



**TESTIMONY OF:**

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**Presented Before**

**The New York City Council Committees on Public Safety and the Justice System**

**Oversight Hearing on Family Separation in Criminal Cases**

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My name is Lisa Schreibersdorf and I am the Executive Director of Brooklyn Defender Services (BDS). BDS provides multi-disciplinary and client-centered criminal, family, and immigration defense, as well as civil legal services, and social work support and advocacy in nearly 35,000 cases in Brooklyn every year. I thank the City Council Committees on Public Safety and the Justice System, and in particular Chair Richards and Chair Lancman, for the opportunity to testify on family separation in criminal cases, as well as Int. No. 1349 and Int. No. 806.

**Recommendations**

1. BDS applauds the spirit of Int. No. 1349, but implores the Council to remove provisions that may trigger more and earlier involvement by the Administration for Children's Services (ACS) in marginalized families' lives. These provisions undermine the spirit of the law. First and foremost, we believe custodial arrests of caretakers cause intergenerational harm and should be avoided whenever possible. When they do occur, parents, family members, and friends should be given the full opportunity to arrange for temporary care of children. If needed, community-based groups that provide direct support should fulfill the role of assisting children and families, not ACS.
2. BDS urges amendments to Int. No. 806. Any task force studying the obstacles faced by children of incarcerated parents should be chaired by impacted families and relevant service providers. Agency officials who have erected or maintained these barriers should not be relied upon to develop solutions.
3. Join with the New York Initiative for Children of Incarcerated Parents (NYCIP) in urging the State Legislature to pass a slate of bills to promote family bonds while a parent is in prison.
4. Require the New York City Department of Correction to implement policies to promote, rather than discourage, jail visiting by family members and other loved ones.

5. Urge greater restraint by prosecutors and judges with respect to the issuance of Orders of Protection, which can needlessly separate families and wreak havoc in their lives.
6. Support reform to the State Central Registry to end unnecessary and counterproductive barriers to employment for parents.

## **Background**

In the wake of the outrage about the federal government's mandatory detention and family separation policy at the border, many observers rightly noted that this policy had ample precedent in the laws and practices of our criminal and child welfare legal systems. Arrests and incarceration of parents and children often occur without serious regard for family unity or well-being, and child removals, though purportedly intended to protect children from abuse or mistreatment, often do more harm than good. An opinion columnist for Bloomberg News went further, tracing this through line to "the U.S.'s long history of separating parents and children from the days of slavery and during Native American removal and extermination." The columnist concluded, "I don't mean to normalize the current treatment of immigrant families — I consider it a moral disgrace. What I am saying is that our treatment of outsiders is rarely an accident, and it so often mirrors how we have been treating each other all along."<sup>1</sup>

The experiences of the people we represent exemplify this reality. Family separation occurs at many stages within the criminal legal system.

## **Racial Disparities in the Overbroad Child Welfare System**

Importantly, as the Council seeks to address family separation in the criminal legal system, it must not exacerbate the problem by augmenting the role of the child welfare system whenever parents are arrested – a fundamentally inappropriate tool for supporting families and keeping them together. Racial disparities in the criminal legal system are well-documented and widely known, but it is important to understand that similar disparities exist in the child welfare system. For example, despite making up only 23% of New York City's child population, Black children represent over 52% of foster care placements.<sup>2</sup> Over 90% of our Family Defense Practice clients are charged with allegations of neglect, rather than abuse. Most of these neglect cases are poverty-related, such as poor housing conditions, lack of adequate day care or children not attending school. Racial inequity is the result of structural racism that is embedded in our historical, political, cultural, social, and economic systems and institutions. Understanding the intersections of race, racism, immigration status, and poverty is critical to challenging inequity in the child welfare system. We acknowledge that the Administration for Children's Services (ACS) is working to address the systemic issues that lead to disproportionality by creating a new office to address racial equity after creating a committee on this issue, yet progress remains to be seen.<sup>3</sup>

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<sup>1</sup> Tyler Cowen, American Families Shouldn't Be Separated, Either, Bloomberg News, June 18, 2018 available at <https://www.bloomberg.com/opinion/articles/2018-06-18/family-separation-goes-beyond-trump-s-immigration-plan>.

<sup>2</sup> New York City Administration of Children's Services Community Snapshots, (2010, 2011, 2013); retrieved from: [http://www.nyc.gov/html/acs/html/statistics/statistics\\_links.shtml](http://www.nyc.gov/html/acs/html/statistics/statistics_links.shtml).

<sup>3</sup> New York City Administration of Children's Services, Racial Equity & Cultural Competence Committee. available at <https://www1.nyc.gov/site/acs/about/racial-equity-cultural-competence.page>

In addition to the racial disparities, the overbreadth of the child welfare system impairs its function, causing a huge backlog of cases and undermining its own integrity, as parents recognize ACS as an invasive force in their communities rather than a true protector of children. For more on this subject, please refer to our testimony before the Council from November 27, 2018.<sup>4</sup>

### **Family Separation Upon Arrest**

The NYPD makes countless arrests of parents in front of their children, sometimes violently, including for behaviors that do not warrant or benefit from police intervention. The arrest of Jazmine Headley, whom we represented, for sitting on the floor of a Human Resources Administration (HRA) office in Brooklyn when no seats were available was just one such case. Every time a child sees their parent handcuffed and forcibly moved can cause lasting trauma. Potentially worse, NYPD often notifies the Administration for Children's Services (ACS), which could trigger months of invasive surveillance and unnecessary child removals. Procedure No. 215-01 of the New York Police Department's (NYPD) Patrol Guide directs officers to obtain care for a dependent child under eighteen by inquiring whether a relative or friend will care for the child, and then notify ACS, but in our experience NYPD officers too often go straight to ACS. To clarify, NYPD may also remove a child from a parent on an emergency basis if they believe the child is at imminent risk of harm.<sup>5</sup> Also, officers are required by state law to report instances of abuse, neglect, or maltreatment of children to the New York State Central Registry (SCR), which triggers an ACS investigation.<sup>6</sup> (Int. No. 1349, under consideration today, would go beyond this requirement by involving ACS in all cases where even when there is no suspicion of imminent risk or harm to a child; this would be inappropriate and counterproductive, as we explain below.) Once a family is on ACS' radar, they may be separated indefinitely, pending an investigation and/or completion of a series of programs, or even permanently

It must be said again that the vast majority of children and families impacted by these policies and practices are Black and/or Latinx and people in poverty, thus exacerbating inequality in our society.

### **Family Separation at Arraignment**

The risks of family separation increase at arraignment. As you know, prosecutors often seek- and judges may set- bail in an amount and form a parent cannot afford. Our criminal defense attorneys at BDS zealously argue for our clients to be released to care for their children, and judges may take a person's role as a primary caretaker into consideration, but in many cases parents are locked up for days, weeks, or months pre-trial. Visiting loved ones on Rikers Island is notoriously difficult and degrading, as we have testified before the Council in the past.<sup>7</sup>

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<sup>4</sup> Lauren Shapiro, BDS Testimony on Removals from Parents and Caretakers in Child Welfare Cases (2018), available at <http://bds.org/wp-content/uploads/BDS-City-Council-Testimony-on-Family-Separation-Final-1.pdf>.

<sup>5</sup> NY Family Court Act § 1024

<sup>6</sup> NY Social Services Law § 413

<sup>7</sup> Kelsey DeAvila, BDS Testimony on Safety and Security in City Jails (2018), available at <http://bds.org/bds-testifies-before-nyc-council-committee-on-criminal-justice-oversight-hearing-on-safety-and-security-in-city-jails/>

Another, less widely understood cause of family separation is the issuance of Orders of Protection. At prosecutors' request, judges often issue these orders preventing family members from having any contact whatsoever, which can make a parent or child homeless, or force a child to stay with a relative who lives far from their school. Orders of Protection impacting young people may be subject to family court orders concerning custody and visitation, and our family defense attorneys are usually able to win modifications to allow one or more forms of contact, but separation for some duration remains common. Family Court Judges conduct evidentiary hearings and weigh the trauma of removing a child from their parent before ordering a removal. But Judges in Criminal Court have not been willing to afford parents and children the same due process protections even though Orders of Protection issued in Criminal Court have the same effect as removal orders issued in Family Court. In addition, many criminal cases do not co-occur with Family Court cases, and so if one parent gets arrested and is issued an Order of Protection subject to family court order, they would have to go to Family Court, open a whole new custody or visitation case that could, in some circumstances, trigger an ACS investigation, in order for them to have any access to their children.

These orders are common in cases involving allegations of drug sale and – incredibly – allegations of leaving children unattended. Without access to affordable childcare, many parents leave their children alone at home for short periods to buy baby formula, diapers, or other essentials. Residents in many shelters must walk down a hallway or to another floor to use the kitchen or take a shower. In these instances, police may respond to a complaint, for example from shelter staff, and arrest the parent for Endangering the Welfare of a Child. Following an arrest, parents are separated from their children for at least 24 hours, and often far longer, begging the question of why the City would think this is an effective tactic or positive use of resources. Compounding this problem, prosecutors regularly ask for and judges regularly grant Orders of Protection even when there is no allegation that the child was harmed.

Orders of Protection are issued almost invariably in cases involving allegations of domestic violence, even when all parties want the criminal case to be dismissed. Upon receipt of a Domestic Incident Report, police are required to make an arrest; rather than guess at which party in an intra-household fight is the “primary aggressor,” they often arrest two or more people. The underlying incidents range from an argument that has spiraled out of control and ended with a cellphone thrown across the room to dangerous acts of violence, but criminal courts rarely make this distinction in the issuance of Orders of Protection. Orders of Protection between parents that are issued without the parents' input can wreak havoc on parents' visitation and childcare arrangements, particularly when a working custodial parent is suddenly prevented from having any contact with the non-custodial parent whom she previously relied on for childcare. This is one way entanglement in the criminal legal system can do more harm than good for families in conflict.

### **Post-Conviction Family Separation**

The New York Initiative for Children of Incarcerated Parents (NYCIP) estimates that approximately 80,000 children across the state have a parent in a state prison, and many others have a parent in a local jail. (The New York State Department of Correction and Community

Supervision (DOCCS) does not report this data.) The majority of New York City residents in state prison are incarcerated more than 200 miles from their homes.<sup>8</sup> A free prison family visit bus program provided an invaluable link for families from 1973 until 2010, when it was eliminated due to budget cuts. In the following year, visits to NYS DOCCS facilities dropped by over 13,000.<sup>9</sup> Free, reliable transportation made visiting possible for thousands of families before the state decided to allocate resources elsewhere.

The challenges of maintaining contact, whether through costly phone calls, in-person visits, or other means, combined with the obstacles to engaging in Family Court-ordered services as required by the law in order to maintain their parental rights, become insurmountable for many families.<sup>10</sup> Although the law directs Family Courts to take into consideration a parent's incarceration in a termination of parental rights proceeding, in our experience Family Courts routinely terminate the parental rights of incarcerated parents serving significant upstate prison sentences under the pretext that a parent who cannot take custody of her child because of her incarceration has therefore "failed to plan" for the child's future. Even when a parent has put forward relatives who can care for the child while the parent is incarcerated, ACS and Family Courts frequently refuse to place the child with relatives for various reasons, including the relatives' ACS or conviction history or the fact that the relative resides out of state. Incarcerated parents may also lose their rights as a result of the obstacles they face in maintaining contact with their children and the foster care agencies tasked with their care. For parents whose sentences are shorter, DOCCS permits certain programming that can help a parent comply with court-ordered service plans and maintain legal custody of their children, but these programs often have long waitlists that may exceed a parent's prison sentence.

BDS proudly supports NYCIP and urges adoption of its legislative platform. This includes S.731 (Montgomery), which would require DOCCS to provide free transportation to prisons from New York City, Rochester, Syracuse, and Albany at least twice per month, and S.724 (Montgomery), which would require DOCCS to place people in suitable facilities closest to their children. We call on the Legislature to pass and the Governor to sign S.731 and S.724. We also urge that, as the Governor considers closing three state prisons in the near future, facilities' distance from the communities most incarcerated people call home be considered.<sup>11</sup> Visiting is an essential lifeline for incarcerated people; the emotional support and connections our clients receive from their families and loved ones is invaluable.

All that said, it is important to remember that the original purpose of a prison, or "penitentiary," was removal from the community to a place of isolation where, in theory, a person would be

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<sup>8</sup> DiZerega, M., Asif Uddin, F., & Tobias, L. (2012). *New York State prison visiting bus: A public safety resource that benefits children and families*. New York, New York: Vera Institute of Justice.

<sup>9</sup> Michael Virtanen, *Advocates want free NY prison visitor bus back*, Troy Record, 2016, available online at <http://www.troyrecord.com/article/TR/20120806/NEWS/308069977>

<sup>10</sup> While New York City, led by NYC Council Speaker Corey Johnson, enacted legislation requiring that phone calls be free for people in jail starting in May of this year, calls from New York State prisons continue to carry exorbitant rates.

<sup>11</sup> Robert Harding, *Cuomo Wants to Close Three NY Prisons*, The Auburn Citizen, Feb. 15, 2019, available at [https://auburnpub.com/blogs/eye\\_on\\_ny/cuomo-wants-to-close-three-ny-prisons/article\\_40697c7b-171a-5543-9d32-fef5b220e327.html](https://auburnpub.com/blogs/eye_on_ny/cuomo-wants-to-close-three-ny-prisons/article_40697c7b-171a-5543-9d32-fef5b220e327.html).

reformed. Incarceration is inherently inconsistent with maintaining family bonds. Decarceration is therefore essential to supporting families.

### **The Challenges of Family Unity Upon Re-Entry**

Family unity and other support structures are extremely important for people returning to the community from prison. Thousands of people are released every year, many of whom immediately enter the shelter system. After suffering separation at any of the stages of involvement in the criminal legal system stated above, reuniting can be a challenge. Certainly, there are emotional complexities to navigate—from the trauma of seeing a loved one arrested to the stigma of incarceration. However, there are also statutory barriers erected by the government. People with criminal records may be denied tenancy with their families in public housing or other subsidized apartments. They face discrimination in professional licensing, employment and every other facet of community engagement, thus obstructing their ability to help support their families and make amends for past conduct. Parents listed in the SCR (which means an investigation into an allegation of child neglect or abuse resulted in “some credible evidence” which may or may not have resulted in a case against them, even if it was later dismissed in court) are denied countless employment opportunities simply because young people would be present on the job premises, and prohibiting from becoming foster or adoptive parents. (In 2018, 67,852 reports to the SCR and 58,118 investigations, with 31.8% meeting the “some credible evidence” standard.<sup>12</sup>) BDS, along with a new coalition led by impacted parents, urges state legislators and the Governor to reform the SCR to eliminate unnecessary barriers to success. Ultimately, many families overcome these barriers in spite of – not with help from – government policies and practices.

### **Int. No. 1349 (Dromm) - Requiring the police department to implement child sensitive arrest policies**

BDS supports the development of child-sensitive arrest policies and applauds many provisions in this bill. However, we *implore* the Council to remove provisions that may trigger more and earlier involvement by ACS in marginalized families’ lives. In fact, we believe these provisions undermine the spirit of the law. While ACS caseworkers serve many roles, they are primarily an investigatory agency that separates families, rather than keeping them together. Our child protective services system has been termed the New Jane Crow for its mass punishment and control of low-income Black and Latinx families, and particularly mothers.<sup>13</sup> Many of our Family Defense Practice clients report having more traumatic interactions with ACS than with NYPD. Where the arrest of a parent is not related to the child’s care and safety and there is no child abuse or neglect suspected, there is no need to contact ACS where a parent is given the opportunity to make a temporary plan for the child’s care. A parent knows best who the child’s extended family and community is and should be given the opportunity to find a trusted resource who can care for their child during the arrest. Allowing the parent to make the arrangement for

<sup>12</sup> NYC Admin. for Children's Services, Flash Monthly Indicator Report - January 2019 (2019), <https://www1.nyc.gov/assets/acs/pdf/data-analysis/flashReports/2019/01.pdf>

<sup>13</sup> Stephanie Clifford & Jessica Silver-Greenberg, Foster Care As Punishment: The New Reality of ‘Jane Crow’, The New York Times, June 21, 2017, available at <https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>

their child will help lessen the trauma to this child. Community-based groups that provide direct support should fulfill the role of assisting children and families during traumatic events like arrests, not ACS. As noted above, NYPD officers are already required by state law to report incidents of suspected child maltreatment to the state and ACS, and may remove a child if there is an imminent risk of harm to that child.<sup>14</sup> **Involving ACS in every single arrest of a caregiver, including when the child is nowhere near the scene of the arrest, will only drive more families into the child welfare system, needlessly separating families and clogging Family Courts.** ACS is already overburdened by thousands of reports, most of which are ultimately unfounded, and should not be additionally tasked with investigating families where there is no suspicion of abuse or neglect. Given the massive dragnet of our criminal legal system, and the racial and economic disparities in who is targeted, there should be no presumption that a child is at risk due to a parent's arrest.

**Int. No. 806 (Williams) - Creating an interagency task force to be charged with studying the obstacles faced by children of incarcerated parents, from arrest to reunification.**

As noted above, BDS urges amendments to Int. No. 806. The bill calls for a task force studying the obstacles faced by children of incarcerated parents, chaired by the Commissioner of the Department of Correction, or their designee, and consisting of Commissioners or representatives from ACS and NYPD, as well as members with relevant expertise. This task force should be chaired by impacted families and relevant service providers. Agency officials who have erected or maintained these barriers should not be relied upon to steer the development of solutions.

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BDS is grateful to the Committees on Public Safety and the Justice System for hosting this critical hearing and shining a spotlight this issue. Thank you for your time and consideration of our comments. We look forward to further discussing these and other issues that impact people we represent. If you have any questions, please feel free to reach out to Jared Chausow, our Senior Advocacy Specialist, at 718-254-0700 ext. 382 or [jchausow@bds.org](mailto:jchausow@bds.org).

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<sup>14</sup> NY Social Services Law § 413