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# BURDEN OF PROOF BEGONE: THE PERNICIOUS EFFECT OF EMERGENCY REMOVAL IN CHILD PROTECTIVE PROCEEDINGS

By Paul Chill<sup>1</sup>

## 1. Introduction

This article examines the tendency of emergency child-removal decisions – by social workers, police officers and judges – to become self-reinforcing and self-perpetuating in subsequent child protective proceedings. The existence of this procedural phenomenon is widely acknowledged by legal practitioners, but its causes and consequences have rarely been explored. Yet its importance cannot be underestimated, especially in the age of ASFA<sup>2</sup> – when every day a child spends in foster care represents another tick of the clock in a countdown toward termination of parental rights.

In the next section, I provide some background on the law and practice of emergency child removal in the United States today. Part 3 analyzes the factors that make initial removals, whether necessary or not, outcome-determinative in many child protection cases, and considers the implications of this phenomenon in light of ASFA. Part 4 identifies possible solutions.

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<sup>2</sup> The federal Adoption and Safe Families Act of 1997. *See infra* n. 75 and accompanying text.

## 2. The Law and Practice of Emergency Removal

On an average day, police officers and child-welfare caseworkers throughout the United States remove more than seven hundred children from the custody of their parents to protect them from alleged abuse or neglect.<sup>3</sup> These children are typically seized without warning from their homes or schools, subjected to intrusive interrogations, medical examinations and/or strip searches,<sup>4</sup> and forced to live in foster homes or group residences while the legal system sorts out their future. Some of these “emergency removals” are pre-authorized by judges in *ex parte* proceedings similar to those for obtaining a search warrant;<sup>5</sup> others are effected solely on the authority of the law enforcement or child welfare agency conducting the removal.<sup>6</sup>

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<sup>3</sup> CHILDREN’S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2001: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, Table 6.5, [http://www.acf.dhhs.gov/programs/cb/publications/cm01/table6\\_5.htm](http://www.acf.dhhs.gov/programs/cb/publications/cm01/table6_5.htm) (last visited June 9, 2003) (estimated 274,686 children removed from home due to suspected maltreatment in fiscal 2001). This number, moreover, probably represents an undercount. *See id.* Chapter 6, n. 4, <http://www.acf.dhhs.gov/programs/cb/publications/cm01/chaptersix.htm#supple> (last visited June 9, 2003).

<sup>4</sup> *See E.Z. v. Coler*, 603 F.Supp. 1546 (N.D.Ill. 1985).

<sup>5</sup> *See, e.g.*, MASS. GEN. LAWS ch. 119, § 24 (2003); N.Y. FAM. CT. ACT § 1022 (McKinney 2003).

<sup>6</sup> *See, e.g.*, CAL. WELF. & INST. CODE § 305(a) (West 2003); 325 ILL. COMP. STAT. 5/5

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(2003).

Removals can be terrifying experiences for children and families. Often they occur at night.<sup>7</sup> Parents have little or no time to prepare children for separation. The officials conducting the removal, as well as the adults supervising the placement, are usually complete strangers to the child.<sup>8</sup> Children are thrust into alien environs, separated from parents, siblings and all else familiar, with little if any idea of why they have been taken there.

A former caseworker described her experience at New York City's Emergency Children's Services (ECS), where 30 to 40 children were brought each night following removals while placements for them were located:

When I first came to ECS, I tried to reach out to all the children who were crying or sitting alone, shocked and terrified. It was easier with the little ones, because I could hug them and they would immediately respond. . . .

. . . .  
. . . . [The people who make removal decisions] don't see a child having a panic attack at 3 a.m. because he is suddenly alone in the world. Or slamming his

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<sup>7</sup> See Akka Gordon, *Taking Liberties*, CITY LIMITS Monthly (Dec. 2000), at <http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=665> (recollections of former New York City caseworker).

<sup>8</sup> Sometimes the placements are not with complete strangers. As of 2001, 24% of all children in foster care were living with relatives (although some of them may have started out in non-relative placements). CHILDREN'S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADOPTION AND FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) REPORT NO. 8 (March 2003), <http://www.acf.dhhs.gov/programs/cb/publications/afcars/report8.htm>.

head against a wall out of protest and desperation.<sup>9</sup>

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<sup>9</sup> Akka Gordon, *Taking Liberties*, CITY LIMITS MONTHLY (Dec. 2000), at <http://www.citylimits.org/content/articles/articleView.cfm?articlenumber=665> (last visited June 9, 2003).

Such experiences may not only cause “grief, terror and feelings of abandonment” but may “compromise” a child’s very “capacity to form secure attachments” and lead to other serious problems.<sup>10</sup> The trauma may be magnified when the child is actually suffering abuse or neglect in the home,<sup>11</sup> and in any event it is increased when reunification with loved ones does not occur quickly.<sup>12</sup>

Not surprisingly, in light of the harsh human impact of removal, the law requires it to be used sparingly. The U.S. Supreme Court has held that the due process clause of the Fourteenth Amendment to the U.S. Constitution provides a fundamental right to “family integrity,” a right of parents and children to be free of unwarranted governmental interference in matters of child-rearing.<sup>13</sup> Consistent with that right, the state ordinarily must provide notice and a hearing before forcibly separating a parent and child.<sup>14</sup> Courts have held that only an imminent danger to a

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<sup>10</sup> Ellen L. Bassuk, M.D., Linda F. Weinreb, M.D., Ree Dawson, Ph.D., Jennifer N. Perloff, M.P.A., John C. Buckner, Ph.D., *Determinants of Behavior in Homeless and Low-Income Housed Preschool Children*, 100 PEDIATRICS 92-100 (1997); see also JOSEPH GOLDSTEIN, ALBERT SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 19 (1996).

<sup>11</sup> See *Nicholson v. Williams*, 203 F.Supp.2d 153, 199 (E.D.N.Y. 2002) (Weinstein, J.) (quoting expert testimony that removal in such circumstances may be “tantamount to pouring salt on an open wound”).

<sup>12</sup> “[C]hildren have a built-in time sense based on the urgency of their instinctual and emotional needs. . . . Emotionally and intellectually, an infant or toddler cannot stretch her waiting more than a few days without feeling overwhelmed by the absence of her parents. . . . For children under the age of five years, an absence of parents for more than two months is intolerable. For the younger school-age child an absence of six months or more may be similarly experienced.” GOLDSTEIN, SOLNIT & FREUD, *supra* n. 10, at 41.

<sup>13</sup> See *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Parham v. J. R.*, 442 U.S. 584, 602 (1979); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>14</sup> See *LaChance v. Erickson*, 522 U.S. 262, 266 (1998) (right to notice and meaningful

child's life or health can justify removal of the child without notice and a hearing first.<sup>15</sup> Even then, a prompt post-removal hearing must be held.<sup>16</sup>

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opportunity to be heard are “core of due process”); *see also* Cleveland Board of Education v. Loudermill, 470 U.S. 532, 542 (1985) (pre-deprivation hearing is “root requirement” of due process).

<sup>15</sup> The precise language varies. *See, e.g.*, Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999) (child must be “immediately threatened with harm”); Hollingsworth v. Hill, 110 F.3d 733, 739 (10<sup>th</sup> Cir. 1997) (immediate threat to a child’s safety); Jordan v. Jackson, 15 F.3d 333, 343 (4<sup>th</sup> Cir. 1994) (imminent harm to a child).

<sup>16</sup> *See, e.g.*, Jordan v. Jackson, 15 F.3d 333, 343 (4<sup>th</sup> Cir. 1994); Duchesne v. Sugarman, 566 F.2d 817, 826 (2d Cir. 1977). Such such post-removal hearings are variously referred to as “emergency hearings,” “shelter care hearings,” “preliminary protective hearings,” and “temporary custody hearings.” *See* Shirley A. Dobbin, Sophia I. Gatowski & Margaret Springgate, *Child Abuse and Neglect: A Summary of State Statutes*, 48 JUV. & FAM. CT. J. 43, 45 (1997).



In practice, however, children are seldom removed on anything but an emergency basis – either unilaterally, without a court order, or on the basis of some form of ex parte judicial authorization.<sup>17</sup> The number of emergency removals, moreover, has increased steadily for the past two decades, to the point where they now occur at nearly double the rate of twenty years ago.<sup>18</sup> This has led to a dramatic expansion of the foster-care population, which grew from 262,000 children in 1982 to nearly 550,000 in 2001.<sup>19</sup> The seemingly inexorable growth of this population, fueled by emergency removals, has led to a consensus that the child welfare system is in crisis.<sup>20</sup>

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<sup>17</sup> Although hard data are unavailable, it is clear that emergency removals represent a very large percentage of all removals. *See, e.g.*, e-mail from Mark Hardin, Director, ABA National Child Welfare Resource Center on Legal and Judicial Issues (Aug. 1, 2002) (on file with author) (“a good 90% of children enter care through emergency removal,” although “this is a pure guess” based on questioning “many courts and agencies” over the years).

<sup>18</sup> STAFF OF HOUSE COMMITTEE ON WAYS AND MEANS, U.S. HOUSE OF REPRESENTATIVES, 2000 GREEN BOOK: BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS, Table 11-18 (17<sup>th</sup> ed. 2000), <http://aspe.hhs.gov/2000gb/sec11.txt>.

<sup>19</sup> *See id.*; *see also* AFCARS REPORT NO. 8, *supra* n. 8.

<sup>20</sup> *See* Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child*

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*Welfare Policy*, 113 HARV. L. REV. 1716 (2000) (book review); cf. Richard Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 110 (1999) (“The child welfare system has been in crisis for nearly three decades.”).

The rising use of emergency removal might be justified if it were necessary to protect children from imminent danger.<sup>21</sup> In addition, a certain number of false positives (“type 2” errors in statistical terms) can be expected from any enforcement scheme. Yet the number of such errors that actually occur is alarmingly large. According to statistics published by the U.S. Department of Health and Human Services (HHS), more than 100,000 children who were removed in 2001 – more than one in three – *were later found not to have been maltreated at all.*<sup>22</sup> And that is only the tip of the iceberg. Because definitions of maltreatment are extremely broad and substantiation standards low,<sup>23</sup> it can be reasonably assumed that a significant number of other children who are found maltreated, and for whom perhaps some intervention – short of removal – is warranted, are nonetheless removed on an emergency basis. Consider the following actual examples:<sup>24</sup>

– Child protective services (CPS) caseworkers remove twin four-year-old boys after their mother admits to inflicting two marks on the back of one boy’s thigh with a belt, and to occasionally using this method to discipline the boys. The mother is a religiously devout, stably-employed mother of four healthy and happy children; no other issues of abuse or neglect exist or are suspected.

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<sup>21</sup> Some have argued that the rise in removals is in fact so justified, and indeed has not been dramatic enough. *See generally* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999).

<sup>22</sup> CHILD MALTREATMENT 2001, *supra* n. 3, Table 6.5.

<sup>23</sup> *See, e.g.*, CONNECTICUT DEPARTMENT OF CHILDREN AND FAMILIES, POLICY MANUAL § 34-3-6, <http://www.state.ct.us/dcf/Policy/invest34/34-3-6.htm> (last visited June 9, 2003) (substantiated means “reasonable cause” to believe that abuse or neglect occurred); ILL. ADMIN. CODE tit. 89 § 300.110(i)(3)(A) (2002) (allegation is indicated when “credible evidence” of abuse or neglect has been obtained).

<sup>24</sup> I represented the parents in both of these cases. *See supra* n. 1.

– CPS caseworkers remove a three-week-old baby girl after her teenage parents get into a loud argument that culminates in the mother striking the father twice with her hands. During the altercation, the infant lies safely in a crib in another room, unharmed. Although there is no evidence of any previous physical violence, CPS investigators express concern about the couple’s history of engaging in loud arguments, the mother’s diagnosis of depression, and the fact that the mother remains on probation for possession of marijuana while admitting that she still continues to use the drug occasionally.

Although some state intervention may have been appropriate in these cases, it is difficult to discern any immediate danger to the children warranting drastic protective action.

What accounts for the large and growing number of unnecessary removals? Although this is a complex question (and one that will be the subject of a forthcoming article), an important factor appears to be the rise within child welfare practice of “defensive social work.” This refers to the tendency of CPS personnel, first identified in the early 1980s, to base removal decisions on fear – fear of job discipline, fear of civil (and even criminal) liability, and especially fear of adverse publicity resulting from the death of a child left with or returned to his biological parents.<sup>25</sup> Defensive social work has flourished in the past twenty years, fueled by the news media’s appetite for sensational child-maltreatment stories<sup>26</sup> as well as by laws that purposely magnify the public visibility of child maltreatment fatalities and near fatalities.<sup>27</sup> This has led to

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<sup>25</sup> Douglas J. Besharov, *Protecting Abused and Neglected Children: Can Law Help Social Work?*, 7 *Child Abuse and Neglect* 4, pp. 421-434 (1983).

<sup>26</sup> Patrick Ayre, *Child Protection and the Media: Lessons from the Last Three Decades*, 31 *BRIT. J. SOC. WORK* 887, 889 (2001).

<sup>27</sup> Under the federal Child Abuse Prevention and Treatment Act (CAPTA), states are eligible to receive federal funding only if cases that result in a child fatality or “near fatality” are exempted from the confidentiality requirements that cloak most CPS activities in secrecy. 42

a series of removal stampedes or “foster care panics,”<sup>28</sup> in which thousands of children have been swept up by child-welfare authorities in the aftermath of high-profile child fatalities.<sup>29</sup> During such stampedes, the very creed of the government’s action – often expressed as “erring on the side of safety” – invites over-reaching in the name of the greater good.<sup>30</sup>

What is forgotten or ignored during removal stampedes, however, and more generally in modern child welfare practice, is the range and extent of harm that can result from unnecessary removals. Members of affected families may suffer enduring harm psychologically, financially and in countless other ways from the stresses of removal and its aftermath (leading to divorce, job loss, etc.). Removed children, moreover, are not necessarily safer in their new placements. Rates of abuse and neglect, including fatal abuse and neglect, are significantly higher in foster care than in the general population.<sup>31</sup> What’s more, unnecessary removals siphon resources and

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U.S.C. § 5106a(b)(2)(A)(vi) (2003). In addition, laws in every state now require multi-disciplinary “child fatality review” panels to investigate and report on deaths resulting from suspected maltreatment. NATIONAL CENTER ON CHILD FATALITY REVIEW, SURGEON GENERAL’S HEALTHY PEOPLE 2000 CDRT GOAL MET, at [http://ican-ncfr.org/surgeon\\_general.shtml](http://ican-ncfr.org/surgeon_general.shtml) (last visited June 10, 2003).

<sup>28</sup> See RICHARD WEXLER, *WOUNDED INNOCENTS* 83 (1990).

<sup>29</sup> See, e.g., Scott Higham & Sari Horwitz, *After Brianna, ‘Pandemonium’ in D.C. Foster Care*, WASH. POST, March 3, 2000, at A1, available at 2000 WL 2288674; Sari Horwitz & Scott Higham, *Record Numbers of D.C. Children Go to Foster Care*, WASH. POST, Feb. 28, 2000, at A1, available at 2000 WL 2288101; Lynn Okamoto, *New Plan: Remove Abused Kids Faster; State Plans Faster Action on Child Abuse Cases*, DES MOINES REGISTER, Sept. 9, 2000, at A1; Joe Sexton, *More Families are Separated as Child Abuse Reports Rise*, N.Y. TIMES, May 12, 1996, at A1; Elaine Song, *D.C.F.’s Sea Change Swamps Juvenile Courts*, CONN. L. TRIB., August 28, 1995, at 1.

<sup>30</sup> See, e.g., Colin Poitras, *Rowland Fires a Rebuke at DCF; “Disgusted” by Case of Baby Who Died*, HART. COURANT, May 21, 2003, at A1, available at 2003 WL 55330530; Karen Houppert, *Crisis in Family Court*, VILLAGE VOICE, April 20, 1999, at 41, available at 1999 WL 7396559.

<sup>31</sup> In 1999, for example, according to data compiled by HHS, the rate of child maltreatment was more than 75% higher – and the rate of fatal maltreatment almost 350% higher

exacerbate problems within the already-strained system, leading to other new harms – such as overcrowded courts that cannot provide hearings<sup>32</sup> and additional “missed” cases of fatal child maltreatment.<sup>33</sup>

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– in foster care than in the general population. *See* CHILDREN’S BUREAU, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1999: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM (1999), Tables 3.2, 4.1, <http://www.acf.dhhs.gov/programs/cb/publications/cm99/index.htm>.

<sup>32</sup> *See, e.g.*, Pamela B. v. Ment, *supra* n. 1.

<sup>33</sup> *See, e.g.*, RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES 46-47, 154 (1996).

But it gets even worse. Once a child is removed, a variety of factors converge to make it very difficult for parents to ever get the child back. One court has referred to this as the “snowball effect.”<sup>34</sup> The very focus of court proceedings changes – from whether the child should be removed to whether she should be returned. As a practical matter, the parents must now demonstrate their fitness to have the child reunited with them, rather than the state having to demonstrate the need for out-of-home placement. By seizing physical control of the child, the state tilts the very playing field of the litigation. The burden of proof shifts, in effect if not in law, from the state to the parents.

The remainder of this article considers the causes and consequences of this procedural phenomenon, and possible responses to it.

### **3. The Pivotal Procedural Role of Emergency Removal and its Consequences**

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<sup>34</sup> Pamela B. v. Ment, *supra* n. 1, 244 Conn. at 315 n.14, 709 A.2d at 1100.

Lawyers have long recognized the powerful influence that an initial removal exerts on subsequent child protective proceedings. Twenty years ago, an American Bar Association study reported that “[e]xperienced litigators” in child protection cases found it difficult to get children returned home “once removed, whether the original removal was appropriate or not.”<sup>35</sup> More recently, one such litigator put it this way: “Possession is nine-tenths of the law. Children who are with their parents at the beginning of a child protective proceeding are likely to remain at home; children who have been removed are likely to remain in governmental custody for a long time, even years.”<sup>36</sup> One clinical law professor has labeled this phenomenon “tracking” – as in

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<sup>35</sup> DIANE DODSON, AMERICAN BAR ASSOCIATION, *THE LEGAL FRAMEWORK FOR ENDING FOSTER CARE DRIFT: A GUIDE TO EVALUATING AND IMPROVING STATE LAWS, REGULATIONS AND COURT RULES 3-1* (1983).

<sup>36</sup> David J. Lansner, *Representing Respondents in Child Protective Proceedings*, in *CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 1998: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM; THE ATTORNEY’S ROLE AND RESPONSIBILITIES* 583 (Practicing Law Institute ed., 1998); *see also* DIANE BOYD RAUBER & LISA A. GRANIK, AMERICAN BAR ASSOCIATION, *REPRESENTING PARENTS IN CHILD WELFARE CASES: A BASIC INTRODUCTION FOR ATTORNEYS* 17-18 (2000).



“a train getting on a track and continuing to move down that track no matter what.”<sup>37</sup> And one nationally-known jurist has written that issuance of an ex parte removal order, “in so many cases, is indeed the ball game.”<sup>38</sup>

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<sup>37</sup> Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52. U. MIAMI. L. REV. 79, 115-16 (1997) (internal quotation marks omitted).

<sup>38</sup> E-mail from the Hon. Frederica S. Brenneman (Nov. 11, 2002) (on file with author). Judge Brenneman presided in juvenile court for more than thirty years and is the mother of Amy Brenneman, star of the popular television series “Judging Amy,” whose role is fashioned loosely after her. See [http://www.cbs.com/primetime/judging\\_amy/about.shtml](http://www.cbs.com/primetime/judging_amy/about.shtml) (last visited March 12, 2003).

It is not supposed to work this way. Consistent with due process, state laws generally establish a two-step process for the state to obtain custody of a maltreated child. In the first, or “adjudicatory,” phase, the court must decide whether allegations that the child has been abused or neglected are legally sufficient and, if so, factually true.<sup>39</sup> In the second, or “dispositional” phase, the court must decide what remedy (assuming abuse or neglect has been found) would be in the child’s best interest.<sup>40</sup> In addition to “committing” the child to the care and custody of the state CPS agency, dispositional options typically include allowing the child to remain at home with (or return to) his or her parents, with or without “protective supervision;” committing the child to the care and custody of the agency for a specified (or in some states indefinite) period of time; or transferring legal guardianship of the child to a relative or other appropriate person.<sup>41</sup> The comments quoted above show that emergency removal serves as an end-run around the adjudicatory and dispositional phases, effectively predetermining their outcome and depriving them of their intended purposes.

Many factors contribute to this phenomenon. To some extent, it merely exemplifies the propensity of interim decisions in any kind of litigation to become self-reinforcing. This has been labeled the “sequentiality effect.”<sup>42</sup> The sequentiality effect may in turn be an example of

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<sup>39</sup> See, e.g., CONN. PRACTICE BOOK § 26-1(f) (2003); 705 ILL. COMP. STAT. § 405/2-21 (2003).

<sup>40</sup> See, e.g., CONN. PRACTICE BOOK § 26-1(f) (2003); 705 ILL. COMP. STAT. § 405/2-22 (2003).

<sup>41</sup> See, e.g., CONN. GEN. STAT. § 46b-129(j) (2003); 705 Ill. Comp. Stat. § 405/2-26, § 405/2-27 (2003).

<sup>42</sup> See Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 146 (1995). My analysis in this section draws from Davis & Barua’s compelling analysis of the procedural consequences of emergency removal in child protective proceedings.

“path dependence,” the principle that earlier events “affect the possible outcomes of a sequence of events occurring at a later point in time.”<sup>43</sup>

The sequentiality effect is based on findings from empirical studies of choice behavior suggesting that judges, like other people, seek to avoid feeling or appearing responsible for negative outcomes, and that they feel more responsible for actions than for omissions.<sup>44</sup> These preferences lead to a “status quo bias,” a tendency to avoid actions but not omissions that subject the decisionmaker to a risk of known failure. To the extent that judges are vulnerable to this bias, they will be inclined to continue interim orders, and to do so in some cases where a change would be warranted.<sup>45</sup>

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<sup>43</sup> Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601, 604 (2001) (internal quotations omitted); see also THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 18 (Peter Newman ed.).

<sup>44</sup> See *id.* at 148-49 n. 47-53 and sources cited therein.

<sup>45</sup> Of course, the act of reversing or modifying an interim decision is arguably no different intrinsically from that of affirming one. What is important, however, is how judges and others may *perceive* the difference between the two kinds of acts. The law itself has long provided that different levels of responsibility may attach to particular conduct depending on whether it is deemed an act or omission. See, e.g., *Merrill v. Navegar, Inc.*, 110 Cal. Rptr. 2d 370, 402, 26 Cal.4th 465, 506, 28 P.3d 116, 143 (2001) (discussing misfeasance-nonfeasance distinction in tort law).

The sequentiality effect is greatly magnified in child protective proceedings (and to some extent in other child custody cases). Most importantly, it “is reinforced by the child development principle that custodial change becomes inherently and increasingly detrimental as the existing custodial arrangement becomes more longstanding.”<sup>46</sup> Children desperately need continuity of relationships, and the more time a relationship between a child and foster parents has to develop – the more “bonded” they become – the more harmful to the child disruption of that relationship is likely to be.<sup>47</sup> Thus, in cases where a child has already been removed, judges’ natural inclination to avoid actions but not omissions that may cause harm are strengthened by the knowledge that any change of custody is intrinsically likely to be harmful. In other words, there is a compelling argument that the child should remain wherever he or she is, regardless of whether the child should have been placed initially.

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<sup>46</sup> Davis & Barua, *supra* n. 42, at 146.

<sup>47</sup> See Goldstein, Solnit & Freud, *supra* n. 10, at 21.

This analysis suggests that efforts to reverse an emergency removal are most likely to succeed if they are made very quickly following the removal. As discussed previously, due process requires a prompt post-removal hearing even when summary removal is justified.<sup>48</sup> Yet these hearings are often shams.<sup>49</sup> They may be extremely brief, lasting one hour or less.<sup>50</sup> Lawyers for parents and children, moreover, if there even are any at this point,<sup>51</sup> may have barely

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<sup>48</sup> *See supra* n. 16.

<sup>49</sup> *See Pamela B. v. Ment, supra* n. 1, 244 Conn. at 304, 709 A.2d at 1095.

<sup>50</sup> *See* NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RESOURCE GUIDELINES FOR IMPROVING COURT PRACTICE IN CHILD ABUSE & NEGLECT CASES 42 (1995) (recommending that no more than one hour be allotted for post-removal hearings).

<sup>51</sup> Parents generally have no constitutional right to counsel in child protection cases, although due process may, depending upon the facts, require appointment of counsel for indigent parents in some termination-of-parental-rights cases. *See Lassiter v. Department of Social Services*, 452 U.S. 18 (1981). A substantial majority of states nevertheless provide appointed counsel for indigent parents in all child protection cases. NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD ABUSE AND NEGLECT CASES: REPRESENTATION AS A CRITICAL COMPONENT OF EFFECTIVE PRACTICE 23-31 (1998).

had a chance to meet their clients, much less to investigate the state's evidence of imminent danger and prepare a cogent response.<sup>52</sup> Thus, the prospect of quickly undoing an unnecessary emergency removal is fanciful at best in most cases.

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<sup>52</sup> This creates a conundrum for parents. On the one hand, postponing the post-removal hearing for several days or weeks – assuming that such a postponement is available – may be tactically advantageous; on the other hand, parents are understandably desirous of being reunited with their child as soon as possible, and any significant delay in reunification, as discussed in the text, tends to reinforce the substitute custodial arrangement and make it that much harder to undo.

A second factor that amplifies the sequentiality effect in child protection cases is the decrease in the state’s substantive burden of proof between the post-removal hearing and the adjudicatory and dispositional hearings. As discussed earlier, a child may be removed on an emergency basis only if he or she faces some imminent danger.<sup>53</sup> At the constitutionally-mandated post-removal hearing, the question of imminent danger generally remains the focus.<sup>54</sup> At the adjudicatory hearing, however, the substantive focus shifts to proving abuse or neglect – broadly defined concepts that are diffuse enough to sweep in a great deal of parental conduct.<sup>55</sup> It may thus actually be easier to prove that a child has been abused or neglected, even by a preponderance of the evidence, than to prove that the child faces imminent danger by the same or a lesser standard. A finding that a child has been abused or neglected, moreover, sets the stage for the disposition, at which the substantive focus in most jurisdictions is on “the best interests of the child” – as amorphous a standard as exists in the law.<sup>56</sup> Again, it may be easier to establish that a child’s best interests would be served by a one-year “commitment” in foster care –

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<sup>53</sup> See *supra* n. 15. This determination generally must be supported by probable cause or the equivalent. See, e.g., FLA. STAT. CH. 39.401(b) (2002) (probable cause); *cf.* CONN. GEN. STAT. § 17a-101g (2003) (reasonable cause); 325 ILL. COMP. STAT. § 5/5 (2003) (reasonable belief); DEL. CODE. ANN. tit. 16 § 907(a) (2003) (reasonable suspicion); *cf.* ARIZ. REV. STAT. ANN. § 8-821(B) (2003) (clear necessity).

<sup>54</sup> Here, however, the state’s burden of proof may increase to a fair preponderance of the evidence. See *Care and Protection of Robert*, 408 Mass. 52, 68, 556 N.E.2d 993, 1001 (1990) (such proof constitutionally required at post-removal hearings); *In re Juvenile Appeal (83-CD)*, 189 Conn 276, 300, 455 A.2d 1313, 325 (1983) (same); *but see, e.g.*, 705 ILL. COMP. STAT. 405/2-10(1) & (2) (2003) (only probable cause required).

<sup>55</sup> See, e.g., Conn. Gen. Stat. § 46b-120 (2003).

<sup>56</sup> See Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, in CHILD, PARENT AND STATE 3, 5-6 (S. Randall Humm et al. eds., 1994) (best interest of the child “is not a standard, but a euphemism for unbridled judicial discretion”); *see generally* Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 108-09 (1997).

especially if the child is already in care pursuant to a removal – than to prove imminent danger. Thus the legal obstacles to placing or keeping a child in foster care decrease rather than increase as the case progresses, contributing to the difficulty of reversing unnecessary removals.

At least two other factors exacerbate the sequentiality effect in child-protection cases. First, although significant risks may attend to both removal and non-removal, the latter inevitably get more play in court hearings. “The proceeding, by its very nature, highlights the dramatic and tangible risk that a child will be harmed at the hands of a person who has been identified as a possible risk to that child.”<sup>57</sup> Judges thus cannot ignore this risk, but it is much easier to overlook the less sensational and palpable risks of family separation and substitute care. This disparity is exacerbated by the resource disparity between the parties. In contrast to the government, the overwhelming majority of parents in child protection cases are poor, and the quality of the representation they receive from their court-appointed lawyers (if they have counsel at all) marginal or inferior. This leads to further exaggeration of the risks of non-intervention.

Second, although judges are supposed to operate as a check on CPS actions, they exhibit the same defensive outlook as many CPS caseworkers. This results in what might be called “defensive judging.” Judges, like social workers, understand that a decision *not* to remove a child, or to return a child home who has been unilaterally seized by CPS, is much more likely to come back to haunt them than is a decision to uphold the status quo.<sup>58</sup> Judges thus may order or uphold an emergency removal even on dubious evidence because they do not want to “risk

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<sup>57</sup> *Id.* at 151.

<sup>58</sup> *See Davis & Barua, supra* n. 42, at 152 (the adverse consequences of removals “are rarely measured or made known to the court or to the public at large”).



making a mistake and having a child die.”<sup>59</sup>

Another set of factors that tends to make emergency removal self-reinforcing stems from the effect of the removal and its aftermath on the parents and child involved. Perversely, the emotional stress caused by these events may themselves become grounds for continued separation and ultimately termination of parental rights.

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<sup>59</sup> NEW YORK CITY SPECIAL CHILD WELFARE ADVISORY PANEL, REPORT ON FRONT LINE AND SUPERVISORY PRACTICE 48 (2000), <http://www.aecf.org/child/frontline.pdf> (last visited March 12, 2003). Judges interviewed for this report “spoke of the withering media attention to decisions that turn out badly” and actually nodded their heads at the suggestion that “the *weaker* the case” CPS presented, the *more* likely it would be to prevail (“because judges would be especially afraid that something bad was going on in a home when they couldn’t get clear information”). *Id.* (emphasis in original).

Many parents understandably become angry at and highly suspicious of caseworkers who remove their children for reasons that are not readily apparent to them – especially when, as is usually the case, the removal occurs without warning after parents have been speaking and/or working voluntarily with CPS for several days, weeks or months. Yet any expression of anger may come back to haunt the parent at a neglect or termination hearing. Descriptions of angry outbursts may be offered by the state and accepted by the court as evidence of instability, lack of cooperation or potential for violence.<sup>60</sup> A parent’s suspicious or hostile attitude toward caseworkers may be construed as evidence of clinically-significant paranoia.<sup>61</sup> A parent’s

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<sup>60</sup> *See, e.g.*, In re J.P., 331 Ill.App. 3d 220, 770 N.E.2d 1160 (2002) (upholding finding of neglect based in large part on father’s angry outbursts to social workers and hospital employees who were holding his child); *cf.* Julie B. v. Superior Court, Los Angeles County, 2002 WL 86904 (Cal.App. 2 Dist. Jan 23, 2002) (upholding termination of reunification services where mother “went into a complete panic and became irrational” and called the FBI to make a report when her son disclosed that he had been sexually abused by another boy in a former foster home).

<sup>61</sup> *See, e.g.*, In re Alexander T., 2002 WL 31310709 at \*11 (Conn.Super. Sept. 23, 2002) (terminating parental rights of mother in part because her refusal to cooperate with CPS workers and her “outright and unwarranted hostility” toward them demonstrated that her alleged paranoid personality disorder “continued unabated and untreated”). I represent the mother in this case,

disclosure to a court-appointed psychologist or psychiatrist that she is experiencing depression, hopelessness, anxiety, or grief from being separated from her child may become the basis for retaining custody of the child until treatment succeeds in alleviating those symptoms.<sup>62</sup>

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which is currently being appealed to the Connecticut Appellate Court.

<sup>62</sup> *See, e.g.*, J.M. v. State Dep't of Human Resources, 686 So.2d 1253, 1254-55 (Ala. Civ. App. 1996) (affirming dependency finding where two psychological evaluators found mother, who was not mentally ill and whose children had been removed from her care pending trial, suffered from anxiety and depression and therapist testified that "mother seemed capable of being a good parent, but . . . seemed over-controlling because of her fear and anxiety for the girls' safety").

The psychological harm to children resulting from the removal and its aftermath may also perversely become the basis for longer and even permanent separations. Most children who remain in foster care for more than a few weeks experience multiple placements – that is, they are repeatedly moved from one foster home to another.<sup>63</sup> This experience, combined with that of the removal itself, may cause children to develop post-traumatic stress disorder,<sup>64</sup> reactive attachment disorder<sup>65</sup> or other major psychiatric illnesses. For children who develop such “special needs,” maintaining the status quo of their current placement is often seen as crucial to helping the child to heal. In some cases, moreover, this becomes part of the basis for terminating the parental rights of parents who may have undergone significant “rehabilitation” but not enough to be able to care adequately for a previously healthy child who has now become

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<sup>63</sup> As of Sept. 30, 1998, nearly two-thirds of the children then in foster care had experienced between one and two placements, 21% had experienced three or four placements, and 16% had experienced five or more. 2000 GREEN BOOK, supra n. 18, Table 11-27.

<sup>64</sup> See AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 424-28 (4<sup>th</sup> ed. 1994) (“DSM-IV”).

<sup>65</sup> See *id.* at 116-18.

emotionally fragile.<sup>66</sup>

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<sup>66</sup> See, e.g., *In re Samantha C.*, 2002 WL 1902963 at \*9 (Conn.Super. Jul 18, 2002) (terminating parental rights of mother and father to six-year-old daughter who developed “special needs” from multiple foster placements and sexual abuse suffered while in foster care; even though three-year-old son who remained in parents’ custody appeared well cared for, “the critical issue is whether the parent has gained the ability to care for the *particular needs of the child at issue*”) (emphasis added). I represent the mother in this case, which is currently being appealed to the Connecticut Supreme Court.

A removal and its aftermath also place tremendous strains on the parent-child relationship. Visitation while the child is in foster care may present logistical problems if the child's placement is far away, especially if (as is often the case) the parents must rely on public transportation to get there. A "lack of services and a sense of hopelessness or rage" may also lead parents not to fully pursue contact with the child.<sup>67</sup> Visits may be further strained by the child's feeling of being abandoned or rejected by the parents, and by anger at them for failing to protect her from being removed; by the awkwardness of meeting in a stranger's home or agency office under the watchful eyes of a caseworker; and by parents simply trying to cram too much loving into a one-hour, weekly visit.<sup>68</sup> Any deterioration of the parent-child relationship manifestly makes return of the child appear more risky and thus less likely.<sup>69</sup>

Finally, the very knowledge by system insiders of the tendency of emergency removals to become self-reinforcing itself contributes to the phenomenon. Parents are repeatedly told – by their court-appointed lawyers, CPS caseworkers, court personnel, and others – that regaining custody of their child will be difficult.<sup>70</sup> They are told that their best chance of regaining custody

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<sup>67</sup> DIANE DODSON, AMERICAN BAR ASSOCIATION, *THE LEGAL FRAMEWORK FOR ENDING FOSTER CARE DRIFT: A GUIDE TO EVALUATING AND IMPROVING STATE LAWS, REGULATIONS AND COURT RULES 3-1* (1983).

<sup>68</sup> Children often express their anxiety around these issues by acting out before and after visits, which behavior may be erroneously construed as evidence that they are being maltreated during visits or were so treated at home prior to their removal. *See, e.g., Failure to Protect: The Taking of Logan Marr* (PBS television documentary, "Frontline" series, Jan. 20, 2003) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/etc/script1.html>).

<sup>69</sup> In extreme cases, the parent-child relationship may completely break down (or fail to develop in the case of a newborn), leading to a petition to terminate parental rights. *Cf. In re Valerie D.*, 223 Conn. 492, 613 A.2d 748 (1992) (reversing termination judgment based on ground of "no ongoing parent-child relationship" because child's removal at birth and subsequent placement in foster care made absence of such relationship inevitable); *In re Justin T.*, 640 A.2d 737, 739 (Me. 1994).

<sup>70</sup> *See* Amy Sinden, "Why Won't Mom Cooperate?": *A Critique of Informality in Child*

quickly is by showing “cooperation” and settling.<sup>71</sup> This creates enormous pressure to settle, and most parents in fact do.<sup>72</sup> “Settling” in this context generally means admitting or pleading nolo contendere to abusing or neglecting the child and accepting the services deemed necessary by the CPS agency to permit the child to return home. Thus some cases that might actually result in a child being returned home quickly, if the parents were to litigate the matter aggressively, wind up being settled with the child remaining in foster care for an extended period.

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*Welfare Proceedings*, 11 YALE J.L. & FEMINISM 339, 353 (1999).

<sup>71</sup> *Id.* at 353-55.

<sup>72</sup> See Ann Moynihan, Mary Ann Forgey & Debra Harris, *Foreward to Fordham Interdisciplinary Conference, Achieving Justice: Parents and the Child Welfare System*, 70 FORDHAM L. REV. 287, 299-300 (2001).

Not every observer, it must be noted, agrees that systemic forces operate solely to reinforce emergency removals and impede the return of children to their parents. One scholar has argued that other forces pull strongly in the opposite direction, particularly the tendency of judges (despite their superior class background) to identify with parents “simply because the judges are also adults and often parents,” and because they like most other people believe strongly in the right of family integrity.<sup>73</sup> Although these factors may have some influence in private custody (i.e., divorce) cases, any impact they might have in the child protection context is overwhelmed by the strength of the forces discussed above that tend to preserve the status quo following an initial removal.<sup>74</sup>

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<sup>73</sup> James G. Dwyer, *Children’s Interests in a Family Context – A Cautionary Note*, 39 SAN. CL. L.R. 1053, 1058-59 (1999).

<sup>74</sup> In addition, the differences between judges and parents in most child-protection cases – and the perceived divergence of parents from anything resembling the middle-class norm – are simply too overpowering. See, e.g., Francis J. Foley, III, *An Unexpected Ministry: Reflections of a Judge in the Juvenile Court*, JUV. & FAM. CT. J. 67, 68-9 (winter 1999) (contrasting typical parents in divorce and child protection cases, and presenting own self-described “cynical and harsh” view of latter).



Since the enactment of ASFA in 1997, prolonging a child’s stay in foster care directly increases the risk that the child’s legal relationship to his or her parents will be completely severed. ASFA generally requires states, as a condition of receiving federal funds, to file for termination of parental rights with respect to any child who remains in foster care for fifteen out of twenty-two consecutive months.<sup>75</sup> Termination of parental rights is a “devastatingly adverse action,”<sup>76</sup> the most severe judicial remedy known outside of the criminal law.<sup>77</sup> Under ASFA,

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<sup>75</sup> 42 U.S.C. § 675(5)(E) (2003). Exceptions are that the child is being cared for by relatives, that the state has documented compelling reasons why termination would be contrary to the child’s best interests, and that the agency has failed to provide the services required by the treatment plan in a timely manner. *See, e.g.*, CONN. GEN. STAT. § 17a-111a (2002); 705 ILL. COMP. STAT. § 405/2-13(4.5) (2003); *see generally* 42 U.S.C. § 675(5)(E) (2003).

<sup>76</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 105 (1996).

<sup>77</sup> *See id.*; *Santosky v. Kramer*, *supra* n. 13, at 759 (“[f]ew forms of state action are both so severe and so irreversible” as termination of parental rights); *see also* *In re Guardianship and Custody of Terrance G.*, 190 Misc.2d 224, 229 731 N.Y.S.2d 832, 836 (N.Y. Fam. Ct. 2001)

parental rights can now be terminated, or at least gravely threatened, on the basis of the mere passage of time.<sup>78</sup>

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(describing termination as “the jurisprudential equivalent of capital punishment” in the civil context).

<sup>78</sup> State legislative responses to this requirement of ASFA have differed greatly. One approach, exemplified by the Illinois statute, creates a new ground for termination of parental rights based solely on the passage of time. 750 ILL. COMP. STAT. § 50/1(D)(m-1) (2003). Another approach, illustrated by the Indiana statute, creates no new ground but merely directs that a termination petition be filed by a certain time. IND. CODE § 31-35-2-4.5(a)(2) (2002). The Illinois statute has been declared unconstitutional as violative of substantive due process, *see In re H.G.*, 197 Ill.2d 317, 757 N.E.2d 864 (2001), while the Indiana statute has been upheld, *see Phelps v. Sybinsky*, 736 N.E.2d 809 (Ind.App. 2000). *See generally* Katherine A. Hort, *Is Twenty-Two Months Beyond the Best Interest of the Child? ASFA’s Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1881 (2001).

Given the enormity of the human interests at stake, it has generally been assumed that termination of parental rights is reserved for cases of severe abuse or neglect, abandonment or parental incapacity.<sup>79</sup> ASFA's focus on a child's length of time in foster care inherently reduces that substantive threshold. Indeed, ASFA's focus on expediting "permanency" for children can be viewed as a direct assault on that threshold. Thus, whether or not the mere passage of time itself is explicitly made a basis for TPR (as opposed to a mere trigger for the filing of a petition), the effect of ASFA has been to lessen the extent to which a parent must be shown unfit in order to obtain a judicial order permanently severing his or her parental rights.<sup>80</sup>

Vague statutory grounds for termination compound this problem. Termination may be authorized, for example, where the parent of a child previously found abused or neglected has failed to achieve sufficient "personal rehabilitation" as to encourage the belief that within a "reasonable time" the parent "could assume a responsible position in the life of the child," or in roughly analogous circumstances.<sup>81</sup> Although statutes such as these have survived void-for-vagueness constitutional challenges,<sup>82</sup> they clearly leave a great deal of room for judicial discretion and subjectivity in determining what constitutes a "failure to rehabilitate."

Now an anonymous call from a neighbor, who may be mistaken or even vindictive, can

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<sup>79</sup> Due process requires proof of parental "unfitness" before a court can terminate parental rights over the parent's objection. *Santosky v. Kramer*, *supra* n. 13, at 760 n. 10 (1982); *Stanley v. Illinois*, *supra* n. 13, at 657-58.

<sup>80</sup> Although hard data on ASFA's impact remain hard to come by, there can be little doubt that ASFA has created a sea-change in child-welfare practice. *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. GAO-02-585, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 3 (June 2002).

<sup>81</sup> Conn. Gen. Stat. § 17a-112(j)(3)(B) (2003).

<sup>82</sup> *See In re Shyliesh H.*, 56 Conn.App. 167, 181, 743 A.2d 165, 174 (1999).

set in motion a process that results in a shattered family and traumatized, victimized children whose lives are permanently cut from those of their parents and siblings despite never being in any real danger to begin with. The next section explores how such tragedies – tragedies of over-inclusion – might be averted.

#### **4. Solutions**

Several relatively minor statutory changes would significantly reduce the risk that children will be unnecessarily removed and that, once a removal does occur, it will become self-reinforcing and self-perpetuating, while maintaining sufficient authority and flexibility for CPS to seize a child on an emergency basis when such action is truly needed to protect the child.

States should clarify that the “imminent danger” required for emergency removal is an *imminent risk of serious physical injury or death*. Although only a few courts have explicitly established this as the constitutional threshold,<sup>83</sup> the dangers discussed in this article dictate that the floor should be set no lower as a matter of *policy*. Yet few states have enacted such narrow substantive limits on emergency removal.<sup>84</sup> Indeed, a few states provide limits that contain no reference to any sort of “imminent” or “immediate” danger.<sup>85</sup> It is difficult to reconcile

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<sup>83</sup> See *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9<sup>th</sup> Cir. 2000) (emergency removal constitutionally justified only when there is reasonable cause to believe child is in “imminent danger of serious bodily injury” and removal is “reasonably necessary to avert that specific injury”); cf. *Egervary v. Rooney*, 80 F.Supp.2d 491, 501-02 (E.D.Pa. 2000) (constitutional minimum is “imminent threat of severe neglect or physical abuse”).

<sup>84</sup> See CONN. GEN. STAT. § 17a-101g(c) (2003) (requiring “imminent risk of *physical harm*”) (emphasis added); VA. CODE ANN. § 63.1-248.9(A)(1) (Michie 2003) (threat of “severe or irremediable injury”); Alaska Stat. § 47.10.142 (2003) (immediate removal necessary to protect child’s *life*).

<sup>85</sup> See 325 ILL. COMP. STAT. 5/5 (2003) (authorizing emergency removal when circumstances “endanger[ ] the child’s health or safety”); MICH. COMP. LAWS § 712A.14(1) (2003) (authorizing removal when a child’s “surroundings are such as to endanger his or her health, morals, or welfare”); KAN. STA. ANN. § 38-1527(b) (2003) (authorizing emergency

provisions such as these with the constitutional standard, and courts have invalidated at least two of them.<sup>86</sup>

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removal when continuing in the home “would be harmful to the child”).

<sup>86</sup> *See* *Roe v. Conn*, 417 F. Supp. 769, 777 (D. Al. 1976) (declaring unconstitutional Alabama statute authorizing emergency removal “if it appears that . . . the child is in such condition that its welfare [so] requires”); *Siereveld by Siereveld v. Conn*, 557 F. Supp. 1178 (D. Ky. 1983) (declaring unconstitutional Kentucky statute authorizing summary removal in non-emergency situations).

States should further specify that a child may be removed unilaterally by CPS officials or police officers only when taking the time to obtain an *ex parte* court order would clearly jeopardize the child's safety. Again, this condition may or may not be constitutionally required,<sup>87</sup> but it is dictated by policy considerations. Several states in fact already require it.<sup>88</sup> Although there is a great deal of pressure on judges to grant *ex parte* removal applications, for some of the reasons discussed above,<sup>89</sup> those pressures increase dramatically once the child is already in placement. Requiring judicial pre-authorization of emergency removals whenever possible is thus not a panacea but may prevent at least some unnecessary removals.

When judicial pre-authorization is sought, reasonable efforts should be made to allow the parents or their counsel to provide at least some informal input to the court (through letters, sworn oral or written statements, etc.). Obviously this might have to be arranged very quickly, depending upon the circumstances, and sometimes it might be altogether impossible. But there are other times – such as when an emergency removal is sought during the pendency of a neglect case in which there was no initial removal – when the parents are already before the court and represented by counsel, and giving the latter a limited opportunity to be heard on extremely short notice may be quite workable. Indeed, in such circumstances, failing to provide that opportunity

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<sup>87</sup> Compare *Tenenbaum v. Williams*, 193 F.3d 581, 596 (2d Cir. 1999) (holding that unilateral seizure of child is unconstitutional “where there is reasonable time safely to obtain judicial authorization consistent with the child’s safety”), with *Doe v. O’Brien*, \_\_\_ F.3d \_\_\_, 2003 WL 21027249 (11<sup>th</sup> Cir. May 8, 2003) (agreeing with dissenting opinion in *Tenenbaum* that this should only be one factor and court should examine “all relevant circumstances” in determining whether prior court order was required).

<sup>88</sup> See, e.g., N.Y. FAM. CT. ACT § 1024(a) (McKinney 2003); 325 ILL. COMP. STAT. 5/5 (2003); DEL. CODE. ANN. tit. 16 § 907(a) (2003).

<sup>89</sup> See *supra* n. 58-59 and accompanying text.

seems both fundamentally unfair and bad policy.<sup>90</sup>

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<sup>90</sup> *But see* Miller v. City of Philadelphia, 174 F.3d 368, 373-74 (3d Cir. 1999) (holding that due process does *not* require parents or their counsel to be included in such proceedings even if they are available, because such a requirement would “inhibit, deter and, at times, subvert the crucial function of ex parte custody hearings -- protecting children who are in imminent danger of harm”).

Once a child is removed, it is imperative that a meaningful temporary custody hearing be promptly convened. Such a hearing should begin no later than one week following the removal – just enough time for counsel for parents and children (who should be appointed immediately when the case is filed in court) to prepare for trial.<sup>91</sup> At this hearing, judges must be given enough information to make an informed and independent assessment of the threat to the child’s safety and the need for his or her immediate removal. This means providing sufficient staffing and courtroom space for trials to exceed one hour, and to continue on successive days, if necessary.<sup>92</sup> It also means providing counsel for parents who cannot afford it at the earliest possible time, and paying those counsel reasonable fees, so that lawyers will have both the time and incentive to advocate vigorously for their clients. In order to sustain an emergency removal following a hearing, proof by no less than clear and convincing evidence should be required, that the child

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<sup>91</sup> States currently sanction anywhere from a twenty-four hour to a twenty-four *day* delay in holding a hearing following an emergency removal. See Dobbin, Gatowski & Springgate, *supra* n. 16, at 45. It seems likely that the lengthier of these delays would be held unconstitutional if subjected to judicial scrutiny. See *Campbell v. Burt*, 949 F.Supp 1461 (D. Haw. 1996), *aff’d*, 141 F.3d 927 (9<sup>th</sup> Cir. 1998) (declaring one-week delay in providing post-removal hearing unconstitutional); *cf.* *Jordan v. Jackson*, 15 F.3d 333, 351 (4<sup>th</sup> Cir. 1994) (delay of sixty-five hours in providing post-removal hearing not unconstitutional but "is near, if not at, the outer limit of permissible delay between a child's removal from his home and judicial review" and probably would be unconstitutional "where a removal is effected other than during, or shortly prior to, a weekend"); see also *Patterson v. Armstrong County Children and Youth Services*, 141 F.Supp.2d 512, 541-42 (W.D.Pa. 2001) (holding that *Jordan* “clearly established” seventy-two hours as maximum constitutionally-permissible delay)

<sup>92</sup> See, e.g., Conn. Gen. Stat. § 46b-129(f). This Connecticut statute, which requires temporary custody hearings to be held on consecutive days absent “compelling” circumstances, was enacted as a result of the Pamela B. v. Ment lawsuit. See *supra* n. 1; see generally Thomas Scheffey, *A Baby Case with Grown-up Consequences: As Pamela B. Settles, the Courts Brace for an Onslaught of Termination-of-Parental-Rights Cases*, CONN. L. TRIB., Sept. 14, 1998, at 1. The same statute also effectively guarantees that such hearings will commence no later than twenty-four days following removal, much quicker than had been standard practice before the lawsuit but still considerably slower apparently than anywhere else in the country, and probably too slow to satisfy due process. See *supra* n. 91.



would be in imminent danger of serious bodily harm or death if returned home.<sup>93</sup>

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<sup>93</sup> *Cf. supra* n. 54. Proof by clear and convincing evidence is constitutionally required in termination of parental rights cases. *Santosky v. Kramer*, *supra* n. 13. “[A] statute authorizing interim intervention might require a standard of proof at least as great as that required for a final determination.” *Davis & Barua*, *supra* n. 42, at 156.

Whenever judges rule on emergency removals, they should be required to expressly weigh the risks of non-removal against those of removal.<sup>94</sup> Statutes might even specify the particular risks to be considered, including but not limited to the emotional trauma likely to result from separation, the risk that the child will experience multiple placements, and the heightened risk that the child will be abused or neglected in foster care. Decision-makers ought to be required to make specific, written findings as to why the risk of allowing the child to remain at home substantially outweighs the risks of removing him or her.<sup>95</sup>

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<sup>94</sup> See E. Gambrill & A. Shlonsky, *The Need for a Comprehensive Risk Management System in Child Welfare*, 23 CHILD. AND YOUTH SERV. REV. No. 1, 79, (2001) (arguing that risk assessment as currently employed focuses too much on risks associated with biological parents, while paying scant attention to “the risks posed by the system and its larger context.”).

<sup>95</sup> See Davis & Barua, *supra* n. 42, at 156-57, 159. Davis & Barua also recommend that judges be “routinely informed of the consequences” of their removal decisions, “whichever way they go,” and reframing statutory language to “stress the active nature” of a decision to uphold a removal. *Id.* at 157-58.

All of these reforms, while helpful, would not address more fundamental, structural problems that cause tens of thousands of unnecessary removals every year. Although a full discussion of these is beyond the scope of this article, several worth mentioning include the rise of defensive social work;<sup>96</sup> the perverse incentive structure of federal financial assistance,<sup>97</sup> the failure of the federal executive branch to enforce the requirement that states make “reasonable efforts” to obviate the need for removal in most cases;<sup>98</sup> and the dual-role structure of modern CPS agencies.<sup>99</sup>

In addition, the proposed reforms do not address the prevailing attitude – among the general public as well as many CPS insiders – that emergency removal is a magic bullet in the battle against child abuse and neglect, a conservative, risk-free way of “erring on the side of safety.” As I have argued above, seizing a child catapults him or her into a legal world in which checks and balances operate poorly, and that is at least as likely to perpetuate an initial mistake as to correct it. Especially today, since the advent of ASFA, this may have devastating and permanent effects. Ultimately, public education must counter the distorted image of the child protection system fostered by the media’s statutorily-enabled obsession with fatality cases, and put an end to the dangerous misconception that emergency removal is a quick-fix to the problem of child maltreatment.

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<sup>96</sup> See *supra* n. 25-30 and accompanying text.

<sup>97</sup> See, e.g., Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Placed in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1728 (2000) (book review).

<sup>98</sup> See Shawn L. Raymond, Note, *Where are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235 (1999).

<sup>99</sup> See LEROY H. PELTON, FOR REASONS OF POVERTY 111 (1989).