powerfully to the racial dimensions of “no excuses” discipline policies and the disproportionate effects on students of color. But the data on parental exclusions is nil. The DOE does not keep track of the race of the parent receiving the letter, the race of the principal giving the letter, or anything else related to the limited access letter practice.³⁸

Why do these letters matter? Because limited access letters are part of the school discipline system and likely result in the systematic exclusion of parents of color. The same impetus leads a principal to ban an “unruly” parent as the one that leads a teacher to suspend a “disruptive” student. Implicit or explicit bias in these contexts will lead a figure of authority to make the kind of snap decision that punishes people of color, whether parent or child. This discipline protocol includes school safety officers and principals, who have the authority to arrest and suspend students and refer them—and their parents—to the police. As such, these letters are one more way in which “our schools are functioning as carceral spaces.”³⁹

The letters are a form of punishment for parents, but also their children. The parent who cannot watch his daughter play basketball or graduate cannot celebrate the joy of her education. The student whose father

twice as likely to be suspended as white students. *Id.* at 9. And in Long Island, Black students are about five times more likely to be suspended than white students. THE N.Y. EQUITY COALITION, *STOLEN TIME: NEW YORK STATE’S SUSPENSION CRISIS: LONG ISLAND* (2018), <https://perma.cc/B9XV-HVEZ>.

³⁶ Alex Zimmerman, *Black Students in New York City Receive Harsher Suspensions for the Same Infractions, Report Finds*, CHALKBEAT (Oct. 11, 2018), <https://perma.cc/BZD9-ATTQ>. New York City’s Independent Budget Office (IBO) released a report in October 2018 breaking down the average length of suspensions by the ten most frequent infractions and by race. *Id.* The report found that “overall suspensions still disproportionately affect black students and students with disabilities.” *Id.* For instance, white students who were suspended for “reckless behavior” during the 2016-2017 school year received an average suspension of 10.9 days, whereas Black students, by contrast, received an average suspension of 16.7 days—more than an entire week of extra suspension time. *Id.* For the IBO’s report, see N.Y.C. INDEP. BUDGET OFF., *WHEN STUDENTS OF DIFFERENT ETHNICITIES ARE SUSPENDED FOR THE SAME INFRACTION IS THE AVERAGE LENGTH OF THEIR SUSPENSION THE SAME?* (2018), <https://perma.cc/BNU2-EB72>.

³⁷ NYC DEP’T OF EDUC. INFOHUB, *SUSPENSION REPORTS*, <https://perma.cc/VX9L-YMH7> (last visited May 9, 2019). These data are also available on OpenData. *See, e.g.*, NYC OPENDATA, *2016-2017 STUDENT DISCIPLINE ANNUAL REPORT – RACE* (updated Sept. 10, 2018), <https://perma.cc/J69R-LV7J> (aggregating school disciplinary contacts by race).

³⁸ *See* Zimmer, *supra* note 17.

³⁹ Dustin P. Gibson, *Speech at the 2019 Am. Ass’n of People with Disabilities Leadership Awards Gala* (Mar. 13, 2019), <https://perma.cc/V695-6GRK>.

may not attend graduation, in turn, cannot feel part of a family fully welcome at the school. The child who does not feel part of a welcome family at school may choose to stop going. And once a student has dropped out of high school, or not gone to college, or otherwise failed to overcome the systemic barriers she faces, the rest, as they say, is history.

* * *

The power in these letters is not just in what they mean for parents receiving them—it is also in their secrecy. No DOE Chancellor’s Regulations directly address the practice. The NYC Parents’ Bill of Rights does not discuss the practice.⁴⁰ Nor do any state laws apparently recognize the relevant rights of a parent.⁴¹ Despite what is almost certainly a racially discriminatory disparate impact, an utter lack of any form of due process, and a violation of the “arbitrary and capricious” standard, the DOE has not given any inkling that it will curtail or eliminate the practice. But parents do have ways to fight back.

Sometimes the harm these letters impose on parents is substantial—such as when a school forbids a parent from attending a child’s capstone project, as Principal Perry did for Norman Johnson,⁴² or participating in graduation. This type of letter prevents a parent from engaging in critical moments of their child’s education. Sometimes the harm may seem less substantial—such as when a school merely reaffirms strict compliance with security protocol already in place. But even if the harm caused by the letters seems minimal, this article argues that the disapprobation and shame that accompanies receipt of the letters poses a serious threat to students and their families.

I hope that the article will motivate New York elected officials to modify or abolish the limited access letter procedure altogether. Of course, all students, teachers, and school staff need a safe, orderly place to learn and work. But what does that look like, and for whom?

Limited access letters should be abolished permanently. They are unnecessary: principals that truly have reason to bar a dangerous parent can seek recourse through a restraining order. The letters can have a financial impact: parents excluded from a campus may need to disrupt their work schedule, if not an entire day, to restructure child drop-off and pick-up

⁴⁰ *Parents’ Bill of Rights*, NYC DEP’T OF EDUC., <https://perma.cc/MN4D-M3AK> (last visited Apr. 24, 2019).

⁴¹ See N.Y. Educ. Law § 2590-h(15)(c)(i) (McKinney 2019), which calls for “reasonable access by parents . . . to schools, classrooms, and academic and attendance records of their own children, consistent with federal and state laws, provided that such access does not disrupt or interfere with the regular school process,” but does not specifically discuss limited access letters.

⁴² *Johnson v. Perry*, 859 F.3d 156, 164 (2d Cir. 2017).

arrangements. Perhaps most importantly, they are humiliating. In the alternative, if the DOE refuses to abolish limited access letters, then it must create a formal appeals process for these letters. This process should entail a fact-finding hearing before an impartial hearing officer—as is required in any New York City superintendent’s suspension of a student.⁴³ This process should also involve a dispositional hearing to determine the length for which a parent can be banned from campus—as is also done in any DOE superintendent’s suspension.⁴⁴ If not even a simple hearing is possible, then, at the very least, the DOE must allow parents to appeal the limited access letter in writing to a superintendent or neutral body—as other school districts, such as the Los Angeles Unified School District, require.

Reform of the limited access letter procedure will allow schools to better build trust with so-called “difficult” parents, and will allow both schools and parents to offer a more inclusive education for the real victims of New York’s limited access letter policy: the students.

In Part I, the article first discusses the current reality of limited access letters in New York City. It provides an overview of other limited access letter “moments” in the last few years. These incidents include the letters that two outspoken parents received after advocating for change at their elementary school in East Harlem; three separate limited access letters that a parent received at an East Village elementary school; and a limited access letter that a parent in the Bronx received after allegedly accosting an eight-year-old eating school breakfast. The article then discusses the lack of any DOE or New York State policy referring to the limited access letter practice in any way. The article analyzes New York State’s education law and associated appeals mechanism and concludes that these, too, provide insufficient (or nonexistent) remedy for parents seeking to contest a limited access letter.

In Part II, the article discusses why limited access letters violate federal and state law. It proposes multiple theories of liability in making this claim. The piece begins by analyzing the *Mathews v. Eldridge* procedural due process framework that the Supreme Court has used for decades. Analyzing the limited access letter process through this basic heuristic—which assesses, roughly, the public interest, private interest, and risk of erroneous deprivation in a taking—the piece concludes that the current lack of a hearing deprives parents of their Fifth and Fourteenth Amendment right to due process. The piece then discusses the small amount of

⁴³ ADVOCATES FOR CHILDREN, AFC’S GUIDE TO SCHOOL SUSPENSIONS 9-11 (2012), <https://perma.cc/C33G-KZKC> (describing the hearing process outlined by Chancellor’s Regulations).

⁴⁴ *Id.* at 12-13.

case law in New York and across the nation addressing limited access letters. While noting that procedural due process may provide the strongest theory of liability, the piece also discusses the potential viability of an Article 78 New York State proceeding challenging limited access letters as arbitrary and capricious. The article observes the “arbitrary and capricious” roadmap created by the January 2019 case *Lujan v. Carranza*,⁴⁵ involving a challenge to a DOE letter very similar to a limited access letter. The piece also briefly discusses the possibility of DOE parents⁴⁶ bringing suit under a theory of racially disparate impact, while noting the limitations imposed by the 2001 Supreme Court case of *Alexander v. Sandoval*.

In Part III, the article presents a recommendation—outright abolition of the limited access letter practice, for the many reasons discussed above. In the alternative to this strongly preferred abolition, the article also proposes urgently needed reforms and solutions. The article discusses the Los Angeles Unified School District (LAUSD), which recently made major changes to its analogous “disruptive parent/person letter” process. In this discussion, the article provides an overview of extensive data that a Los Angeles parent advocacy group found when analyzing these LAUSD disruptive person letters. The article next highlights the reforms that Los Angeles put into place. These reforms, which New York City or New York State could adopt, include: a clear policy guidance document on the subject; a template for a warning letter and subsequent disruptive person letter; and a parent’s right to two levels of appeal in a simple, timely fashion. The piece suggests that, if limited access letters are not eliminated outright, these reforms provide a bare minimum of what the DOE must afford parents. Finally, the piece concludes with a call to end the due process violations of parents of color and parents of students with disabilities.

I. LIMITED ACCESS LETTERS IN NEW YORK CITY

A. *A Punishment for Outspoken Parents of Color and Parents of Children with Disabilities*

It is no coincidence that limited access letters—at least the ones publicly discussed in media—have gone almost exclusively to people of color

⁴⁵ *Lujan v. Carranza*, 63 Misc. 3d 235, 239–40 (N.Y. Sup. Ct. 2019).

⁴⁶ The term “DOE parents” refers to parents of students who attend DOE schools. Many parents in New York City send their children to charter schools (e.g. Success Academy). While these charter schools remain subject to some New York State oversight, the degree to which charter schools must abide by DOE policies remains in dispute. As a result, this article focuses on parents of children who attend traditional DOE public community schools.

and/or parents of children with disabilities.⁴⁷ As one Black parent, who received three limited access letters in three years, said, “When you say stuff as a white man, you’re seen as expressing yourself. You’re passionate. You’re smart and challenging. Whenever I do anything, I’m seen as an angry black woman and aggressive. I’m a ‘pit bull.’”⁴⁸ Since a limited access letter can purport to target nebulous, subjective behavior, its use is especially prone to reflecting stereotypes in U.S. culture that people of color, particularly Black people, are angrier and more aggressive than white people.⁴⁹

Kaliris Salas-Ramirez is a DOE parent born in Puerto Rico.⁵⁰ She is the parent of a special education student, Seba, and the co-president of the Parents Association at his school.⁵¹ “Seba is my pride and joy,” she wrote in an article.

He is the center of my world. I do the things I do to make the world a better place for him. He struggles with emotional processing, and has issues around abandonment. At the beginning of the year, he was running away from school, a safety concern for sure, but he wanted to be at home.⁵²

Salas-Ramirez had concerns about her son’s school, Central Park East 1 (“CPE1”).⁵³ In particular, she and other parents took issue with Monika Garg, the school’s new principal, who imposed significant school cultural changes.⁵⁴

Salas-Ramirez received a limited access letter on May 1, 2017, after joining more than seventy percent of the families at CPE1 in requesting the removal of Principal Garg.⁵⁵ She received the letter after inviting a graduate student from the Columbia School of Journalism into CPE1.⁵⁶

⁴⁷ Note that, although the City does not keep track of data regarding limited access letters, every letter publicly discussed in media pieces involves either a parent of color or the parent of a child with disabilities. This is the author’s experience.

⁴⁸ Zimmer, *supra* note 17.

⁴⁹ See, e.g., Trina Jones & Kimberly Jade Norwood, *Aggressive Encounters & White Fragility: Deconstructing the Trope of the Angry Black Woman*, 102 IOWA L. REV. 2018, 2045-52 (2017).

⁵⁰ Kaliris Salas-Ramirez, *Kaliris Salas-Ramirez: Caught in the Crossfire of a Battle for Democracy*, ECE POLICYMATTERS (May 2, 2017), <https://perma.cc/5C4X-Z2CB>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*; *CPE 1 Parents to Wage Strike Demanding Mayor de Blasio Remove School’s Principal*, ED NOTES ONLINE (May 5, 2017), <https://perma.cc/YJF3-PCTX> (describing the action around, and request for, Garg’s removal, and listing Ms. Salas-Ramirez as a point of contact).

⁵⁶ Dartunorro Clark, *Controversial Harlem Principal Bars Parents from Campus*, DNAINFO (May 2, 2017, 9:24 AM) (alteration in original), <https://perma.cc/E7RM-TF5Z>.

The journalism student began taking photographs of empty classrooms; Garg wrote in the letter that “bringing press on site without authorization put[s] children and teachers at risk.”⁵⁷ Salas-Ramirez wrote about the effect the limited access letter had on her son’s education:

Under the terms of the letter, I cannot take my son to his classroom, or pick him up from school—unless I have been announced or have made an appointment. The security staff must escort him to his classroom. Nor can I be at the school to assist parents with their concerns. I don’t know if I can attend leadership meetings, or meet with the school psychologist or counselor about my son’s Individualized Education Plan.⁵⁸

Principal Garg also gave a letter to Jen Roesch, a parent of a child in the special education program at CPE1.⁵⁹ Roesch does not appear to have publicly self-identified her race. Roesch reported that her letter came after allegations that she was “recording on her cell phone in the school.”⁶⁰ Roesch, however, denied the accusations, explaining that she photographed the hallways and bulletin boards to document the school’s lack of compliance with a DOE-required policy mandating the public display of anti-bullying posters.⁶¹

* * *

Advocates know very little regarding limited access letters. When a journalist filed a FOIL request, the DOE wrote back that it did not keep data on these letters.⁶² At least some limited access letters—such as the ones Latasha Battle, Norman Johnson, Kaliris Salas-Ramirez, and Jen Roesch all received—appear to be retaliatory in nature.⁶³ None of these incidents seem to involve any violence or potential danger to the rest of the school. Three of the four parents present as people of color, and at least two of the parents’ children are identified as having special needs.

An anonymous commenter on an internet blog for New York City public school parents, for instance, wrote in June 2015 that they received a limited access letter from the principal of P.S. 109 in the Bronx.⁶⁴ The commenter, like Roesch and Salas-Ramirez, also identifies as a parent of

⁵⁷ *Id.*

⁵⁸ Salas-Ramirez, *supra* note 50.

⁵⁹ Int’l Socialist Org., *supra* note 27.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² Zimmer, *supra* note 17.

⁶³ See Int’l Socialist Org., *supra* note 27; see also Holmes et al., *supra* note 4.

⁶⁴ Anonymous, Comment to *NYC Principal Hall of Shame: Why Does DOE Protect Abusive Principals?*, NYC PUB. SCH. PARENTS (June 20, 2015, 6:57 PM), <https://perma.cc/N4SZ-B7DS>.

a child with a disability.⁶⁵ As with the other parents who received a letter, this commenter also states that they took a stand against the school's administration:

I've been bullied by my children principle at a elementary school in the bronx p.s 109 in the bronx. she has taken my rights away from me with my 2 disabled children I've been slapped in my face with a evolope, I've been followed by the staff. My children who are victims of domestic violence have been snatched out of there class and put into a kindergarten class where my son urinated on himself due to believing that our abuser was there to hurt him. As a parent the principle josette Claudio stop all staff from talking to me I received a limited access letter from the princible after I filed a complaint against her she them allowed herself to become personal with me. I've reported this behavior to the doe and the board of education but as always they protect their princible and continue to allow her to treat me and other parents this way. Over 28 teachers left the school last June and this June of 2015 many more have left due to the horrible behavior of this principle.⁶⁶

Limited access letters may also be correlated with a degree of parent activism within a school community. For instance, Stephanie Thompson, a woman who identifies as Black and a parent of a child at an East Village public school, held a seat on the Lower East Side/East Village District 1 Community Education Council (CEC).⁶⁷ Thompson in fact received three limited access letters in three years.⁶⁸ Thompson says she received one letter "for complaining about her principal" and a second "for criticizing her superintendent within earshot."⁶⁹ Roesch and Salas-Ramirez, too, held leadership roles in their school community. Specifically, Salas-Ramirez was the co-chair of the CPE1 Parent Association, an elected position.⁷⁰ As part of her advocacy against the principal, Salas-Ramirez stated that she had "attended and spoken at meetings of the Panel for Educational Policy, on which New York City's [then] chancellor Carmen Fariña s[at], and the Community Education Council of [her] district."⁷¹ As part of this work, Salas-Ramirez also met with many elected officials,

⁶⁵ *Id.*

⁶⁶ *Id.* This comment is preserved as originally written.

⁶⁷ Zimmer, *supra* note 17.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Int'l Socialist Org., *supra* note 27.

⁷¹ Salas-Ramirez, *supra* note 50.

including a member of Congress.⁷² Roesch, too, joined in this advocacy.⁷³ A Change.org petition created to support these parents described Roesch as an “outspoken critic[] of Principal Garg’s leadership.”⁷⁴

Limited access letters may also be issued in response to an incident of violence. These incidents may consist of the very narrow purpose the DOE originally had in mind for limited access letters—based on a “serious incident at the school that required the involvement of School Safety Agents.”⁷⁵ While limited access letters addressing violence are still not legitimate—as they essentially allow a school to circumvent the restraining order process—one may perhaps sympathize more with school officials who write them. On April 27, 2018, for instance, a mother at P.S. 146 in the Bronx allegedly interrupted an eight-year-old who was eating breakfast at the school cafeteria and “burst in and hauled him off to the principal’s office.”⁷⁶ Police and EMTs responded to the incident.⁷⁷ The student was treated at a hospital for a stiff neck the next day.⁷⁸ His mother later sought a safety transfer to another school.⁷⁹ The mother who allegedly attacked the student received a limited access letter.⁸⁰ Meanwhile, all parents at the school received a limited access letter⁸¹ “informing them not to enter the Cauldwell Ave. building during school hours.”⁸²

B. *A Policy Without a Guide*

Limited access letters appear to be a “shadow” policy. They are not covered in the Chancellor’s Regulations in the relevant sections. They cannot be found, apparently, in state or city laws. And few people, if anyone, seem to know anything about what legal basis allows them to exist at all.⁸³

⁷² *Id.*

⁷³ Int’l Socialist Org., *supra* note 27.

⁷⁴ *Id.*

⁷⁵ Zimmer, *supra* note 17.

⁷⁶ Kerry Burke et al., *Bronx Mom Claims Another Parent Dragged Her Child by Neck as He Ate Breakfast at School*, N.Y. DAILY NEWS (May 7, 2018, 10:36 PM), <https://perma.cc/98EC-J64Y>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Christina Carrega & Ben Chapman, *Schools OK Bronx Third Grader’s Transfer, but Still Won’t Say Who Grabbed Him by Neck*, N.Y. DAILY NEWS (May 9, 2018, 2:41 AM), <https://perma.cc/J8Y5-HWGT>.

⁸⁰ *Id.*

⁸¹ While the line between a limited access letter and a schoolwide policy may blur, I classify this letter as a limited access letter because it takes away the right of a parent to be on campus based on actions that have taken place at school.

⁸² Burke et al., *supra* note 76.

⁸³ Based on the author’s consultation with other attorneys practicing special education law in New York City.

Principals seem to vary widely in how, when, and whether they choose to wield limited access letters at all. No DOE regulations describe any discretion in how principals may choose to use these limited access letters. According to Nequan McLean—a leader on the Bedford-Stuyvesant District 16 Community Education Council—one principal in Bed-Stuy “was giving out limited access letters like candy.”⁸⁴ Since DOE regulations do not provide guidance to principals in how they may choose to use these limited access letters, principals have unfettered discretion. In general, the Chancellor’s Regulations, a set of less-than-transparent legal documents, explain most of the DOE’s policies. But these supposedly comprehensive Regulations are utterly silent with respect to limited access letters. The Chancellor’s Regulations, consisting of four volumes, cover a wide range of material spanning admissions, budgeting, employee concerns, and countless other topics in between.⁸⁵ While available online and free to the public, they make for dense reading material hardly accessible to the majority of New York City public school parents (or anyone else).⁸⁶ Even if banned parents were to labor through these tomes in search of an explanation of limited access letters, they would come up empty-handed. The DOE Chancellor’s Regulations simply do not address limited access letters at all. Volume D, which addresses “parent and community involvement,” is entirely silent on the subject.⁸⁷ The regulations in this volume instead focus on FOIL requests, school leadership teams, political campaigns, community education councils, and use of DOE buildings for non-academic purposes.⁸⁸

Chancellor’s Regulation A-412, “Security in the Schools,” also does not discuss limited access letters.⁸⁹ Part A of section II of this Regulation describes the procedure in place for “Notification Requirements for School-Related Crimes.”⁹⁰ But this Regulation does not refer to limited access letters in any way, shape, or form.⁹¹ Part B of section II would

⁸⁴ Zimmer, *supra* note 17.

⁸⁵ *Chancellor’s Regulations*, NYC DEP’T OF EDUC., <https://perma.cc/5X8G-8WRS> (last visited Apr. 27, 2019).

⁸⁶ See NYC DEP’T OF EDUC., REGULATION OF THE CHANCELLOR A-190: SIGNIFICANT CHANGES IN SCHOOL UTILIZATION AND PROCEDURES FOR THE MANAGEMENT OF SCHOOL BUILDINGS HOUSING MORE THAN ONE SCHOOL (2010), <https://perma.cc/CYX3-B9Z9>, for a particularly dense read.

⁸⁷ *Volume D Regulations*, NYC DEP’T OF EDUC., <https://perma.cc/9EXE-KWKQ> (last visited Apr. 27, 2019).

⁸⁸ *Id.*

⁸⁹ NYC DEP’T OF EDUC., REGULATION OF THE CHANCELLOR A-412: SECURITY IN SCHOOLS (2006), <https://perma.cc/2E9S-KAXM>.

⁹⁰ *Id.* § II.A.

⁹¹ *Id.* Section II of this Regulation discusses crimes committed by students, sexual misconduct by a DOE employee, and medical emergencies. The Regulation generally directs

seem to be more directly on point for limited access letters, as this section describes the “Notification Requirements for School-Related Incidents.”⁹² While the Regulations do not define an “incident,”⁹³ this term might include Norman Johnson’s shouting match with the principal of Capital Prep; the unwanted entry of a student journalist who started taking too many pictures; or the alleged physical assault on a student eating school breakfast.

But this section also does not reference limited access letters. The entirety of the text of this section is as follows:

B. Notification Requirements for School-Related Incidents

The following procedures must be followed if a SSA/DOE employee learns of or witnesses a school-related non-criminal incident, accident or medical emergency which may require school disciplinary or other follow-up action and/or central/superintendent notification:

1. If an individual requires immediate medical attention, the SSA/DOE shall follow the same procedures set forth in II.4 above;
2. The SSA/DOE must notify the principal/designee;
3. The principal/designee must determine what, if any, disciplinary or other follow-up action shall be taken and then contact the superintendent and the parent, where a student is involved;
4. If the incident involves corporal punishment, the principal must notify the Office of Special Investigations.⁹⁴

Item 3 of this section, section II.B, does not make any reference to limited access letters.⁹⁵ The item seems to grant the principal carte blanche to fashion any or no discipline at all. The section also does not mention any other type of specific follow-up measure for the principal to take.⁹⁶ Per item 3, when a student is involved in an incident, the principal must notify the superintendent and the parent.⁹⁷ However, beyond this de

school safety agents to call 911, notify the principal, inform the student’s parent, and take other similar measures. The Section does not address misconduct by a parent, nor does it reference limited access letters.

⁹² *Id.* § II.B.

⁹³ *See id.*

⁹⁴ *Id.* (emphasis added).

⁹⁵ *See* NYC DEP’T OF EDUC., REGULATION OF THE CHANCELLOR A-412: SECURITY IN SCHOOLS (2006), <https://perma.cc/2E9S-KAXM>.

⁹⁶ *See id.*

⁹⁷ *See id.*

minimis notification requirement, the principal seems to have no constraints at all. The next section, II.C., discusses the “Written Reporting Requirements” but, again, this section does not address limited access letters at all.⁹⁸ Overall, then, the DOE’s Chancellor’s Regulations—which are supposed to detail all the DOE’s policies—make zero references to limited access letters.

C. A Snap Decision Without Any Chance for DOE Appeal

The Chancellor’s Regulations also offer no opportunity for a parent to appeal a limited access letter. Indeed, a Department of Education website that specifically lists other appeals available under the Chancellor’s Regulations—such as appealing a “transfer to another school based on residency,” “a zoning line decision,” or “an approved proposal to locate or co-locate a charter school in a public school building”—makes no reference to limited access letters.⁹⁹

The parent’s best option may come from another less-than-transparent process: the Division of Family and Community Engagement (“FACE”) complaint procedure.¹⁰⁰ But this grievance process does not appear in the Chancellor’s Regulations. Rather, the same informal DOE website describing the appeals procedures describes what parents are to do under this FACE process.¹⁰¹ The procedure seems designed for the exclusion of a child—rather than a parent—from the school.¹⁰²

For any other issues not addressed in the regulations—such as, again, limited access letters—the DOE includes only a boilerplate catchall procedure.¹⁰³ First, the DOE suggests that an aggrieved parent speak with the school’s parent coordinator and fill out a form.¹⁰⁴ Once again, the form makes no reference to limited access letters.¹⁰⁵ After a parent submits the

⁹⁸ *Id.* § II.C. This section requires the principal to prepare an incident report, attempt to obtain handwritten statements from parties and witnesses, and comply with other procedural requirements. However, once again, nothing in the section discusses limited access letters as a possible consequence.

⁹⁹ *How to File an Appeal or Complaint*, NYC DEP’T OF EDUC., <https://perma.cc/GEJ5-G7JS> (last visited Apr. 28, 2019).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* The relevant section is labeled generally “Complaints Regarding Exclusion from School,” but the site only makes reference to a child’s exclusion.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Division of Family & Community Engagement Parent Intake/Referral Form, NYC DEP’T OF EDUC., <https://perma.cc/9D3Q-5WAD> (last visited June 11, 2019). This complaint form includes only the bare minimum. Parents are asked to fill out demographic information and then to “please state the nature of [their] complaint[,] [i]ndicating any actions that have

form, the district-level family support coordinator may get involved, and the parent may need to “contact[] officials at the school or district level,” yet it is unclear who needs to be contacted, the necessary timeframe, or exactly how the “family support coordinator will then work with [parents] to resolve the issue.”¹⁰⁶ No further details are given in this section as to specific points of law, procedures, or other protections for parents.

Finally, the website describes interim measures:

If at any point in the complaint process staff at the school, district, borough, or central level determine that it is necessary to take immediate steps or measures to address your concerns, prior to the complaint being fully investigated or resolved, the Chancellor’s Office/Division of Family and Community Engagement will recommend the appropriate actions to help your child and address your concerns.¹⁰⁷

However, once again, the site remains geared toward complaints involving children and provides no details on specific interim protections for parents who have received a limited access letter. It is a bureaucratic nightmare that never ends.

D. A State Appeal Process Mired in the Hell of Bureaucracy

Within the state education system, parents retain an “appeal right”—but it is extraordinarily cumbersome and almost never used. The DOE “Appeal or Complaint” web site discussed above notes in passing that parents and others “may appeal a decision by the New York City Department of Education under the procedures laid out in New York Education Law § 310.”¹⁰⁸ Does a limited access letter constitute a decision at all? It seems that the answer is yes—but only a handful of appeals of a limited access letter seem to have ever taken place.¹⁰⁹ While parents in other districts in New York State have appealed these letters, there does not seem

already taken place.” *Id.* Parents are also advised that if the complaint is “particularly sensitive” in nature, they may refer the complaint form directly to the District Office. *How to File an Appeal or Complaint*, *supra* note 99.

¹⁰⁶ *How to File an Appeal or Complaint*, *supra* note 99.

¹⁰⁷ *Id.* To clarify, these interim measures are for a parent’s grievance against a school, not vice versa—so this section would not logically support a school’s effort to issue a limited access letter.

¹⁰⁸ *See id.* In particular, N.Y. EDUC. LAW § 310 states that “[an appeal] petition may be made in consequence of any action: . . . [b]y any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.” N.Y. EDUC. LAW § 310(7) (McKinney 2019).

¹⁰⁹ *See* discussion of Appeals of Robert P. Oliver, No. 14,829 (N.Y. Educ. Dep’t Jan. 9, 2003), *infra* note 124. The other appeals are: Appeal of Paul and Kathleen Havens, No. 14,758 (N.Y. Educ. Dep’t July 24, 2002), <https://perma.cc/5MDX-5552> (involving a blanket limited

to have ever been an appeal of a New York City DOE limited access letter.¹¹⁰

Furthermore, this appeal process is not nearly as straightforward as the DOE makes it sound. The following is an attempt to document all the steps a parent must take to appeal a limited access letter to the New York State Education Department (“NYSED”).

1. File a Complaint to the DOE District Regional Superintendent

The DOE first directs the parent to refer to NYSED’s appeal procedures.¹¹¹ NYSED then directs parents in New York City to send a complaint directly to the District Superintendent.¹¹² A parent then must determine who the relevant superintendent is—no small feat in a city with forty-six superintendents whose authority can depend on geography, grade level, or a student’s special needs.¹¹³

Neither NYSED or DOE appears to have made sample complaints for this level of the appeal.¹¹⁴ However, based on the author’s experience with parents seeking to contest other educational issues (e.g. in a special

access letter a principal issued in the wake of Sept. 11, 2001); Appeal of Christine Canazon, No. 12,997 (N.Y. Educ. Dep’t Aug. 31, 1993), available at <https://perma.cc/QZJ9-GNVN> (involving a parent not permitted to observe a health class).

¹¹⁰ See *Commissioner’s Decisions*, N.Y. STATE EDUC. DEP’T, <https://perma.cc/Y5VE-5FM2>. A search of the New York State Education Department Office of Counsel’s decisions for the term “limited access letter” yields no results. Nor does the term “parent ban” or variations yield any results. A number of decisions do describe a school’s decision to ban a teacher or other staff member from school property. See, e.g., Appeal of Anonymous, No. 15,855 (N.Y. Educ. Dep’t Dec. 12, 2008), <https://perma.cc/NPL2-4SRQ> (overturning a school’s attempt to ban a guidance counselor whose husband had made threatening remarks via telephone); Appeal of Mark Bratge, No. 17,433 (N.Y. Educ. Dep’t July 5, 2018), <https://perma.cc/H7BQ-V8SU> (discussing the appeal of a teacher banning him from school property while on administrative leave and denying the appeal solely for procedural reasons, due to untimely filing). Note also that at least one NYC DOE parent did appeal a letter banning him from campus, but this letter was based on a decades-old sex offense conviction, not any alleged misconduct on school grounds. See Appeal of R.L., No. 17,359 (N.Y. Educ. Dep’t Mar. 26, 2018), <https://perma.cc/897Z-TXFK>. He ultimately appealed the NYSED decision in the Albany County Supreme Court. *Lujan v. Carranza*, 63 Misc. 3d 235 (N.Y. Sup. Ct. 2019).

¹¹¹ *How to File an Appeal or Complaint*, *supra* note 99.

¹¹² *New York State ESSA-Funded Programs Complaint Procedures*, N.Y. STATE EDUC. DEP’T, <https://perma.cc/6WMN-UZH2> (last visited Apr. 8, 2019).

¹¹³ *Superintendents*, NYC DEP’T OF EDUC., <https://perma.cc/P4DC-DDFZ> (last visited Apr. 8, 2019). Note that, in the author’s experience, parents may have trouble accessing information involving the DOE, even if it is available on a public website.

¹¹⁴ See *Sample Forms*, N.Y. STATE EDUC. DEP’T, <https://perma.cc/5JUF-H8AK> (last visited Mar. 12, 2019), where the NYSED has made sample forms available for unrepresented pro se parents at the state appeal level, but not for the initial DOE complaint level that the NYSED directs the parent to initiate.

education context), a brief email or letter to the superintendent may suffice. While, again, no samples appear to exist, a complaint might be as simple as a parent writing, “I disagree with the limited access letter, because I am not a danger to the school or community.” But without a clear process or samples, parents are left trying to make sense of their options.

2. Wait Up to Thirty Business Days, Then File a Complaint with the DOE’s Office of State/Federal Education Policy and School Improvement

The hell of bureaucracy continues. After first sending a complaint to the correct district superintendent, the school district then has thirty business days—six weeks—to take any action (e.g., retracting the limited access letter), during which time the parent’s restricted access continues.¹¹⁵ If the regional superintendent does not resolve the parent’s complaint within thirty business days or fails to resolve it as the parent sees fit, then the parent can send a complaint to the DOE’s Office of State/Federal Education Policy and School Improvement.¹¹⁶

3. Wait Up to Thirty More Business Days, Then File a Complaint with the New York State Education Department

The parent waits for a decision from the DOE’s Office of State/Federal Education Policy and School Improvement—which could take up to thirty more business days—before sending a complaint to the New York State Education Department.¹¹⁷

Taking a step back for a moment: a principal can issue a limited access letter on a whim, without the slightest shred of oversight or delay. No DOE regulations bar or even guide the principal’s decision-making process before sending the letter.¹¹⁸ A parent, by contrast, could be delayed twelve weeks—even longer if the procedures are not followed in a timely manner somewhere along the DOE chain—before they are able to file a complaint with the State of New York.¹¹⁹ The parent must navigate multiple local and state bureaucracies, craft a sophisticated legal argument, and continuously determine who and where to send a complaint—not to mention, what to include in the complaint. The existing avenues to appeal these letters fall short, especially considering that the letters ban parents from important milestones in their child’s education, plenty of

¹¹⁵ See *New York State ESSA-Funded Programs Complaint Procedures*, *supra* note 112.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See discussion of NYC Dep’t of Educ. Chancellor’s Regulations, *supra* Section I.B.

¹¹⁹ See *New York State ESSA-Funded Programs Complaint Procedures*, *supra* note 112.

which would be missed over a twelve-week period during which a parent is left navigating their procedural options in the dark.

4. Cross Every “T,” Dot Every “I”: Legal Papers, Personal Service, and Payment

Even after waiting for months, the New York State-level appeal process remains incredibly difficult at a procedural level. The process requires the parent to submit formal legal documents that an attorney would normally prepare.¹²⁰ The New York State Education Department’s Office of Counsel has prepared an appeals information web page for parents attempting to appeal pro se (without assistance of counsel), including brief sample forms.¹²¹ However, the requirements are technical and difficult. The parent must complete the following: a Notice of Petition; a Petition, which must be verified by a notary public; a caption for the case; and personal service of the papers via hand delivery to the DOE’s clerk, any “member or trustee” of the DOE, or “the superintendent of schools or someone in the superintendent’s office who has been designated by the board to accept service.”¹²² The hand delivery requirement for service seems particularly unfair from a power imbalance perspective, given the lower burden on the defendant Education Department, which is permitted to respond “by mail.”¹²³ In one of the very small number of NYSED appeals addressing limited access letters, the NYSED dismissed most of the entire appeal on the parent’s failure to perform personal service alone.¹²⁴

Adding further to the imbalance of power, the parent must also provide payment to the state in order to start the appeal. Specifically, the parent must submit a check for \$20 to the New York State Education Department.¹²⁵ The Commissioner of Education may waive this fee, but only if the petitioner makes a request for this waiver via affidavit.¹²⁶ Unless a

¹²⁰ See, e.g., *Instructions and Sample Forms for Filing an Appeal for Petitioners Not Represented by an Attorney*, N.Y. STATE EDUC. DEP’T, <https://perma.cc/42RA-J754> (last visited Apr. 28, 2019).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See Appeals of Robert P. Oliver, No. 14,829 (N.Y. Educ. Dep’t Jan. 9, 2003), available at <https://perma.cc/WF9K-V986> (“Section 275.8 of the Commissioner’s regulations requires that a petition be personally served upon the named respondents. The record shows that petitioner served the petitions upon the [B]oard of [E]ducation but failed to serve the individual respondents Leland Christensen, Superintendent Evelyn Blose Holman, Security Director Paul Brady, Germaine Moore and the individual board members named in the caption. Therefore, the appeals are dismissed as to all parties except respondent [B]oard of [E]ducation.”).

¹²⁵ See *Instructions and Sample Forms for Filing an Appeal for Petitioners Not Represented by an Attorney*, *supra* note 120.

¹²⁶ *Id.*

parent happens to have connections to a free notary, parents may also need to pay for a notary public. The parent has thirty days—a long time for a parent to wait when excluded from school, but perhaps not a long time when attempting to complete pro se legal papers—from the date of the “decision or action complained of” to complete all of these requirements.¹²⁷ If the parent seeks a temporary “stay” of the limited access letter, the parent must specifically ask for one, apparently using the exact language the NYSED requires.¹²⁸

In terms of substantive law, meanwhile, the burden of proof for a parent is high. NYSED’s Office of Counsel states that the burden of proof rests on the parent bringing the petition.¹²⁹ NYSED continues by stating that a parent “has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing all the facts upon which he or she seeks relief.”¹³⁰ The Office of Counsel instructions continue by noting that the parent may meet this burden by submitting exhibits, affidavits, or other forms of proof.¹³¹ The Office of Counsel explicitly warns that anything less—such as allegations or conclusory statements—will not suffice.¹³² A banned parent, then, must not only navigate this appeals process after waiting many weeks, but must submit “affidavits, exhibits or other proof” in order to return to school.¹³³

The Office of Counsel says that New York will send a so-called Letter of Resolution “[w]ithin 60 State agency work days” of receiving the complaint.¹³⁴ This Letter of Resolution will explain whether the agency has chosen to sustain the parent’s complaint or overrule it.¹³⁵ The letter will also specify “if any corrective action is required.”¹³⁶ If the appeal is unsuccessful, the Office of Counsel notes that parents may appeal to the United States Department of Education in Washington, D.C.¹³⁷

¹²⁷ *Id.*

¹²⁸ *Id.* (“You must include as part of your Notice of Petition an additional paragraph stating: ‘Please take further notice that the within petition contains an application for a stay order. Affidavits in opposition to the application for a stay must be served on all other parties and filed with the Office of Counsel within three (3) business days after service of the petition.’”).

¹²⁹ *General Information*, N.Y. STATE EDUC. DEP’T, <https://perma.cc/VAZ9-ECZG> (last visited Apr. 28, 2019).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *New York State ESSA-Funded Programs Complaint Procedures*, *supra* note 112.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

In the meantime, what about school pick-up? What about parents who work more than one job and cannot afford the time involved in writing such a cumbersome appeal? The system is designed, it seems, to keep parents unaware of their rights and unable to exercise them. Most problematically, it is unclear if any parents in New York City receiving a limited access letter have ever completed this appeals process, in any context, at all.¹³⁸

II. WHY LIMITED ACCESS LETTERS VIOLATE THE LAW

A. *Limited Access Letters Violate Procedural Due Process*

This article advances the argument, recognized by the Second Circuit in the 2017 case of *Johnson v. Perry* but not enforced in New York City's DOE, that parents who receive a limited access letter are not receiving their constitutional due process rights. These rights, discussed below, originate under the Fifth Amendment and Fourteenth Amendment of the U.S. Constitution. More concretely, parents cannot be banned from a child's school property without first having an opportunity to be heard. Just as people must have a hearing before almost any other type of deprivation takes place—whether it be a criminal trial before a person is deprived of personal liberty; a grievance hearing before losing public housing; or even a traffic court hearing before being forced to pay a speeding ticket—a parent must have a right to present her, his, or their side of the story.

1. *Mathews v. Eldridge* Balancing of Interests

For decades, the basic framework for procedural due process in American law has been governed by *Mathews v. Eldridge*. In this 1976 case, the Supreme Court identified a basic three-part balancing test for determining whether a recipient of a government benefit is entitled to a pre-deprivation hearing: (1) “the private interest,” which translates roughly to the importance an individual places on the benefit; (2) the risk of “erroneous deprivation” if no hearing were to take place; and (3) “the public interest,” which translates roughly to the government's valuation of the liberty or property and the financial cost and administrative burden of the hearing process.¹³⁹ In order to trigger this *Mathews* balancing test, an individual must have a protected liberty or property interest implicated,

¹³⁸ Based on a review of the NYSED Commissioner's decisions; see discussion *supra* Section I.D.

¹³⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

which brings the Due Process Clause of the Fifth Amendment and Fourteenth Amendment into play.¹⁴⁰

As a simple but perhaps clear example: a court may permit a towing company to remove a parked car that is blocking traffic on a highway, even before the car's owner has a chance to contest the taking in court. The car itself, as a form of tangible private property, represents a protected property interest implicating the Due Process Clause of the Fifth Amendment and Fourteenth Amendment. The public interest in keeping roads safe for other motorists is extremely high. The risk of erroneous deprivation, meanwhile, may be quite low: in other words, the fact-finding needed to determine whether a parked car is indeed blocking traffic on a highway or not may be extremely simple. These two factors almost certainly outweigh the car owner's high private interest in the individual car.

2. DOE Student Discipline as DOE Limited Access Letters Analogue

Student discipline and suspension procedures in the DOE—which already invoke a *Mathews*-style hearing—may provide a helpful analogue for limited access letters. The DOE seems to have already accepted, in essence, that procedural due process and *Mathews* balancing necessitate a pre-deprivation hearing in the context of a superintendent's suspension.

As established by *Goss v. Lopez*, the right of a student who is facing discipline to participate in public education represents a protected Fourteenth Amendment property and liberty interest.¹⁴¹ This protected interest triggers *Mathews* balancing. In New York City, a DOE school is permitted to remove a student immediately from the classroom under certain circumstances.¹⁴² However, a student receives notice and opportunity to be heard within one school day of the removal.¹⁴³ When a DOE school issues a more serious superintendent's suspension—any suspension that

¹⁴⁰ *Id.* at 332 (“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”).

¹⁴¹ *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (“At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”).

¹⁴² NYC DEP'T OF EDUC., REGULATION OF THE CHANCELLOR A-443: STUDENT DISCIPLINE PROCEDURES § III.A.2 (2004), <https://perma.cc/LR4H-RA3K> (“If the student's presence in [the] classroom poses a continuing danger and presents an ongoing threat of disruption to the academic process, the student may be removed immediately, and such notification to the student and opportunity to be heard must be provided within one school day of the removal.”) [hereinafter STUDENT DISCIPLINE PROCEDURES].

¹⁴³ *Id.*

may last more than five days¹⁴⁴—the DOE must schedule a hearing for the student within five days of the suspension.¹⁴⁵

At the hearing, the student has many procedural rights. For instance, the student can introduce exculpatory evidence, provide live testimony, and cross-examine witnesses.¹⁴⁶ An attorney or non-attorney advocate may represent the student.¹⁴⁷ The student also has a right to an appeal within the DOE.¹⁴⁸ In the language of *Mathews*, then, the DOE seems to have determined that the student's private interest in receiving an education outweighs the school's public interest in immediately punishing students who allegedly violate discipline rules, with the risk of erroneous deprivation—i.e., inadvertently punishing a student who does not break any rules—high enough to warrant a right to a hearing.

3. *Johnson v. Perry, Troxel v. Granville*, and a Parent's Right to Be on School Grounds

Extending the logic of the DOE student suspension procedure to the context of limited access letters—which both constitute parts of the school-to-prison pipeline¹⁴⁹—this *Mathews* framework should illustrate the need for a pre-deprivation hearing.

In a limited access letter context, *Mathews* balancing starts with a determination of the public and private interests. The public interest would seem to be school safety. A DOE school, that is, wants to keep students, teachers, and other school staff safe from allegedly disruptive parents. The private interest would seem to be the interest of a parent in being on school grounds. Parents, that is, want to make sure they can participate fully in their child's education. Finally, *Mathews* balancing requires an assessment of the risk of erroneous deprivation. This erroneous deprivation would seem to mean the risk that a school would wrongly exclude a non-disruptive parent by falsely concluding that the parent is disruptive.

But will this balancing even take place at all? To trigger *Mathews* balancing under the Due Process Clause of the Fifth and Fourteenth Amendment, parents must first demonstrate that they have a protected liberty or property interest.¹⁵⁰ In non-lawyer terms: do parents have a right to be at their child's school?

¹⁴⁴ *Suspensions*, NYC DEP'T OF EDUC., <https://perma.cc/2FKY-U48X> (last visited Apr. 28, 2019).

¹⁴⁵ STUDENT DISCIPLINE PROCEDURES, *supra* note 142, § III.B.3(s)(1).

¹⁴⁶ *Id.* § III.B.3(n)(1)-(23).

¹⁴⁷ *Id.* § III.B.3(n)(12).

¹⁴⁸ *Id.* § III.B.3(n)(23).

¹⁴⁹ See discussion *supra* pp. 338-41.

¹⁵⁰ *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

In *Johnson v. Perry*—the Connecticut case described earlier—the District of Connecticut, and the Second Circuit as well (by declining to overturn the District Court), answered this question: yes—parents do have a right to be on their child’s school campus.¹⁵¹ The District of Connecticut, reviving parent Johnson’s due process claims *sua sponte*, stated that the trial court “was mistaken to dismiss plaintiff’s due process claim, as defendant’s actions deprived plaintiff of a recognized liberty interest.”¹⁵² In support of this right, the District Court discussed *Troxel v. Granville*, a 2000 Supreme Court case involving a custody battle between parents and grandparents.¹⁵³ The *Troxel* court, making extensive note of earlier Supreme Court cases, highlighted the “interest of parents in the care, custody, and control of their children.”¹⁵⁴ The *Johnson* court applied this property interest to the specific locus of limited access letters and a parent’s right to be at a child’s school:

Banning a parent from his child’s public school infringes upon the parent’s constitutional liberty interest in directing the education of his child. Although the State has authority to restrict school access to ensure a safe and productive environment, it may not so significantly prohibit an individual parent from normal school access without affording the parent a fundamentally fair opportunity to contest the State’s asserted reasons for doing so.

At a minimum, due process requires notice and an opportunity to be heard “at a meaningful time and in a meaningful manner.”¹⁵⁵

In the context of New York City and New York State, *Johnson v. Perry* remains the law of the land. The Second Circuit, ruling in 2017 on an appeal of *Johnson v. Perry* on technical grounds, left this aspect of the decision—establishing a parent’s Fifth Amendment liberty interest in being on school grounds—undisturbed.¹⁵⁶

With the parent’s property interest to be on campus established by *Johnson*, the rest of the *Mathews* due process framework establishes a right to a pre-deprivation hearing. Limited access letters significantly implicate the private interests of parents in being able to set foot on their

¹⁵¹ See *Johnson v. Perry*, 140 F. Supp. 3d 222, 229 (D. Conn. 2015), *aff’d in part, rev’d in part, dismissed in part*, 859 F.3d 156 (2d Cir. 2017) (upholding the relevant portion of the lower court’s decision).

¹⁵² *Johnson*, 140 F. Supp. 3d at 228.

¹⁵³ *Id.* at 228-29.

¹⁵⁴ *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

¹⁵⁵ *Johnson*, 140 F. Supp. 3d at 229 (quoting *Mathews*, 424 U.S. at 333).

¹⁵⁶ *Johnson*, 859 F.3d at 168 (“We conclude that the district court’s treatment of Johnson’s due process claim is not within the scope of Perry’s notice of appeal, and we thus lack jurisdiction to review that decision.”).

child's school campus. This private interest is of the utmost gravity given the enormous importance that most parents place on their child's education. As noted in *Johnson*—which in turn supported its finding with *Troxel*—the right to set foot on a child's campus goes part and parcel with the right to share in a child's education.¹⁵⁷ A parent who cannot set foot on her, his, or their child's school grounds potentially cannot participate in school meetings, student performances, fundraising events, sporting activities, or even graduation. It is true that some limited access letters do permit even banned parents to attend these activities—but often they must still contact the school ahead of time to notify security of their presence. The incredible affront to a parent's dignity—in other words, the ability of a school to humiliate a parent—by requiring this process alone should make the high level of private interest apparent.

The public interest at stake—i.e. the school's interest in being able to maintain an orderly, safe campus—may also be relatively high. The school rightfully has to balance the interests of not just one child or parent but the interests of an entire community of children and parents. Just as a single student can make a learning environment challenging, a single parent can perhaps make a school setting unsafe or disruptive. However, notably, in some situations a parent may pose substantially more risk to the rest of the school than others: a parent who has demonstrated physical violence is a far cry from a parent who merely has expressed unpopular opinions. But even parents who demonstrate physical violence in a school are entitled to due process—just as students facing suspension, and individuals facing incarceration, receive Fifth Amendment protections as well.¹⁵⁸

From a more nuanced, long-term perspective, the school's public interest might actually align with the parent's private interest. Many studies show that the children of parents who are more involved in their child's education often perform better in the classroom.¹⁵⁹ Studies also show that

¹⁵⁷ *Johnson*, 140 F. Supp. 3d at 229 (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.’ . . . Banning a parent from his child’s public school infringes upon the parent’s constitutional liberty interest in directing the education of his child.”) (quoting *Troxel*, 530 U.S. at 66).

¹⁵⁸ U.S. CONST. amend. V; STUDENT DISCIPLINE PROCEDURES, *supra* note 142, § III.

¹⁵⁹ See, e.g., BARRY RUTHERFORD ET AL., U.S. DEP’T OF EDUC., OFFICE OF EDUC. RESEARCH & IMPROVEMENT, PARENT AND COMMUNITY INVOLVEMENT IN EDUCATION 29-30 (1997), <https://perma.cc/59YJ-6E4L> (“[T]here are two facts that are ‘fairly well settled’ in the literature regarding the link between parent involvement and student achievement. First, students, including students from low [socio-economic status] whose parents are involved in their schools, do better in their academic subjects and are less likely to drop out than those students whose parents are less involved. Second, those schools where parents are well informed and highly involved are most likely to be effective schools.”) (citations omitted).

parents involved in their children's schools "spend more time working with their children at home and rate teachers higher,"¹⁶⁰ a positive outcome for parents and schools alike.

But the risk of erroneous deprivation should break any ties.¹⁶¹ In other words: it is an enormous problem that the principal has apparent power to ban from school grounds both the parent who acts with violence, constituting, perhaps, a "proper deprivation" of a parent's right to set foot on campus, and the parent who merely suggests school policy changes, constituting the "erroneous deprivation" contemplated in *Mathews*. Moreover, determining the propriety of a deprivation based on a parent's alleged violent behavior must necessarily take into account the ways in which implicit racial bias influences perceptions of behavior, such that the conduct of a parent of color is deemed violent while the same conduct of a white parent is not deemed violent. While this discussion is beyond the scope of this article, these issues could be resolved, or at least raised, in a *Mathews*-style hearing.

The fact that the DOE currently allows principals to ban either type of parent without any type of accountability or oversight means that, without some form of hearing, these erroneous deprivations will continue.

The cost of a hearing, meanwhile, seems incalculably low. It would take as little as an hour-long meeting—between the principal and the parent, with a neutral arbiter presiding—to conduct the fact-finding necessary to get to the truth. The DOE already has an entire department, the Office of Safety and Youth Development ("OSYD"), devoted to approving superintendent's suspensions.¹⁶² Five separate hearing offices in New York City adjudicate suspension cases—one for each borough, with a second hearing office in Brooklyn that also serves Staten Island.¹⁶³ Extending this same procedural mechanism through OSYD for parents who receive a limited access letter seems a logical and simple step. A similar process could easily be put in place for whenever a principal wishes to issue a limited access letter.

¹⁶⁰ *Id.* at 30 (citations omitted).

¹⁶¹ For a landmark case that illustrates the court's balancing of individual and public interest, see *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970) ("Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens.").

¹⁶² See *Suspensions*, *supra* note 144 ("The chief executive officer of the DOE Office of Safety and Youth development (OSYD)/designee must approve [superintendent's] suspensions . . .").

¹⁶³ *Suspension Hearing Offices*, NYU LAW SUSPENSION REPRESENTATION PROJECT, <https://perma.cc/M6C2-3VKC> (last visited Apr. 29, 2019).

Again, discussion of DOE student suspension procedures as an analogue may shed light. Currently, whenever a student receives a superintendent's suspension, the regional superintendent sends a letter to the students' parents the same day the suspension is issued.¹⁶⁴ Then, the student's hearing must take place within five days of the suspension.¹⁶⁵ If the student is found not responsible for the conduct giving rise to the suspension, the student is immediately returned to the student's home classroom.¹⁶⁶ If the student is found responsible, the DOE may continue to suspend the student for a designated amount of a time.¹⁶⁷

The DOE could introduce a similar process for parents who receive a limited access letter. For instance, the DOE could formally require the principal or superintendent to issue a limited access letter on the day in question. The DOE could then require OSYD to schedule a hearing to take place within five days of the letter. Based on the hearing, the DOE could then either uphold the limited access letter, retract it, or modify the length of the parent's "limited access" to campus.¹⁶⁸ Realistically, the DOE could almost certainly bootstrap limited access letter hearings into the same exact five hearing offices that currently hold suspension hearings. The procedure would be enormously similar.

The DOE has already made what perhaps most reasonable people would consider erroneous deprivations. To wit: Stephanie Thompson, the East Village mom banned for criticizing the superintendent and the principal; and Kaliris Salas-Ramirez and Jen Roesch, the CPE1 advocates banned for challenging policy at their children's school. These are the erroneous takings that the DOE must curtail through a pre-deprivation hearing.

* * *

Courts in other circuits and states have also supported the assertion that limited access letters violate the Fifth Amendment and Fourteenth Amendment procedural due process rights. In a 2010 criminal case in Washington State—for which the ACLU filed an amicus brief—a parent

¹⁶⁴ STUDENT DISCIPLINE PROCEDURES, *supra* note 142, § III.B.3(n).

¹⁶⁵ *Id.* § III.B.3(s).

¹⁶⁶ *Id.* § III.B.3(u)(2); *see also* ADVOCATES FOR CHILDREN, *supra* note 40, at 13 ("If the charges are dismissed, your child has the right to return to school immediately . . .").

¹⁶⁷ STUDENT DISCIPLINE PROCEDURES, *supra* note 142, § III.B.3(v) (describing dispositional options should the allegations be sustained); *see also* ADVOCATES FOR CHILDREN, *supra* note 40, at 13 ("If the charges are sustained, your child may be suspended for a particular length of time . . .").

¹⁶⁸ Based on the author's experience, a current major issue with limited access letters is that many (if not all) letters do not specify any length of time for which the parent ban is in effect. A hearing officer could create more parameters to an otherwise apparently indefinite suspension.

was banned from her son's elementary school campus "after she repeatedly asked pointed questions about curriculum, district policies, textbooks, and lesson plans at a 'Curriculum Night' event held for parents."¹⁶⁹ According to the ACLU, this parent was later "cited and criminally prosecuted for going back to the school twice—once to try to attend a parent-teacher conference and a book fair, and once to pick up her son from a science fair."¹⁷⁰ When the parent requested a hearing to challenge the ban, the school district refused.¹⁷¹

In that criminal case, *State v. Green*, the Court of Appeals of Washington discussed the school's failure to inform the parent, Ms. Green, of the right to appeal the trespass.¹⁷² The court held that this failure of notice to the parent constituted a violation of her procedural due process rights.¹⁷³ Discussing *Mathews* yet again, the court elaborated—highlighting many of the same types of procedural deficiencies that plague the New York City Chancellor's Regulations:

Here, Green had the right to appeal under [the Revised Code of Washington] 28A.645.010. But, she was not informed of this right. The notice of trespass and other correspondence to Green restricting her right of access cite only to the criminal trespass statute. The notice of trespass instructed Green to direct any concerns about a "school-related issue" to the assistant superintendent. The letter amending the notice of trespass also permitted Green to contact [general counsel for the school district, Charles] Lind with any questions regarding the notice. Nowhere do these materials mention a right to appeal the restrictions in the notice of trespass to any school district official, the school board, or the court. The materials do not cite the regulations or statutes that provide the right to appeal. They identify no procedure or deadline. No witnesses for the State testified even to an oral notice of any right to appeal, let alone a procedure to appeal The bare right to a judicial appeal, without being informed of that right, was insufficient to protect Green from arbitrary action by the school district.¹⁷⁴

¹⁶⁹ Nancy Talner, *Appeals Court Supports Parent's Right to Be at School*, ACLU WASH. (Oct. 7, 2010), <https://perma.cc/LPN3-DHPY>.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *State v. Green*, 239 P.3d 1130, 1137 (Wash. Ct. App. 2010).

¹⁷³ *Id.* at 1137-38.

¹⁷⁴ *Id.* at 1137.

Later in the decision, the court explicitly invoked the *Mathews* test. It found that the school district violated the parent's procedural due process rights due to the risk of erroneous deprivation: "We hold that under the *Mathews* test[,] without notice of procedures to challenge the notice of trespass, no protection existed to prevent the erroneous deprivation of Green's right to be at her child's school."¹⁷⁵

A similar set of facts resulted in a similar decision in California. In a May 2018 case—in which the Mexican American Legal Defense and Education Fund (MALDEF) filed an amicus brief—the Eastern District of California found that, under state law, a parent cannot be banned indefinitely without a right to a hearing.¹⁷⁶ The case began when Claudia Macias, mother of a fourth-grade student, asked that her son's principal re-assign him to a different class.¹⁷⁷ Macias made this request because her son's teacher triggered his anxiety.¹⁷⁸ When Macias and her husband attempted to visit the classroom, the principal refused to let them do so.¹⁷⁹ The principal called the school's resource officer, a Sheriff's deputy, and indefinitely banned Macias from the school.¹⁸⁰ The principal said that Macias "screamed at and harassed two teachers," an allegation Macias denied in her amended complaint.¹⁸¹ The deputy then threatened to arrest Macias if she ever returned to the school except for an emergency.¹⁸² Macias raised both First Amendment retaliation for protected speech and deprivation of procedural due process arguments.¹⁸³

With respect to the free speech arguments, Senior District Judge Ishii noted that, while California does allow school officials to restrict parental access to campus in certain circumstances, this restriction requires a finding that the individual "willfully disrupted the orderly operation" of a

¹⁷⁵ *Id.* at 1138.

¹⁷⁶ See *Macias v. Filippini*, No. 1:17-CV-1251 AWI EPG, 2018 WL 2264243, at *12 (E.D. Cal. May 17, 2018).

¹⁷⁷ *Id.* at *1.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *California School Officials May Not Indefinitely Ban Parent from Child's School as Retaliation for Free Speech or Without Opportunity to Contest*, MEXICAN AMERICAN LEGAL DEF. AND EDUC. FUND (May 18, 2018), <https://perma.cc/EWE4-7N9G> [hereinafter *California School Officials May Not Indefinitely Ban Parent*].

¹⁸¹ *Id.*; *Macias*, 2018 WL 2264243, at *5 ("While Plaintiff's complaint does reference Principal Filippini's perspective that the teachers were being harassed by Plaintiff . . . Plaintiff describes this as a false accusation.") (citation omitted).

¹⁸² *California School Officials May Not Indefinitely Ban Parent*, *supra* note 180; *Macias*, 2018 WL 2264243, at *1 ("Sheriff's Deputy Brian Miller, the school resource officer, told Plaintiff that Principal Filippini 'had the authority to ban her from the school,' and said 'he would arrest her if she ever returned to the school.'").

¹⁸³ *Macias*, 2018 WL 2264243, at *3-10.

school campus.¹⁸⁴ Because the defendant school had moved to dismiss, the court was required to view this motion in the light most favorable to Macias, the nonmoving party.¹⁸⁵ The court found that there was “no basis to conclude that Plaintiff engaged in improper conduct” and denied the school officials’ motions to dismiss.¹⁸⁶ Importantly, Judge Ishii noted that “imposing [an indefinite] ban indicates a retaliatory motive.”¹⁸⁷

With respect to the procedural due process grounds, the court discussed whether Macias had a right under state law to be present on campus.¹⁸⁸ The court looked to Section 51101 of California’s Education Code¹⁸⁹ and Section 626.4 of the California Penal Code¹⁹⁰ to see whether the laws “significantly limit[ed]” the school’s discretion to ban a parent from campus.¹⁹¹ Based on these statutory provisions, the court concluded that Macias’s right to be on the grounds of her child’s school was a type of property interest that required procedural due process.¹⁹² As such, Judge Ishii then concluded that this interest gave rise to requirement for a hearing, which never took place.¹⁹³ These laws—if enforced—ensure that principals in California cannot issue the type of indefinite limited access letters that school leaders in the DOE and elsewhere in New York have used without providing a hearing.

¹⁸⁴ *Id.* at *11 (citing CAL. PENAL CODE § 626.4).

¹⁸⁵ *Id.* at *2 (citing *Faulkner v. ADT Security Services*, 706 F.3d 1017, 1019 (9th Cir. 2013)).

¹⁸⁶ *Id.* at *5, 12.

¹⁸⁷ *Id.* at *1.

¹⁸⁸ *Macias*, 2018 WL 2264243, at *6-8.

¹⁸⁹ *Id.* at *7-8 (“Section 51101 states, in relevant part: ‘[P]arents and guardians of pupils enrolled in public schools have the right and should have the opportunity . . . to be informed by the school, and to participate in the education of their children, as follows: (1) Within a reasonable period of time following making the request, to observe the classroom or classrooms in which their child is enrolled; (2) Within a reasonable time of their request, to meet with their child’s teacher or teachers and the principal of the school in which their child is enrolled; . . . (7) To have a school environment for their child that is safe and supportive of learning . . . (9) To be informed of their child’s progress in school; . . . (12) To be informed in advance about school rules, including disciplinary rules and procedures in accordance with Section 48980, attendance policies, dress codes, and procedures for visiting the school.’”).

¹⁹⁰ *Id.* at *7 (“[The Section] from which a school official derives the power to remove a person from school grounds for disruptive conduct, specifies that ‘[i]n no case shall consent [to remain on campus] be withdrawn for longer than 14 days from the date upon which consent was initially withdrawn.’”).

¹⁹¹ *Id.* at *6-8.

¹⁹² *Id.* at *8 (“Plaintiff therefore has alleged a protected property interest on which to base her claim for a due process violation.”).

¹⁹³ *Macias*, 2018 WL 2264243, at *8, 11.

Other circuits and courts have come down another way when parents have been accused of disrupting a school environment.¹⁹⁴ In a Michigan case from 2002, for instance, a father of an elementary school student was accused of masturbating in a car in the school's parking lot.¹⁹⁵ The father, Alexander Mejia, was arrested and charged with indecent exposure.¹⁹⁶ He was ultimately acquitted, but, nevertheless, the superintendent conducted his own investigation, and, based on this investigation, wrote Mejia a letter banning him from all school activities and from setting foot on the school property.¹⁹⁷ Mr. Mejia's wife, Patricia Mejia, asked—personally and by going through an attorney—that the superintendent retract the letter, but he would not do so, giving rise to the case.¹⁹⁸ The school subsequently filed a motion for summary judgment.¹⁹⁹

The Michigan court in this case relied on *Troxel v. Granville*, the same Supreme Court child custody case that the *Johnson* court relied on in Connecticut.²⁰⁰ After discussing several Sixth Circuit cases, the *Mejia* court noted that the Mejias based their argument in part on the *Troxel* “right to direct and control the education of their child.”²⁰¹ However, unlike in *Johnson*, the *Mejia* court disagreed with this take on *Troxel*:

This argument . . . is based upon a strained reading of *Troxel*. While *Troxel* does mention that parents have the right to direct and control the education of their children (albeit the case does not, itself, involve the education of a child), nothing in that decision suggests that it includes the right to go onto school property, even if doing so is necessary to participate in the child's education.²⁰²

¹⁹⁴ Note also that parents seeking to litigate claims must choose a theory of liability carefully. In a case cited by the *Macias* court, a parent was banned from a school after an altercation in which the parent allegedly yelled obscenities. *Camfield v. Bd. of Trustees of Redondo Beach Unified Sch. Dist.*, No. 2:16-cv-02367-ODW (FFM), 2016 WL 7046594, at *2 (C.D. Cal. Dec. 2, 2016). However, rather than pursuing a claim based on Fifth and Fourteenth Amendment procedural due process grounds, the parent attempted to argue that California Education Code § 51101 gave rise to tort liability. *Id.* at *4-5. This effort was unsuccessful, and the court dismissed this claim and the parents' other unrelated claims. *Id.* at *6.

¹⁹⁵ *Mejia v. Holt Pub. Sch.*, No. 5:01-CV-116, 2002 WL 1492205, at *1 (W.D. Mich. Mar. 12, 2002).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Mejia*, 2002 WL 1492205, at *1 at *5; *Johnson v. Perry*, 140 F. Supp. 3d. 222, 228-29 (D. Conn. 2015).

²⁰¹ *Id.* at *5 (citation omitted).

²⁰² *Id.*

But times have changed since *Mejia* was decided seventeen years ago. Since then, a wealth of scholarship has shed light on the criminalization of youth in schools.²⁰³ Communities have become far more aware of the school-to-prison pipeline,²⁰⁴ and this change in attitudes has led to school administrators and courts questioning zero-tolerance policies.²⁰⁵ For cases coming seventeen years after *Mejia*, then, courts may find it less tenuous to read *Troxel* as granting parents a right to be on campus.

The *Mejia* court also relies on the blanket assertion that the Supreme Court generally uses “restraint in delineating the scope of parents’ fundamental rights with respect to education.”²⁰⁶ But this assertion does not pass muster. For decades, the Supreme Court has many times taken an aggressive posture in expanding the rights of parents with respect to education. In the 1923 case of *Meyer v. Nebraska*, for instance, the Court struck down a Nebraska statute that prohibited the instruction of any language other than English in schools.²⁰⁷ The Court made specific reference to the same parental “right of control” over a child’s education advanced in *Troxel*.²⁰⁸ In the 1925 case of *Pierce v. Society of Sisters*, the Supreme Court overruled an Oregon statute forbidding private schools.²⁰⁹ Drawing specifically on the logic of *Meyer v. Nebraska*, the Court found that the Oregon law “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”²¹⁰ Years later, the Supreme Court continued this logic in *Wisconsin v. Yoder*. In this case from 1972, the Supreme Court struck down a Wisconsin statute forcing children to remain in school beyond eighth grade, due to religious objections brought by Amish parents.²¹¹

As of 2019, the Supreme Court has continued to grant very broad power to parents in an educational context, contrary to the *Mejia* court’s assertion. In 2017, for instance, the Supreme Court decided *Endrew F. v. Douglas County*. This case greatly expanded parents’ rights with respect to their children’s education because it confirmed the right to public reimbursement for private school tuition—in other words, the right to opt

²⁰³ See, e.g., Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?* 39 EDUC. RESEARCHER 59 (2010); Nancy A. Heitzeg, *Education or Incarceration: Zero Tolerance Policies and the School to Prison Pipeline*, FORUM ON PUBLIC POLICY (2009).

²⁰⁴ Harold Jordan, *As Awareness of the School-to-Prison Pipeline Rises, Some Schools Rethink the Role of Police* (Mar. 20, 2015, 1:00 PM), <https://perma.cc/GF66-9TLJ>.

²⁰⁵ See Heitzeg, *supra* note 203, at 15-16.

²⁰⁶ *Mejia*, 2002 WL 1492205, at *6.

²⁰⁷ *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923).

²⁰⁸ *Id.* at 400.

²⁰⁹ *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925).

²¹⁰ *Id.* at 534-35.

²¹¹ *Wisconsin v. Yoder*, 406 U.S. 205, 235-36 (1972).

out of the public education system entirely, at taxpayer expense—when a child is not making appropriate progress in line with her, his, or their abilities.²¹² Thus, the Supreme Court can hardly be said to exercise “restraint” when it comes to a parent’s rights over their child’s education.²¹³

The *Mejia* court also observed that the *Mejias* did not point to any cases which would establish a fundamental right to being present on their child’s school property.²¹⁴ But this observation is also out of date. *Johnson*, *State v. Green*, and *Macias v. Filippini* all now seem to stand for the proposition that parents have a fundamental right to be present on their child’s campus.²¹⁵ Without going too far “into the weeds,” the *Mejia* court’s logic seems meager or insufficient at best: the cases it cites are distinguishable from the conduct alleged in the case.²¹⁶ Furthermore, the analysis of *Mejia* focused largely on substantive due process—not the procedural due process that *Johnson* has focused on since.²¹⁷

The case law from the Second Circuit and beyond overwhelmingly support a New York City parent’s right to be on their child’s school grounds. The one exception, *Mejia*, is out of date and, most importantly, decided by the Sixth Circuit—which includes Kentucky, Michigan, Ohio, and Tennessee—so it does not have binding or precedential effect on the Second Circuit. Since at least the 1920s, contrary to *Mejia*, the Supreme Court has regularly expanded the rights of parents to control or direct the education of their children. Other cases, such as *Johnson* and *Macias*, have argued forcefully for a parent’s right to a pre-deprivation hearing before being excluded on a long-term basis from campus.²¹⁸

²¹² *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.* RE-1, 137 S. Ct. 988, 999-1002 (2017).

²¹³ *Contra Mejia v. Holt Pub. Sch.*, No. 5:01-CV-116, 2002 WL 1492205, at *6 (W.D. Mich. Mar. 12, 2002).

²¹⁴ *Id.* at *5-6.

²¹⁵ See discussion *supra* pp. 359-67.

²¹⁶ See *Mejia*, 2002 WL 1492205, at *4. In one case cited by *Mejia*, for instance—*Lovern v. Edwards*, 190 F.3d 648 (4th Cir. 1999)—a court dismissed somewhat similar claims for lack of subject matter jurisdiction. In *Lovern*, a parent was banned from a school campus after a dispute over his son’s failure to be selected for the varsity basketball team. However, the *Lovern* court seemed distracted by what it perceived as the frivolity of the proceedings; it turned out the parent ran a private litigation company and sought more to advance his business interests rather than his son’s basketball career. The *Mejia* court also cited *Henley v. Octorara Area School District*, 701 F. Supp. 545 (E.D. Pa. 1988), but this case involved an individual who was not a parent getting banned from school property. Another case cited by *Mejia*, *Swanson v. Guthrie Indep. Sch. Dist.*, 135 F.3d 694 (10th Cir. 1998), involved a homeschooling parent concerned about curriculum, facts not directly applicable to the limited access letter context.

²¹⁷ Compare *Mejia*, 2002 WL 1492205, at *2-7, with *Johnson v. Perry*, 859 F.3d 156, 166-68 (2d Cir. 2017).

²¹⁸ See *Johnson v. Perry*, 140 F. Supp. 3d 222 (D. Conn. 2015); *Macias v. Filippini*, No. 1:17-CV-1251 AWI EPG, 2018 WL 2264243 (E.D. Cal. May 17, 2018).

Thus, the conclusion is stark: the DOE’s limited access letters—to the extent that they ban or restrict a parent’s presence on campus without a pre-deprivation hearing, rather than merely enforce safety rules already in effect for all parents—are illegal.

B. Limited Access Letters Are Arbitrary and Capricious

While procedural due process may provide the primary and most immediate theory of liability to challenge limited access letters, the “arbitrary and capricious” standard may provide an alternative attack on the practice.

Under the federal Administrative Procedure Act, a court may overturn the findings of a federal agency if the findings are found to be “arbitrary and capricious.”²¹⁹ States have adopted their own versions of the Administrative Procedure Act to create a similar standard of review for state agency decisions. In New York, litigants may initiate an Article 78 proceeding—referring to Article 78 of New York’s Civil Practice Law and Rules—to challenge New York state agency decisions.²²⁰ New York State has interpreted “arbitrary and capricious” to mean “without sound basis and reason and generally taken without regard to the facts.”²²¹

A recent case involving an appeal of a parent ban similar to a limited access letter may shed light on a path toward arguing that these letters are arbitrary and capricious.²²² In *Lujan v. Carranza*, a New York City man was banned from coming within 1,000 feet of the grounds of his son’s elementary school due to his 1988 sex conviction of an offense against a middle school-aged girl.²²³ The principal issued the ban nearly twenty years after Mr. Lujan, the “sole caretaker” of his son, had been released from prison and discharged from parole.²²⁴ Lujan attempted to have the ban overturned by writing to the DOE; however, the DOE upheld the ban, referencing its policy that prohibits people convicted of sex offenses against minors and designated as having “the highest risk of recidivism”

²¹⁹ JARED P. COLE, CONG. RESEARCH SERV., R44699, AN INTRODUCTION TO JUDICIAL REVIEW OF FEDERAL AGENCY ACTION 22 (2016), <https://perma.cc/D84U-RT9X>.

²²⁰ N.Y. C.P.L.R. § 7803 (McKinney 2019) (“The only questions that may be raised in a proceeding under this article are: . . . whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion . . .”).

²²¹ See *Lujan v. Carranza*, 63 Misc. 3d 235, 239 (N.Y. Sup. Ct. 2019) (citations omitted).

²²² I consider a “limited access letter” to refer to when a parent receives a letter from a principal restricting access in response to a recent incident that allegedly took place on school grounds. By contrast, the letter in *Lujan* comes in response to a sex offense—which involves its own statutory reporting and restriction scheme—from many years earlier.

²²³ *Lujan*, 63 Misc. 3d at 236.

²²⁴ *Id.*

from entering school grounds.²²⁵ The letter also advised that Lujan “could contact school personnel regarding his son’s progress, and could try to make arrangements with the principal if he wanted to attend a specific event with supervision.”²²⁶ Lujan appealed to the Commissioner of Education at NYSED, and later to the Supreme Court of Albany County under an Article 78 claim.²²⁷ In the meantime, Lujan’s son graduated from the elementary school and moved on to middle school.²²⁸ Lujan received a letter from the middle school principal imposing what the court characterized as “somewhat more lenient” restrictions compared to the elementary school: this principal allowed him to meet with school staff and attend events if he let them know ahead of time and a school safety agent (“SSA”) accompanied him.²²⁹

When Lujan ultimately appealed in Albany County Supreme Court, that court found that the DOE’s refusal to grant him full access to his son’s school was not arbitrary and capricious.²³⁰ The court seems to have based its decision on two factors. First, the court noted that the ban on Lujan’s entry into the middle school was not a “blanket prohibition.”²³¹ Because Lujan could still set foot on school grounds after giving notice and with SSA accompaniment, the court found that Lujan still had sufficient access to the school.²³² Second, the court noted that Lujan’s sex offender status and underlying conviction did make the school’s treatment of him rational, despite the many years that had passed since the crime.²³³

While Lujan was unsuccessful in demonstrating that his case involved arbitrary and capricious decision-making, applying the same standard to many of the cases discussed in this piece would likely yield the opposite conclusion. For instance, Natasha Battle’s ban from school property came in response to her use of the word “damn” in front of school children.²³⁴ To adopt the *Lujan* analysis: to ban a parent from stepping on school grounds due to profanity is “without sound basis and reason.”²³⁵

²²⁵ *Id.* at 236-37.

²²⁶ *Id.*

²²⁷ *Id.* at 237, 239.

²²⁸ *Lujan*, 63 Misc. 3d at 237.

²²⁹ *Id.* at 238.

²³⁰ *Id.* at 243. Lujan also appealed the NYSED Commissioner’s decision that dismissed his administrative appeal as moot because his son was no longer at the elementary school that sent the letter upon which the claim was based. *Id.* at 237-39. The court held that the Commissioner’s decision was not arbitrary and capricious. *Id.* at 243.

²³¹ *Id.* at 242.

²³² *Id.* at 238, 242.

²³³ *Lujan*, 63 Misc. 3d at 242-43.

²³⁴ Chapman & Smith, *supra* note 1.

²³⁵ See *Lujan*, 63 Misc. 3d at 239.

Battle did not exhibit any threat toward students or staff.²³⁶ Even Success' position—that she was scaring students and school staff by yelling out profane words—does not seem to indicate an actual threat of violence or a crime. The profanity she allegedly uttered came in direct response to a predictable trigger: the school's failure to open its doors for families and children standing outside in the rain.²³⁷ Continuing the *Lujan* inquiry, Success banned Battle “without regard to the facts.” The only relevant facts, as stated, were that Battle used the word “damn” and was forced to stand outside in the rain with her children.

Parents and practitioners who feel that a school has issued any type of ban “without sound basis and reason” and/or “without regard to the facts,” then, may wish to argue that the ban is arbitrary and capricious. While unproven, perhaps this approach might yield strategic rewards as well. “Arbitrary and capricious” claims invoke a more “low stakes” standard inherent in state law.²³⁸ Procedural due process claims, meanwhile, invoke “higher stakes” principles of federal constitutional law.²³⁹ A state court, then, may feel more comfortable overruling a school district's limited access letter by simply saying the decision was arbitrary and capricious, rather than wading into the murky and deeper waters of procedural due process. Strategically, however, the standard for “arbitrary and capricious” may also be a challenging one to meet.²⁴⁰

C. *Limited Access Letters Impose a Disparate Impact on Parents of Color and Parents of Students with Disabilities*

Finally, litigants could almost certainly argue disparate impact in theory. In other words, litigants could argue that limited access letters impose a disparate impact on a constitutionally-protected class—people of color—and on parents of students with disabilities.

Unfortunately, this theory of liability would likely not be successful in the current judicial landscape. In 2001, the Supreme Court decided the case of *Alexander v. Sandoval*.²⁴¹ This case found that Title VI of the Civil Rights Act, which prohibits discrimination on the basis of “race, color, or

²³⁶ See Chapman & Smith, *supra* note 1.

²³⁷ *Id.*

²³⁸ See, e.g., Lesley Daunt, *State vs. Federal Law: Who Really Holds the Trump Card?*, HUFFPOST (Jan. 28, 2014, 4:13 PM), <https://perma.cc/KUS8-T78D>.

²³⁹ *Id.*

²⁴⁰ See, e.g., Louis J. Virelli, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 728 (2014) (describing the narrow scope of arbitrary and capricious review).

²⁴¹ *Alexander v. Sandoval*, 532 U.S. 275 (2001).

national origin,”²⁴² did not allow for a private right of action under a theory of disparate impact.²⁴³ As a result, DOE parents would likely not be able to seek judicial relief unless *Alexander v. Sandoval* were overturned.²⁴⁴

III. SOLUTIONS FOR NEW YORK CITY: LESSONS FROM LOS ANGELES

In Los Angeles, limited access letters—or “disruptive person letters,” as they are known there—once mirrored New York City’s practices.²⁴⁵ The Los Angeles Unified School District (“LAUSD”) recently reformed its schools’ use of these letters in banning parents from campus.²⁴⁶ Although New York City can learn from LAUSD’s reforms, the most appropriate action is still to stop the limited access letter practice.

A. *Abolish Limited Access Letters Altogether*

For nearly every reason imaginable, New York City—and the rest of the country—should end the practice of limited access letters, full stop. As discussed above, they are illegal. Depriving parents of their protected liberty interest in being on a school campus without a pre-deprivation hearing violates procedural due process requirements under the Fifth and Fourteenth Amendments. Even if a process were introduced to attempt to satisfy constitutional requirements, parents should not be excluded from campus—period. These types of letters have a disproportionate effect on parents of color. The letters can cause shame and humiliation for recipients.²⁴⁷ And they do not resolve the more serious underlying issues of establishing mutual trust between schools and parent communities.

There are other ways to engage with parents productively without resorting to limited access letters. Lily Gonzalez is an LAUSD graduate

²⁴² *Id.* at 278.

²⁴³ *Id.* at 293 (“Neither as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated [to prohibit discrimination]. We therefore hold that no such right of action exists.”).

²⁴⁴ See Tanya L. Miller, *Alexander v. Sandoval and the Incredible Disappearing Cause of Action*, 51 CATH. U. L. REV. 1393, 1419-20 (2002) (discussing the ramifications of the *Sandoval* ruling in the education context where it is difficult to prove intentional discrimination, but there is an undeniable disproportionate impact).

²⁴⁵ See Sonali Kohli, *L.A. Unified Creates Appeal Process for Parents Who Are Kept off School Campuses*, L.A. TIMES (Nov. 21, 2016, 12:35 PM), <https://perma.cc/3QC4-DP2Q>.

²⁴⁶ *Id.*

²⁴⁷ Based on the author’s conversations with practitioners and clients. See also Mike Szymanski, *LAUSD Softens ‘Disruptive Person’ Letters, but Parents Are Still Angry*, LA SCH. REP. (Nov. 22, 2016), <https://perma.cc/2TTT-JK3T>.

and parent of a student at a California charter school.²⁴⁸ She recently wrote a moving story about her own experience:

Recently I sent a strongly worded email to my daughter's teachers, she was working on a group project and didn't receive the grade we were hoping for, she was also not presented with the grading rubric right away letting her know what she did wrong and areas for improvement. This was a project that I saw my little scholar working avidly on, and I was beyond upset when my daughter received a low score. The hoop earrings were about to come off. This alone could have been reason enough to be labeled as a disruptive parent had she been at LAUSD. Instead of receiving one of these letters, her teachers scheduled a meeting with me to take place a few days later. This also gave me the time to cool off. We met, they explained the rubric and why she received the grade that she did. The reason rubrics weren't handed out on the spot was because the grade was cumulative and other components for assessment were factored in. We resolved the situation and worked together. Had I received letter telling me that I was "disruptive," I would have only been further agitated, and the last thing I would have wanted was to work together with my child's educators. It was a learning experience for us all.²⁴⁹

Gonzalez's story may illustrate the type of response that DOE principals and educators could take with "difficult" parents. The Parent Organization Network ("PON"), a collaborative organization whose mission is to "connect, empower, and mobilize parents and parent organizations" in the Los Angeles area,²⁵⁰ suggests "provid[ing] training to any staff member that interacts with parents on customer service, conflict resolution, and de-escalation techniques."²⁵¹ Given the plethora of biases that school staff may unconsciously or consciously harbor toward certain parents, de-escalation provides an essential tool for staff to check in with themselves and act responsively instead of reactively.

²⁴⁸ Lily Gonzalez, *Parent Engagement Gone Wrong: Parents Beware, You Can Get a "Disruptive Parent" Accusation in LAUSD*, LA COMADRE (June 2016), <https://perma.cc/64DG-AWSG>.

²⁴⁹ *Id.*

²⁵⁰ *About Us*, PARENT ORG. NETWORK, <https://perma.cc/NV96-ZHHU> (last visited May 2, 2019).

²⁵¹ PARENT ORG. NETWORK, *ISSUANCE OF 'DISRUPTIVE PERSON LETTERS' TO LAUSD PARENTS: MODIFYING THE SYSTEM TO MAINTAIN SCHOOL SAFETY AND IMPROVE PARENT RELATIONS* 35 (2016), <https://perma.cc/GP5V-ZPU7> [hereinafter PARENT ORG. NETWORK REPORT].

In a similar vein, schools can take affirmative steps to open up the conversation about their policies and expectations of parents. “Providing parents with a booklet of rights to review on their own is not enough,”²⁵² PON’s 2016 report reads. “Principals need to review the rules most frequently violated with parents at ‘Back to School Night’ events.”²⁵³ The group also recommends “formal orientations . . . with opportunities for parents and staff to dialogue about rights and responsibilities, school rules and procedures . . . and how to navigate the school and district to seek resources and resolve problems at school[,]” as well as training for parents on how to observe their child’s classroom without violating rules and policies.²⁵⁴

“Maintaining the safety of students while building stronger relationships with their parents are not mutually exclusive concepts. Both are achievable if schools truly reframe the role of parents as true partners.”²⁵⁵ Even though LAUSD has made reforms, parents and advocates there still see the effects of the letters—parents are still excluded from participating in their children’s education.²⁵⁶ Outright abolition of limited access letters, then, is by far the preferred solution. In the alternative, the reforms discussed below would make the practice more palatable for DOE parents. As we work towards abolition of limited access letters altogether, the following steps should be taken to improve the practice as it exists.

B. Restrict the Reach of Limited Access Letters

Under the new LAUSD policy, the ban cannot be indefinite; letters may only ban a parent for up to a year.²⁵⁷ Significantly, the bulletin also states that a parent or other recipient of the letter may not be banned outright from campus: “[t]he letter does not preclude individuals from visiting the school or attending school activities, but merely requires calling the principal ahead of time to schedule an appointment.”²⁵⁸ The DOE should adopt this policy as well, restricting limited access letters to a maximum duration of one year and ensuring parents may still participate fully in school events.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.* at 36.

²⁵⁵ *Id.* at 37.

²⁵⁶ See Szymanski, *supra* note 247.

²⁵⁷ Disruptive Person Letter Policy Bulletin, BUL-6826.0 (L.A. Unified Sch. Dist., Feb. 21, 2017), <https://perma.cc/FD4A-CUDQ>.

²⁵⁸ *Id.*

C. *Make Data Public*

In Los Angeles, unlike in New York, the public has been able to learn more about who is receiving these letters, who is issuing them, and why. The findings on schools issuing these letters have been upsetting, but, from a policy perspective, they provide valuable information. PON filed an information request regarding the LAUSD.²⁵⁹ In response, the group was permitted to analyze 476 disruptive person letters issued between 2002 and 2016.²⁶⁰ PON analyzed each letter and compiled a database charting “school year, local district, school grade-level configuration, school type, principal, recipient(s), type and frequency of offense, and number of warnings and letters given to recipients.”²⁶¹ Among other findings, the group learned the following:

- Seventy percent of disruptive person letters were issued by elementary schools.²⁶²
- Approximately seventy percent of those receiving a letter were female.²⁶³
- A small number of principals accounted for a disproportionate number of letters: About one third of all letters issued were issued by a block of eleven percent of all principals giving out these letters.²⁶⁴
- During 2015-2016, 60.5% of all principals in LAUSD were women, but this group of principals constituted 68% of the principals who issued one or more disruptive person letters.²⁶⁵
- Eighty-two percent of letters, or 389 in total, were issued due to “verbal behaviors.”²⁶⁶ Specific examples of verbal behavior that resulted in a disruptive person letter included: “being irate, raising the voice, yelling, using the wrong tone of voice, using

²⁵⁹ PARENT ORG. NETWORK REPORT, *supra* note 251, at 8.

²⁶⁰ *Id.*; see also Kohli, *supra* note 245 (clarifying that this 476 figure is not the total number of disruptive person letters that were sent during the years in question). In fact, 304 letters were issued in 2015 alone. Szymanski, *supra* note 247. Also note that “disruptive person letters” were formerly known as “disruptive parent letters,” the change reflecting that anyone setting foot on campus could receive a letter. *Id.*

²⁶¹ PARENT ORG. NETWORK REPORT, *supra* note 251, at 8.

²⁶² *Id.* at 13.

²⁶³ *Id.* at 16.

²⁶⁴ *Id.* at 13.

²⁶⁵ *Id.* at 12.

²⁶⁶ PARENT ORG. NETWORK REPORT, *supra* note 251, at 17.

profanity, being argumentative, being disrespectful, saying negative things about the school, staff, or parents to others, or making general threats.”²⁶⁷

- The other top reasons principals issued letters were due to alleged violation of school policies,²⁶⁸ threats,²⁶⁹ and parents approaching students.²⁷⁰
- Prior warning was only mentioned in fourteen percent of the letters.²⁷¹
- Ninety-nine percent of the letters restricted the recipient’s access to the campus.²⁷²
- Ninety-seven percent of the letters restricted access for an indefinite duration.²⁷³
- None of the 476 letters analyzed “provided instructions on how to appeal the letter or how a parent might work with the school administrator to regain normal access to campus.”²⁷⁴

PON also conducted qualitative interviews with a small number of parents who received letters.²⁷⁵ Five out of six of the individuals interviewed said that they suspected the real reason they were banned from campus was “because they had been vocal or persistent in challenging

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 18. Thirty-five percent of letters, or 168 in total, were issued due to “[v]iolating school or district policy or procedures.” *Id.* Some specific examples of violating policy or procedures that resulted in a disruptive person letter included: violating the visitor’s policy; failing to leave campus when requested; talking to others during classroom observation; and violating court orders. *Id.*

²⁶⁹ *Id.* at 20. Twenty-five percent of letters, or 121 in total, were issued due to “[t]hreats.” *Id.* The report stated that they were “unable to assess from the letters whether a specific verbal threat . . . was credible.” *Id.* at 21.

²⁷⁰ *Id.* at 19. Eighteen percent of letters, or 85 in total, were issued due to “[p]arents approaching students.” *Id.* These were issued in “situations where parents approached children other than their own directly to talk to them, touched their arm or shoulder to re-direct them, reprimanded or confronted them, threatened them, or physically struck them.” *Id.*

²⁷¹ *Issuance of ‘Disruptive Person Letters’ to LAUSD Parents: Modifying the System to Maintain School Safety and Improve Parent Relations*, PARENT ORG. NETWORK (Oct. 26, 2016), <https://perma.cc/7LMM-5MFM>. Note that this source is a PowerPoint presentation made in conjunction with (and utilizing much of the same information from) the report cited in PARENT ORG. NETWORK REPORT, *supra* note 251. The report notes that “it can be deduced that documenting warnings is not a requirement and therefore it is not systematically included in the letters.” PARENT ORG. NETWORK REPORT, *supra* note 251, at 25.

²⁷² PARENT ORG. NETWORK REPORT, *supra* note 251, at 26.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 9.

policies being enforced.”²⁷⁶ All six parents took action upon receiving the letter, from attempting to meet with the school principal or asking that the principal’s supervisor or a district official review the letter.²⁷⁷ In the interviews, however, parents described the outcomes of their actions, none of which was that the letter was rescinded.²⁷⁸ Parents interviewed reported “feeling sad, angry, frustrated, powerless, desperate, . . . ultimately devastated . . . [and that] there was ‘no way out’ to get the principal’s decision reviewed or overturned.”²⁷⁹

This is the type of qualitative and quantitative data that the DOE needs to generate. In fact, as of early 2019, the New York City Council has proposed legislation before it that would make this data a reality.²⁸⁰ In March 2018, City Council member Ritchie Torres introduced a bill designed to require the DOE to report information and trends regarding limited access letters.²⁸¹ The bill would require the DOE to report annually on the number of limited access letters issued to parents, with data disaggregated by student race, student special education status, and other categories.²⁸² However, as of mid-2019, the City Council’s Committee on Education has control of the bill, and it does not appear to have made any movement since its introduction in March 2018.²⁸³

²⁷⁶ *Id.* at 27. Examples parents gave in the interviews included challenging the school’s policy that “classroom visitations were limited to 20 minutes, in violation of District policy and state law . . . [and] flagging to [the] principal and district officials that their child’s teacher was giving contradictory grades for different tests and assessments.” *Id.*

²⁷⁷ PARENT ORG. NETWORK REPORT, *supra* note 251, at 28.

²⁷⁸ *Id.* The report included a strong example of the result of one parent’s action: “One parent recalled appealing to the principal’s director for intervention but instead being told, ‘When it comes to things like this, the District backs the principal 100 percent.’” *Id.*

²⁷⁹ *Id.* at 29.

²⁸⁰ N.Y.C. Council Int. No. 670 (2018), <https://perma.cc/V8ZZ-2K4M>.

²⁸¹ *Id.*; see also Alex Zimmerman, *How Often Do New York City Schools Bar Parents from Entering? The City Could Soon Be Forced to Say.*, CHALKBEAT (Mar. 7, 2018), <https://perma.cc/KYQ3-TURW>.

²⁸² N.Y.C. Council Int. No. 670 (2018), <https://perma.cc/V8ZZ-2K4M>. The full categories the bill requires for disaggregation are as follows: “(i) student race and ethnicity; (ii) student gender; (iii) student special education status; (iv) student English language learner status; (v) student eligibility for the free and reduced price lunch program; (vi) parent race and ethnicity; (vii) parent gender; (viii) primary language of parent; (ix) community school district; and (x) grade level.” *Id.*

²⁸³ *Id.*

D. *Introduce a “Limited Access Letter” Hearing, Modeled After a Suspension Hearing*

As discussed earlier, the suspension hearing process in the DOE—while highly flawed—might provide a model for an appropriate adjudication mechanism for parents.²⁸⁴ Given that the DOE already has suspension hearing office “machinery” in place, allowing parents a chance to be heard by a neutral hearing officer before a limited access letter goes into effect could be a fair way to resolve the solution. This fact-finding proceeding could work in the same way the suspension process currently does: parents could present evidence explaining why the principal’s version of events was not accurate. The school could also present evidence. Both sides could present witnesses, cross-examine the other side’s witnesses, and introduce documents for review.

This process could also, in the long run, save the DOE time. Rather than requiring a regional superintendent or other person to review an appeal of the letter (as the new Los Angeles process requires, detailed below), an independent hearing officer could take a first pass at resolving the situation. In doing so, the hearing officer could “weed out” nonsensical limited access letters and keep tabs on how individual schools are operating.

In late 2016, shortly after the PON report, LAUSD implemented an initial appeals process for disruptive person letters.²⁸⁵ To document and outline this policy, LAUSD formally issued a written bulletin entitled “Disruptive Person Letter.”²⁸⁶ Under the new appeals process, a parent can now first appeal the letter to the school’s principal, and, within thirty days of receiving the appeal, the principal shall issue a written response.²⁸⁷ After the initial appeal to the principal, the parent (or other letter recipient) may then appeal the letter to the local district superintendent or designee.²⁸⁸ The district must respond within thirty days to issue the final decision.²⁸⁹ If the letter is upheld by the principal or the district, then the school must review the letter every ninety days.²⁹⁰ One loophole is that the new policy does not specify the individual who must conduct the review—meaning that potentially a person with vested interests in supporting school personnel over parents might be reviewing the letter.²⁹¹

²⁸⁴ See discussion *supra* Section III.A.2.

²⁸⁵ See Kohli, *supra* note 245.

²⁸⁶ Disruptive Person Letter Policy Bulletin, *supra* note 257.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ Kohli, *supra* note 245; see also Disruptive Person Letter Policy Bulletin, *supra* note 257.

The bulletin also includes a sample “warning” letter for principals to use in interacting with parents or others prior to issuing a disruptive person letter.²⁹² The warning letter template begins:

Dear Mr./Mrs. _____:

I am writing to confirm our conversation on _____ and to warn you I am considering restricting your access to our campus. Your conduct on _____ created a serious disturbance, which required the attention of school personnel.

[DESCRIBE INCIDENT THAT MAY LEAD TO DISRUPTIVE PERSON LETTER]

I found your behavior to be _____. While I appreciate your concern for your child, such a disturbance to the instructional program cannot be tolerated. I cannot operate a school effectively when conferences are not scheduled.²⁹³

The letter goes on to cite the relevant School Board Rules and criminal statutes which may apply if a parent persists in making a disturbance.²⁹⁴ The bulletin also includes a form for a parent to appeal a letter at the school level, as well as another form for a parent to appeal the letter at the local district level.²⁹⁵ Following is the sample of a disruptive person letter that a principal may use that matches the “warning” letter almost identically for the first three paragraphs, as well as its closing.²⁹⁶ However, the letter includes the following text for principals to use in restricting a parent’s access:

This letter **does not** preclude you from visiting the school or attending school activities, but merely requires calling the principal ahead of time to **schedule an appointment**.

If you have business at the school, please call _____ in advance for an appointment. You may not enter the school without _____ authorization.²⁹⁷

²⁹² Disruptive Person Letter Policy Bulletin, *supra* note 257, attachment A.

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ *Id.* attachment B, C.

²⁹⁶ Compare *id.* attachment A, with *id.* attachment D.

²⁹⁷ Disruptive Person Letter Policy Bulletin, *supra* note 257, attachment D (emphasis in original).

The letter also describes the appeals process: “You may appeal the letter to the issuing principal and, if not resolved, to the local district director.”²⁹⁸

These are exactly the types of procedures that the New York City DOE should put into place for limited access letters. The LAUSD bulletin—a document analogous to the DOE’s Chancellor’s Regulations—provides the appropriate formality for principals, staff, attorneys, and parents to rely on when a dispute arises. Again, given the extensive hearings and appeals process already in place for school suspensions in New York, it would seem only a small step to introduce a written policy similar to the school suspension process for limited access letters.

In addition to the formal written notice component, the DOE should also implement the warning letter aspect of the LAUSD appeals plan. The formality of a warning letter provides fair notice to parents that their behavior may not be acceptable to the school. At the same time, it facilitates a dialogue between a principal and parents before their behavior crosses the school’s line. This dialogue in turn gives the parent a chance to share their side with the principal. Given that the first notice a parent currently receives in New York City of any problem is the letter banning them from the campus, a prior written warning would be very useful.

The DOE should also adopt LAUSD’s letter template for a number of reasons. First, the uniformity of the letter may help reduce implicit bias and/or problematic language by principals. The standardization of the letter would also ensure that parents receive consistent information on what the limited access letter actually means. The clarity of the disruptive parent letter template—including the statement in bold that the letter “**does not** preclude you from visiting the school or attending school activities”²⁹⁹—also makes the process clearer for parents. Even some of the subtle nuances—such as the letter’s note of appreciation for the parent’s “concern for your child”³⁰⁰—seem well-executed and logical. The DOE should adopt a similar tone with public school parents.

Finally, the LAUSD appeals process seems both simple and intuitive for parents. Rather than relying on opaque references to state and federal education laws, the appeals process allows a parent to immediately request a chance from the authority figure they likely know best at the school—the principal. The thirty-day requirement sets a clear and timely standard for the school to adhere to, while also giving principals sufficient time to prepare a more thorough investigation and report. The second

²⁹⁸ *Id.*

²⁹⁹ *Id.* (emphasis in original).

³⁰⁰ *Id.*

level of appeal, to the local district superintendent, also seems well-designed. By allowing the superintendent to have final say in the matter, the procedure allows schools to maintain a safe campus while also ensuring that parents are not bound to the discretion of a principal who may already be biased against them.

There may, of course, be limitations and downsides to this process. For instance, the appeals process might be, in essence, a sham, giving the appearance of due process while remaining a system that excludes parents of color and parents of students with disabilities systematically from school campuses. A parent might not receive the letter, given that many people may experience housing insecurity or do not use snail mail regularly. A letter might not be translated into a parent's native language. Parents might feel pressured to obtain legal representation, creating a system where only parents represented by counsel would receive the full attention of the superintendent. Pitfalls still abound. However, this appeals process would still almost certainly be preferred to the current lack of any system.

CONCLUSION

Limited access letters pose a serious problem for parents of color and for parents of children with disabilities. Students of color and students with disabilities already face disproportionate levels of school discipline. Banning parents from campus exacerbates the carceralization of schools and reinforces the reality of the school-to-prison pipeline.

As Los Angeles's PON urges: "Listen to parents; don't restrict their access to campus when they are informed and empowered, because they are your most crucial partners in educating children."³⁰¹ Ultimately, when a school excludes a parent, it is the student who suffers the most. No child deserves to have their parent banned from watching them play soccer, star in a play, or graduate from high school. By introducing a formal set of requirements for fact-finding and dispositional hearings in a school suspension context, the DOE has already shown a keen and admirable interest in reforming student discipline. Applying the same interest to helping schools deal fairly with the parents who may present similar issues—and, preferably, by banning limited access letters outright—is the next logical step.

³⁰¹ See *Issuance of 'Disruptive Person Letters' to LAUSD Parents: Modifying the System to Maintain School Safety and Improve Parent Relations*, PARENT ORG. NETWORK (Oct. 26, 2016), <https://perma.cc/7LMM-5MFM>.

ACCIDENTS HAPPEN: EXPOSING FALLACIES IN CHILD PROTECTION ABUSE CASES AND REUNITING FAMILIES THROUGH AGGRESSIVE LITIGATION

Jessica Horan-Block & Elizabeth Tuttle Newman[†]

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INTRODUCTION

In New York City, much-needed critical attention has been paid to the racial disproportionality and overreach of the city’s child welfare system, the Administration for Children’s Services (“ACS”), and its conflation of poverty with neglect.¹ The vast majority of child protection cases

¹ See, e.g., Rachel Aviv, *Where Is Your Mother? A Woman’s Fight to Keep Her Child*, NEW YORKER (Dec. 2, 2013), <https://perma.cc/7FXR-93WS> (revealing that a single mother who left her son home alone for lack of childcare lost custody of her child); Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of ‘Jane Crow,’* N.Y. TIMES (July 21, 2017), <https://perma.cc/6A3T-WPLH> (discussing the negative long-term impacts of the foster care system); Jessica Horan-Block, Opinion, *A Child Bumps Her Head. What Happens Next Depends on Race.*, N.Y. TIMES (Aug. 24, 2019), <https://perma.cc/HB5N-JFLE>; Emma S. Ketteringham, Opinion, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), <https://perma.cc/9N9W-JK3R> (“The problem is not that child services fails to remove enough children. It’s that the agency has not been equipped to address the daily manifestations of economic and racial inequality. Instead, it is designed to treat structural failings as the personal flaws of low-income parents.”); Yasmeen Khan, *Family Separations in Our Midst*, WNYC (Apr. 17, 2019), <https://perma.cc/22LL-TNX8> (discussing emergency removals in New York City child neglect cases).

brought in New York City allege child neglect rather than abuse.² This article explores the proportionally smaller category of cases brought with the most severe physical abuse allegations, cases in which ACS is often seen to be most justified in removing and separating children from their families. As The Bronx Defenders Family Defense Practice has developed and evolved over its ten years in existence, we have found that early litigation exposes the fact that, much like elsewhere in child protective law, these serious physical abuse cases are often based on misperceptions and are susceptible to both mistake and overreach.

The mere existence of a fracture, head trauma, or other serious injury in a young child or infant that cannot be explained, even without additional evidence of an intentional act, can trigger civil child abuse allegations, tear apart a family, and stigmatize a parent as an “abuser.” In the context of public defense, where the vast majority of parents represented are low-income people of color, whose parent-child bonds are largely devalued, the severity of an accusation alone can mean long-protracted family separation and, in some cases, the permanent dissolution of a family.

Head trauma and “unexplained fracture” allegations seem medically complicated and unassailable when they include a diagnosis of abuse by a medical professional. A parent defender’s understandable first reaction may be that the case is unwinnable, indefensible, or that a parent faced with these charges may never get their children home. A common response is to resolve the case as expeditiously as possible without challenging the allegations.

In many cases, however, injuries labeled as “unexplained” may be the result of accidents simply unwitnessed by the parents, events not fully understood or believed by medical professionals due to bias, the result of a natural disease process or, in some cases, the injuries may not exist as pled. In our experience in The Bronx Defenders Family Defense Practice, employing aggressive and early litigation in abuse cases, in conjunction with holistic client advocacy by parent advocates and social workers, has more than halved the amount of time families are separated.³ By immediately demanding proof of abuse or medical evidence that substantiates the

² In 2018 in the Bronx, there were 12,407 reports of suspected neglect to the State Central Register, contrasted to the 233 abuse reports received. NYC ADMIN. CHILD SERVS., CHILD WELFARE INDICATORS ANNUAL REPORT 2018, at 9 (2019), <https://perma.cc/JC5C-GKPM>.

³ See Section III.A, *infra*, for a discussion of our data on physical abuse cases. A recent study sponsored by The Annie E. Casey Foundation found that children of parents represented by interdisciplinary offices like The Bronx Defenders spent 118 fewer days on average in foster care during the four years following an abuse or neglect filing, as compared to panel attorneys. Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 CHILD. & YOUTH SERVS. REV. 42 (July 2019); see also John Kelly & Michael Fitzgerald, *New York’s Parent Defender Model Lowers Reliance on Foster*

abuse allegations, we have in many cases been able to expose that alleged abusive injuries are more likely accidentally caused or related to a natural disease process, even if the accidents are not witnessed. In challenging these cases through immediate and aggressive litigation, we have been able to both achieve quicker reunification between our clients and their children and expose the fallacy that certain injuries in a baby, such as a skull fracture, are necessarily from abuse. We have also found that these cases are winnable, even where a parent can never explain how their child sustained an injury. Early, creative, and aggressive litigation is the key, and this article shares strategies that can be used to win cases, reunify families more quickly, and expose the fallacy that a young child's "unexplained" injury in some communities is necessarily abusive.

The purpose of the article is to use our experience litigating physical abuse cases in the Bronx to provide practitioners and family defenders both in New York and in other states with ideas and strategies of how to move cases forward for parents and caretakers charged with serious physical abuse of a child. It is our hope that, by challenging these allegations, defense attorneys can expose the misperceptions and overreach of agencies that charge parents with physical abuse based on injuries alone.⁴

Part I includes real Bronx Defenders case examples that demonstrate the shift in how our practice now aggressively litigates abuse cases early and often and how it has changed outcomes for our clients. Part II provides a legal background on some of the most applicable New York City and State child protection processes, statutes, and standards, as well as the racially disproportionate ways in which those statutes, standards, and practices target people of color. Part III provides some of the tools and strategies we have found most useful in pushing reunification, using our cases to demonstrate how emergency hearings, expert witnesses, motion practice, and depositions can expose the fallacy of many abuse cases.

I. SHIFT TO EARLY AND AGGRESSIVE LITIGATION IN THE BRONX DEFENDERS' ABUSE CASES

Over the last ten years, as The Bronx Defenders Family Defense Practice has developed and grown, we have changed the way in which we approach physical abuse cases. When we first represented parents charged

Care, Study Finds, CHRON. SOC. CHANGE (May 6, 2019), <https://perma.cc/44AM-FE8G> (summarizing and discussing the findings of the Gerber et al. report).

⁴ The authors understand and appreciate the vast difference in resources available to a lawyer at an institutional provider in New York City such as The Bronx Defenders as compared to a practitioner in upstate New York or in another state. The goal of this article is to demonstrate that abuse cases are not only winnable but that there are avenues to reunite families more quickly even if a parent is charged with abuse based on unexplained injuries.

with abuse based on the existence of unexplained injuries alone, we often, though not always, delayed litigation in order to collect all of the information and records, obtain multiple experts who could testify in person, and understand all of the evidence before challenging ACS's claims of abuse. Unfortunately, this resulted in long and protracted trials conducted over a period of years, thereby frustrating clients, attorneys, and judges alike. Clients had to wait until the trial itself, many months or years down the line, before exposing that fractures in the petition in fact didn't exist or were not definitive, or that ACS's original claims in the petition were not all they appeared to be. The following is such an example.

A. *"Multiple Fractures in Three-Month-Old Baby": Protracted Litigation Exposes Medical Overreach*

Josephine lives in the Bronx with her grandmother, husband, teenage cousin, and three young children, including her three-month-old son Evan.⁵ One morning, when returning from her full-time overnight job, her husband tells her that Evan was holding his arm in a funny way while drinking his nighttime bottle. Worried, Josephine checks in on Evan to find him sleeping soundly in his crib, so she decides to check on him when he next wakes. A few hours later, Josephine notes that, despite gulping his bottle, Evan holds his arm differently and seems to be in pain when she moves him. Josephine talks with her husband, and neither can recall anything happening that could have caused an injury. Josephine immediately takes Evan to an emergency room.

At the hospital, the doctors clinically examine Evan and x-ray his arm. The clinical examination reveals that Evan has no swelling and does not appear to be in pain during tummy time. A radiologist reads the X-ray and suggests that Evan may have a small arm fracture, though it is difficult to read on X-ray. The doctors question Josephine, but she can't recall any event that could have fractured her baby's arm. She notes that sometimes her older children play with Evan while he sits in a bouncy seat, but that she always cautions them to be gentle with their little brother. The emergency room refers Evan to a child abuse pediatrician and conducts a full skeletal survey⁶ on Evan. The skeletal survey reveals a possible abnormality in the ribs that could be a fracture and possible leg fractures but is not conclusive.

⁵ Names and identifying details in all cases have been changed to protect client confidentiality.

⁶ A skeletal survey (or a bone survey) is a full body X-ray of the bones of the body. Christine W. Paine & Joanne N. Wood, *Skeletal Surveys in Young, Injured Children: A Systematic Review*, 76 CHILD ABUSE & NEGLECT 237, 237 (2018). It is often done when there is

Even though Evan is healthy and his mother has sought appropriate and immediate medical care, ACS and the child abuse pediatrician⁷ (“CAP”) allege that both parents abused Evan based on the existence of “multiple” fractures. ACS forcibly removes not just Evan but all three of the children from their home, placing them in foster care. ACS files a petition against the parents alleging abuse based on the existence of three sets of unexplained fractures. The petition does not include information that we learn later but was as yet unknown at the time: (1) the fact that the child is clinically well, (2) that the leg “fractures” may actually be abnormalities or normal bone variants, and (3) that a radiologist has determined that the bones themselves may look abnormal.

Evan is discharged from the hospital without receiving a cast, medication, or any other treatment for his allegedly fractured arm and legs. At the first appearance in family court, Josephine’s lawyers ask for an emergency hearing for the children’s return but quickly withdraw after the child abuse pediatrician states that the injuries were caused by abuse, without explaining how the abnormalities were determined to be fractures or why they were necessarily from abuse. Josephine’s attorneys decide they need more time to evaluate the medical evidence and speak to experts.

Over the next several years, Josephine’s attorneys prepare for trial, hire experts including two bone specialists, and pore over the medical evidence. After almost a year of litigation it becomes clear, and even the child abuse pediatrician concedes, that Evan’s leg “fractures” were, in fact, not fractures but a normal variation of a child’s bones as seen in an X-ray. It also becomes clear that the alleged rib fractures may also have

a fracture suspected due to child abuse to see whether there are other occult or unknown fractures that may not be showing clinical symptoms. *Id.*

⁷ The concept of “Child Abuse Pediatricians” is a relatively new phenomenon, having gained formalization and wider-spread utilization within the past ten years. *See* AM. BD. OF MED. SPECIALTIES, ABMS BOARD CERTIFICATION REPORT 2017-2018, at 8 (2018). The term refers to a sub-specialization for which pediatricians receive certification. The field of “Child Abuse Pediatrics” was created in 2006 in response to increased interest in the biologic basis of disease processes that have their origins in childhood trauma experiences. A fuller discussion of this specialization is beyond the scope of this article but is an important piece of the issues at play in these cases. For just a few examples of the literature on this issue, see Keith A. Findley et al., *Shaken Baby Syndrome, Abusive Head Trauma, and Actual Innocence: Getting It Right*, 12 HOUS. J. HEALTH L. & POL’Y 209 (2012) (explaining that in the past decade the legitimacy of “Shaken Baby Syndrome” diagnoses has been called into question, as demonstrated by the evolution of the diagnosis nomenclature from “Shaken Baby Syndrome” to “Abusive Head Trauma,” among other examples); Kip Nelson, *The Misuse of Abuse: Restricting Evidence of Battered Child Syndrome*, 75 L. & CONTEMP. PROBS. 187 (2012) (explaining that “Battered Child Syndrome” was intended to be a helpful tool for physicians, but has degraded into a cunning instrument for prosecutors who use the designation inappropriately, such as to mask otherwise impermissible or prejudicial character evidence).

been normal variants and that the arm “fracture” may have been nursemaid’s elbow.⁸ During the trial, it is exposed that the radiologist who originally read the X-rays was not even certified in pediatric radiology and that a more sensitive radiology study did not show an arm fracture. In addition, it isn’t until at least a year into the case that the court hears testimony from our client, the children’s mother, who up to that point has had no opportunity to tell her story or speak to the judge about the allegations. Over the course of the multi-year trial, the mother, our client, completed services and slowly gained more contact with her children, eventually reunifying with them fully.

After three years in court, Josephine consents to a neglect finding after her children have been back in her care for many months. In total, the family is separated for over a year and mired in a family court case for over three years. In that time period, it not only becomes clear that there were not three sets of fractures, that at best there was an arm fracture or a rib fracture, and that it is possible that some if not all of the fractures never existed at all. Unfortunately, it takes years to clarify these issues and work toward reunification, during which time the children are in foster care with limited parental contact.

B. Challenging Abuse Allegations at Case Outset: Proving an Infant Skull Fracture Is Accidental

While it is impossible to know exactly what would have occurred if Josephine’s lawyers had pursued a full emergency hearing at the case outset, our recent and numerous experiences litigating aggressively against abuse allegations soon after the case is filed have routinely and quickly exposed ACS’s inadequate investigations and lack of firm medical evidence to support their abuse allegations, even where injuries remain unwitnessed or without a clear cause. The following example is demonstrative.

One afternoon in January 2019, Rosa is folding laundry in her Bronx apartment bedroom while her six-year-old son Johnny and nine-month-old daughter Wendy play on the bed. As the siblings are cuddling and playing, they accidentally bang heads when Johnny, who is laying on his back, sits up as his baby sister Wendy crawls over him. Johnny cries, and Rosa comforts him. Rosa checks Wendy for injuries but she seems fine. Later that evening, Rosa breastfeeds Wendy and puts her to bed without issue.

⁸ For a description and discussion of nursemaid’s elbows, see Mohd Miswan MF et al., *Pulled/Nursemaid’s Elbow*, 12 MALAY. FAM. PHYSICIAN 26, 26-28 (2017).

The next morning while she is feeding Wendy, Rosa notices that Wendy's head is slightly swollen and that Wendy has a bruise on her forehead. Not taking any chances, Rosa brings Wendy to her primary care doctor, who refers Wendy and Rosa to the emergency room at a Bronx public hospital. The hospital conducts a CT scan and finds that Wendy has two minor skull fractures and a very small bleed in the brain underlying the fractures. When questioned at the hospital about the injury, Rosa gives the only explanation she has for how Wendy sustained the fractures: that her children bumped heads on the bed. Wendy appears happy and playful in the hospital, nursing multiple times throughout the day.

The hospital finds Rosa's explanation concerning and calls ACS to report Rosa, setting in motion investigations for potential criminal prosecution and family separation. ACS and the NYPD repeatedly question Rosa. Because Rosa cannot provide a reason deemed adequate for the swelling on Wendy's head, she is not allowed to take her daughter home. Once discharged from the hospital, ACS places Wendy, Johnny, and an older sibling with Rosa's sister, telling Rosa that, despite there being no court order, she cannot see her children for any prolonged period of time and that all contact between Rosa and her children must be supervised. Rosa is incredibly distraught, since she is still nursing Wendy every few hours.

Two days later, ACS files a petition in Bronx Family Court alleging that Rosa and her husband abused their daughter, based on an emergency room doctor's statement that Rosa's explanation for the injury was "inconsistent with the child's injuries." Despite the fact that Rosa acted entirely appropriately, sought medical attention, and that no doctor could provide an explanation for the injuries or conclude that they were caused by an abusive act, she still faces abuse charges from the state. The petition fails to mention why Rosa's account of the head banging between Wendy and her brother is considered inconsistent with a skull fracture, nor does the petition state whether ACS spoke to any specialist doctors other than a physician in the emergency room.

When assigned to represent Rosa, the Bronx Defenders attorney learns that she hasn't seen her children in two days, believing she was not allowed any contact.⁹ Rosa tells her attorneys that she has never been arrested or had prior contact with ACS. Before going in to arraign the case,

⁹ After a child is removed from their parents' care into foster care, the government becomes responsible for the child's care and custody. ACS is also responsible for scheduling and facilitating visitation between parents and their children. *See* N.Y. SOC. SERV. LAW § 384-b(7) (McKinney 2019). According to ACS's own policies, visitation should be the "least restrictive" as is safely possible—meaning not only the most time and days, but also the lowest level of "supervision." N.Y.C. ADMIN. FOR CHILDREN'S SERVS., POL'Y AND PROC. NO. 2013/02, DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED FOR FAMILIES WITH

Rosa shows her attorneys Wendy's discharge summary, which indicates that Wendy did not even need follow up care and that the type of skull fracture Wendy sustained can be from falling or bumping one's head. Rosa tells her attorneys this summary was provided to ACS.

At intake, ACS asks that the court place the children with their relatives. At the arraignment, after consulting a pediatric neurosurgeon to confirm the fracture could be caused by two children banging heads against one another, The Bronx Defenders ask for an emergency hearing to keep the children in Rosa's care. During the appearance, the judge holds a short informal hearing, asking the ACS caseworker for evidence to support the charges that Wendy's skull fractures were the result of abuse. By questioning the ACS worker, the judge learns that this worker did not speak to the doctors who actually examined Wendy, but instead only spoke to two social workers. In fact, though Rosa is accused of abuse, the ACS worker does not have an opinion from any medical professional that the injuries are the result of abuse, only a statement from a physician in the emergency room where Wendy received treatment who believed that two children bumping heads could not cause a skull fracture. The judge questions the ACS worker and finds out that the ACS worker interviewed and observed the other children, who had no bruising or other issues. The Bronx Defenders attorney asks the ACS worker whether an actual medical professional had deemed the injury abusive, but the ACS worker cannot answer. In addition, the attorney for the children notes that the fourteen-year-old daughter desperately wants to return home, corroborates the head banging incident, and describes her parents as loving.

Given the lack of information brought by ACS and the agency's inability to articulate why the injury was actually abusive or non-accidental, the court sends all the children home to Rosa that same day over ACS's objection. The court orders ACS to visit the home to check in but does not require the family to participate in any services. Indeed, in making its decision, the court points out that there was no phrasing in the abuse petition alleging that Wendy's skull fracture was actually the result of abuse rather than an accident. ACS objects and requests that the children be sent to foster care with Rosa's sister. The judge denies the request, inviting ACS to amend the petition if and when the agency has more information.

CHILDREN IN FOSTER CARE (2013); OFFICE OF CHILDREN AND FAM. SERVS., CHILD WELFARE AND COMM. SERVS., 17-OCFS-ADM-14: FAMILY VISITING POLICY FOR CHILDREN IN FOSTER CARE 5 (2017). Often, visitation will be restricted for weeks if not months to an ACS "agency" office, where families are forced to spend time in often tiny rooms under the constant surveillance of a caseworker, also known as a Child Protective Specialist. These visits often constrict families from being themselves or sharing the comfortable intimacy of "family time." *See, e.g.,* Jeanette Vega, 'Your Actions Are Setting You Back' - Losing My Temper in Visits Hurt My Case, RISE (Sept. 1, 2015), <https://perma.cc/77MG-VV2N>.

Just over three months later, ACS withdraws its abuse petition against the parents, never producing evidence that baby Wendy was abused or that her skull fracture was anything other than an unfortunate accident. Weeks later, Rosa receives a letter that the original ACS investigation was “unsubstantiated.” Nevertheless, Rosa tells her attorney that she is now scared to bring her children to the hospital.

II. A FRAMEWORK OF BRONX CHILD PROTECTION ABUSE CASES

When a parent brings a baby or young toddler under two years old to a Bronx hospital emergency room to seek medical assistance with an injury to the head, or brings a young child or baby who has something wrong with their leg or arm, the hospital likely runs tests and imaging. If the imaging, such as a CT scan or an X-ray, reveals skull fractures, brain injuries, rib fractures, or arm or leg fractures, hospital staff question the parent about how the injury happened and, if unsatisfied with the response, subsequently call ACS to report possible abuse.¹⁰ ACS conducts a short investigation and, if a medical professional raises even the slightest suspicion of abuse, even if there may be an accidental cause for the injury, ACS usually intervenes and separates a child from the parent or restricts a parent’s access to their child. This is almost always done before coming to court to file abuse charges or seek a judicial order to remove children.

When ACS separates a parent from a child, the agency must come to court the next business day to seek judicial oversight over the child’s removal, which generally is in the form of an abuse petition. In many cases, the government charges the parent for inflicting the very injury the parent was seeking assistance for when the parent originally came to the hospital. For example, in the case of Rosa above, she was seeking medical assistance for the swelling she found on Wendy’s head and then was ultimately accused of causing the head injury for which she sought treatment.

When the government ultimately charges a parent with abuse, the abuse petition often only includes the child’s age, the alleged injuries, and a vague statement that the injuries are suspicious for abuse, or more often

¹⁰ The majority of hospital staff who interact with an injured child—physicians, surgeons, dentists, osteopaths, residents, interns, registered nurses, and staff involved in admissions, examinations, care or treatment—are categorized as “mandated reporters” and are required by law to report when there is reasonable cause to suspect abuse. Injuries such as “fractures . . . to skull, nose, facial structure . . . skeletal trauma accompanied by other injuries . . . multiple or spiral fractures . . . in various stages of healing” are listed in guidance to these professionals for determining if there is reasonable suspicion of abuse or maltreatment. SHELDON SILVER & ROGER GREEN, *A GUIDE TO NEW YORK’S CHILD PROTECTIVE SERVICES SYSTEM* (2001), <https://perma.cc/P3DU-954W>. For a 2019 OCFS publication containing similar guidance, see OFFICE OF CHILDREN AND FAM. SERVS., *CHILD PROTECTIVE SERVICES MANUAL* (2019).

simply that a parent's explanation is inconsistent with the injuries according to medical staff. The petitions are often based on poorly investigated allegations with no definitive medical evidence that any particular injury was caused by abuse. The petition rarely includes potential variances in diagnoses or causes that are still being ruled out at the time of filing. And almost never is the source with the medical opinion of abuse actually named. Instead, the petition may say "staff from Named Hospital state that an injury is not consistent with the parent's explanation or is suspicious for abuse." The petition seldom articulates in any detail why an injury itself, such as a rib fracture, bespeaks abuse or why a certain parental explanation for an injury would be implausible.¹¹

Nevertheless, in our experience, cases charging parents with abuse, even if often poorly investigated, are treated as more "serious" from the moment of filing than those charging parents with neglect.¹² For example, once the specter of abuse is raised, a parent's contact with a child is almost always restricted to a few supervised hours a week at ACS or a foster care agency.¹³

¹¹ For example, a typical petition may have the following language, "on or about [date], the emergency room doctor who received the CT at [hospital] stated that the child sustained a skull fracture. The mother stated that she believed this was the result of the baby hitting its forehead while playing with another child. According to [doctor], this explanation is inconsistent with the injuries." The petition often will not include further allegations as to why the parent's explanation of the injuries was insufficient or inconsistent, therefore suggesting abuse.

¹² The distinction is roughly analogous to the distinction between felony and misdemeanor charges in criminal court. In our experience, the vast majority of cases in Bronx Family Court are brought under neglect dockets, which often involve facts or circumstances related to raising children in poverty. *See* discussion *supra* notes 2, 7.

¹³ Under N.Y. FAM. CT. ACT § 1030(c) (McKinney 2019), a parent has a right to reasonable and regularly scheduled visitation with a child who is not in their care unless the court finds that the child's health or life would be in danger. § 1030(c) allows the court to order supervised visitation if it is in the best interest of the child. In cases where physical abuse is alleged, in the authors' experience, courts routinely commence with visitation supervised by ACS. At this time, ACS's policy is to provide at least one visit per week for two hours at a time, or two to three visits a week for infants and toddlers of shorter duration. N.Y.C. ADMIN. FOR CHILDREN'S SERVS., POL'Y AND PROC. NO. 2013/02, DETERMINING THE LEAST RESTRICTIVE LEVEL OF SUPERVISION NEEDED FOR FAMILIES WITH CHILDREN IN FOSTER CARE (2013). In our practical experience, ACS will often not provide more than two visits a week unless ordered to do so. In some cases, in our experience, the courts will order visits supervised by a family member, which allows a parent to have more contact with a child in foster care. *See, e.g., In re T.A.*, No. 21833-4/11, 2012 WL 745087, at *2 (N.Y. Fam. Ct. Feb. 28, 2012) (ordering supervised visitation by either the grandparents or a 24-hour nanny). However, this often does not commence until some visits have occurred under agency-based ACS supervision. In addition, ACS, and sometimes the attorneys for the children, take the position that a court may not be able to order unsupervised visitation on certain serious abuse cases before fact-finding. *See, e.g., In re Daniel O.*, 141 A.D.3d 434, 435 (N.Y. App. Div. 2016); *see also infra* Section II.B (discussing the Daniel O. case further).

Due to serious time lags, cases often don't reach trial for years. In the intervening time, parents and children remain separated from one another with supervised contact only, and the government moves along the federally-mandated timeline that may require the agency to file a petition to terminate the parents' rights altogether.¹⁴ The section that follows provides an abbreviated look into the path of a typical child protection abuse case in the Bronx after the case has been filed in family court. Abuse cases are litigated in two basic types of hearings: at a classic "fact-finding" trial or at a reunification hearing called a "1028 hearing," known in other jurisdictions as the "shelter hearing" or "removal hearing." Given that the majority of these cases are argued under a *res ipsa loquitur* theory, explained below, the background provides special focus on those cases.¹⁵

A. *Abuse Investigations and Prosecutions Disproportionately Impact Low-Income People of Color*

Before discussing the doctrinal elements and legal path of an abuse case, it is crucial to address the reality that hospital reporting practices, laws, statutes, and standards disproportionately impact parents of color who live in low-income, heavily policed and surveilled communities. In discussing abuse cases, what is ultimately at stake for parents is the fundamental freedom to seek medical care for their children¹⁶ and to be met with help, compassion, and care rather than with suspicion, distrust, and a prosecutorial eye. We contend that this freedom and right is simply not afforded equally.

Research consistently shows that children of color receive differential treatment in the pediatric emergency room.¹⁷ Once there is a suspicion

¹⁴ The Adoption and Safe Families Act (ASFA), passed in 1997, created a federally-mandated timeline within which states must, save for the exemptions provided within the statute, file to terminate parents' rights when children remain in foster care. Under ASFA, the government is required to file to terminate a parent's rights—thereby "freeing" a child to be adopted—after a child has been in foster care for fifteen out of the last twenty-two months. 42 U.S.C. § 675(5)(E) (2019). This timeline, when layered upon staggering family court delays, creates disastrous results, given that serious abuse cases will often not even commence trial for over a year.

¹⁵ The doctrine of *res ipsa loquitur* infers negligence from the nature of an accident or injury rather than from concrete proof of the injury's causation. 79 CHRISTINE M.G. DAVIS ET AL., N.Y. JUR. NEGLIGENCE § 194 (2d ed. 2019). New York extends that doctrine to inferences of abuse, and "permits a finding of abuse or neglect based upon evidence of an injury to a child which would ordinarily not occur absent acts or omissions of the responsible caretaker . . . authoriz[ing] a method of proof which is closely analogous to the negligence rule of *res ipsa loquitur*." *In re Philip M.*, 82 N.Y.2d 238, 246 (1993) (citations omitted).

¹⁶ See *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (recognizing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

¹⁷ See, e.g., Kent P. Hymel et al., *Racial and Ethnic Disparities and Bias in the Evaluation and Reporting of Abusive Head Trauma*, 198 PEDIATRICS 137 (2018) (finding significant racial

of abuse raised at the hospital, Black children are more likely than white children to receive full body X-rays to check for fractures, despite the fact that Black children are no more likely than white children to have X-ray findings suggestive of abuse.¹⁸ For example, in a six-year-long study of the Children's Hospital of Philadelphia, researchers concluded that African-American and Latinx toddlers hospitalized for fractures were five times more likely to be evaluated for child abuse with a skeletal survey, and three times more likely to be reported for suspected abuse and/or maltreatment.¹⁹ The study's authors concluded that "racial differences do exist in the evaluation and reporting of pediatric fractures for child abuse, particularly in toddlers with accidental injuries."²⁰ Further, a recent study that examined medical professionals' implicit biases showed the existence of stereotyping that linked race and class to abuse.²¹

Due to hospitals' disparate reporting practices, ACS's disparate investigation rates within communities of color, and the well-documented disproportionate policing and surveillance of families of color, there is consequently a massively disproportionate effect on families of color and those living in poverty.²² This means that, for families of color, certain

and ethnic disparities in children evaluated and reported for abusive head trauma); *see also* Robert L. Hampton & Eli H. Newberger, *Child Abuse Incidence and Reporting by Hospitals: Significance of Severity, Class, and Race*, 75 AM. J. PUB. HEALTH 56 (1985) (finding Black and Latinx families more likely to be reported to child services by hospitals than white families); J.N. Wood et al., *Disparities in the Evaluation and Diagnosis of Abuse Among Infants with Traumatic Brain Injury*, 126 PEDIATRICS 408 (2010) (finding higher rates of traumatic brain injury diagnoses in publicly insured/uninsured infants, leading to concern of over-evaluation in Black and publicly insured communities).

¹⁸ Paine & Wood, *supra* note 6, at 237.

¹⁹ Wendy G. Lane et al., *Racial Differences in the Evaluation of Pediatric Fractures for Physical Abuse*, 288 JAMA 1603, 1606-07 (2002).

²⁰ *Id.* at 1603.

²¹ Cynthia J. Najdowski & Kimberly M. Bernstein, *Race, Social Class, and Child Abuse: Content and Strength of Professionals' Stereotypes*, 86 CHILD ABUSE & NEGLECT 217, 221 (2018) ("Our findings demonstrate a degree of consensus among medical professionals regarding the existence and content of stereotypes that link race and social class to child abuse.").

²² *See id.*; *see also* Sheila D. Ards et al., *Racialized Perceptions and Child Neglect*, 34 CHILDREN & YOUTH SERVS. REV. 1480, 1488 (2012) ("The one aspect of the chain of events over which caseworkers have the largest control—investigation and substantiation—is the one area that we find is most consistently related to racialized beliefs and perception"); Frank Edwards, *Family Surveillance: Police and the Reporting of Child Abuse and Neglect*, 5 RSF 50, 63 (2019) (citations omitted) ("Race plays a powerful role in explaining the geography of family surveillance. For children and families of color, population composition and policing powerfully explain the intensity of family surveillance").

injuries are considered “abusive” that would not be seen as even suspicious among affluent and predominantly white communities mere blocks away.²³

In contrast to other anecdotes within this article, the reality for a wealthy, white family might proceed as follows. In a wealthy Manhattan zip code,²⁴ a white mother brings her baby to the emergency room after her son’s babysitter reported discovering what she described as a “weird soft spot” on her son’s head. The emergency room staff immediately calls in a pediatric neurologist. The pediatric neurologist diagnoses the child with a skull fracture. The mother states that she has no idea how this injury occurred. Doctors tell her that it is common to have no explanation, given that skull fractures can be caused by trivial contact, such as if a baby hits his head hard with a toy or on a wall. The child’s treatment team consoles the mother. They reassure her that the injury is minor, requires no treatment, and will not cause any long-term damage. The child spends the night in the hospital for monitoring and goes home the next morning. The mother never hears from ACS or the police. The child returns home to his mother’s care and is never separated from his loving family.

²³ For an in-depth analysis of these dynamics and the well-documented and severe racial disproportionality within the child welfare system, see Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. F. 68 (2017), <https://perma.cc/BE2M-79EX>; see also Clifford & Silver-Greenberg, *supra* note 1; Ta-Nehisi Coates, *The Black Family in the Age of Mass Incarceration*, ATLANTIC (Oct. 2015), <https://perma.cc/5FHV-6JQD>; Thomas D. Morton, *The Increasing Colonization of America’s Child Welfare System: The Overrepresentation of African-American Children*, 57 POL’Y & PRAC. PUB. HUM. SERV. 23 (1999); VAJEERA DORABAWILA & NICOLE D’ANNA, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., DISPROPORTIONATE MINORITY REPRESENTATION (DMR) IN CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS (2015), <https://perma.cc/G48R-P7DT>; GREGORY OWENS, DIRECTOR OF SPECIAL PROJECTS, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., OCFS INITIATIVE TO ADDRESS RACIAL DISPROPORTIONALITY IN CHILD WELFARE AND JUVENILE JUSTICE, (Jan. 19, 2011), <https://perma.cc/P5RX-3KVY>; JOSHUA PADILLA & ALICIA SUMMERS, NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, DISPROPORTIONALITY RATES FOR CHILDREN OF COLOR IN FOSTER CARE (2011), <https://perma.cc/HF9S-UDV9>.

²⁴ This story is fictitious, but is based, in part, on conversations with medical professionals and other individuals who work with families in other boroughs. For just one real-life example of the differential treatment of a white, upper class parent who may have inadvertently injured their child, see Anna Arons, *Jenny Mollen, Jason Biggs, and How Race and Class Shape the Aftermath of Childhood Accidents*, PASTE (May 3, 2019, 1:32 PM), <https://perma.cc/R76X-ZKGF> (“[F]ar too many parents do end up alone, with their children snatched from their arms, after accidents as common as Ms. Mollen’s. The difference for these parents: they are poor, they are people of color, and they do not have the benefit of the doubt from child services.”); Lisa Respers France, *Jenny Mollen Reveals She Dropped Her Son on His Head, Fracturing His Skull*, CNN ENT. (Apr. 18, 2019, 3:25 PM), <https://perma.cc/NVF3-RT8W>.

It is well-documented that Black families are grossly overrepresented in New York's child welfare system in general, and that the system's laws problematically conflate poverty with neglect in myriad ways.²⁵ In our experience, poor parents of color who bring their young babies and children to Bronx hospitals with certain injuries are often met with interrogation rather than consolation and compassion. The case anecdotes throughout this article describe parents repeatedly being charged with abuse based exclusively on injuries that litigation reveals are plausibly accidental. Even if ACS ultimately drops its charges or the children return home after a hearing, the government has inflicted needless, irreversible, and serious harm on families.²⁶

B. *A Parent's First Day in Family Court*

On a parent's first date in Bronx Family Court, a parent meets a lawyer either from The Bronx Defenders or from a panel of 18-B private attorneys.²⁷ Sometimes a parent's child or children are still in the hospital, while in other circumstances the child with the injury and his or her siblings have already been placed in foster care. Attorneys often have mere minutes to review the abuse petition and speak to a client on a crowded court bench before being rushed into courtrooms to arraign the case. Many times, neither the parents nor the attorney enter the courtroom even knowing where the children are physically located or ACS's plan for the children's care should they not go home. As discussed earlier, the petitions often lack specificity as to how ACS will prove that a certain injury is the result of physical abuse. At the initial arraignment appearance, the

²⁵ See sources cited *supra* note 23 and *infra* note 26; see also Emma S. Ketteringham et al., *Healthy Mothers, Healthy Babies: A Reproductive Response to the "Womb-to-Foster-Care-Pipeline,"* 20 CUNY L. REV. 77, 86-87 (2016) (discussing low-income families' disparate involvement with the child protective apparatus); Amy Mulzer & Tara Urs, *However Kindly Intended: Structural Racism and Volunteer CASA Programs,* 20 CUNY L. REV. 23, 27 (2016) (discussing race and class disproportionality in the child welfare context, specifically within CASA programs).

²⁶ See, e.g., Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care,* 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016) (demonstrating the long-term harm of removal, even when children are removed from their family's care less than a month); Wendy Jennings, *Separating Families Without Due Process: Hidden Child Removals Closer to Home,* 22 CUNY L. REV. 1, 8 (2019) (discussing the ways in which family separation traumatizes children).

²⁷ In New York's First Appellate Division, Article 18B of the County Law provides for the assignment and compensation of private attorneys to represent indigent defendants. N.Y. COUNTY LAW Art. 18-B § 722 (McKinney 2019); *id.* § 722-b.

court formally assigns the lawyer to the parent²⁸ and addresses the question of where the child or children will be placed pending litigation, whether staying with relatives or being placed in foster care.²⁹ Unless a parent requests an emergency hearing for the return of their children, the next court date will be set months out for a preliminary conference with a court attorney—not the judge. The trial on whether or not a child’s injury exists and is the result of a parent’s physical abuse against the child, rather than a normal childhood accident, may be delayed anywhere from several months to, more typically, at least a year. Thus, on the date of arraignment, parents are left with the choice of either reserving the right to an emergency hearing and waiting as the trial litigation slowly progresses or instead affirmatively attempting to prove that they did not abuse their child, without a full understanding of the actual “abuse” they are being accused of perpetrating.

On the initial court date, judges may also issue temporary orders of protection on behalf of the subject children.³⁰ In our experience, ACS often requests such orders as a matter of course whenever charging abuse. Where the court finds that the subject children’s lives or well-being are in danger, it may restrict parents’ access to their children to supervised visitation at ACS agencies throughout the borough,³¹ where families must interact in a single small room while caseworkers observe their every move. Unfortunately, expanding beyond these restrictive settings in an abuse case can be a protracted process that may not occur until after trial on the ultimate issue of abuse.³²

²⁸ N.Y. FAM. CT. ACT § 261 (McKinney 2019) (guaranteeing a constitutional right to counsel in certain family court cases); *id.* § 262 (establishing that the judge must inform the party of the right to have counsel at the initial court appearance).

²⁹ *Id.* § 1027.

³⁰ *Id.* § 1029.

³¹ *Id.* § 1030(c).

³² Unfortunately, given one recent First Department decision, Bronx Family Court judges often feel constrained from liberalizing visitation arrangements pre-trial in abuse cases, in large part because ACS cites that case as a barrier to unsupervised visits pre-trial. In the 2016 case *In re Daniel O.*, the First Department reversed an order granting unsupervised time in a pre-trial abuse case. 141 A.D.3d 434 (N.Y. App. Div. 1st Dep’t 2016). In fact, the court found that it was an abuse of discretion to order unsupervised visitation at all before a trial. However, in that case, the Bronx Family Court judge had not taken testimony and, though it was pre-trial, the case was also pre-hearing, making it very different than many abuse cases now which are litigated extensively through witnesses pre-trial, which affords the judge an opportunity to evaluate credibility and expand visitation. Nevertheless, given *Daniel O.*, the massive lag times before a trial hearing may actually mean that parents cannot visit their children outside of government agencies or supervision by friends or family for years before any allegation has even been proven against them. *See, e.g., In re Aliah M.J.-N.*, 145 A.D.3d 891 (N.Y. App. Div. 2d Dep’t 2016) (reversing a family court order finding that “it was an improvident exercise of discretion for the Family Court to direct that the mother shall have unsupervised visitation with the subject child prior to the disposition of the Family Court Act article 10 proceeding

After arraignment, ACS provides parents with a “service plan” in which they are expected to enroll in various courses before allegations are even substantiated against them.³³ In abuse cases, these courses may include anger management, batterers accountability, parenting, mental health assessments, and/or substance abuse assessments. Parents are expected to voluntarily participate in these services, even if they maintain that they have never engaged in abusive behavior toward their children and were simply seeking medical assistance at an ER for a discovered injury. Often, ACS constructs these service plans with little information about the family, and without meaningful consultation with the children or social workers. Parents have a right to visitation that is not supposed to be denied on the basis of failure to adequately comply with their service plan.³⁴ However, the on-the-ground reality in our experience is that ACS often declines to expand visits on the basis of non-compliance with services, frequently restricting parenting time with children to twice-weekly, two-hour visits in the stifling supervised agency setting until and unless parents engage in these services.

While awaiting a trial date, parents and their counsel will generally meet at least twice with a court attorney assigned to specific judges: first for a preliminary conference and second for a settlement conference. These appearances, however, do not take place before a judge, so issues of substantive fact continue to go unaddressed.³⁵ In other words, unless attorneys file motions, orders to show cause, or other pleadings, the court may not see a parent between arraignment and trial, other than at twice-yearly permanency hearings when a child is in foster care.³⁶ In the interim,

which was still pending”); *In re Bree W.*, 98 A.D.3d 522 (N.Y. App. Div. 2d Dep’t 2012) (reversing a family court order that granted a mother in a neglect and abuse case at least one hour of unsupervised visitation); *In re T.A.*, No. 21833–4/11, 2012 WL 745087, at *2 (N.Y. Fam. Ct. 2012) (“permit[ing] the children to reside with their parents with an order of protection requiring that neither parent be with either child in the absence of the grandparents or a newly-hired nanny who stayed in the parents’ home 24 hours per day.”). *But see In re Matthew W.*, 125 A.D.3d 677 (N.Y. App. Div. 2d Dep’t 2015) (permitting supervised parenting time pre-trial).

³³ See N.Y. SOC. SERV. LAW § 384-b(7)(f)(1) (McKinney 2019).

³⁴ N.Y. FAM. CT. ACT § 1030(c) (McKinney 2019); N.Y. SOC. SERV. LAW § 384-a(2)(b) (McKinney 2019); OFFICE OF CHILDREN AND FAM. SERVS., CHILD WELFARE AND COMM. SERVS., *supra* note 9, at 5.

³⁵ Sometimes parties may appear in front of the judge on discovery motions for records that must be obtained through motion, such as a child or parent’s mental health records. These appearances tend to be perfunctory and non-substantive as they relate to the facts of the underlying case. See FAM. CT. ACT. § 1038 (governing the scope of discovery in abuse and neglect cases).

³⁶ Under FAM. CT. ACT. § 1089, courts are required to conduct hearings regarding placement and permanency every six months while children are placed in foster care. At these hearings, courts must determine a permanency “goal” for the child, such as “return to parent” or

months and sometimes years may pass without a case moving forward, while a parent is stalled having only supervised contact with their young child growing up out of their care.

C. *Family Court Prosecution Theories of Physical Abuse*

At the trial, which often comes years after a child is removed and a parent is charged with abuse,³⁷ parties litigate under a preponderance of the evidence standard³⁸ to determine the ultimate question of whether the parent committed “child abuse” as defined by the Family Court Act.³⁹ ACS can seek to prove abuse against a parent in one of three ways: 1) by proving a parent inflicted or allowed to be inflicted injury resulting in a serious or life-threatening consequences; 2) by proving by direct evidence that a parent’s action or inaction caused a child to have a serious or life threatening injury; or 3) through circumstantial evidence, by proving under a theory of *res ipsa loquitur* that a child’s injuries or death would not have occurred absent abuse.⁴⁰

“adoption,” *id.* § 1089(d)(2)(i)(A)-(E), as well as whether the government has made “reasonable efforts” toward achieving that goal. *Id.* § 1089(d)(2)(i)(E)(iii). Permanency hearings encourage the government and courts to more quickly determine a “permanent” plan for children. Thus, in a situation where a child languishes in foster care pending adjudication at trial, courts are required to evaluate and re-evaluate the appropriateness of a goal of “return to parent,” often before they have even had a chance to determine whether or not the allegations are substantiated.

³⁷ The average time from the filing of the petition to a trial hearing was 8.1 months in the Bronx, according to 2013 data. NICOLE MADER, THE NEW SCHOOL CTR. FOR N.Y.C. AFFAIRS, CHILD WELFARE WATCH, BY THE NUMBERS: A STATISTICAL PORTRAIT OF THE COURT’S CHILD PROTECTIVE CASES 19, <https://perma.cc/63YR-J9A3> (last visited Apr. 25, 2019). However, in the authors’ experience, there is massive variability in the amount of time it takes to resolve abuse/neglect cases; some cases resolve on the day of intake, while abuse cases often take years.

³⁸ FAM. CT. ACT § 1046(b) (“In a fact finding hearing . . . any determination that the child is an abused or neglected child must be based on a preponderance of the evidence”).

³⁹ *Id.* § 1012(e) (defining child abuse). At a trial, only “competent, material, and relevant” evidence is admissible; inadmissible hearsay will not be permitted. *Id.* § 1046.

⁴⁰ An “abused child” is defined in FAM. CT. ACT § 1012(e) as:

A child less than eighteen years of age whose parent or other person legally responsible for his care

(i) inflicts or allows to be inflicted upon such child physical injury by other than accidental means which causes or creates a substantial risk of death, or serious or protected disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ, or

(ii) creates or allows to be created a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death or serious or protracted disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the function of any bodily organ”

In our experience, by and large, most physical abuse cases in the Bronx are filed under the third theory of prosecution, pursuant to *res ipsa loquitur*, when a child—usually a young child or infant—has injuries, accidental causes of the injuries were ostensibly ruled out, and the parents or caretakers were in control of the child when the injuries allegedly occurred.⁴¹ In those cases, ACS has no direct evidence of abuse but maintains that a child’s specific injuries either bespeak abuse or could not have been caused in the way the parents suggest. These cases generally come about when a concerned parent brings an infant or pre-verbal toddler to the doctor or hospital after noticing abnormal symptoms, either more minor ones such as a bump on the head or a swollen leg or arm, or major ones, like decompensation, seizures, or failure to breathe. The parents themselves are often seeking emergency medical help for a worrisome symptom, only to find themselves accused of the very symptoms or injuries they are seeking help for.

In order to establish a *prima facie* case of abuse under a *res ipsa loquitur* theory, ACS must demonstrate both (1) evidence of the child’s injury that is the result of abuse and not an accident or other natural causes, and (2) that the respondents were the caretakers of the child when the injury occurred.⁴² In other words, the statute itself should not allow ACS to file cases simply because a doctor or ACS finds a parent’s explanation for an injury inconsistent or “suspicious.” Rather, the statute is fault-based and requires that there be evidence that an injury is the result of abuse.⁴³ However, it is our experience in Bronx Family Court that ACS

⁴¹ The theory of proving abuse under *res ipsa loquitur* is codified in FAM. CT. ACT § 1046 and is available to ACS when it is able to show “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” FAM. CT. ACT § 1046(a)(ii). When the government is unable to meet the standard for abuse under FAM. CT. ACT § 1012(e), they may seek leave to amend the petition from abuse allegations to neglect allegations. Possible neglect causes of action include failure to seek immediate medical care, failure to properly supervise, or a failure to protect from someone else’s abuse. N.Y. FAM. CT. ACT § 1012(f). Even if an injury happened accidentally, if it came about due to negligent conduct or if the parent failed to seek appropriate medical attention, the government may make out a case of neglect. *See, e.g., In re Alanie H., Jr.*, 69 A.D.3d 722 (N.Y. App. Div. 2d Dep’t 2010) (finding neglect for failure to bring child to emergency room, but declining to find abuse based on parent’s credible non-abusive explanation); *In re Vincent M.*, 193 A.D.2d 398 (N.Y. App. Div. 1st Dep’t 1993) (finding neglect when a mother left child with the child’s father, who the mother should have known was unsuitable and unsafe, but declining to enter abuse finding).

⁴² *In re Lisa A.*, 57 Misc. 3d 948, 954 (N.Y. Fam. Ct. 2017) (citation omitted).

⁴³ *See In re Philip M.*, 82 N.Y.2d 243, 246 (1993).

will often plead a case as an abuse docket without having definitive medical evidence that a certain injury is necessarily from abuse as opposed to being accidental.⁴⁴

When ACS relies upon a *res ipsa loquitur* theory to prove abuse, in most cases it must present expert testimony to establish that, to a reasonable degree of medical certainty, the child's injury was caused by an act of abuse rather than an accidental or natural cause, "unless that conclusion is within the common understanding of the finder-of-fact."⁴⁵ Kings County Family Court has specifically clarified that the expert's opinion "may not be based upon supposition or speculation. The doctrine of *res ipsa loquitur* is not applicable where it is merely possible that negligence or abuse was the cause of the injury."⁴⁶ In the Bronx, ACS's usual practice for meeting this standard at trial is to call the child abuse pediatrician on staff who consulted on the case or examined the child in the hospital.⁴⁷ That doctor will then often provide an opinion in court, to a reasonable

⁴⁴ See, e.g., *In re Lisa A.*, 57 Misc. 3d at 948 (finding that, despite the physician's testimony that the child's injury was accidental, a prima facie case was nonetheless established by evidence of the child's injuries and evidence that respondents were the caretakers of the child at the time the injuries occurred). This is not unique to the Bronx. See, e.g., *In re Alanie H.*, 69 A.D.3d at 722 (pleading the initial case as abuse on the basis of head trauma, which parents were able to rebut by demonstrating that injuries were a result of meningitis and its subsequent treatment).

⁴⁵ *In re G.C. Children*, No. xx/o6, 2009 WL 1543684, at *9 (N.Y. Fam. Ct. June 2, 2009).

⁴⁶ *Id.* at *10 (citation omitted).

⁴⁷ See generally *In re Xavier F.*, NA10810-11/12, 2015 WL 3938469 (N.Y. Fam. Ct. Jun. 26, 2015) (finding that ACS proved abuse in an abusive head trauma case in part because ACS's testifying doctor treated the child while respondents' expert was retained for the purposes of litigation and testified based on her review of the available records and never examined the child). Though an exploration of the sometimes problematic nature of child abuse pediatricians is both well-documented and beyond the scope of the article, it is worth noting that, in our experience as attorneys defending parents against child abuse charges in family court, the child abuse pediatrician is often not willing to conclude that an injury was caused by an act of abuse to a reasonable degree of medical certainty. Even in such cases, the government still files petitions against parents and conducts emergency removals, thereby setting a punitive process in motion, even if the family is ultimately reunited and the parent is exonerated. See *In re Eric G.*, 99 A.D.2d 835 (N.Y. App. Div. 2d Dep't 1984) (overturning a finding of abuse because petitioner's expert witness acknowledged that the infant's femur fracture could have been caused accidentally when one of the respondents lifted the child out of the crib); see also DEBORAH TUERKHEIMER, *FLAWED CONVICTIONS: SHAKEN BABY SYNDROME AND THE INERTIA OF INJUSTICE* 71 (2014) ("[T]he reality of clinical diagnosis is . . . convoluted. Doctors generally struggle to translate the best available scientific knowledge into practice, often reaching conclusions akin to 'educated guesses.'"). For a discussion of some of the problems with the field of child abuse pediatrics, see GEORGE J. BARRY & DIANE L. REDLEAF, *FAM. DEF. CTR., MEDICAL ETHICS CONCERNS IN PHYSICAL CHILD ABUSE INVESTIGATIONS: A CRITICAL PERSPECTIVE* 75 (2014) ("Because many different areas of medicine come into play in the determination of whether a particular injury is the result of abuse, a child abuse pediatrician cannot credibly claim to be [an] expert in all of them.").

degree of medical certainty, that certain injuries are indicative of abuse after other accidental and natural causes were medically ruled out. Especially with a very young baby, the doctor often will testify that the baby could not cause this injury or injuries to themselves, or that the number of injuries, even if some could be accidental, bespeak abuse in a young baby.⁴⁸

Once ACS meets its *prima facie* burden, the burden then shifts to respondent parents to rebut the presumption of abuse by, for example, advancing a theory that creates a credible accidental or natural cause explanation for the child's injuries, proving the child's abuse diagnosis is wrong, or by showing that the child wasn't in the parent's control when the injuries were sustained; in other words, someone else did it.⁴⁹ As the 1993 Court of Appeals case *Matter of Philip M.* details, the establishment "of a *prima facie* case does not require the court to find that parents were culpable; it merely establishes a rebuttable presumption of parental culpability which the court may or may not accept based upon all the evidence in the record."⁵⁰

To rebut the presumption, defense attorneys can call their own medical experts to demonstrate a known or possible accidental cause for the child's injury or injuries⁵¹ or can also rebut the presumption by putting on

⁴⁸ See *In re Vincent M.*, 193 A.D.2d 398, 402 (N.Y. App. Div. 1st Dep't 1993) (finding that "the credibility of the 'accident' explanation diminishes as the instances of similar alleged 'accidental' injury increase") (citations omitted). Even with this testimony, because fractures can be caused through accidental means, courts have found that a fracture alone, absent additional factors such as marks, bruises, or other injuries may not necessarily meet the *prima facie* standard. See, e.g., *In re Tony B.*, 41 A.D.3d 1242 (N.Y. App. Div. 4th Dep't 2007) (affirming family court determination that evidence that a three-month-old child suffered a skull fracture was insufficient to meet *prima facie* standard for abuse); see also *In re Brandyn P.*, 278 A.D.2d 533, 535 (N.Y. App. Div. 3d Dep't 2000) (citations omitted) ("Although a spiral fracture may be compatible with a finding of abuse, standing alone it does not compel a finding of abuse. In cases involving such a fracture where abuse is established, there have been other physical manifestations of abuse such as marks, bruises or other fractures . . .").

⁴⁹ See *In re Philip M.*, 82 N.Y.2d 238, 246 (1993) ("Before relying upon its provisions, the court should consider such factors as the strength of the *prima facie* case and the credibility of the witnesses testifying in support of it, the nature of the injury, the age of the child, relevant medical or scientific evidence and the reasonableness of the caretaker's explanation in light of all the circumstances. In weighing the caretaker's explanation, the court may consider the inferences reasonably drawn from his or her actions upon learning of the injury. Certainly, the caretaker's failure to offer any explanation for the child's injuries, to treat the child, or to show how future injury could be prevented are factors to be considered by the court, for they reflect not only upon the caretaker's fault and competence but also the strength of the caretaker's rebuttal evidence.").

⁵⁰ *Id.* at 243.

⁵¹ See, e.g., *In re Brea E.*, NA-XXXXX-18, 2019 WL 1984174, at *4-5, *10 (N.Y. Fam. Ct. Feb. 22, 2019) (finding that the respondent father's medical expert's testimony rebutted ACS's allegations of abuse); *In re Tyler S.*, 103 A.D.3d 731 (N.Y. App. Div. 2nd Dep't 2013)

a medical defense, challenging the methodology and medical determinations of ACS's expert. This is most effectively done by calling expert witnesses to counter and challenge ACS's expert witnesses.⁵² This method of defense is often used, for example, in cases where a client is accused of losing control and shaking their baby, allegedly resulting in serious and life-threatening brain and eye injuries or other symptoms to the baby. In these circumstances, ACS's witness, generally a child abuse pediatrician, has diagnosed a baby with Shaken Baby Syndrome.⁵³ Shaken Baby Syndrome, which is often now referred to as Abusive Head Trauma ("AHT"), is a hypothesis that the violent shaking of an infant can be diagnosed by the existence of certain symptoms in a baby, including subdural hematoma in the brain, retinal hemorrhages, and various other brain findings.⁵⁴

Given the myriad studies calling into question the diagnostic method of Shaken Baby Syndrome, as well as post-conviction criminal court decisions discrediting the diagnosis of Shaken Baby Syndrome as forensically unreliable, the use of defense expert witnesses in these types of cases is particularly effective and important.⁵⁵ In addition to the use of expert witnesses, defense attorneys may also attempt to rebut the presumption by advancing alternative caretakers who might have plausibly caused the child's injuries.⁵⁶

(reversing the family court and finding that, although ACS established a prima facie case of abuse, the mother's own testimony and expert proposing an accidental cause rebutted the prima facie abuse case).

⁵² See, e.g., *In re Tyler S.*, 103 A.D.3d at 731.

⁵³ *In re Xavier F.*, NA10810-11/12, 2015 WL 3938469, at *13 (N.Y. Fam. Ct. June 26, 2015) (finding that an infant was abused based on serious physical injuries, including subdural hematomas and retinal hemorrhages, that were deemed consistent with inflicted abusive head trauma and the respondents were responsible for the injuries sustained).

⁵⁴ Findley et al., *supra* note 7, at 220 ("[T]he trend in recent years has been to move away from terms involving shaking towards generalized terms such as AHT, which avoids the criticisms of shaking by relying upon an undetermined mechanism."); Randy Papetti et al., *Outside the Echo Chamber: A Response to the "Consensus Statement on Abusive Head Trauma in Infants and Young Children,"* 59 SANTA CLARA L. REV. 299, 305 (2019).

⁵⁵ See e.g., *People v. Bailey*, 144 A.D.3d 1562 (N.Y. App. Div. 4th Dep't 2016) (vacating a conviction that was based upon a dated understanding of Shaken Baby Syndrome, and finding that advances in scientific understanding of head trauma constitute new and material facts such that the outcome would likely be changed if a new trial were granted). For a sample of the studies and literature discussing the syndrome and its unreliability in determining abuse, see SWEDISH AGENCY FOR HEALTH TECH. ASSESSMENT AND ASSESSMENT OF SOC. SERVS., REPORT 225E, TRAUMATIC SHAKING – THE ROLE OF THE TRIAD IN MEDICAL INVESTIGATIONS OF SUSPECTED TRAUMATIC SHAKING: A SYSTEMATIC REVIEW (2016), <https://perma.cc/FNW7-GP4L>; RANDY PAPETTI, THE FORENSIC UNRELIABILITY OF THE SHAKEN BABY SYNDROME (2018); TUERKHEIMER, *supra* note 47, at 71.

⁵⁶ See, e.g., *In re Miguel G.*, 134 A.D.3d 711, 712 (N.Y. App. Div. 2d Dep't 2015) (finding that the mother's expert provided sufficient evidence to show that the child was not in the exclusive care of the mother); *In re David T.C.*, 110 A.D.3d 1084, 1086 (N.Y. App. Div. 2d

If the court enters a finding of abuse against the parents, the court is empowered to move to a second phase of the proceedings called the “dispositional” phase, which allows the court to make further orders against the parents pending the end of court supervision.⁵⁷ Dispositional orders include the child’s placement at home, in foster care, or elsewhere, and can include orders the parent must follow in order to keep a child home or to achieve reunification.⁵⁸

D. *Emergency Reunification Hearings in Abuse Cases*

As opposed to a fact-finding trial, which litigates the ultimate question of whether a parent’s acts constituted abuse or neglect, parents may also seek to litigate abuse cases at hearings where they seek the children’s return to their care, in some states called a “shelter hearing” and in New York referred to as an emergency hearing or a “1028 hearing.”⁵⁹

New York Family Court Act Sections 1027 and 1028 allow respondent parents⁶⁰ to seek an emergency hearing at any time before the fact-finding trial has been completed, at which the relief sought is the return of the child to the parent’s care.⁶¹ Generally speaking, parents can only ask for a 1027 or 1028 emergency hearing once throughout the life of the

Dep’t 2013) (finding that the petitioner failed to prove that the deceased child was in the exclusive care of her mother at the time she sustained her brain injury); *In re Zachary MM.*, 276 A.D.2d 876 (N.Y. App Div. 3d Dep’t 2000) (finding that the child care provider was responsible for child’s subdural hematomas); *In re Vincent M.*, 193 A.D.2d 398, 399, 401 (N.Y. App Div. 1st Dep’t 1993) (stating that the mother testified to being sick and not caring for the child after his birth but pointed to the father’s usual rough treatment of the child while playing with him and noted that the child had been in the care of other relatives and a babysitter); *In re Lisa A.*, 57 Misc. 3d 948 (N.Y. Fam. Ct. 2017); *In re Jason D.*, [Index Number Redacted by Court] N.Y.L.J. 1202759445045, at *1 (N.Y. Fam. Ct. Jan. 11, 2016).

⁵⁷ These orders can be effective for up to twelve months if the child is home or, if the child is in foster care, from permanency hearing to permanency hearing until “permanency” is achieved by termination of parental rights, an order of custody, kinship guardianship, or a return to the parent, among other options. N.Y. FAM. CT. ACT § 1054(c) (McKinney 2019) (“In conjunction with an order releasing the child to a non-respondent parent . . . the court may also issue . . . an order of supervision of a respondent parent An order of supervision of the respondent entered under this subdivision may be extended upon a hearing for a period of up to one year for good cause.”); *Id.* § 1052 (enumerating rules for dispositional hearings and orders); *Id.* § 1089 (enumerating rules for permanency hearings).

⁵⁸ *Id.* §§ 1054, 1055, 1057.

⁵⁹ *Id.* § 1028.

⁶⁰ Sections 1027 and 1028 allow either a parent or a person legally responsible to seek the return of the children to their care, though in the vast majority of cases, particularly abuse cases, it is the parent exercising their right under Sections 2017 and 1028. *Id.* §§ 1027, 1028.

⁶¹ *Id.* §§ 1027, 1028. There are two types of expedited hearings under the New York Family Court Act, each with slightly different requirements for scheduling: § 1027 governs those cases in which a remand order has not yet been entered by Family Court, whereas § 1028 governs those in which a remand order has already been entered.

case and often utilize this option when the case is filed and the child is removed. However, in some circumstances, parents can seek another hearing if “good cause” is shown, usually by demonstrating a material change in circumstances.⁶²

Though the greater context of what actually constitutes abuse or neglect is certainly relevant, as well as whether ACS can ultimately meet its *prima facie* burden at trial, ACS’s inability to prove an abuse charge at a 1027 or 1028 hearing does not in and of itself mean that a child comes home to their parent or caretaker. At the emergency hearing stage, the legal inquiry is three-fold. Firstly, ACS must show that there would be an “imminent risk of harm” to the child if they were to be returned to their parent or caretaker.⁶³ Secondly, ACS must also show that such imminent risk cannot be mitigated by services, resources, or orders.⁶⁴ Thirdly, ACS must prove that, in balancing the harms between such an imminent risk and the harm of removing a child from its caretaker or parent, the risk of harm outweighs that of a removal’s harm.⁶⁵ Hearsay evidence is permissible at these hearings.

In New York, emergency 1028 removal hearings occur much earlier in the path of a family court case than a trial does. While trials may not commence until years into the legal life of a case, emergency 1028 hearings can be requested on the date of arraignment and are usually scheduled within a day.⁶⁶ The authors acknowledge that these types of delays and statutory schema may not be the norm elsewhere, and that some of these litigation efforts would need to be done through post-finding motion practice in other jurisdictions. Part III will discuss the benefits and strategic considerations attendant to asking for emergency hearings for the return of children upfront when the case is filed or soon after, as opposed to waiting to litigate all the issues at trial. Of course, this assumes that trial is far after an emergency hearing.

Under the prior model of slowly litigating a case at trial over a protracted period of time after a case is filed, parents and children remain in limbo while the cases against them remain mere unproven allegations. Orders of protection, visitation restrictions, service plan requirements, and other major obstacles often remain in place. When attorneys do not disrupt this structure through affirmative litigation and/or motion practice, removal and separation become normalized as the case’s status quo.

⁶² *Id.* § 1028.

⁶³ *Nicholson v. Scopetta*, 3 N.Y.3d 357, 372-82 (2004) (delineating the legal standard for removal hearings in New York).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ N.Y. FAM. CT. ACT § 1028 (McKinney 2019) (“[S]uch hearing shall be held within three court days of the application and shall not be adjourned.”).

Children may grow up away from their parents, often in foster care. Parents may feel stigmatized and become discouraged by the feeling that they have been adjudicated guilty before ever having their day in court, and may understandably disengage completely from the arduous and often humiliating process of services, supervised visitation, and state surveillance. In this way, families from impoverished, surveilled, and oppressed communities of color may be permanently severed as a result of the child's injury that ultimately may be determined accidental years later, while for parents in privileged communities, the medical intervention fades into memory with minimal disruption to the family itself.⁶⁷

III. AGGRESSIVE AND EARLY LITIGATION IN ABUSE CASES GETS KIDS HOME, ACHIEVES BETTER SETTLEMENTS, AND OVERTURNS THE PRESUMPTION THAT CERTAIN INJURIES BESPEAK ABUSE

It can be daunting to represent a parent or caretaker in family court charged with seriously abusing or even causing the death of their own child, especially those charges based on allegations of serious head trauma or multiple broken bones. There are the practical challenges attendant to cases with complex medical findings or injuries, ranging from an entirely unfamiliar medical field to thousands of pages of discovery.⁶⁸

⁶⁷ For a discussion of how the child welfare system disproportionately impacts families of color and perpetuates inequality, see *supra* note 23. See also DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at ix-x (2002) (“One hundred years from now, today’s child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people”); Erin Cloud, Rebecca Oyama & Lauren Teichner, *supra* note 23, at 70 (“Maybe the answer is that privilege keeps those who are not oppressed by the child welfare system from recognizing the implicit fear of Blackness that pervades the system”); Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS, <https://perma.cc/4YZ2-NDHB> (last visited Mar. 29, 2019) (discussing how systemic flaws within child protective services disproportionately affect Black and Latino families); Kathryn Joyce, *The Crime of Parenting While Poor*, NEW REPUBLIC (Feb. 25, 2019), <https://perma.cc/B2UF-NL36> (discussing how often allegations of child maltreatment are a result of the everyday struggles of low-income families faced predominantly by families of color); CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, RACIAL DISPROPORTIONALITY AND DISPARITY IN CHILD WELFARE (2016), <https://perma.cc/6KDS-VKWC> (exploring the prevalence of racial disproportionality and disparity in the child welfare system).

⁶⁸ This is especially true when a parent or caretaker did not witness what may have caused the injury, as the defensive case theory often requires multiple and varied experts to dig into the symptomology and imaging *ex post facto*.

There is also the challenge of representing a parent who has been stigmatized in the proceedings as a “child abuser”—or worse, a murderer.⁶⁹ Regardless of the actual degree of injury severity, the case always appears serious based on an abuse docket filing and a listing of injuries, the children are almost always removed to foster care, and, in some scenarios and in other jurisdictions, the government can even file a companion case seeking to terminate the client’s parental rights.⁷⁰ Allowing the court process to move at its own pace may mean waiting months or years to get to trial and narrow the issues, standing by as the government subpoenas records, investigates, and looks for doctors to testify. Meanwhile, children remain in foster care and visitation expands slowly and incrementally, sometimes never going beyond agency-supervised visits pre-trial.⁷¹

The question then becomes, what next? What next, after you interview your client accused of abuse, and she tells you she has no idea how her newborn or young child sustained an injury or tells you that her child fell off the bed or out of her arms? What if she says she is seeking the same answers and can’t believe she is being charged with the very injury she was seeking medical care for in the first place? What if the newborn also has rib fractures? What if the baby has died after falling off a bed having sustained a head injury, or if the baby has symptoms often considered synonymous with Shaken Baby Syndrome? What if the government claims to—or does—have a child abuse pediatrician who will testify that the injuries are likely from abuse and couldn’t have been caused by the child themselves, even if the child is mobile?

First and most importantly, the intent of this section is to encourage other family defenders that these cases are manageable, winnable, and not always as impossible as they seem at first blush. What’s more, aggressive litigation on abuse allegations exposes the fallacies that certain injuries or

⁶⁹ By this, we specifically mean the stigma our clients face by the judge and parties within the courtroom, the hurdles in convincing fact-finders and other counsel to view clients not as “killers” or “abusers” but as humans, parents, and caretakers worthy of dignity, respect, and an honest chance to tell their story.

⁷⁰ New York legal procedure generally does not allow for the filing of abuse and termination proceedings at the same time. N.Y. SOC. SERV. LAW §§ 358-a, 384-b (McKinney 2019). However, the authors are aware that many states allow for concurrent abuse and termination proceedings with separate standards of proof. CHILD WELFARE INFO. GATEWAY, CHILDREN’S BUREAU, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 3 (2016), <https://perma.cc/ZVP9-LR7C> (“While State laws require that proceedings to terminate parental rights be initiated when statutory grounds are met, approximately 34 States, the District of Columbia, and the U.S. Virgin Islands provide for exceptions . . .”).

⁷¹ See, e.g. *In re Daniel O.*, 141 A.D.3d 434 (N.Y. App. Div. 2d Dep’t 2016); *In re Aliah M.J.-N.*, 145 A.D.3d 891 (N.Y. App. Div. 2d Dep’t 2016) (citations omitted); *In re Bree W.*, 98 A.D.3d 522 (N.Y. App. Div. 2d Dep’t 2012) (holding it an improvident exercise of discretion for the court to grant unsupervised visitation without a full trial hearing).

medical findings without explanation or a plausible story are necessarily abusive rather than accidentally caused or from a natural disease process. When they are not winnable at trial or hearing, or doing so is not advantageous for various reasons, the cases can still be pushed forward using various devices to either achieve clarification of the allegations, family reunification, or better and more expeditious resolutions for clients.

Over the last several years at The Bronx Defenders,⁷² we have approached these cases aggressively and head-on using litigation and legal techniques to move abuse cases forward more quickly and with more intention and strategy than we have in the past. By doing so, we have been able to narrow the legal and factual issues at stake, disprove abuse, reunify families, and, of crucial importance, repeatedly bring the client in front of the judge to demonstrate that the client is a conscientious and concerned parent, not the “abuser” the government paints them to be. We have found that in most abuse cases, an aggressive litigation approach, paired with early and concerted collaboration with family defense advocates from our office, has yielded quicker reunification and exoneration.⁷³

⁷² While this article provides specific anecdotes of Bronx Defenders cases, the work at The Bronx Defenders is no different than the work done by other institutional providers in the city, particularly Brooklyn Defender Services (BDS), an office whose family defense attorneys have pioneered and heavily litigated abuse cases to reunify clients with their children. In fact, it is through partnership, sharing of information and resources, and case law created by BDS and cited throughout this article that, at The Bronx Defenders, we have been able to achieve what we have for our clients.

⁷³ In one case, we asked for an emergency hearing where a three-month-old twin baby girl sustained a femur fracture and had no other injuries. We represented the mother and another attorney represented the father and grandmother. Our client, the mother, was at work when the child sustained the injury and started showing symptoms. No one could provide an explanation for the injuries. All parties suspected that the child was either accidentally dropped by the father or fell off the bed. Over the course of a long hearing that lasted many months, it became clear that no one would provide an explanation but that the government also could not prove the injury was the result of abuse. Both the mother and the father testified and appeared in court on many occasions. The judge became fond of them, as did the foster care agency, and the judge gradually expanded their contact with their children over a period of months, understanding through observations regarding their visits, services, and in court that the parents were devoted parents who were possibly scared to explain that something happened. At the end of the hearing, the judge did not send the children home but granted liberal unsupervised contact and a clear path toward reunification. The children came home several months later and ultimately the mother was given a resolution whereby she did not receive a finding of neglect after several more months of supervision. At this juncture, she has her children and no child protective record. Again, despite the fact that we “lost” the hearing on the merits, we were able to tell the judge a story of two devoted parents who were not abusers and achieved a more expedient reunification than we would have had we waited for trial. *See also, e.g., In re Matthew W.*, 125 A.D.3d 677 (N.Y. App. Div. 2nd Dep’t 2015) (“[T]he Family Court properly directed ACS to commence overnight parental visits and thereafter, except for good cause, to temporarily release the subject children to the parents’ custody”); *In re Nyla W.*, 105 A.D.3d 861, 861-62 (N.Y. App. Div. 2nd Dep’t 2013) (awarding the mother “unsupervised

It is the intention that the strategies discussed below can be replicated in other forms throughout New York and different jurisdictions where similar remedies and hearings may be available to parents charged with abuse. The authors acknowledge that each jurisdiction and case in family court is different. The authors are also aware that different attorneys have various resources at their disposal, including access to potential expert witnesses or even access to adequate time for litigating these cases. The authors are also mindful that a litigation strategy must always, first and foremost, support a client's goal for the case, whether that be to get a client's children home or to relatives, or another resolution that provides a clear path toward reunification.

A. *Tackling the Government's Abuse Prosecution Through Immediate Pre-Trial Emergency Hearings*

By far the most impactful and effective strategy that we have implemented in abuse cases over the last several years where children are removed has been to request, in many cases where we may not have in the past, an immediate emergency hearing to return the child either at the case's filing or shortly thereafter.

1. Data Support Effectiveness of Early and Aggressive Pre-Trial Litigation

As stated above, at an emergency hearing in the State of New York, the government retains the burden to prove the child is at imminent risk.⁷⁴ The evidentiary rules are relaxed and hearsay is permissible.⁷⁵ Because the parent can request a hearing at any time prior to the entry of a finding of neglect or abuse, attorneys representing clients charged with physical abuse often reserve the right to this hearing for a later date when more information is garnered from the client, an expert is obtained, or services are arranged and ongoing. Often, this hearing right is never exercised. However, as a matter of statutory right, this hearing can be requested at a client's first arraignment once a child has been removed or a parent excluded from the home.⁷⁶

visitation with the subject child three times per week for up to four hours each visit" after a partial hearing pursuant to Family Court Act § 1028).

⁷⁴ See *supra* Part II.

⁷⁵ FAM. CT. ACT § 1046(a)(iv).

⁷⁶ This right to seek an immediate hearing may also be exercised upon an order removing a parent or caretaker from the home, including an order of protection and exclusion order. See, e.g., *In re Elizabeth C.*, 156 A.D.3d 193, 203-204 (N.Y. App. Div. 2d Dep't 2017) (citing N.Y. FAM. CT. ACT § 1028(f)).

For a long time within our practice, attorneys would infrequently request such hearings at the inception of an abuse case, except in rare circumstances. It was thought to be strategically advantageous to spend as much time as possible gathering information about the strength of the abuse case against the parent and encouraging the parent to engage in services while we obtained records and discovery. However, in recent years, attorneys at The Bronx Defenders have begun petitioning the court much earlier in the case for an emergency hearing seeking the immediate return of the children, often at the parent's first appearance in court or shortly thereafter.

The data we have obtained from our own practice bears out the effectiveness of this shift. As of January 2019, we analyzed our most recent cases in which The Bronx Defenders represents, or previously represented, parents accused of serious physical abuse.⁷⁷ The Bronx Defenders requested emergency hearings on the issue of removal in nearly half of those cases.⁷⁸ In cases where we requested an emergency hearing, children were returned home within 226 days, on average. In cases where we did not request a removal hearing but in which children eventually returned home, children were not returned home for 595 days on average, more than *twice* as long. Furthermore, even in cases where we originally asked for a hearing, commenced the hearing, but withdrew it for one reason or the other, we found that hearings led to better overall outcomes. In each case that has proceeded to a hearing but in which the hearing request was withdrawn before its conclusion, the agency ultimately dropped the charge from abuse to neglect.

Furthermore, the data show that, as we have evolved to request removal hearings earlier and earlier in the case—often now on the date the petition is initially filed—the length of time children are separated from their parents has drastically decreased. For example, of hearings requested in 2016, it took on average 400 days for families to be reunited. Of hearings requested in 2017, that average dropped to 111 days, and in 2018 the average was 253 days. Though at the time of this writing, it is early 2019 and thus data cannot be appropriately analyzed, at least five of our practice's cases have resolved with children, usually babies, returned to their parents charged with abuse either on the date of arraignment itself or within three days.

⁷⁷ We collected and analyzed data from 57 of the most recent abuse cases to which The Bronx Defenders was assigned, from 2016 to present. Due to constraints in the scope of this article, we cannot confirm with certainty that this includes every single relevant case, but it does represent the vast majority of recent abuse cases, if not all of them.

⁷⁸ Based on our data, Bronx Defenders attorneys requested emergency hearings in 26 of 57 cases.

2. Building the Defense: First Steps in Litigating an Emergency Hearing

Upon asking for a hearing, Bronx Defenders attorneys, parent advocates, and social workers meet with the client to determine their goals. The legal team consults within the practice and often with experts regarding the relative strength of the client's case. In order to adequately defend a client in a serious physical abuse case, an attorney must seek to understand the factual allegations and alleged medical findings against the client and the government's theory of prosecution.

The first question many attorneys ask is how certain injuries occurred: the "what happened?" question during the first interview with the client after reviewing a petition. "How did your baby get this injury?" "Did you see any symptoms?" "Walk me through the last 3 days." While this is a proper question to ask, it is important to also ask and explore "do the injuries exist at all in the way the government is pleading the injuries?" The government's petition or complaint may say "rib fracture," but the radiology report may say "slight rib abnormality, possibly a rib fracture." The government's petition may say "arm fracture," but the report may say "bone formation on the humerus." It is important to immediately seek the medical records to understand and investigate the source of any medical findings, and in most cases these records can be obtained quickly. Social workers and parent advocates play an incredibly important role at this early stage, meeting with clients and child protective workers, as well as with child abuse pediatricians, to obtain facts and information that can be used at the hearing on cross-examination.

When we first started requesting these hearings, ACS would often only call its child protective caseworker to testify about their conversations with the medical professionals who clinically evaluated the child's injuries at the hospital.⁷⁹ As time went on, judges quickly realized that it was relatively useless to hear a doctor's hearsay statements through a caseworker, even if it was technically admissible under a decreased evidentiary standard, as it was difficult to evaluate the credibility of the medical professional's statements through sometimes double or even triple layers of hearsay. Often at our lawyers' insistence, some Bronx judges started demanding that ACS call as witnesses the child abuse pediatricians or another medical professional to support or clarify the government's abuse allegations.⁸⁰ Only in this way could we cross-examine the doctor

⁷⁹ Because the hearsay rules are relaxed due to the urgent nature of the proceedings, statements of a doctor to a caseworker are admissible at an emergency 1028 hearing in New York family courts. *See* FAM. CT. ACT § 1046(a)(iv).

⁸⁰ On occasion, given the relaxed evidentiary standards at emergency hearings, the judges will at least require ACS to submit a detailed multi-page report from a doctor explaining why

and allow the court to assess the doctor's credibility or, in some cases, determine if the doctor in fact believed the injuries were the result of abuse.⁸¹

3. Two-Day Hearing Exposes "Abusive" Leg Fractures as Accidental: *Lisa A.* Case Study

The Bronx Defenders represented a woman charged with abuse based on her eight-month-old daughter's leg fractures. In *Matter of Lisa A.*, our client noticed one evening that her daughter, Lisa, had a swollen leg and appeared to be in pain.⁸² As a result, our client immediately brought her daughter to the hospital, where doctors discovered that both of the child's legs were fractured in the same place. Lisa's mom could not explain to the doctors how Lisa sustained the leg fractures but proposed the possibility that her legs were fractured based on the way our client carried Lisa on her back and sometimes sat down while the child was in the carrier. Finding our client's explanation not plausible based on conversations with hospital staff, ACS forcibly separated Lisa from her mother and charged her mother with abuse.

Once our attorneys met Lisa's mother, her Bronx Defenders attorney requested an emergency hearing on the day the petition was filed. At our insistence, the judge required that ACS meet its burden by calling the child abuse pediatrician, who suggested that the injuries were caused by abuse. The hearing took one day,⁸³ wherein both the mother and child abuse pediatrician testified. The child abuse pediatrician acknowledged on her direct testimony and then again on cross-examination that, while the mother did not have an explanation the pediatrician believed could plausibly cause the injuries, the injuries were nevertheless much more likely the result of an accident than of abuse. Finding that the government had not met its burden, that the child had multiple caretakers, and that the mother took appropriate action when she noticed the child's leg swelling, the judge ordered the child returned to her mother that same day.⁸⁴ The

certain injuries are suggestive of abuse in lieu of relying on the caseworker to testify to a doctor's statements. This is admissible given the requirement that only material and relevant evidence may be admitted. FAM. CT. ACT § 1046(c).

⁸¹ And, of course, judges and attorneys for the children also have the opportunity to question the diagnosing CAPs.

⁸² *In re Lisa A.*, 57 Misc. 3d 948, 951 (N.Y. Fam. Ct. 2017). See generally *In re Lisa A.* for a lengthier discussion of the facts observed by the court.

⁸³ Generally speaking, hearings take more than a day and can be protracted over days to weeks and even months, though, under New York's statutory scheme, certain hearings for reunification must go day to day while the issues are litigated. FAM. CT. ACT §§ 1027(a)(i), 1028(a)(ii).

⁸⁴ *In re Lisa A.*, 57 Misc. 3d at 954-55. Similarly, in April 2019, we were assigned to represent a mother who, alongside her husband, was charged with abuse based on their three-

case ultimately resolved several months later with a dismissal of the petition after a relatively short supervision period.

4. Early and Aggressive Litigation Against “Multiple” Fractures Reunites Family More Quickly than Protracted Years-Long Litigation

In some cases, though the factual issues are not resolved on the first day or even the first week and the cases are more medically complicated than a single leg or skull fracture, early and aggressive litigation can still reunite a family more quickly and brings on a more reasonable, if still difficult, settlement.

Bronx Defenders attorneys and social workers, alongside a law firm working *pro bono*, represented a mother charged with abuse based on allegations of her eight-month-old’s multiple fractures, including a fracture to her vertebrae, an old clavicle fracture, and a possible rib fracture. The child was hospitalized after her mother brought her to the emergency

week-old daughter’s linear and mild skull fracture and the parents’ “inability” to provide an explanation for the skull fracture. The infant had no other injuries. The family also had a nine-year old daughter and no history with ACS. The newborn was only in the hospital for a few hours, during which time the hospital called ACS, who removed the children and placed them with the mother’s relatives. When ACS appeared on the first date and filed an abuse petition, they asked that the judge place the children in foster care with our client’s relatives. The Bronx Defenders attorney asked for an emergency hearing. It soon became clear, after conversations between our client’s husband, another respondent, and ACS, that he had accidentally dropped the baby on the side of the changing table, hitting her head. Out of fear, he had not told his wife, our client, who was very protective of her daughter, and had also not told the hospital, fearing severe consequences. At the hearing, ACS called its worker. The Bronx Defenders presented evidence in the form of an affirmation from a pediatric neurosurgeon and also offered to call our client to testify. The court was also provided pictures of the home and a video of the father reenacting how the baby fell. The pediatric neurosurgeon’s affirmation provided general information to the court and showed that the type of skull fracture sustained is exactly the type a baby would sustain from being dropped onto a hard surface, rather than from abuse. Evidence also showed that the mother, our client, was never told that her husband had dropped their baby, and was in the shower at the time, which is why she had “no explanation.” After ACS had presented its evidence, the judge found that there was no imminent risk and that the baby and her older sister could come home with ACS services in place to our client, the mother, with the father in the home supervised by our client around the baby. The court found that in a *res ipsa* case, accidental causes had to be ruled out, which hadn’t happened here. The baby went home to the family and there have been no further issues. In fact, as of a month after the hearing date, ACS had not offered the family any services to address what ACS had initially claimed was abuse. For additional cases in this vein, see *In re Alanie H.*, 69 A.D.3d 722 (N.Y. App. Div. 2d Dep’t 2010) (granting the parents’ application pursuant to Family Court Act § 1028 to return the child to their custody after finding that the child’s injuries were not caused by head trauma but by a form of meningitis and the treatment the child received); *In re Christopher Anthony M.*, 46 A.D.3d 896, 898 (N.Y. App. Div. 2d Dep’t 2007) (finding that “the admissible evidence at the 1028 hearing” clearly showed that the father had not abused the child).

room seeking help, explaining that the child was not moving her leg. Our client had two other children, worked as a home health aide, and had no child protective or criminal history. Our client spent a month with her daughter in the Bronx hospital as the physicians attempted to determine the cause of her daughter's spine condition. Having found no natural or genetic medical explanation, the physicians ultimately determined the spinal and other fractures were caused from abuse. A month into the child's hospital stay, our client was charged with abuse, and ACS removed all three children and placed them into kinship foster care. After meeting our client the day after she was separated from her children when she was ultimately charged with abuse, Bronx Defenders attorneys sought an emergency hearing for the return of her children. The hearing went on for over a year on an almost weekly basis. By asking for a hearing, we received immediate discovery and learned that the rib fracture was indeed not a "fracture" at all, but rather a medically explained and non-abusive abnormality. We were able to quickly narrow the alleged fractures from three to two.

At our insistence, the judge directed ACS to bring in the child abuse pediatrician with the opinion that the injuries were abusive. She testified that the back injury was caused by abuse and, in fact, demonstrated in court with her hands how she believed the injury had occurred. The medical records were vague as to how the child abuse pediatrician planned to call the injury abusive. But by asking for a hearing, within a week or two of the case filing, we had in-court testimony and cross examination about the doctor's proposed mechanism of injury, providing us with the prosecution theory we needed to refute. Over the course of a year, with consistent and regular time before the court, we called two of our own experts and created a serious dispute as to the nature and cause of the injuries, such that the judge determined she would never know if the injuries were the result of abuse or not.⁸⁵ Had we waited for trial to litigate these issues, it could have taken years and we may never have learned how the child abuse pediatrician opined on how the injury occurred. At the end of the hearing and prior to the court's decision, when offered a clear and expedient path to getting her children home, our client agreed to consent to a

⁸⁵ Over the course of that year, alongside a Bronx Defenders social worker, our client continuously met with the foster care agency to show that she would do anything she could to support her children and get them home. In addition, the Bronx Defenders social worker was able to repeatedly point out at meetings and conferences that our client was already caring for the children as if they were home, and that the agency's service plan did not comport with the serious allegations, begging the question as to whether the foster care agency or ACS fully believed our client had abused her children in the first place. This type of out-of-court, holistic advocacy proved crucial to the case's ultimate success.

finding of neglect, *not abuse*, without making any admission of wrongdoing. Her children were soon returned home.

In this case, the benefit came not only from moving the case forward more quickly than it otherwise would have and learning the child abuse pediatrician's theory, but also from litigating an ongoing hearing, returning to court at least thirty times in the first several months of the case. All parties and the judge got to know our client and hear her testify. They saw our client coming to court day in and day out, sacrificing time at work, passing time in the waiting area for hours, devoted to getting her kids home. Within a few months of starting the hearing, the judge heard the mother testify and could see that she was not a violent "child abuser," as portrayed in the petition, but a concerned parent looking for an explanation and cure for her daughter's rare injuries. For complex reasons, our client decided to consent to a finding of neglect without admission. As a result, her children soon came home. Had we waited to challenge the abuse allegations at trial and not asked for a hearing, she would have rarely come to court or seen movement in the case, as we would have waited months or years for a trial to commence. Importantly, the court may have been influenced by the nature of the allegations and never would have had the opportunity to get to know her and understand her to be a concerned, loving parent.⁸⁶

As in this case example, sometimes a resolution may not be the dismissal of the petition but consent to a lesser charge that would not have been offered but for a hearing and, though not ideal, facilitates reunification. It has been our experience that negotiating *nolo* pleas to neglect findings often provides more space for creative paths to reunification, or even an exchanged-for "global resolution" of a *nolo* plea and reunification itself.⁸⁷ Part of this may simply have to do with the fact that judges are considering cases in which a child has suffered potentially serious injuries, and—even if they cannot conclude that the parent caused such an injury—they may seek some level of perceived insight or responsibility from the parent in order to feel comfortable sending the children home.

⁸⁶ *Cf. In re Eric G.*, 99 A.D.2d 835, 835 (N.Y. App. Div. 2d Dep't 1984) (finding, based on a fact-finding hearing, that the infant had no other injuries or bruises except for a fractured femur and that the parents had no prior history of child abuse and were described as "caring parents").

⁸⁷ In New York, submissions to neglect are more or less analogous to *nolo contendere* pleas in the criminal context, wherein a client neither admits nor denies the allegations but allows the court to enter a finding. It is important in every case to consider whether a finding of neglect, or any type of plea, could have collateral consequences or could uniquely impact a client. For example, even though the findings of neglect are not public findings in the same way criminal findings are, they may still have collateral consequences for non-citizens or clients whose work deals directly with children. For some parents, a submission to neglect would not be the right choice of resolution.

Consider the above mother's story in comparison to Josephine's story discussed earlier.⁸⁸ This is a clear demonstration that issues can be narrowed and lack of medical evidence exposed if ACS is required to put forward their proof of injury right away. While an extended emergency hearing is not ideal and can be incredibly grueling for a family and a client, the case is heard multiple times a week and the lawyer has the opportunity to move the case forward, all the while demonstrating the parent's commitment to reuniting with their children and exposing their truth.

5. Redefining Victory: Important Benefits from Upfront Aggressive Litigation

These reunification stories are powerful, but reunification is not the sole success from hearings. In other cases, we have asked for hearings and later withdrawn our request, or have asked for hearings and lost after many months. In those cases, there are still important benefits gained from upfront litigation. At the very least, defense counsel receives discovery from the government and an opportunity to be seen by the judge in court on visitation or various other issues. In some cases, the children aren't returned home and the hearing is "lost" on the merits but, in the process of the court appearances, the judge gets to know the family, and the narrative around that family changes. Through this, the parent may be granted expanded visitation and may feel more engaged with the legal process itself. A more expedient path toward reunification may also be established. In other cases, it might make more sense to withdraw the hearing request because the investigation and discovery have helped clarify the limits of the available defenses and that a certain plea or outcome, even if the plea is to abuse, is likely the best outcome and should be taken sooner rather than later.⁸⁹

The important takeaway from conducting upfront litigation through emergency return hearings is not only that it narrows the issues, can prove there is no abuse, helps clarify the government's case, and sometimes achieves reunification; it also keeps your client and the case in front of the judge. A hearing does not allow the government, the judge, or any party to ignore or delay dealing with the critical and complicated medical issues involved with abuse cases because the case is calendared before the court multiple times a week, or at least more frequently than it would be

⁸⁸ See *supra* Part I.

⁸⁹ As stated above, even in cases where we originally asked for an emergency hearing, started the hearing, but later withdrew, hearings led to better overall outcomes. In each case in which we requested a hearing but ultimately withdrew the hearing request before its conclusion, the agency then dropped the charge from abuse to neglect. See discussion *supra* Section III.A.1.

otherwise. It requires all parties, including the parents' attorneys, to consider the strength of the case at its inception, before the crushing delays of court set in and before the separation of families drags on, often needlessly.

B. Additional Strategies for Moving Abuse Cases Forward Pre-Trial

While litigating an emergency hearing and requiring the government to bring in a doctor to substantiate abuse allegations, the government may realize that they cannot prove their abuse case or that, for other reasons, it makes sense to consent to a lesser charge for a parent in order to end the hearing. In the Bronx, if this happens, ACS will in some cases offer a neglect finding and agree to withdraw the abuse allegations against the client. While this is not as favorable as a withdrawal or outright dismissal of the petition, consenting to a neglect finding can come with return of the children or expanded unsupervised contact between a parent and a child with a clear plan toward reuniting the family.

For example, in the case discussed above,⁹⁰ wherein a child sustained spine and clavicle fractures, the hearing was litigated over many court dates over the course of a year. After the mother had finished all services, the government agreed to withdraw the abuse petition against her and consent to a neglect finding. With that agreement, our client was allowed unsupervised time and a clear path towards reunification. It was incredibly difficult for our client to agree to a finding that she neglected her daughter given that two experts testified the injuries were not abusive in nature, but she agreed to the resolution because it allowed her to get her children home more quickly.⁹¹ Had we not litigated the hearing, narrowed the factual issues, and demonstrated to the judge and ACS that the fractures were very possibly accidental, and in any event not caused by our client, we would never have been offered a neglect finding or a clear timeline for reunification. In addition, because of the delays attendant to litigating abuse trials in family court, had the case gone to trial without a

⁹⁰ See case description *supra* Section III.A.3.

⁹¹ There are complicated dynamics at play that might impact why someone might take a settlement that leaves them with a potential finding when they know they have done nothing wrong. In the middle of a protracted removal hearing or other such proceeding, when parents are offered a lower charge if it means getting their children back home, some parents may be willing to take such a plea despite the fact that they have not injured their children. The reasons for this are myriad and case-dependent, but some include: 1) the facts surrounding how an injury occurred would meet the standard for neglect, and this resolution is a best-case scenario; 2) taking a plea ends litigation and means that children come home, visits are expanded, or a caretaker otherwise has more access to their child; and 3) depending upon the jurisdiction, parents may be able to request later hearings to vacate these findings of neglect. In New York, this process is conducted through a contested dispositional hearing, wherein a parent or caregiver might seek a suspended judgment. N.Y. FAM. CT. ACT § 1052 (McKinney 2019).

prior hearing, it would not have concluded for months to years, leaving our client with only agency-supervised contact until the conclusion of the trial.

1. Pre-Trial Motion Practice: Motions to Dismiss Before or After Emergency Hearing

In some cases, if defense counsel prevails at a pre-trial hearing in showing there is no proof of abuse, they can subsequently file a motion to dismiss to end the case or force the government to withdraw. In some instances, a pre-trial return hearing may not be appropriate for a client, for reasons ranging from the client not wanting the hearing to other factors in the client's life.⁹² In other jurisdictions, a hearing might not be statutorily available, or a judge may be resistant to litigation. In those circumstances, family defenders can consider civil motion practice as a way to move cases forward, narrow the issues, and tell the client's story. This is especially true when the allegations on their face are insufficient to prove abuse.

In our experience, cases filed under an "abuse" cause of action often follow one of a few similar fact patterns: a young child has "unexplained" injuries, a doctor states that a parent's explanation for a child's injury is "inconsistent" with the injuries, or, in tragic circumstances, a child has died without an obvious cause. In some cases, the petition is pled as abuse under the *res ipsa* theory but there is no requisite statement in the petition from a medical professional indicating the injuries are abusive; therefore, the petition is facially insufficient.⁹³

Here, it is as important as ever to return to the statute to determine whether or not the stated petition makes out a claim for abuse. Though it may seem obvious, we repeatedly turn to the statute to ensure that the government has asserted facts that satisfy every element of the abuse cause of action. In New York State, as explained above, a cause of action for abuse requires that the government show that a parent's intentional action or omission either caused a serious long-term injury or resulted in

⁹² Though FAM CT. ACT § 1028 requires that hearings for the return of children "be held within three court days of the application and shall not be adjourned," in our experience, hearings can be incredibly time-consuming as they require all lawyers and the client to be present. Additionally, the family courts in New York City are only open weekdays from 9 AM to 4:30 PM, leaving hearings to be protracted and occurring in minutes-long increments over weeks or even months.

⁹³ For example, the petition may state, "according to staff at Named Medical Center, the child was brought in and found to have a skull fracture, subdural hematoma, and a cephalohematoma. The parents could not provide an explanation for the injuries." Or it may state that the parents' explanation is "inconsistent" with the injuries. The petition might contain no statements from a medical professional indicating the injuries are consistent with abuse.

the child's death, or that the parent created the situation that resulted in substantial injury or death.⁹⁴ Under a *res ipsa* theory of prosecution, they must show that the injury could not have occurred but for such an abusive act or omission. If the injury could be caused by accidental means, all other possibilities must have been ruled out. In practice, this *should* require the government to allege that injuries were the result of abuse by including a statement from a medical professional who determined the injuries are from abuse or at least suggestive of abuse.

When the charging document does not state sufficient facts to meet the necessary elements of the abuse statute, practitioners can file a motion to dismiss for failure to state a claim even before there has been a trial on the issue of whether a parent was abusive or neglectful.⁹⁵ In New York family law cases, the statutory scheme provides two distinct grounds for dismissal at the motion to dismiss stage:

If facts sufficient to sustain the petition under this article are not established, or if, in a case of alleged neglect, the court concludes that its aid is not required on the record before it, the court shall dismiss the petition and shall state on the record the ground for dismissal.⁹⁶

It may seem at odds with traditional lawyering instincts for an attorney to file a motion to dismiss if they expect such a motion to perfect or sharpen the government's pleadings to better make out an abuse cause of action. However, in the specific context of serious abuse cases, forcing the government to sharpen the exact pleadings and allegations can be helpful in narrowing the issues for the judge and developing a theory of defense. Furthermore, while you may not prevail on the motion, there are several reasons to consider filing: (1) it forces the government to articulate its claim more thoroughly; (2) it gives you an opportunity to push your client's theory and highlight certain facts alleged or lack thereof; and (3) it keeps the case in the judge's mind.⁹⁷ By filing a motion in writing and giving the judge the time to consider the issues away from the tension of the courtroom, you may possibly avoid the gut reaction of stress and stigma that can so overwhelm the tenor of an abuse case when all parties are present and arguing for different outcomes.

⁹⁴ FAM. CT. ACT § 1012(e); *see supra* Section II.C.

⁹⁵ N.Y. C.P.L.R. 3211 (McKinney 2019); FAM. CT. ACT § 1051(c).

⁹⁶ FAM. CT. ACT § 1051(c).

⁹⁷ In some cases, depending on the judge, it might be worthwhile at the first arraignment to alert the judge to the fact that a petition does not state the necessary elements and ask for a motion schedule. In the right case, this is a strategic way to set the tone for the case and signal to the judge at the outset that the government may have proof issues.

2. Discovery Devices: Expert Disclosure Motions and Depositions

Expert discovery provides another area of practice that moves a case forward and can narrow the legal and medical issues. As previously discussed, in almost all cases based on medical findings, the government must call an expert witness to prove that a child's medical diagnoses and injuries resulted from abuse and not another non-abusive cause. When there is no direct evidence of abuse such as a firsthand witness, as is often the case, an expert usually must testify that certain accidents or natural illnesses were medically ruled out in favor of abuse. In New York, as in most jurisdictions, the civil practice law requires that, upon request, parties put one another on notice regarding the proposed testimony and credentials of an expert they seek to call.⁹⁸ The disclosure rules in New York are very specific and require the government to identify the proposed expert, disclose in reasonable detail the subject matter on which each expert will testify, the substance of the facts and opinions of the expected testimony, the summary of the grounds for the opinion, and the expert's qualifications.⁹⁹

Similar to the petitions, ACS often provides an expert disclosure that is vague and unhelpful, containing conclusory statements of abuse without detail. For example, the disclosure may include one sentence that says, "based on the medical records and the injuries, Dr. XYZ will testify that the injuries are consistent with abuse." Under the civil practice rules of New York, these sentences or conclusions are not sufficient to put the parent or caretaker on notice of the expert's proposed testimony.¹⁰⁰ These disclosures fail to mention *why* the doctor believes the injuries or diagnoses constitute abuse, what other non-abusive diagnoses have been ruled out or, in some cases, why a parent's explanation for an injury or retelling of an event is not consistent with that injury. In some cases, we have come to learn from experience that disclosures are not necessarily strategically

⁹⁸ N.Y. C.P.L.R. 3101(d)(1)(i). This is so an opposing party can prepare in advance and retain an expert themselves if necessary. This requirement is reciprocal; when defense counsel calls an expert they must provide such a disclosure to opposing counsel as well.

⁹⁹ *Id.* This puts the parent and their lawyers on notice of an expert's proposed testimony. The language of the CPLR does not allow a party offering an expert to give the expert's conclusory opinion, but rather requires the party proffering the expert to outline, in some level of detail, an expert's opinion and the substantive basis for that opinion. In an abuse case, this would require the government to not only state that a doctor would testify injuries are suggestive of abuse, but also why the doctor has reached this opinion and what methodology or tests were used to reach this conclusion. *See id.*

¹⁰⁰ *See id.*

vague, but rather indicate that the doctor may not actually hold the opinion that the injuries were caused by abuse—or may have doubts about their origins.

In these cases, it is important to push for more detailed pre-trial discovery and information about a child abuse pediatrician's opinion, even when you have the doctor's own medical records or notes if they have clinically evaluated the child. The doctor's notes or medical records often do not contain the necessary information to understand their opinion and to understand the extent of the injuries or the facts supporting a doctor's opinion. By pushing for pre-trial discovery, an attorney can at worst come to better understand the government's case, and at best may expose the government's lack of pre-trial proof to the judge. This may quickly force a settlement, withdrawal, or family reunification. Practically speaking, if the government will not provide an adequate disclosure or if a doctor's report is not helpful, an attorney can file a motion to compel an adequate disclosure.¹⁰¹ This can accomplish three things: 1) in many cases, the court will compel the government to provide an adequate disclosure; 2) this signals to the judge and allows oral argument on the fact that the government may have an expert witness who cannot provide the requisite proof; and 3) importantly, it is an opportunity, like all opportunities in front of the judge, to push whatever theory of the case you are pursuing. If the government refuses to provide more information about a doctor's testimony or cannot obtain that information, and the medical records aren't helpful, an attorney may move for a deposition of the government's expert witness.¹⁰²

For example, in a somewhat recent matter, we represented a father accused of abuse based on his newborn daughter's minor skull fracture and underlying small subdural hemorrhage. The parents had told ACS that they physically fought while the mother was holding the baby. The mother alleged that our client had "struck" the baby. This fact was disputed. There was also an allegation that, during the same argument, the child fell on the bed with the mother. Notably lacking from the abuse petition were any statements from a medical professional stating that the injuries were the result of abuse as opposed to accidentally caused.

Nevertheless, in pre-trial discovery, the government provided a signed disclosure indicating that the child abuse pediatrician who evaluated the child would testify that the baby's skull fracture was the result of abuse. No other details were provided. At a court appearance, we asked the judge to order the government to provide a supplemented disclosure, arguing that neither the disclosure nor the medical records contained the

¹⁰¹ N.Y. C.P.L.R. 3124.

¹⁰² *See id.* 3101(d)(1)(iii).

doctor's detailed opinion nor any information about her opinion. To the judge, we intimated that the lack of detail in both the record, petition, and the disclosure might indicate that ACS could not prove its abuse case and did not have an expert that could establish the necessary elements of the abuse statute. The government indicated it could not supplement its disclosure because the doctor, as communicated through the hospital legal department, would not respond to inquiries regarding her opinion. As a result, and with no other way to obtain the discovery, we moved for a pre-trial deposition¹⁰³ of the child abuse pediatrician.¹⁰⁴ The attorney for the children joined our application. The government did not object, admitting that they did not know the opinion of the expert they planned to call. Unfortunately, the court determined that we did not need a deposition and could use the medical records to help us understand the child abuse pediatrician's opinion. Those records provided little help. On our appeal, the First Department reversed the family court's order and granted our motion for a deposition, finding that the parent was entitled to a deposition of the government's expert witness, since they could not obtain the doctor's opinion in any other way.¹⁰⁵ In fact, the court's decision stated that the

¹⁰³ N.Y. C.P.L.R. 3101(d)(1)(iii) ("Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances."). The courts have not articulated a specific governing standard for the "special circumstances" inquiry but have generally emphasized the concern that the information at issue is not available from any other source. As the Second Department has explained, "[a]lthough the 'special circumstances' requirement of CPLR 3101(d)(1)(iii) is more than a nominal barrier to discovery, such circumstances exist where physical evidence is 'lost or destroyed' or 'where some other unique factual situation exists,' such as proof 'that the information sought to be discovered cannot be obtained from other sources.'" *Brooklyn Floor Maint. Co. v. Providence Wash. Ins.*, 296 A.D.2d 520, 521-22 (N.Y. App. Div. 2d Dep't 2002) (citations omitted). For cases regarding the special circumstances doctrine, see *Melendez v. Food Emporium*, 243 A.D.2d 264 (N.Y. App. Div. 1st Dep't 1997) (holding that disclosure from an expert and of the materials related to their inspection is warranted after a long delay in responding to a third party demand for expert information); *Mead v. Benjamin*, 201 A.D.2d 796, 796-97 (N.Y. App. Div. 3d Dep't 1994) (holding that trial courts should be given "considerable latitude" in granting discovery, though the special circumstances requirement is "more than a nominal barrier to discovery"); *Rosario v. Gen. Motors Corp.*, 148 A.D.2d 108, 109 (N.Y. App. Div. 1st Dep't 1989) (holding that a special circumstance exists where material physical evidence is inspected by an expert and then lost or destroyed before the other side has an opportunity to conduct its own expert inspection).

¹⁰⁴ In that matter, our attorneys made intense efforts to get the information, such as going through all the medical records, contacting the child abuse pediatrician, and speaking to the hospital's legal department. Though depositions are costly and not frequently taken in family court child protection cases in New York, the deposition, or the threat thereof, is a good option, especially where it is particularly unclear how an expert will testify that an injury is indicative of abuse. Like any discovery device, at worst it narrows the issues and allows for more fruitful settlement discussions, and at best could help achieve reunification and dismissal.

¹⁰⁵ *In re Aliyah N.*, No. 9025, 2019 WL 1715135, at *1 (N.Y. App. Div. 1st Dep't Apr. 18, 2019).

parent would be entitled to the “substance of the expert’s expected fact finding testimony, including her expert opinion as to the extent of the child’s injuries, her future prognosis, or the facts supporting her conclusion that the child’s injuries were non-accidental.”¹⁰⁶ After a deposition of the child abuse pediatrician, ACS withdrew the abuse charges and agreed to settle the matter with a no-contest neglect finding for our client, the father, and returned the baby to his care.

C. Changing the Courthouse Culture and ACS Filing Procedures

As challenges to abuse charges pervade the family courtrooms, judges become more accustomed to presiding over such litigation. While a judge may resist upfront litigation such as an emergency reunification hearing after reading a petition alleging abuse, by staying the course and litigating the case, a parent defender may win the hearing and ultimately start a cultural shift in the way the courthouse views abuse cases.

When parent defenders achieve reunification and prove that certain injuries do not bespeak abuse, or parents win trials or hearings even without an “explanation” for injuries, in subsequent abuse cases judges may begin to ask questions and require the government to put forth evidence of abuse from the start. In some cases, the judge may ask the government to provide more notice in a charging document. Where judges reunify families and subsequently receive reports that children are safe and well cared-for, they may feel further empowered to want to hear all the evidence before condoning separation. Through this litigation, judges, alongside parent defenders and other attorneys, learn the complex medical science underlying injuries and start to understand that the government may be overstating their abuse allegations. Therefore, when another abuse case comes before the judge, they may be better prepared to ask the important questions about proof and expert testimony and require the government to back up their allegations. By demanding this information from the government, judges can move an abuse case more quickly through court.

One welcome change we have recently seen in ACS’s practices is the somewhat increased filing of applications under Family Court Act Section 1026.¹⁰⁷ Under the law, when ACS removes a child, they must file a petition alleging either abuse or neglect no later than the next court day after the child is removed.¹⁰⁸ Normal practice has been to separate children from a parent and then file an abuse case without much investigation beyond a doctor’s statements that injuries are suspicious for abuse.

¹⁰⁶ *Id.*

¹⁰⁷ N.Y. FAM. CT. ACT § 1026(c) (McKinney 2019) (allowing for pre-petition ACS investigation).

¹⁰⁸ *Id.*

In those circumstances, even if we prevail at a 1028 hearing, the case continues with supervision for months, until a trial date.

However, as in the case of several Bronx Defenders' clients who have children with so-called suspicious injuries, rather than filing an abuse petition, ACS has instead removed a child, and asked the court under Family Court Act Section 1026 for two to three days to investigate the suspicions raised by a doctor. In all of those cases where The Bronx Defenders have been involved, both in court and through out-of-court social work advocacy at the hospital and at ACS meetings, we have been able to avoid abuse filings and return children home. While even a three-day removal is incredibly traumatic and unnecessary for the family, ACS's use of Section 1026 allows the agency to investigate whether abuse actually exists, rather than filing a case and starting a months- or years-long process unnecessarily.

CONCLUSION

Physical abuse cases in child protection proceedings are plagued by gross overreach that disproportionately affects communities of color and causes needless, harmful, and long-term separation between parents and children while cases slowly move through court. By litigating cases upfront and putting the child protection agency's feet to the fire, parent defenders can achieve quicker family reunification, attain better resolutions for clients, and expose meritless abuse allegations. By experimenting with the legal devices that we have discussed, including removal hearings, motion practice, and expert witness litigation, attorneys will inevitably engage with the client and the legal case in a way they—and the court—may otherwise not have.

By litigating particular serious physical abuse cases upfront through emergency hearings and motion practice, defense counsel forces the government to immediately try to make its case, legitimize a removal, and substantiate its abuse charges. By hearing the medical evidence and witnesses, the court, the ACS attorneys, and the attorneys for the children can often better determine whether parents and children can be reunited with as little delay as possible, what type of visitation should occur, what services should be recommended, and whether there is a more appropriate non-reunification resolution to the matter. In other words, upfront litigation helps separate abuse cases that have merit from those that do not, which we have seen to be the majority of cases.

Litigating serious abuse cases through early litigation also requires the involvement of—and a true partnership with—the client. We have seen time and again in our work that, over the course of long, protracted abuse cases, parents may feel understandably disempowered by and disenfranchised from the system. They feel unheard in a case that is supposed

to be about them. They have been labeled an “abuser” and have been stigmatized and stereotyped. This is particularly destructive when a parent is accused of causing the very injury for which they themselves sought help. By engaging in affirmative, early, and aggressive litigation, attorneys are not only pushing more expeditious and better outcomes but are actively engaging with the case and their client. This can provide parents with reassurance that, despite the terrible accusations being hurled at them, reunification and exoneration are within reach. In our experience, they truly are.

