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A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families

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A CURE WORSE THAN THE DISEASE? THE IMPACT OF REMOVAL ON CHILDREN AND THEIR FAMILIES

VIVEK SANKARAN,* CHRISTOPHER CHURCH** & MONIQUE MITCHELL***

Removing children from their parents is child welfare's most drastic intervention. Research clearly establishes the profound and irreparable damage family separation can inflict on children and their parents. To ensure that this intervention is only used when necessary, a complex web of state and federal constitutional principles, statutes, administrative regulations, judicial decisions, and agency policies govern the removal decision. Central to these authorities is the presumption that a healthy and robust child welfare system keeps families together, protects children from harm, and centers on the needs of children and their parents.

Yet, research and practice—supported by administrative data—paint a different picture. They suggest a system that haphazardly and needlessly removes children from parents through an impersonal process driven by the convenience of the system at the expense of families. In fact, some of the processes designed to protect children from harm directly cause trauma to them. Too often, child welfare professionals remove children based on misplaced confidence in that safety intervention and without careful consideration of the consequences thereof. Whenever professionals remove children from their parents without carefully balancing the risks created by that intervention, they are culpable for the harm to children and their parents.

This Article focuses on how children and parents interacting with the child welfare system experience the removal process, the genesis of a foster care case. It analyzes the gaps and emergent issues in practice, research, and policy related to child removal. The Article concludes with specific policy and

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practice recommendations aimed at curbing child welfare's reliance on removal to foster care as its predominant safety intervention.

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I. INTRODUCTION

Taking children from their parents¹ is the government's most drastic intervention to protect children. While the intervention may be necessary to protect children, it can also inflict serious trauma on them. Because of this trauma, the decision to separate children from their parents must be carefully calibrated to ensure no child unnecessarily enters the foster care system.

To ensure this, a complex web of state and federal constitutional principles, statutes, administrative regulations, judicial decisions, and agency policies govern the removal decision, all intended to place a high burden on child welfare professionals to avoid removal if at all possible. Yet overwhelming inconsistencies plague the process by which child welfare professionals remove children, resulting in a process that is often unpredictable, traumatizing, and punitive for the children it is designed to protect.

Across the country, there is a wide range of practices concerning: (1) who has the authority to remove a child; (2) who makes the decision to remove a child; (3) the evidentiary burden required to remove a child; (4) how quickly an impartial judicial officer must review the removal decision; and (5) what occurs at that judicial review, including who must be given a lawyer. This Article addresses these questions and others related to the process by which children are removed from the custody of their parents.

Such questions are core to examining the government's *parens patriae* authority² to protect children from harm. While the protection of vulnerable children is certainly a compelling interest of any government, the United States balances this governmental interest against a parent's fundamental constitutional right to family integrity, including the right to direct the care, custody, and control of her children.³ Yet an examination of the foster care system tells the story of a bureaucracy that fails to carefully scrutinize the decision to separate children from their parents.

1. Throughout this Article, we use the term parent or parents for ease of reading to refer to the person(s) with legal responsibility for a child that is the subject of a civil child abuse and neglect proceeding. The authors recognize this term may apply to a variety of caretakers and the term may inadvertently exclude many person(s). The authors recognize this term is defined differently based on state law governing foster care proceedings.

2. *Parens patriae*, Latin for "father of the people," refers to the power of the State to usurp the legal rights of the natural parent, and to serve as the parent of any child who is in need of protection. See *The History of Child Welfare Law*, in *CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND STATE AGENCIES IN ABUSE, NEGLECT, AND DEPENDENCY CASES* 113, 126 (Marvin Ventrell & Donald N. Duquette eds., 2005).

3. The Supreme Court has recognized this right in numerous decisions. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400–01 (1923).

This Article contends that the process by which children are removed to foster care is incongruent with the core values of child welfare and the legal principles governing civil child abuse and neglect proceedings. This claim is explored through clinical, legal, and empirical arguments that expose the need for professionals to reexamine the values and principles that are guiding their decision to involuntarily remove children from their parents and place them in foster care. In Part Two, it examines the impact of removal on families, focusing on the different types of trauma experienced by children and their parents when children are involuntarily separated for the purpose of placement in foster care. In Part Three, it presents a legal overview of the removal process, highlighting the discrepancies across the country that are built into the legal framework governing removals. These discrepancies magnify the dissonance between child welfare removal practices and the important family rights at stake. In Part Four, it provides an overview of the removal process through an examination of administrative data collected by child welfare agencies concerning the children and families involved in state foster care systems.⁴ These data reveal: (1) the removal decision is haphazard; (2) significant uncertainties exist as to why children enter foster care; and (3) children may unnecessarily enter foster care. Finally, the Article concludes with specific policy and practice recommendations aimed at curbing child welfare's reliance on removal to foster care as a safety intervention.

The idiom serving as the title of this Article has its origins in Virgil's *Aeneid*, when Virgil penned the Latin phrase *aegrescitque medendo*.⁵ Virgil was forewarning readers of the unintended consequences of trying to help people who are facing complex problems.⁶ Acting under color of state law, child welfare professionals remove children from their parents more than 250,000 times a year.⁷ While removal is a necessary safety intervention to

4. Unless otherwise noted, the administrative data presented in this publication were made available by the National Data Archive on Child Abuse and Neglect (NDACAN), Cornell University, Ithaca, N.Y., and have been used with permission. Data from the Adoption and Foster Care Analysis and Reporting System (AFCARS) are originally collected by the state's child welfare agency pursuant to federal reporting requirements. The authors, in partnership with Fostering Court Improvement, have analyzed the data and analyses are on file with them. Neither the collector of the original data, the funder, the Archive, Cornell University, or their agents bear any responsibility for the analyses or interpretations presented in this paper. Correspondence related to data analysis should be directed to cchurch@law.sc.edu.

5. VIRGIL, *THE AENEID*, bk. XII 391 (Charles W. Eliot ed., John Dryden trans., Harvard Classics 1909) (19 B.C.); see also *Virgil*, WIKIQUOTE, https://en.wikiquote.org/wiki/Virgil#Book_XII [<https://perma.cc/MNK7-NDRJ>] (last visited Aug. 8, 2018).

6. See VIRGIL, *supra* note 5, at 394–97.

7. See AFCARS Files, *supra* note 4, FFY 2009–2017 (analysis on file with author).

protect some children, it is also disproportionately wielded against impoverished families facing little more than social and environmental stressors.⁸ Identifying services and resources to serve these families, rather than separate them, has been a child welfare priority and legal requirement for decades.⁹ Yet child welfare has habituated flawed removal practices in cases in which services or resources may have alleviated the need for child–parent separation. Child welfare professionals must get the removal calculus right and invoke the remedy only when absolutely necessary to protect children from serious, imminent harm. The insufficient knowledge about the traumatic impact of removal on families and the malleability of removal practices across the United States combine for an indefensible confidence in removal as a safety intervention. In too many cases, removal is overutilized by well-meaning professionals. In those instances, a difficult admission regarding child welfare’s use of removal as safety intervention is deserved: *aegrescitque medendo*.

II. IMPACT OF REMOVAL ON CHILDREN AND THEIR PARENTS

The moment children are removed from the custody of their parents, their lives are forever changed. The placement in foster care separates children from parents, siblings, teachers, friends, communities, and most other things familiar to their lives. Familiarity is replaced by a pervasive sense of ambiguity: an inherent confusion about what is happening and why, and when it will end.¹⁰ Ambiguity inundates the removal process: children are faced with unpredictability, unfamiliarity, and a lack of clarity about: (1) why they are in foster care (i.e., placement reason ambiguity); (2) the meaning of foster care (i.e., structural ambiguity); (3) how long they will be in foster care (i.e., temporal ambiguity); (4) where they will be living (i.e., placement context ambiguity); (5) the people with whom they will be living (i.e., relationship ambiguity), and (6) their roles in familial environments (i.e., role ambiguity).¹¹

8. See Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1491 (2007) (noting that poverty plays a role in roughly half of all foster care cases); Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 257 (2006) (observing that most children placed in foster care come from poor families, and that decreases in family income increases the likelihood of neglect); Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 789 (2001) (noting the correlation between poverty and foster care placement).

9. See, e.g., JUDGE LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 7–9 (2014).

10. MONIQUE B. MITCHELL, THE NEGLECTED TRANSITION: BUILDING A RELATIONAL HOME FOR CHILDREN ENTERING FOSTER CARE 6 (2016).

11. *Id.* at 5.

Most importantly, when left unattended, ambiguity can and will traumatize children who have been removed from their parents.¹²

A. The removal and placement of children in foster care can traumatize children.

Within a child welfare context, trauma is often explored through the lens of what has happened to a child *before* or *after* he/she enters foster care; however, it is critical to consider how children may experience trauma due to *entering* foster care.¹³ Not only are children in foster care forced to live apart from their parents, they are also expected to form new relationships with unfamiliar people (e.g., foster parents, lawyers, teachers, agency staff, providers, foster siblings). Moreover, children can and often do experience multiple placements over the course of their time in foster care.¹⁴ Unanticipated placement changes negatively impact a child's psychological well-being and can cause relational losses, disenfranchised grief, and complex trauma.¹⁵ Complex trauma is caused by exposure to multiple unresolved traumatic events that compromise personal safety and interpersonal well-being.¹⁶ Children who have experienced complex trauma may suffer from body dysregulation, difficulty managing emotions,

12. Monique B. Mitchell & Leon Kuczynski, *Does Anyone Know What is Going On? Examining Children's Lived Experience of the Transition into Foster Care*, 32 CHILD. AND YOUTH SERV. REV. 437, 438 (2009).

13. *Id.* at 437.

14. During the 2017 FFY, there were nearly 165,000 placement changes for the 719,000 children that spent some amount of time in foster care. Just over one-third (36%) of those placement changes were *lateral* placement changes. That is, they were placement changes between the same placement type, i.e., a non-relative foster care placement to another non-relative foster care placement, or a child caring institution to another child caring institution. The federal government has traditionally measured placement instability largely agnostic to placement changes that may be planned and may promote positive child welfare outcomes, such as a move from an institutional setting to a pre-adoptive home. Although placement stability is a complex priority to measure with any single metric, administrative data, such as those presented above, reveal many children suffer placement instability that is likely unanticipated, thus compounding their trauma and sense of loss. See AFCARS Files, *supra* note 4, FFY 2009–2017 (analysis on file with author).

15. See MITCHELL, *supra* note 10, at 6; Monique B. Mitchell, "No One Acknowledged My Loss and Hurt": *Non-death Loss, Grief, and Trauma in Foster Care*, 35 CHILD AND ADOLESCENT SOC. WORK J. 1, 4–5 (2017) [hereinafter "No One Acknowledged My Loss and Hurt"]; Monique B. Mitchell, *The Family Dance: Ambiguous Loss, Meaning Making, and the Psychological Family in Foster Care*, 8 J. FAM. THEORY & REV. 360, 362 (2016) [hereinafter *The Family Dance*]; David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-being for Children in Foster Care*, 119 PEDIATRICS 336, 343 (2007).

16. *Complex Trauma*, NAT'L CHILD TRAUMATIC STRESS NETWORK, <https://www.nctsn.org/what-is-child-trauma/trauma-types/complex-trauma> [https://perma.cc/YG58-PPHF] (last visited Aug. 8, 2018).

dissociation, poor self-regulation and self-concept, cognitive impairment, and multiple long-term health consequences.¹⁷ Therefore, it is critical for child welfare professionals to consider the impact of trauma and ensure that all efforts have been made to mitigate the potential for complex trauma by keeping families safe and together.

Research, policy, and practice indicate that child removal and entry into foster care evokes emotional and psychological trauma and is the most drastic safety intervention utilized by a child welfare agency.¹⁸ The harm that can occur as a result of removal results in a “monsoon of stress hormones . . . flood[ing] the brain and body.”¹⁹ Even brief separations can cause the release of higher levels of cortisol—stress hormones—that begin to damage brain cells.²⁰ And, unlike other areas of the body, research suggests that “most cells in the brain cannot renew or repair themselves.”²¹ The evidence about the harm of involuntarily separating children from their parents is so overwhelming that Dr. Charles Nelson, professor of Pediatrics at Harvard Medical School, concluded: “There’s so much research on this that if people paid attention at all to the science, they would never do this.”²² In the context of foster care cases, perhaps not *never*, but certainly *less*.

17. *See id.*

18. *Id.*; see Kimberly Howard et al., *Early Mother–Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5, 21 (2011) (finding that separating children from mothers led to higher negativity towards mother and aggression); Allison Eck, *Psychological Damage Inflicted By Parent–Child Separation is Deep, Long-Lasting*, NOVA NEXT (June 20, 2018), <http://www.pbs.org/wgbh/nova/next/body/psychological-damage-inflicted-by-parent-child-separation-is-deep-long-lasting/> [<https://perma.cc/ND65-53GP>] (“The scientific evidence against separating children from families is crystal clear We all know it is bad for children to be separated from caregivers.”); Sara Goudarzi, *Separating Families May Cause Lifelong Health Damage*, SCI. AM. (June 20, 2018), <https://www.scientificamerican.com/article/separating-families-may-cause-lifelong-health-damage/> [<https://perma.cc/2K8M-K2J4>] (describing how removal can cause developmental regression, difficulty in sleeping, depression and acute stress, and can also lead to long-term chronic medical conditions like cardiovascular disease, hypertension, obesity and a shorter lifespan); William Wan, *What Separation from Parents Does to Children: ‘The Effect Is Catastrophic,’* WASH. POST (June 18, 2018), https://www.washingtonpost.com/national/health-science/what-separation-from-parents-does-to-children-the-effect-is-catastrophic/2018/06/18/c00c30ec-732c-11e8-805c-4b67019fcfe4_story.html?utm_term=.2731f2fd1d3 [<https://perma.cc/59KF-UY2S>] (describing studies showing that children separated from parents had lower IQ test scores, higher rates of aggression, and were more likely to be involved in the criminal justice system and suffer from substance abuse issues).

19. Eck, *supra* note 18.

20. *Id.*

21. Wan, *supra* note 18.

22. *Id.*

Significant gaps exist in state policy and practice, which fail to address the impact of child removal on children and their parents. This intervention, which is intended to mitigate serious, imminent harm, has the potential to cause its own serious, imminent harm. The *apprehension transaction* (i.e., the transaction involving a child's removal from his/her original home and the successive transfer into foster care) exposes children to an event that challenges their understanding of self, interpersonal relationships, and the safety and stability of the world in which they live.²³ When children are removed from their families—often suddenly and without warning—and transferred to a new family environment, children have a harmful physiological response, rooted in stress, and far too often are traumatized.²⁴ While discussing their involvement in the apprehension transaction, children report experiences of ambiguity, loss, and trauma and often equate child removal to kidnapping.²⁵ Children's reports suggest that the apprehension transaction is often interpreted as a threat to their well-being and an event that should be avoided if at all possible. When it is necessary to remove a child due to safety issues that cannot be addressed in less intrusive ways, this transaction requires sensitivity, competency, and trauma-informed knowledge.

More than half of the children who enter foster care will be placed with people whom they have never met.²⁶ This experience of *relationship ambiguity* further complicates a child's experience. In addition to their trying to make sense of the reason they were removed from their home, children struggle with acclimating to unfamiliar people and unfamiliar environments. This dynamic can evoke further experiences of ambiguity: *role ambiguity*.²⁷ As a result of being forced to engage in familial environments which involve unfamiliar people and unfamiliar environments, children may question whether the family roles in which they served prior to entering foster care (e.g., identifying as a son/daughter, brother/sister, etc.) can be preserved or are now obsolete.²⁸ The anguish experienced by role ambiguity can have a significant strain on a child's psychological and emotional well-being and interpersonal relationships.²⁹

23. Mitchell & Kuczynski, *supra* note 12, at 440–41.

24. *The Family Dance*, *supra* note 15, at 362.

25. Mitchell & Kuczynski, *supra* note 12, at 440.

26. On September 30, 2017, only 32% of children in foster care were placed in a Relative Foster Care placement and 5% in Trial-Home Visit (a placement for children to be with their parent as the case progresses towards reunification). See AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

27. Mitchell & Kuczynski, *supra* note 12, at 443.

28. *See id.* at 441, 443.

29. *See id.*

While experiencing this strain, children also struggle with the separation from their family and friends.

Ambiguous loss (a lack of clarity about the psychological or physical presence of members in the psychological family) can traumatize children because they are grieving the loss of a family member who is not dead, but is out there *somewhere*.³⁰ Ambiguous loss, a non-death loss, can provoke anxiety, confusion, despair, and other negative mental health experiences.³¹ Research suggests that these experiences are often left unattended by the child welfare system.³² Without adequate attention, children may suffer from additional stressors that can have a negative impact on their mental and behavioral health, and immediate and long-term well-being. In one prominent study of foster care alumni, 25% of foster care alumni were found to experience post-traumatic stress disorder, a rate which is nearly twice as high as the rate documented by U.S. war veterans.³³ These findings challenge us to consider how to mitigate the long-term negative effects on children who have been separated from their parents and linger, sometimes needlessly, in foster care.

B. The removal and placement of children in foster care can traumatize their parents.

Child removals not only pose a psychological threat for the children who have been removed; family separation can cause ambiguity for the entire family. In a study involving mothers who had experienced the removal of their children, participants reported that their identity as mothers were challenged by having their children removed.³⁴ For example, one mother reported, “They’ve [CPS] taken my kids away. I don’t have anybody to mother.”³⁵ In other words, mothers reported that their inability to assert their rights, responsibilities, and identity as a mother resulted in role ambiguity. Role ambiguity causes confusion, grief, and trauma for mothers when they no longer believe they have a parental role to serve in *their* children’s lives.³⁶ In addition to experiencing

30. See PAULINE BOSS, *AMBIGUOUS LOSS: LEARNING TO LIVE WITH UNRESOLVED GRIEF* 5–8 (1999).

31. *Id.* at 23–24.

32. See “*No One Acknowledged My Loss and Hurt*”, *supra* note 15, at 4.

33. PETER J. PECORA ET AL., *IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY I*, 1 (Casey Family Programs 2005).

34. Kendra L. Nixon et al., “*Every Day It Takes a Piece of You Away*”: *Experiences of Grief and Loss Among Abused Mothers Involved with Child Protective Services*, 7 J. PUB. CHILD WELFARE 172, 182–83 (2013).

35. *Id.* at 183.

36. *Id.* at 176.

role ambiguity, parents who have had their children removed report experiencing ambiguous loss, not knowing when they would get their children back.³⁷ Parents discuss how knowing their children are out there *somewhere* yet not with them can evoke feelings of grief, loss, confusion, and despair.³⁸ As one mother explains:

I went insane. I broke down, nearly died. I couldn't stay in my house. I couldn't be around their clothes . . . I found myself just wandering around looking for them. Even though, you know, they are not there. It's just—it's traumatizing. It's awful. [sobbing] . . . It's as if the three of them died. One day just died. That's the grief that I went through. That's the pain that I went through. But meanwhile they didn't [die]. Somebody's got them. Somebody's keeping them from me . . . It was too much.³⁹

Undoubtedly, the mental and social health outcomes of parents can deteriorate when a child is removed from their home and placed into foster care.⁴⁰ Mothers who have been separated from their children and whose children have been placed into foster care were found to have increased rates of anxiety and substance use disorder diagnoses within two years of being separated from their children.⁴¹ Support is not only needed, it is necessary. Ideally, the provision of this support would be provided to parents well before the need to warrant a child's removal as child removal often exacerbates the problem.

C. There are insufficient practice standards and training for professionals involved in the removal and placement of children in foster care.

Despite the trauma that is caused by child removal, very little guidance is offered in policy and practice regarding how to mitigate child removals and, for non-preventable child removals, how to conduct child removals within a trauma-informed framework. For example, law enforcement, an entity that is regularly authorized by law to remove children from their parents, are not required to receive trauma-informed training on the psychological and emotional impacts of removals on children and their parents during the

37. *Id.* at 184.

38. *Id.* at 180.

39. *Id.* (alteration in original).

40. *Id.* at 183; E. Wall-Wieler et al., *Maternal Health and Social Outcomes After Having a Child Taken into Care: Population-based Longitudinal Cohort Study Using Linkable Administrative Data*, 71 J. EPID. COMM. HEALTH 1145 (2017).

41. See Nixon et al., *supra* note 34, at 186.

apprehension transaction.⁴² Furthermore, many states do not require a trauma-informed clinician to be present and available to children and their parents when children are being physically removed from their home.⁴³ Consequently, children and their parents never receive the psychological and emotional support needed during moments where they are vulnerable to conditions that will almost certainly traumatize them. Further complicating this issue, state child welfare agency policies permit up to seven days before a caseworker is required to establish an initial visit with a child post-removal.⁴⁴ Therefore, the trauma experienced by children during this period where little communication occurs is at odds with child welfare's core charge: protecting children from harm. This process of non-communication creates more problems for a child than it is designed to resolve.

The United States' child welfare system authorizes considerable stressors on the children and parents it aims to serve, most of which are preventable.

III. THE CHILD REMOVAL PROCESS

Given the trauma the removal process can inflict on children and their parents, it is crucial that the legal system closely monitors this process to ensure that only those children who must be removed are removed. Yet, in various ways, the process by which children can be removed is haphazard—varying from jurisdiction to jurisdiction—raising serious questions about the efficacy of the legal system in preventing unnecessary removals.

First, state laws vary on who can immediately remove children from their parents without a court order in emergency situations. In most states, statutes authorize law enforcement officers to remove children from their parents.⁴⁵ In some states, child welfare agency staff (e.g., case workers or investigators) can remove children.⁴⁶ Other states authorize private citizens (e.g., doctors, prosecuting attorneys, nurses, or nurse practitioners) with the discretion to

42. LISA H. THURAU, OJP DIAGNOSTIC CTR., *FIRST, DO NO HARM: MODEL PRACTICES FOR LAW ENFORCEMENT AGENCIES WHEN ARRESTING PARENTS IN THE PRESENCE OF CHILDREN* 5 (2012).

43. *See, e.g.*, ALA. CODE § 12-15-306 (2018); MICH. COMP. LAWS ANN. § 712A.14a(1) (West 2018); N.M. STAT. ANN. §§ 32A-3B-3(A), 32A-3B-4(A) (West 2019).

44. *See, e.g.*, GA. DIV. OF FAMILY & CHILD. SERVS., *CHILD WELFARE POLICY MANUAL*, CHAPTER 10 FOSTER CARE § 19 (June 2016); OR. DEP'T HUMAN SERVS., *CHILD WELFARE PROCEDURAL MANUAL*, CHAPTER 3 MANAGING CHILD SAFETY, § 3 TRANSFER OF A CASE 2.

45. *See, e.g.*, ALA. CODE § 12-15-306(a); COLO. REV. STAT. § 19-3-401(1) (2018); MICH. COMP. LAWS ANN. § 712A.14a(1); N.D. CENT. CODE § 27-20-13 (2017); N.M. STAT. ANN. § 32A-3B-3.

46. *See, e.g.*, ARK. CODE ANN. § 12-18-1001(a) (2018); MONT. CODE ANN. § 41-3-301(1) (West 2017); N.C. GEN. STAT. § 7B-500(a) (2018); TENN. CODE ANN. § 37-1-113(a)(3) (2018).

separate a parent from their child.⁴⁷ The breadth of people lawfully authorized to remove children from their parents raises questions about their training, qualifications, and capacities to make this life-changing decision.

Second, in addition to states varying in the designations of professionals authorized to remove a child without a court order, states also vary on the legal standard that must be met before an emergency removal can occur. For example, some states such as Florida and North Carolina allow removals to occur whenever an authorized individual has reason to believe that a child is a victim of abuse or neglect.⁴⁸ Others states, such as Alabama, Connecticut and Kentucky, demand evidence that a child is in imminent danger of serious or substantial harm.⁴⁹ Several states, including Colorado and Michigan, mandate a demonstration that no service or program could be delivered to the family that would obviate the need to remove the child from the home.⁵⁰ This is consistent with federal law that requires states to make reasonable efforts to prevent children from entering foster care,⁵¹ although this requirement is inconsistently enforced.⁵² Lastly, there are other states, for example, Illinois, Indiana and New Jersey that require a particularized showing that immediate removal is absolutely necessary because the delay in proceeding to court and obtaining an order would create the risk of significant harm to the child.⁵³

The following example illustrates the significant differences between these standards. Consider the case of Debra Harrell, whose nine-year-old child was found playing alone at a local park while her mother worked a shift at McDonald's.⁵⁴ Ms. Harrell could not afford day care so, rather than have her child stay at McDonald's, she sometimes allowed the child to play at the park.⁵⁵

47. See, e.g., IOWA CODE ANN. § 232.79(1) (West 2018); KY. REV. STAT. ANN. § 620.040(5)(b) (West 2018); WYO. STAT. ANN. § 14-3-405(b) (West 2018).

48. FLA. STAT. ANN. § 39.401(1)(b) (West 2018); N.C. GEN. STAT. § 7B-500(a).

49. ALA. CODE § 12-15-306(a)(1); CONN. GEN. STAT. ANN. § 17a-101g(e) (West 2019); KY. REV. STAT. ANN. § 620.040(5)(c).

50. COLO. REV. STAT. § 19-3-401(1.5); MICH. COMP. LAWS ANN. § 712A.14b(1)(c)-(d) (West 2018).

51. 42 U.S.C. § 671(a)(15) (2019).

52. See 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, 226-29 (2016).

53. ILL. ADMIN. CODE tit. 89, § 300.120(a)(1)-(2) (2018); IND. CODE ANN. § 31-34-2-3(a)(2) (West 2018); N.J. STAT. ANN. § 9:6-8.29(a) (West 2018).

54. See Diana Reese, *South Carolina Mom Who Left Daughter at Park Sues TV Station*, WASH. POST (Aug. 14, 2014), https://www.washingtonpost.com/blogs/she-the-people/wp/2014/08/14/south-carolina-mom-who-left-daughter-at-park-sues-tv-station/?utm_term=.13e5b2bad4a1 [<https://perma.cc/X2TR-LN5M>].

55. See *id.*

But when another adult noticed the child by herself, she called the police.⁵⁶ After the police officer arrived, he arrested Ms. Harrell for child abandonment and placed her daughter in foster care.⁵⁷

The various legal standards significantly alter the legal response to such a situation. In some jurisdictions, regardless of whether the officer could have contacted the court to obtain an order, if the officer determines that the child has been neglected—an inherently subjective determination—the officer can remove that child immediately.⁵⁸ In other states, the police officer must also determine that the child is in immediate danger of substantial harm.⁵⁹ In a few other states, the officer would have to ascertain whether any services can be put in the home to prevent the removal.⁶⁰ Some states would not permit the immediate removal unless the officer first determined that the situation was so life endangering that the officer did not have time to seek a court order.⁶¹ These differences play a major role in how individuals view their authority to take children from their parents without a court order.

The statutes also send a clear message about how states view the impact of removal on children and their parents. States that permit individuals to remove a child based solely on suspicion of abuse or neglect have created a scheme that encourages removals based on one individual's subjective determination.⁶² This scheme does little, if anything, to ensure a removal is absolutely necessary prior to the apprehension transaction. Whereas other states, with a stringent standard for *ex parte* removals, require not only a finding of abuse or neglect, but also a finding of immediate danger that demonstrates that services cannot address the problem and that proceeding to court is not feasible.⁶³ Ultimately, states with stringent standards for *ex parte* removals reaffirm the notion that children should only be removed as a means of last resort.

56. *See id.*

57. *See id.*

58. *See, e.g.*, FLA. STAT. ANN. § 39.401(1)(b) (West 2018); N.C. GEN. STAT. § 7B-500(a) (2018).

59. ALA. CODE § 12-15-306(a)(1) (2018); CONN. GEN. STAT. ANN. § 17a-101g(e) (West 2019); KY. REV. STAT. ANN. § 620.040(5)(c) (West 2018).

60. COLO. REV. STAT. § 19-3-401(1.5) (2018); MICH. COMP. LAWS ANN. § 712A.14b (West 2018).

61. *See, e.g.*, ILL. ADMIN. CODE tit. 89, § 300.120(a)(1)–(2) (2018); IND. CODE ANN. § 31-34-2-3(a)(2) (West 2018); N.J. STAT. ANN. § 9:6-8.29(a) (West 2018).

62. *See, e.g.*, N.C. GEN. STAT. § 7B-500(a) (2018).

63. ILL. ADMIN. CODE tit. 89, § 300.120(a)(1)–(2); IND. CODE ANN. § 31-34-2-3(a)(2); N.J. STAT. ANN. § 9:6-8.29(a).

In addition to determining who has the authority to remove and which findings are necessary to remove, states also vary on the timing of how quickly courts must review an emergency removal once it has occurred. A number of jurisdictions require courts to hold hearings within twenty-four hours after a child has been removed.⁶⁴ Other jurisdictions grant courts longer timeframes, between forty-eight and ninety-six hours, to review the emergency removal.⁶⁵ Yet there are a few outliers. For example, Arizona requires a hearing “not fewer than five days nor more than seven days” after a child is removed from their parents.⁶⁶ North Carolina permits the hearing to be held within seven calendar days.⁶⁷ New Mexico mandates a hearing to be held within ten days after a petition is filed.⁶⁸ Montana only requires a hearing to occur within twenty days of the emergency removal.⁶⁹ That is, in Montana, a child and parent may wait nearly three weeks before they will have the opportunity to challenge the lawfulness of an agency’s removal of the child from their home.

The differences in due process protections among states raise significant concerns. Some parents and children have the opportunity to contest an emergency removal order within twenty-four hours of the apprehension transaction. However, for parents in other states, it may take weeks before they have any opportunity to appear before a judge. In the interim, without active court oversight, important decisions are made exclusively by the child welfare agency, decisions which could mitigate or intensify the trauma experienced by children and their parents including where children are placed, what school they attend, what services they receive, and how often children see their parents.⁷⁰ Given the traumatic impact of a removal, states must consider whether their standards and respective processes sufficiently safeguard against unnecessary removals.

Finally, when a parent appears in court, their ability to effectively challenge an emergency removal will vary based on whether they are afforded the right to receive the assistance of an attorney. Attorneys play a critical role in

64. See, e.g., FLA. STAT. ANN. § 39.401(5) (West 2018); MICH. CT. R. 3.965(A)(1) (2019); MISS. CODE ANN. § 43-21-303(4) (West 2018); N.J. STAT. ANN. § 9:6-8.31(a) (West 2018).

65. See, e.g., CONN. GEN. STAT. ANN. § 17a-101g(f) (West 2019); MINN. STAT. ANN. § 260C.178(a) (West 2019); N.H. REV. STAT. ANN. § 169-C:6 (2018); NEV. REV. STAT. ANN. § 432B.470(1) (West 2017); S.C. CODE ANN. § 63-7-710(A) (2016); S.D. CODIFIED LAWS § 26-7A-14 (2019); WYO. STAT. ANN. § 14-3-405(d) (West 2018).

66. ARIZ. REV. STAT. ANN. § 8-824(A) (2018).

67. N.C. GEN. STAT. ANN. § 7B-506(a) (West 2018).

68. N.M. STAT. ANN. § 32A-4-18(A) (West 2018).

69. MONT. CODE ANN. § 41-3-301(7) (West 2017).

70. See Sankaran & Church, *supra* note 52, at 209.

challenging erroneous removals. They remind the court of the correct legal standards, provide key information to the court and, when removal is necessary, can identify alternative placements and resources for the children.⁷¹ Attorneys also counsel clients on their options, explain complicated legal processes, and help guide parents through a complex and overwhelming bureaucracy. Unsurprisingly, research has demonstrated that the early appointment of counsel can reduce the need for children to be removed or can expedite reunifications.⁷² A national consensus has coalesced around the notion that parents' attorneys must be appointed at the outset of a child welfare case.⁷³

Yet many states do not appoint counsel for parents early in the child welfare process. For example, in Mississippi, no statute affords parents an absolute right to counsel, allowing courts to completely deny parents the right to a lawyer throughout an entire child welfare case, even prior to the termination of their parental rights.⁷⁴ In other jurisdictions, while parents may receive the assistance of a lawyer at some later stage of a child welfare case, they are not entitled to a lawyer at the first removal hearing. For example, in Texas, parents are first appointed counsel at the full adversary hearing, which only occurs fourteen days after the child has been removed.⁷⁵ This delay in appointment increases the likelihood that the court will be deprived of information to properly vet the removal decision. Other states provide courts with discretion to appoint counsel. For example, in Delaware, a court's decision whether to appoint counsel is purely discretionary, based on "the degree to which the loss of parental rights are at stake; the risk of an erroneous deprivation of those rights through the dependency proceedings; and the interest of [the child welfare

71. For information about the different ways in which parents' attorneys can assist their clients, see generally MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY DEFENDERS (2015).

72. See Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, 46 FAM. L.Q. 139, 154 (2012) (documenting studies showing that strong parent representation services the interests of children in child welfare cases).

73. See, e.g., U.S. DEP'T OF HEALTH & HUMAN SERVS., ACYF-CB-IM-17-02, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 3 (Jan. 17, 2017).

74. MISS. CODE ANN. § 43-21-201(1) (West 2018) (listing no right to appointed counsel); MISS. CODE ANN. § 93-15-113(2)(b) (West 2018) ("If an indigent parent does not have counsel, the court shall determine whether the parent is entitled to appointed counsel under the Constitution of the United States, the Mississippi Constitution of 1890, or statutory law . . ."); see also J.C.N.F. v. Stone Cty. Dep't of Human Servs., 996 So. 2d 762, 772 (Miss. 2008) (finding that the trial court did not err in denying counsel to an indigent parent); K.D.G.L.B.P. v. Hinds Cty. Dep't of Human Servs., 771 So. 2d 907, 910 (Miss. 2000) (noting that "appointment of counsel in termination proceedings, while wise, is not mandatory . . .").

75. TEX. FAM. CODE ANN. § 262.201(a) (West 2017).

agency] as to the ultimate resolution.”⁷⁶ Similar statutory frameworks exist in Minnesota,⁷⁷ Nevada,⁷⁸ Oklahoma,⁷⁹ Wisconsin,⁸⁰ Virginia,⁸¹ Missouri,⁸² and Wyoming.⁸³ In these jurisdictions, courts have vast discretion, on a case-by-case basis, to determine whether parents should be appointed counsel.

Even in states in which parents’ right to counsel at the first court hearing appears to be strong, problems with early appointment exist. For example, in Michigan, although indigent parents are entitled to counsel at their first court appearance, hearings can be continued—for up to two weeks—to allow courts the time to locate attorneys willing to take such appointments.⁸⁴ While a court can continue the hearing to find a lawyer, it can also continue the placement of a child outside her home, away from her parents, during that time.⁸⁵ Thus, in practice, many parents still lose their children to foster care without ever having a lawyer advocate on their behalf. In Washington, D.C., a statute permits courts to appoint a guardian *ad litem* for children⁸⁶ immediately upon the child’s removal—prior to the first court hearing—presumably to allow the attorney to work with others to try to resolve issues, including the need for an out of home

76. DEL. FAM. CT. R. CIV. PRO. 206(a)–(b) (West 2018).

77. MINN. STAT. ANN. § 260C.163(3)(c) (West 2018) (court may appoint counsel “in any case in which it feels that such an appointment is appropriate . . .”).

78. NEV. REV. STAT. ANN. § 128.100(2) (West 2017).

79. OKLA. STAT. ANN. tit. 10A, § 1-4-306(A)(1)(a) (West 2018) (“counsel may be appointed by the court at the emergency custody hearing . . .”).

80. Wisconsin has no statute allowing trial courts to appoint counsel for parents prior to the termination of parental rights hearing, but its supreme court has ruled that courts must have the discretion to appoint counsel when necessary. *See* *Joni B. v. State*, 202 Wis. 2d 1, 18, 549 N.W.2d 411, 417–18 (1996) (“We emphasize that the key to an individualized determination is that the need to appoint counsel will differ from case to case. In other words, a circuit court should only appoint counsel after concluding that either the efficient administration of justice warrants it or that due process considerations outweigh the presumption against such an appointment.”).

81. VA. CODE ANN. § 16.1-266(D) (West 2018) (“Prior to a hearing at which a child is the subject of an initial foster care plan filed pursuant to § 16.1-281, a foster care review hearing pursuant to § 16.1-282 and a permanency planning hearing pursuant to § 16.1-282.1, the court shall consider appointing counsel to represent the child’s parent or guardian.”).

82. MO. ANN. STAT. § 211.211(4) (West 2018) (court shall appoint counsel only if it finds: “(1) That the custodian is indigent; and (2) That the custodian desires the appointment of counsel; and (3) That a full and fair hearing requires appointment of counsel for the custodian.”).

83. WYO. STAT. ANN. § 14-2-318(a) (West 2018) (“The court may appoint counsel for any party who is indigent.”).

84. MICH. CT. R. 3.965(B)(11) (2019).

85. *Id.* R. 3.965(B)(11)–(13).

86. A guardian *ad litem* is an advocate appointed to represent what he or she believes is in the child’s best interest.

placement for the child.⁸⁷ However, the statute does not allow those same courts to appoint lawyers to represent parents until the day of the actual hearing, which could be three days after the child's removal.⁸⁸ This system denies the parents' lawyers the same chance to adequately prepare for the hearing and have a meaningful impact on the outcome. It also ignores the expansive body of research on traumatic separation related to children removed to foster care and deprives parent attorneys the opportunity to promote family autonomy by preventing unnecessary removals before they occur.

The procedural infirmities that surround the removal process should concern anyone seeking to ensure that children are not traumatized by unnecessary removal and placement in foster. But how often are unnecessary removals actually taking place in the United States? While not conclusive, the next Section examines administrative data that raise concerns about the removal process.

IV. REMOVAL DYNAMICS IN THE FOSTER CARE SYSTEM

This Section contains an empirical exploration of the clinical and legal claims advanced in this Article, raising concerns about how often children are removed, why children are removed, and whether children are unnecessarily removed.

Each year since 2009, the United States foster care system has removed children from their parents on more than 250,000 occasions.⁸⁹ In other words, the efforts by the U.S. child welfare system to prevent removal from the home fail over 250,000 times per year. Each time, an individual, acting under color of state law, physically separated a child from their parents representing to a court that reasonable efforts were made to prevent the removal or the circumstances fit an exception.⁹⁰ While not dispositive, the patterns in the variation of the data raise many concerns as to how often this intervention is appropriately invoked.

A. The Likelihood a Child Enters Foster Care Varies Significantly Across States, Counties, and Other Geographical Boundaries.

One major criticism advanced in this Article is the lack of uniformity among policies and practices governing the decision to involuntarily remove a child from their parents. The data support this claim.

87. D.C. CODE Ann. § 16-2312(a)(1)(A) (West 2019).

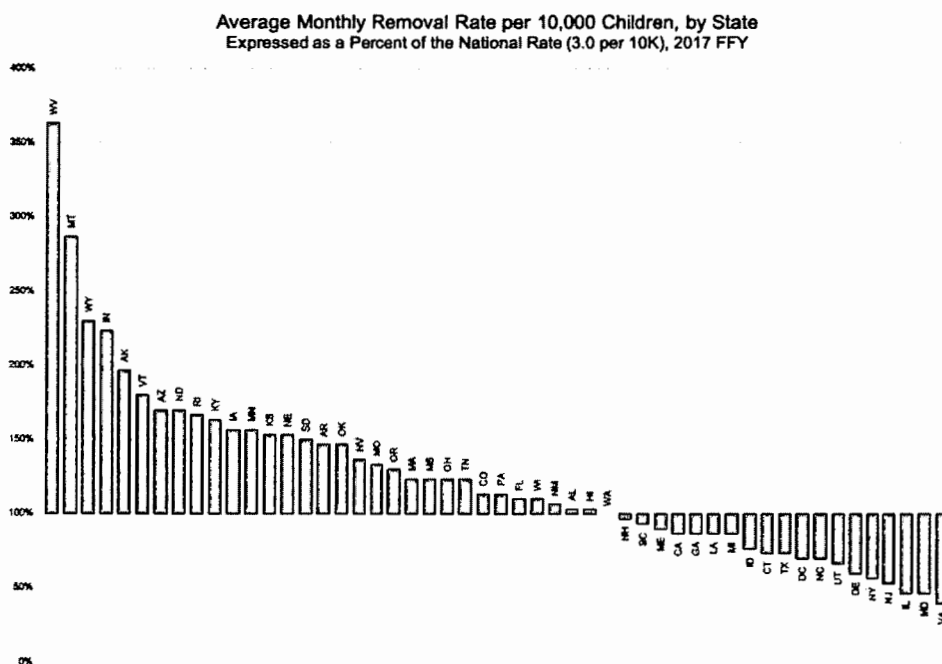
88. *Id.* § 16-2312(c).

89. See AFCARS Files, *supra* note 4, FFY 2009–2017 (analysis on file with author).

90. 42 U.S.C. § 671(a)(15) (2019).

During the 2017 federal fiscal year (“FFY”), there were 266,738 child removals, which represented an average monthly removal rate of 3 child removals for every 10,000 children in the population.⁹¹ While some differences in rates of removal across geographies is expected, the extent of the variance is concerning. Consider West Virginia, where the average monthly removal rate (10.9 per 10K children) during the 2017 FFY was more than ten times that of neighboring Virginia (1.2 per 10K).⁹² Across all states, the average monthly removal rate varies by a factor as much as 10 to 1 (see Figure 1).⁹³

Figure 1: Statistical Dispersion Across States in Average Monthly Removal Rate, 2017 FFY⁹⁴



Similar variance exists within states across county lines, agency regions, judicial circuits, and other geographical boundaries.⁹⁵ Variance within states may be more concerning, because local jurisdictions presumably operate under

91. See AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

a more consistent removal standard informed by state law and state agency policy. Yet there is no shortage of examples that demonstrate the significant statistical dispersion in removal rates within a state. Consider the Atlanta, GA metropolitan area: the average monthly removal rate in DeKalb County (2.1 per 10K) during the 2018 FFY was twice the rate of neighboring Gwinnett County (1.4 per 10K).⁹⁶

It is tempting to justify this dispersion on grounds such as differences in child poverty rates, caretaker substance abuse, or available resources in a community. Such justifications line up with the many prevailing views on why differences in removal rates may be so stark across geographies.⁹⁷ Yet child poverty, among the more commonly offered explanatory variables,⁹⁸ measured against removal rates yields a very weak association.⁹⁹ More practically, reconsider these data for the Atlanta Metropolitan area by county example, as shown below.¹⁰⁰

	Child Poverty Rate	Avg. Monthly Removal Rate
<i>Gwinnett County</i>	16.5%	1.0 per 10K
<i>DeKalb County</i>	25.8%	2.1 per 10K
<i>Fulton County</i>	24.3%	1.6 per 10K
<i>Georgia</i>	23%	2.7 per 10K

96. Regional Rankings on Select Performance Indicators, FOSTERING COURT IMPROVEMENT (2017–2018), www.fosteringcourtimprovement.org/ga [<https://perma.cc/6CXL-WBBW>].

97. See, e.g., Jeff Jenkins, *Kanawha County Child Removal Numbers Staggering*, METRONews (Aug. 3, 2018), <http://wvmetronews.com/2018/08/03/kanawha-county-child-removal-numbers-staggering> [<https://perma.cc/6EU5-AHLT>] (substance abuse); Ben Renner, *Opioid Epidemic Linked to Alarming Spike in Children Sent into Foster Care*, STUDY FINDS (Aug. 6, 2018), <https://www.studyfinds.org/opioid-epidemic-children-foster-care-florida> [<https://perma.cc/Q63T-F485>]; Katie Stancombe, *Neglect or Not? DCS Study Takes Aim at CHINS Statute*, IND. LAW. (July 25, 2018), <https://www.theindianalawyer.com/articles/47657-neglect-or-not-dcs-study-takes-aim-at-chins-statute> [<https://perma.cc/D9BM-SAUT>].

98. See, e.g., Emma S. Ketteringham, *Live in a Poor Neighborhood? Better Be a Perfect Parent.*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html> [<https://perma.cc/DEF3-A4PV>].

99. The coefficient of determination between the child poverty rate published by KIDSCOUNT for the 2016 calendar year and annual child removal rate computed using federal data is .0002. See THE ANNIE E. CASEY FOUND., *Children in Poverty (100 Percent Poverty) in the United States*, KIDS COUNT DATA CTR., <https://datacenter.kidscount.org/data/tables/43-children-in-poverty> [<https://perma.cc/6QM6-SR9Q>]; AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

100. See THE ANNIE E. CASEY FOUND., *supra* note 99; Regional Rankings on Select Performance Indicators, *supra* note 96.

Although Gwinnett County and DeKalb County have very different child poverty rates, child poverty is not a strong explanatory variable for variance in removal rates. Neighboring Fulton County has a similar child poverty rate to DeKalb County, yet removes far fewer children. Removal rates likely need multiple explanatory variables, some which are not readily measurable.

Explaining the variance in removal rates by referring to any single variable (caretaker drug use, child poverty, lack of services, etc.) is a damning oversimplification, and it sidesteps the question of whether the likelihood that a child is removed has any relationship to an objective assessment of child safety.

B. The child welfare system knows very little about why children are separated from their parent(s).

Before a child is removed to foster care, the state agency must demonstrate it made reasonable efforts to prevent the removal, or that the case fits an exception.¹⁰¹ This is an important requirement to protect parents' and children's constitutional rights to family integrity. Yet federal administrative data contain little or no information concerning *what* efforts were made to prevent the removal and why they failed, a significant deficit in our regulatory landscape. The reason(s) a child enters foster care is provided by states,¹⁰² but those data have several limitations including: (1) state differences in how reasons for removal are reported;¹⁰³ (2) mutual inclusivity and overlap of certain removal reasons;¹⁰⁴ (3) the timing at which circumstances of removal data are finalized;¹⁰⁵ and (4) a lack of reporting on the efforts the state made to prevent removal.¹⁰⁶

State agencies must make reasonable efforts to prevent removal to foster care, unless the case fits an exception.¹⁰⁷ Yet federal regulations only require the state child welfare agency to describe the child and family circumstances at removal, with no requirement to document the case-specific efforts made to prevent removal.¹⁰⁸ Furthermore, each circumstance of removal is defined in

101. 42 U.S.C. § 671(a)(15) (2019).

102. See Sankaran & Church, *supra* note 52, at 216 n.65.

103. *Id.* at 223.

104. See *infra* Section IV.B.3, at 25.

105. 45 C.F.R. § 1355.43(a) (2016).

106. See Sankaran & Church, *supra* note 52, at 236.

107. 42 U.S.C. § 671(a)(15) (2019).

108. 45 C.F.R. § 1355.44(d)(6).

the federal regulations as an individual or family deficit, for which a parent's hope for reunification typically hinges upon remedying.

The Children's Bureau has defined how family circumstances are to be reported in federal administrative data submissions by providing fifteen data elements that must be used to identify circumstances of removal.¹⁰⁹ Each state is charged with identifying all relevant circumstances, so there can and often are multiple reasons reported for a single removal.¹¹⁰ Were these data required to be reported with any sort of fidelity, a quantitative narrative justifying why approximately 265,000 child removals were necessary during the 2017 FFY might exist. If these data elements had envisioned state accountability rather than just documenting family deficits, states would be required to report on each failed effort to assist a family in the hopes of preventing a removal. Were these data aligned with the core child welfare value of family preservation, perhaps the system could quantify how often reasonable efforts are made to successfully prevent a removal. Yet there is no such fidelity, no such vision, and no such alignment. Thus, child welfare is left with no such confidence in any narrative claiming to justify why children enter foster care. In its wake, there is only conjecture, hyperbole, and emotion-ridden explanations.

1. Circumstances of removal data are not well-defined.

Although the *circumstances of removal* data provide insight into the worker's impressions of the conditions or risks at the time of removal, the data do not explain why children are separated from their parents. First, some *circumstances of removal* criteria are too broad to be informative. Consider neglect, the most common *circumstance of removal* nationally.¹¹¹ Neglect is circularly defined as negligent treatment in the federal regulations.¹¹² During the 2017 FFY, 62% of removals were attributed to neglect, with states ranging from 92% (Maine and Idaho) to 22% (Iowa and North Dakota).¹¹³ How neglect is operationalized and further defined certainly differs across state lines,¹¹⁴ reasonably so. However, those differences preclude a systemic understanding of why children are placed in foster care, and whether certain removals might have been preventable.

109. See Foster Care and Adoption Record Layouts, Appendix D, 45 C.F.R. § 1355 app. D (2016); see also U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, AFCARS TECHNICAL BULLETIN #1: DATA ELEMENTS 7-10 (2012).

110. See 45 C.F.R. § 1355.44(d)(6).

111. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

112. 45 C.F.R. § 1355.44(d)(6)(vi).

113. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

114. See GUGGENHEIM & SANKARAN, *supra* note 71, at 1-2; Charlow, *supra* note 8, at 788.

Other *circumstances of removal* fail for their specificity: compare the criteria of neglect, defined as “negligent treatment or maltreatment of the child, including failure to provide adequate food, clothing, shelter or care”¹¹⁵ with *child’s disability*, defined as:

clinical diagnosis by a qualified professional of . . . one or more of the following: Intellectual disability, emotional disturbance, specific learning disability, hearing, speech or sight impairment, physical disability or other clinically diagnosed handicap. Include only if the disability(ies) was at least one of the factors which lead to the child’s removal.¹¹⁶

This definition’s insistence on a clinical diagnosis by a qualified professional is at odds with other definitions. Compare *child disability* with *caretaker drug or alcohol abuse*: each require the abuse be of a “compulsive use” and “not of a temporary nature” but *caretaker drug or alcohol abuse* makes no such reference to a formal diagnosis or limits who may make such a determination.¹¹⁷ Similarly, *caretaker’s inability to cope due to illness or other reason* focuses on a caretaker’s “physical or emotional illness or disabling condition,” again without reference to a formal diagnosis or limits on who makes the determination.¹¹⁸

The implications of these limitations are straightforward. According to federal data, only 4,281 child removals implicated *child disability* as a *circumstance of removal* during the 2017 FFY, just 1.6% of all removals.¹¹⁹ Do these data suggest a child’s complex medical health needs are not a significant reason why children are removed? What about when a caretaker neglects to address a child’s disability through appropriate medical care? Perhaps then, the technical definition of *child disability* is too limiting, and the broader definition of *neglect* too inviting, to accurately reflect why a child is removed to foster care.

These deficits also highlight the important consideration of whether certain removals are preventable. More fidelity and specificity in reporting circumstances of removal data and an additional focus on state accountability to document case specific efforts to prevent removal would inform whether

115. 45 C.F.R. § 1355.44(d)(6)(vi).

116. *Id.* § 1355.44(d)(6)(xvii); see also AFCARS TECHNICAL BULLETIN #1, *supra* note 109, at 9.

117. 45 C.F.R. § 1355.44(d)(6)(xi)–(xii); see also AFCARS TECHNICAL BULLETIN #1, *supra* note 109, at 9.

118. 45 C.F.R. § 1355.44(d)(6)(xxiii)–(xxiv); see also AFCARS TECHNICAL BULLETIN #1, *supra* note 109, at 10.

119. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

removal is truly used as a safety intervention of last resort. Many parental addictions, familial living conditions, and other determinants of child maltreatment are treatable without necessitating an involuntary separation of the child from their parents.¹²⁰ States should be required to document how they tried and failed at treatment. Local variations in both ability and motivation to treat a family's identified circumstances of removal contributes to the dispersion in removal rates across jurisdictions.¹²¹

2. States interpret and report circumstance of removal data inconsistently.

Another limitation relates to the inconsistency across states in reporting circumstances for removal data. For example, a single state, Texas, accounted for nearly half (47.3%) of the 4,281 removals nationally that included *child disability* as a circumstance of removal.¹²² It is hard to imagine Texas is experiencing a crisis with respect to cases of children with disabilities not receiving minimally adequate parental care.

Such interpretations, however, are not uncommon. Consider the opioid epidemic in the United States.¹²³ While this nation is facing a growing problem with opioid dependency that will certainly have implications for children and families, it is short-sighted to suggest a causal relationship between the increasing number of children in foster care and the increase in opioid abuse. Inferring a causal relationship is speculative at best, and indirectly puts forth an imprudent suggestion of foster care serving as the go-to treatment for parental opioid abuse.¹²⁴

Yet, such an inference is well-documented in coverage of Indiana's foster care system.¹²⁵ *Caretaker drug or alcohol abuse* is increasingly reported as a

120. See Charlow, *supra* note 8, at 785–86, 788.

121. See Sankaran & Church, *supra* note 52, at 225.

122. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

123. See, e.g., *What Is the U.S. Opioid Epidemic?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <https://www.hhs.gov/opioids/about-the-epidemic/index.html> [<https://perma.cc/9Z62-CE3X>] (last visited Mar. 6, 2018).

124. See Decisions Related to the Development of a Clearinghouse of Evidence-Based Practice in Accordance with the Family First Prevention Services Act of 2018, 83 Fed. Reg. 29,122, 29,123 (June 22, 2018) (proposing limits of development of evidence-based services to only three types of maltreatment—substance use, mental health, and parental training—with no evidence offered that these are the predominant conditions leading to removal).

125. See, e.g., *Data: Opioid Epidemic Driving More Children into Foster Care*, ASSOCIATED PRESS (Feb. 5, 2018), <https://apnews.com/87e412e7563c4ed691734ca82a10293f> [<https://perma.cc/Z2HG-5QST>]; *Opioid Crisis Strains Indiana Foster System as Kids Removed from Homes*, FOX 59 (Dec. 12, 2017), <https://fox59.com/2017/12/12/opioid-crisis-strains-indiana-foster-system-as-kids-removed-from-homes> [<https://perma.cc/DUA6-7QMC>].

circumstance for removal, currently implicated in 64% of cases, the fourth most across states.¹²⁶ The narrative of the data is irresistible: the opioid epidemic is behind the state's considerable increase in removals and number of children in foster care.¹²⁷ Contrast these data with neighboring Ohio's foster care dynamics, which are much more stable. In Ohio, there are far fewer removals for caretaker drug or alcohol abuse (32% compared to 39% nationwide) and a relatively steady number of children in care.¹²⁸ Yet Ohio has the nation's second highest rate of fatalities due to opioid overdoses.¹²⁹ Despite being similarly affected by the opioid crisis, why does Indiana remove far more children than Ohio?

States also report removal data inconsistently because each state has different *circumstances of removal* categories. While each state must ultimately report in AFCARS the child and family circumstances of removal data pursuant to federal regulations,¹³⁰ state data systems initially capture child and family circumstances of removal pursuant to state law and agency policies. State data systems and AFCARS data elements do not always line up one-to-one. Consider South Carolina, where the state agency reported the fourth most common reason for removal as *family instability*.¹³¹ There is no federal guidance on mapping various state removal reasons, such as *family instability* that have no clear counterpart in federal regulations, to the state's AFCARS submissions. This contributes to inconsistencies in reporting across states.

Circumstances of removal data are far from absolute truth, despite the temptation to call upon them when they fit a desired or compelling narrative.

3. Circumstances of removal data fail in specificity and vagueness.

The interrelatedness of *circumstances of removal* definitions limit the child welfare system's ability to understand why children enter foster care. Neglect is perhaps the least specific circumstances of removal data field. While neglect

126. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

127. See, e.g., Teresa Wiltz, *Drug-Addiction Epidemic Creates Crisis in Foster Care*, STATELINE (Oct. 7, 2016), <http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2016/10/07/drug-addiction-epidemic-creates-crisis-in-foster-care> [<https://perma.cc/B6Q2-NBBP>].

128. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

129. See, e.g., *Drug Overdose Deaths*, CTRS. FOR DISEASE CONTROL & PREVENTION, www.cdc.gov/drugoverdose/data/statedeaths.html [<https://perma.cc/H54G-L3HW>] (last updated Dec. 19, 2018).

130. 45 C.F.R. § 1355.43(b) (2016).

131. S.C. DEP'T OF SOC. SERVS., REASONS YOUTH ENTERED FOSTER CARE DURING SFY 2017 (Aug. 1, 2017), <https://dss.sc.gov/media/1579/reasons-that-children-entered-foster-care-rev.xlsx> [<https://perma.cc/PN3R-9P6U>].

is certainly intended to capture many typologies of neglect, including medical neglect,¹³² there are circumstances of removal data elements outside of neglect that would better classify when a child needs to be removed to foster care due to medical neglect. For example, there are many instances when the circumstance of removal for *child disability* would qualify as medical neglect, defined in federal regulation as the “failure to provide for the appropriate health care of the child by a person who is responsible for the child’s welfare, although the person was financially able to do so, or was offered financial or other means to do so.”¹³³ Where does medical neglect fit as a circumstance of removal: neglect, child disability, both? Federal regulations and technical bulletins fail to answer this question. The same is true for other circumstances of removal, where the most common of case scenarios fit within multiple circumstances of removal categories.

Without rigorous guidance on how to report the circumstances of removal across even the most common of scenarios, data designed to track why children enter foster care will fail to answer the important question of why children enter foster care.

4. Circumstances of removal data are biased towards observable parental deficits at the time of removal.

Finally, the regulations require these data to reflect the circumstances *at removal*, without the benefit of hindsight.¹³⁴ The decision to remove is often made in an emergency situation,¹³⁵ where the totality of circumstances surrounding the family’s strengths and vulnerabilities is unclear. These data capture the child welfare professional’s impressions of the family’s weaknesses at the time of removal, with no requirement to balance that narrative with observable data concerning a family’s protective capacities.¹³⁶ Once an emergency removal is effectuated, there will certainly be a more thorough investigation accompanied by more formal assessments, all of which unearth child and parent circumstances—both protective capacities and vulnerabilities—that were present at the time of the removal, yet unknown to the professionals effectuating that removal. A child exposed to domestic violence may also be the victim of physical violence, yet that violence may go

132. 45 C.F.R. § 1355.44(d)(6)(vii).

133. *Id.*; see also AFCARS TECHNICAL BULLETIN #1, *supra* note 109, at 8.

134. 45 C.F.R. § 1355.44(d)(6) (emphasis added).

135. See Charlow, *supra* note 8, at 783.

136. See 45 C.F.R. § 1355.44(d)(6).

undetected until an evaluation is completed. Such additional information is not reported or identifiable in federal administrative data.

Although a cornerstone of federal law, circumstances of removal data also fail to capture any information concerning the agency's efforts to prevent removal, despite the fact that such efforts are clearly observable.¹³⁷ This fundamentally misguided data design belies a misguided goal of federal data collection: to document evidence of a parent's failings and deficits.¹³⁸ The basis for federal data collection is to document information related to federal spending on, among other priorities, efforts to prevent removal, none of which are recorded in the data.

The circumstances of removal data are unreliable and disoriented. If knowing why children enter foster care is important, then states should be required to report clearly on why children enter foster care. If knowing whether a state first made efforts to treat the circumstances of removal is important, states should be required to report on those efforts. Until then, circumstances of removal data's only use should be a constant reminder of how little we know about why children are separated from their parents and placed in foster care, and what the state agency did to prevent such a removal. Preventing the unnecessary removal and placement of children in foster care is a core value of the United States foster care system.¹³⁹ Requiring states to make reasonable efforts to prevent removal to foster care is a core value of the United States justice system.¹⁴⁰ The inability to meaningfully report on why children enter foster care and why states failed to prevent those removals represents the epitome of failure in measuring our values.

C. A proxy for unnecessary removals: quick discharges raise questions about the necessity of the removal and reasonable efforts to prevent the removal

Preventing unnecessary foster care placements reflects the foster care system's respect for parents' fundamental right to family integrity. While administrative data cannot directly answer whether a child should have been removed to foster care, a proxy measure is the number of children that enter and exit foster care rather quickly. These removals beg the question of whether a child needed to be removed in the first place. What imminent safety threat was addressed during the child's brief stay in foster care that could not have been addressed through appropriate preventative services?

137. *See id.*

138. *See id.*

139. *See* 42 U.S.C. § 671(a)(15) (2019).

140. *See id.*

During the 2017 FFY, nearly one out of every ten children removed were discharged from foster care within thirty days of their removal.¹⁴¹ Most of these children spent a week or less in foster care (56.7%) in an unfamiliar placement (67.8%).¹⁴² Almost all (90.5%) of these children were discharged to a family member, with the bulk (73.9%) returned to the same caretaker from whom they were removed.¹⁴³ These data have been relatively stable over time.¹⁴⁴ During the 2017 FFY, twenty-six states discharged more than one out of every ten children they removed within thirty days of their removal.¹⁴⁵ Figure 2 represents the percent of children that were discharged within thirty days of their removal, by state. There are a non-trivial number of children in a non-trivial number of states that enter and exit foster care rather quickly.

141. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

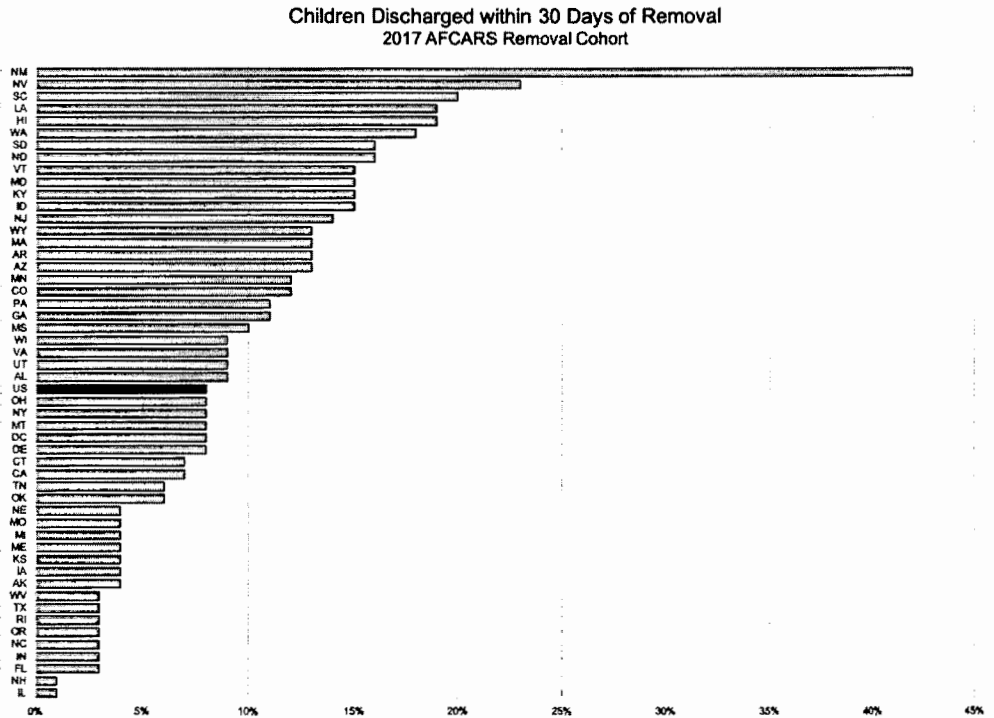
142. *Id.*

143. *Id.*

144. *Id.*; AFCARS Files, *supra* note 4, FFY 2009–2017 (analysis on file with author); *see also* Sankaran & Church, *supra* note 52, at 217–18.

145. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

Figure 2: Children Discharged Within 30 Days of Removal, 2017 FFY¹⁴⁶



At the most extreme is New Mexico, where 42% of children removed spent less than thirty days in foster care.¹⁴⁷ Yet even the thirty-day timeframe hides the true narrative of what is happening on the front lines of child welfare. In New Mexico, 45% of children removed—more than one out of every three children in its foster care system—spent less than three days in foster care.¹⁴⁸ These data may hold our best hope for quantifying how many children are unnecessarily involuntarily separated from their parents for purposes of placement in foster care.¹⁴⁹

Our system should continuously calibrate its removal process to ensure no child unnecessarily passes through our foster care system. Yet year after year, roughly one in ten children removed exit foster care within thirty days.¹⁵⁰ These

146. *Id.*

147. *Id.*

148. *Id.*

149. See Sankaran & Church, *supra* note 52, at 217–18.

150. AFCARS Files, *supra* note 4, FFY 2017 (analysis on file with author).

removals, some of which are certainly preventable, seem undetected. Perhaps this is due to the federal government's practice of censoring them from important federal monitoring efforts.¹⁵¹ Rather than censor these children's foster care episode, the federal government should shine a light on their experience as an opportunity to address whether local jurisdictions have a deliberate and robust removal process. Whether it is one out of every three children, or one out of every ten children, an unnecessary removal to foster care represents the nadir of government overreaching, directly harming children and their parents.

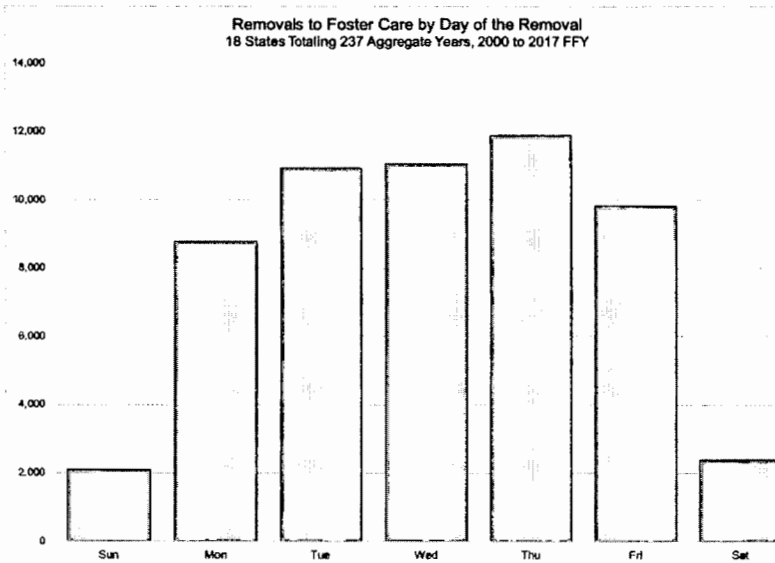
D. The weekdays when children are removed undermine the narrative that removals are emergencies requiring ex-parte judicial authorization

Child removal is often characterized as a chaotic experience, where child welfare staff are making real-time decisions in emergency situations. While this aligns with many of the experiences of the authors, there is a more troubling narrative revealed by examining precisely when children are removed to foster care. Utilizing removal data from eighteen states—representing more than 237 aggregate years between 2000 and 2017—most (approx. 93%) removals occur during the business week (Monday through Friday), with a very small percentage (approx. 7%) of removals occurring over the weekend.¹⁵²

151. See Statewide Data Indicators and National Standards for Child and Family Services Reviews, 79 Fed. Reg. 61,241, 61,244 (Permanency Performance Area 1), 61,245 (Permanency Performance Area 4), 61,246 (Proposed Permanency Performance Area 4) (Oct. 10, 2014) (to be codified at 45 C.F.R. pt. 1355); see also *Child Well-being Data Portal: Entering Out-of-Home Care (Rate)*, PARTNERS FOR OUR CHILD., <http://pocdata.org/visualizations/ooh-entry-rates> [<https://perma.cc/V2VW-FWGX>] (last visited Aug. 13, 2018) (an organization using administrative data to “promote[] access to and understanding of child welfare” encouraging users to “exclude short episodes”).

152. Fostering Court Improvement, (2000–2017 FFY) (analysis on file with author).

Figure 3: Removals to Foster Care by Day of the Week of Removal¹⁵³



There may be several reasons why children are not removed over the weekend at a rate consistent with weekday removals. Children may have less exposure to, or interaction with, mandated reporters over the weekend. Child welfare agencies may be understaffed on the weekends as compared to the weekdays. Of course, these explain characteristics of the state reporting systems unrelated to child safety. It is very unlikely that children are not removed on weekends because they are somehow safer on weekends, somehow less *at risk of imminent harm* on days when most children spend greater amounts of time with adult family members, the very persons who are often identified as the primary perpetrators of child abuse.¹⁵⁴

How do these data line up with our narrative that most removals arise out of emergency situations, where the risk of harm to the child eclipses a family's fundamental right to due process? These data suggest the opposite: delaying the removal decision to allow for due process may not increase the risk of harm to the child. Perhaps our system's reliance on *ex parte* removal orders is exaggerated and, instead, full court hearings could be convened more routinely to determine whether a child, in fact, must be involuntarily separated from their parents. The troubling aspect of these data is self-evident: removals may have

153. *Id.*

154. AFCARS Files, *supra* note 4, FFY 2009–2017 (analysis on file with author).

little to do with child safety, and more to do with the convenience of the system created to treat it.

Removal standards, policies, and practices should continuously be calibrated to ensure the only children that enter foster care are those that unequivocally require such a drastic safety intervention. Whenever data, practices, or observations of child welfare professionals call into question the sensitivity or specificity of the removal process, recalibration should occur. Otherwise, children may unnecessarily enter foster care, subjecting children and their parents to harm, grief, and loss at the hands of well-meaning state officials. Although removal undoubtedly saves many children from serious, imminent harm, it just as certainly irreparably damages others.

V. NEXT STEPS: RECOMMENDATIONS FOR REFORM

The Article has established the case for why child welfare professionals should be alarmed about the process by which children are removed from their parents and placed in foster care. The first Section detailed the profound trauma removal inflicts on children and their parents. The next Section raised serious concerns about how carefully the judicial system is overseeing the removal process, thereby increasing the likelihood that children are needlessly entering foster care. The last Section detailed the haphazard nature of the removal process, revealing the fact that far too many children are likely unnecessarily removed from their parents. At the very least, child welfare systems must prioritize a conversation about how to address these disturbing dynamics.

But systems must do more. The following recommendations are intended to highlight some of the steps the authors believe are necessary to ensure removal is truly a safety intervention of last resort. This list is offered as a starting point, not an exhaustive summary of interventions. In other words, these recommendations are initial steps to create a child welfare system that seeks to prevent children from unnecessarily experiencing trauma and removal from their parent(s).

- Only government agents—like child protective service workers and police officers—can remove children from their parents without a court order. Additionally, all public officials empowered to remove children must receive training in the legal standard required to remove, the legal rights of families, the trauma experienced by children and parents during the removal, and how to mitigate that trauma when removal is necessary.
- Government officials can only remove a child—without a court order—upon evidence that: (1) the child is in imminent and substantial risk of harm to her life, physical

health, or mental well-being; (2) no service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from harm, and; (3) there is insufficient time to obtain a court order authorizing the removal.

- Juvenile courts—absent a full contested hearing—can only issue an *ex parte* removal order upon a showing that: (1) the child is in imminent and substantial risk of harm to her life, physical health, or mental well-being; (2) no service or other arrangement except removal of the child is reasonably available to adequately safeguard the child from harm; and (3) the child will suffer irreparable harm if a contested hearing is held prior to the removal. Courts must only issue these orders when absolutely necessary to immediately protect a child.
- When an emergency removal occurs, the court must convene a hearing to review the decision no later than twenty-four hours after that removal. At that removal hearing, the court must provide the parent with an attorney and must give that attorney the opportunity to challenge the lawfulness of the removal.
- Jurisdictions should explore providing parents with the assistance of counsel during the investigation process, similar to the model pioneered by the Detroit Center for Family Advocacy.¹⁵⁵ Providing parents with attorneys during this stage can reduce the need for a removal by addressing collateral legal matters that are adding stress to an already fragile family. State child welfare agencies should be able to include funding for this prevention service in their state plan, and accordingly, be reimbursed under their federal Title IV-E cost allocation plan according to their Title IV-E rate.¹⁵⁶
- At the initial or preliminary hearing in which the court must determine whether the child was lawfully removed (and needs to remain in care), the court should utilize bench cards, summarizing the laws of the state, to ensure

155. U.S. DEP'T OF HEALTH AND HUMAN SERVS., ACYF-CB-IM-18-05, RESHAPING CHILD WELFARE IN THE U.S. TO FOCUS ON STRENGTHENING FAMILIES THROUGH PRIMARY PREVENTION OF CHILD MALTREATMENT AND UNNECESSARY PARENT-CHILD SEPARATION 19–20 (Nov. 16, 2018).

156. For more information about the merits of providing parents with a lawyer before the child is removed, see Vivek Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 WM. MITCHELL L. REV. 1036, 1037–38 (2014).

that it is making all of the appropriate inquiries. A study by the National Council of Juvenile and Family Court Judges revealed that children were far more likely to return home at the initial removal hearing when judges used bench cards to thoroughly understand the case.¹⁵⁷

- Parents and children should have an immediate right to appeal a removal order in an expedited process. The District of Columbia provides an excellent model. The law allows children to appeal removal orders within two days of the court's decision.¹⁵⁸ Within three days of the appeal's filing, the Court of Appeals must hear oral argument on the issue.¹⁵⁹ The Court must then issue its decision within a day of the oral argument.¹⁶⁰ This type of expedited process will provide a necessary check on trial courts to ensure that they are fulfilling their legal obligation to avoid unnecessary trauma to children and their parents and oversee the removal process.
- The federal government should develop more specific data fields in AFCARS to capture the reasons for and efforts to prevent a child's removal and should require jurisdictions to distinguish whether removals were emergency removals or authorized under an *ex parte* court order prior to the apprehension transaction.
- Juvenile courts and child welfare agencies should convene intra-agency workgroups to review each case in which a child who is removed returns home within thirty days. These groups should examine why the removal happened and what services could have been implemented to prevent the short-term removal.

VI. CONCLUSION

The sanctity of the family is one of this nation's core fundamental principles. While our government has a responsibility to ensure that each child is safe and free from harm, it has a commensurate responsibility to ensure that it does not unnecessarily inflict harm on children by taking them from their

157. See NAT'L COUNSEL OF FAMILY AND JUVENILE COURT JUDGES, RIGHT FROM THE START: THE CCC PRELIMINARY PROTECTIVE HEARING BENCHCARD STUDY REPORT 1, 3 (2011), <https://www.ncjfcj.org/sites/default/files/CCC%20Benchcard%20Study%20Report.pdf> [<https://perma.cc/DKC4-99CR>].

158. D.C. CODE Ann. § 16-2328(a) (West 2019).

159. *Id.* § 16-2328(b).

160. *Id.*

parents when no need exists. This Article argues that our child welfare system may be doing so by institutionalizing a removal process that does not carefully vet when a child must be removed. As a result, children might be unnecessarily removed from their parents, resulting in preventable harm at the hands of state actors.

While suggesting several prescriptive measures to address this dynamic, the authors believe that stakeholders must first engage in an authentic conversation on standards of removal in their community. Stakeholders must persuade themselves that this is a serious enough problem to merit a frank discussion and a follow-up investigation on what might be occurring in their jurisdiction. But until stakeholders are persuaded that many more children are better off with their parents than in foster care, substantive reforms will be difficult—or nearly impossible—to implement. This might explain why broken systems continue to inflict harm on children and their parents. Until individual removal decisions are scrutinized in proportion to the potential for harm they carry, Virgil's words—*aegrescitque medendo*—bring to mind a cure child welfare has discovered that may be worse than the disease it aims to ameliorate.