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WHAT'S MISSING FROM FOSTER CARE REFORM? THE NEED FOR COMPREHENSIVE, REALISTIC, AND COMPASSIONATE REMOVAL STANDARDS

*Theo Liebmann*¹

I. INTRODUCTION: THE STATE OF FOSTER CARE AND CURRENT STANDARDS FOR REMOVAL

Class action litigations, media commentary, and statistical data have time and again laid bare the tragically poor quality of foster care in this country.² The 520,000 children in foster care³

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² See, e.g., *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 480 (D.N.J. 2000) ("tragic" facts show New Jersey's foster care system jeopardized health and safety of children in foster care); *Kenny A. ex rel. Winn v. Perdue*, 218 F.R.D. 277, 286 (D.Ga. 2003) (alleged failures of Georgia's foster care system included not providing support services to foster parents, not screening foster homes properly to ensure children's safety, placing children in dangerous and unsanitary foster care shelters, and failing to provide necessary mental health, medical and education services to foster children); *Brian A. ex rel. Brooks v. Sundquist*, 149 F. Supp. 2d 941, 953 (D.Tenn. 2000) (complaint against Tennessee Department of Children's Services describes, inter alia, violations of foster children's right not to be harmed while in state custody, and right to receive care, treatment and services consistent with accepted professional judgment); *Braam v. State*, 81 P.3d 851, 856 (Wash. 2003) (findings against Washington's Department of Social and Health Services included inadequate training and supervision of foster parents, denial of necessary mental health services to foster children, and placement of foster children in unsafe foster homes); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 996-97 (D.D.C. 1991) (court finds inadequate services and case planning for children in foster care, leading to multiple damaging and unsafe placements). See, e.g., Butch Mabin, *Suit Claims Failures in Foster Care*, LINCOLN J. STAR, Sept. 20, 2005, at A1 (describing, inter alia, allegations of maltreatment of foster children, provision of inappropriate services, and overcrowded foster homes); Jackie Hammers-Crowell & Justice Maura Corrigan, *Fix Foster Care Now*, MOBILE REG., Apr. 2,

2006, at D4 (opinion piece by former foster child and chief justice of Michigan Supreme Court describing need for reform); Jack Leonard, *Mental Care of Children Faulted*, L.A. TIMES, Aug. 18, 2005, at 1 (reporting on failure of child welfare agency to provide appropriate mental health treatment to foster children and children at risk of foster placement); Susan K. Livio & Mary Jo Patterson, *Advocates to Assail DYFS on Reform*, THE STAR-LEDGER, Dec. 1, 2005, at 1 (reporting on failure of child protection agency to implement court-ordered foster care reform measures); Harry H. Snyder III, *The Same Old "Change,"* BANGOR DAILY NEWS, Mar. 23, 2006, at A8 (opinion piece describing how Maine's foster care system remains overcrowded and dangerous for foster children in spite of nearly three decades of promise of reform by politicians); Richard Lezin Jones & Tina Kelley, *Agency Still Fails New Jersey Youth, Report Says*, N.Y. TIMES, Oct. 12, 2005, at A1 (reporting on continued failure of child welfare agency despite class action settlement, including continued failure to have regular medical care); *Foster Children Deserve Better*, BOSTON HERALD, Apr. 5, 2006, at 28 (editorial seeking more action in response to death of four-year-old foster child at hands of his foster mother); Curt Woodward, *Report: Foster Care Needs More Spending*, SEATTLE TIMES, Feb. 5, 2006, at B3 (describing, *inter alia*, need for better health screenings and better services for foster children). See, e.g., Sharon Vandivere et al., *Children in Foster Homes: How Are They Faring*, CHILD TRENDS RESEARCH BRIEF (Dec. 2003), available at <http://www.childtrends.org/Files/FosterHomesRB.pdf> (listing statistics showing, *inter alia*, more health problems for foster children than similarly disadvantaged children, greater likelihood of developmental impairments, higher incidence of behavioral and emotional problems); CHILD WELFARE INFO. GATEWAY, FOSTER CARE: NUMBERS AND TRENDS, 1 (July 2005) available at <http://www.childwelfare.gov/pubs/factsheets/foster.pdf> (listing statistics on length of time children remain in foster care and rate of child maltreatment perpetrated by foster parents); U.S. DEP'T. OF HEALTH AND HUMAN SERVS. ADMIN. ON CHILDREN, YOUTH & FAMILIES, CHILD MALTREATMENT 2004, at 70-74, available at <http://www.acf.hhs.gov/programs/cb/publications> (listing statistics showing incidence of child maltreatment by foster parents and fatalities of children while in foster care); U.S. DEPT. OF HEALTH AND HUMAN SERVS. ADMIN. ON CHILDREN & FAMILIES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING – BASELINE REPORT FOR ONE YEAR IN FOSTER CARE SAMPLE: EXECUTIVE SUMMARY, available at http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/exesum_nscaw/exsum_nscaw.pdf (statistics on problems encountered by foster children in care for one year). See also CHILD WELFARE LEAGUE OF AMERICA, CHILD MALTREATMENT IN FOSTER CARE: UNDERSTANDING THE DATA, Oct. 2002 for a description of how such data is recorded, and why the incidence of child maltreatment in foster care may actually be even greater than the statistics show.

often live in unsafe and unsanitary conditions, with poorly trained foster parents and without crucial mental health, medical, and education services.⁴ Even worse, children in foster care are abused and neglected at a greater rate than other children, and have an increased risk of delinquency and other behavioral problems.⁵ The longer-term statistics are equally bleak. In a recent broad survey, foster alumni had disproportionately more mental health disorders, significantly lower employment rates, less health insurance coverage, and a higher rate of homelessness when compared with the general population.⁶

In response to the extensive nature of these problems, federal and state commissions have been established to study what ails the foster care system, to issue reports on their findings, and to make recommendations for reform.⁷ The resulting suggestions have typically included increased funding,⁸ improved judicial

³ CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 3.

⁴ See *supra* note 2.

⁵ See generally John G. Orme & Cheryl Buehler, *Foster Family Characteristics and Behavioral and Emotional Problems of Foster Children: A Narrative Review*, 50 FAMILY RELATIONS 3 (2001); Betty Fish & Bette Chapman, *Mental Health Risks to Infants and Toddlers in Foster Care*, 32 CLINICAL SOC. WORK J. 121 (2004). See also U.S. DEPT. OF HEALTH AND HUMAN SERVS. ADMIN. ON CHILDREN, YOUTH & FAMILIES., CHILD WELFARE OUTCOMES 2001: ANNUAL REPORT APP. IV-263 (2001), available at <http://www.acf.hhs.gov/programs/cb/pubs/cwo01/cwo01.pdf>; U.S. DEPT. OF HEALTH AND HUMAN SERVS., *supra* note 4.

⁶ P.J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY (2005) at 1 – 3, available at <http://www.casey.org/Resources/Publications/NorthwestAlumniStudy.htm>. See also Sandra K. Cook-Fong, *The Adult Well-Being of Individuals Reared in Family Foster Care Placements*, 29 CHILD & YOUTH CARE FORUM 7 (2000).

⁷ See, e.g., PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE (2004) (*hereinafter* PEW COMMISSION, FOSTERING THE FUTURE), available at <http://www.pewfostercare.org/research/docs/FinalReport.pdf>; *Pew Commission Progress Report*, 25 CHILD LAW PRACTICE 1, March 2006, at 13 (*hereinafter* *Pew Commission Progress Report*) (listing fifteen states which have established or are planning commissions on children in foster care).

⁸ *Pew Commission Progress Report*, *supra* note 7, at 16.

oversight of children in care,⁹ better collaboration among different social service agencies,¹⁰ more input from children and families in decision-making,¹¹ and more programs designed to prevent the need for foster placement in the first place.¹² These and other similar recommendations cover crucial aspects of systemic reform. If implemented, there is no doubt that the quality of foster care would dramatically improve. But a critical step would still be missing. In order truly to protect children from the perils of the foster care system, we must examine the out-dated and short-sighted standards nearly every state currently uses to justify initially removing children from their parents and placing them in foster care in the first place.¹³ Reforming these standards is a crucial component of any effort to make effective changes to the foster care system, yet one that is never mentioned.¹⁴

Child protection agencies commonly remove a child from her home pending the outcome of a case in order to eliminate any risk that the child will be further harmed by her parents. While

⁹ *Pew Commission Progress Report*, *supra* note 7, at 17.

¹⁰ *Id.* at 17.

¹¹ *Id.* at 18.

¹² *Id.* at 16-18. Note that these types of recommendations are also found in the vast majority of consent decrees and stipulations which arise from class actions.

¹³ Parents are, of course, only one type of caregiver who can have long-term legal custody and guardianship of a child. Relatives or other legal guardians may be the primary custodian of a child as well. For the purposes of this paper, however, I will use the term parents as they are the most frequent custodian of their children.

¹⁴ There is some legal scholarship in the area, but it rarely speaks directly to the actual standard used for removal. *See, e.g.*, Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 986 (1975) (arguing that the definition of neglect itself should be changed to minimize state intervention and placement of children in foster care); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745 (1987) (criticizing those who argue for more limited intervention and placement); Sonja Starr & Lea Brilmayer, *Family Separation as a Violation of International Law*, 21 BERKELEY J. INT'L L. 213 (2003) (describing international provisions which relate to removal of children); MARTIN GUGGENHEIM, *WHAT'S WRONG WITH CHILDREN'S RIGHTS* (2005) (critiquing generally the benefits of state intervention).

often children will be placed with relatives, the vast majority of the time they are placed in a non-kinship setting such as a non-kinship foster home, a group home, or an institution.¹⁵ Long-established Supreme Court doctrine reserves for parents the right to contest these removals at a hearing.¹⁶ Not surprisingly, those hearings are some of the most passionately contested proceedings in family and juvenile courts. Child protection agencies take the drastic measure of seeking removal of a child from his parents because of grave concerns for the child's safety; parents desperately seek to prevent any separation from their children; and the children who are the subject of the proceedings must confront the trauma of an uncertain future. Statutes which govern removal proceedings generally reflect this sense of urgency with provisions such as those that require that the hearing commence within a short amount of time, and that give child maltreatment cases precedence over nearly every other court matter.¹⁷

Yet despite the recognized import of these proceedings, in nearly every jurisdiction the standard which must be met to justify a removal order at these hearings has a remarkably narrow and short-sighted perspective. The vast majority of states require only that the risk of harm in the child's home be analyzed,¹⁸ and if that

¹⁵ See CASEY FAMILY PROGRAMS, CHILD WELFARE FACT SHEET, <http://www.casey.org/NR/rdonlyres/89F2787D-AA68-45D5-B5CC-557B20BB426F/846/ChildWelfareFactSheet1.pdf> (last visited Nov. 12, 2006).

¹⁶ See *infra* section II(B) for a full discussion.

¹⁷ See, e.g., N.Y. Fam. Ct. Act §§ 117(b)(ii), 1028(a) (Consol. 2003); N.Y. Comp. Codes R. & Regs. tit. 22 § 125.1 (2004). A temporary removal has *long-term* implications for a case as well, pushing parents to settle and even, some commentators argue, shifting the burden of proof at the fact-finding hearing on the maltreatment allegations. See Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 FAM. CT. REV. 540, 543 (2003); Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 156 (1995).

¹⁸ Arizona, ARIZ. REV. STAT. § 8-824(F) (2004) (temporary placement, only if probable cause that removal is necessary to prevent further abuse or neglect); Arkansas, ARK. CODE ANN. § 12-12-519(a) (2003) (child's health and safety are

risk meets a certain level – usually “imminent,”¹⁹ “serious”²⁰ or some combination thereof²¹ – then a removal is deemed warranted.

of paramount concern in determining removal); D.C. CODE § 16-2310(a)(1) (2004) (temporary placement only permissible if necessary to protect the child); Georgia, GA. CODE ANN. § 15-11-46(1) (2005) (removal appropriate where required to protect the child); Louisiana, LA. CHILD. CODE ANN. art. 619(A) (2005) (emergency removal necessary to secure the child’s protection); Michigan, MICH. COMP. LAWS § 712A.13(a)(5) (2004) (neither return to parents nor placement with any non-certified foster parent unless child would be safe from risk of harm to his life, physical health, or mental well-being); Ohio, OHIO REV. CODE ANN. § 2151.31(A)(3)(a) (West 2004) (immediate or threatened physical or emotional harm); Rhode Island, R.I. GEN. LAWS § 40-11-7(c) (2005) (removal mandatory if continued placement with parents might result in further harm to child); South Carolina, S.C. CODE ANN. § 20-7-736(B) (2005) (removal justified if return would present an unreasonable risk of harm to child’s life, physical health, safety, or mental well-being).

¹⁹ Connecticut, CONN. GEN. STAT. § 46b-129(B)(1) (2003) (child is in immediate danger and immediate removal is necessary to ensure child’s safety); Hawaii, HAW. REV. STAT. ANN. § 587-24(a) (LexisNexis 2005) (continued placement with parents presents risk of imminent harm); Illinois, 705 ILL. COMP. STAT. 405/2-10 (2004) (immediate and urgent necessity for the safety and protection of the child); Indiana, IND. CODE § 31-34-2-3(a)(1) (2005) (child’s physical or mental condition will be seriously impaired or endangered if not immediately taken into custody); Maryland, MD. CODE ANN. FAM. LAW § 5-709(a)(2) (West 2005) (child in serious, immediate danger); Missouri, MO. ANN. STAT. § 210.125.2 (West 2005) (child in imminent danger of serious physical harm or threat to life); Nevada, NEV. REV. STAT. § 432B.390(1)(a) (West 2005) (immediate action necessary to protect child from injury, abuse or neglect); New Hampshire, N.H. REV. STAT. ANN. § 169-C:6(I) (2005) (imminent danger to child’s health or life unless immediate action taken); New Jersey, N.J. STAT. ANN. § 9:6-8.32 (West 2004) (imminent risk to child’s life, safety or health); New Mexico, N.M. STAT. ANN. § 32A-4-18(A) (LexisNexis 2005) (imminent danger from surroundings, and removal necessary for child’s safety); Minnesota, MINN. STAT. ANN. R. JUV. PROTECTION PROC. 28.02, 30.09 (West 2005) (continuation of custody with parent is contrary to child’s welfare); New York, N.Y. FAM. CT. ACT § 1028(b) (McKinney 2005) (imminent risk to child’s life or health); Tennessee, TENN. CODE ANN. § 37-1-404(a) (2005) (imminent danger to child’s life or physical or mental health); Virginia, VA. CODE ANN. § 16.1-252 (2004) (imminent threat to life or health to the extent that severe or irreparable injury would likely result); West Virginia, W.VA. CODE § 49-6-3 (2005) (imminent danger to the physical well-being of the child).

A substantial number of states solely require an analysis of whether continuation in the home is contrary to the child's welfare²² or "best interests."²³ A few state statutes incorporate a combination of these two requirements.²⁴

²⁰ Alabama, ALA. CODE § 12-15-59(a) (2004) (serious threat of substantial harm to child); North Carolina, N.C. GEN. STAT. § 7B-503 (2005) (substantial risk of physical injury); Wyoming, WYO. STAT. ANN. § 14-3-405 (2005) (child seriously endangered by surroundings).

²¹ Indiana, IND. CODE § 31-34-2-3 (2005) (child's physical or mental condition will be seriously impaired or endangered if not immediately taken into custody); Maryland, MD. CODE ANN., FAM. LAW § 5-709 (West 2005) (child in serious, immediate danger); Missouri, MO. ANN. STAT. § 210.125 (West 2005) (child in imminent danger of serious physical harm or threat to life); Virginia, VA. CODE ANN. § 16.1-252 (2004) (imminent threat to life or health to the extent that severe or irremediable injury would likely result).

²² Alaska, ALASKA STAT. § 47.10.030 (2004) (child's welfare requires immediate assumption of custody by court); Maine, ME. REV. STAT. ANN. tit. 22, § 4036-B (2005) (remaining in home is contrary to welfare of child); Mississippi, MISS. CODE ANN. § 43-21-309 (2005) (continuation in home would be contrary to welfare of child, and placement of child in foster care is in best interest of child); Oklahoma, OKLA. STAT. ANN. tit. 10, § 7303-7304 (West 2005) (continuation in home is contrary to welfare of child); Pennsylvania, 42 PA. CONS. STAT. ANN. § 6332 (West 2006) (allowing child to remain in home would be contrary to child's welfare); South Dakota, S.D. CODIFIED LAWS § 26-8-A-21 (2005) (continued presence of child in home would be contrary to child's welfare).

²³ Colorado, COLO. REV. STAT. § 19-1-115 (2003) (continuation of child in home would be contrary to child's best interests); Massachusetts, MASS. GEN. LAWS ANN. ch. 119, § 29C (West 2004) (continuation in home is contrary to child's best interests); Oregon, OR. REV. STAT. § 419B.150(2)(b) (2005) (protective custody is in best interests of child).

²⁴ California, CAL. WELF. & INST. CODE § 319 (West 2004) (continuance in home is contrary to child's welfare, and either substantial danger to physical or emotional health in the home, or there is a likelihood of flight by parents or child, or child has left a juvenile court placement, or child was physically or sexually abused and is unwilling to return home); Delaware, DE. FAM. CT. CIV. PRO. R. 212 (2004) (child is in actual physical, mental or emotional danger in home, or there is a substantial imminent risk thereof, and continuation of the child in the home is contrary to the welfare of the child); Florida, FLA. STAT. § 39.402(h)(2-3) (2003) (there is a substantial and immediate danger to child, and placement is in best interest of child); Iowa, IOWA CODE ANN. § 232.79 (West

What is missing in all of these standards is any acknowledgement that placement in foster care itself – even temporarily – poses a risk of harm to children. The standards require no analysis of the specific placement of a child if removed from her parents, what resources that specific placement has to care for the child adequately, what emotional effect a removal will have on the child, or what practical effect removal will have on issues such as a child maintaining ties with her school, community, family, and friends. Across the board, removal standards fail to acknowledge or incorporate into the analysis the poor outcomes for many foster children with respect to education and financial well-being. They fail to account for the very real fact that removal from a parent carries proven risks of mental, emotional, and physical harm, including the development of separation anxiety, depression, and other mental health problems.²⁵ The decision to remove a child is made in a vacuum utterly devoid of these very real facts.

The reformulation of legal standards so they require more comprehensive and balanced assessments before removing a child from her home and placing her in foster care must be a crucial aspect of any overall reform of the foster care system. Even if there exists some risk to a child in her home, moving her into a new living situation without first assessing the risks in that placement is, at best, irresponsible. This paper explains how and why current standards developed such a limited and ultimately perilous focus; describes an innovative approach recently introduced by the social services field and the legal system to more

2005) (there is imminent danger to the child and continuation in the home would be contrary to the welfare of the child); Kentucky, KY. REV. STAT. ANN. § 620.60 (West 2005) (removal is in best interests of child and child is in imminent danger); Texas, TEX. FAM. CODE ANN. § 262.107 (Vernon 2004); (continuation in the home would be contrary to child's welfare, and there is a continuing danger to health or safety of child in the home).

²⁵ See Ellen L. Bassuk et al., *Determinants of Behavior in Homeless and Low-Income Housed Preschool Children*, 100 PEDIATRICS 92, 98 (1997) (study showing the placement in foster care was predictor for behavioral problems among children from homeless and low-income families). See also *supra* notes 2, 5.

accurately, comprehensively, and compassionately determine the risks to a child before removing her, even temporarily, from her home; and proposes how this new approach can be used by attorneys, judges, and policy makers to institute removal standards which ensure children are no longer placed in harmful settings under the guise of protection.

II. THE DEVELOPMENT OF CURRENT REMOVAL STANDARDS

The removal standards which exist today are the product of the interplay between two long-standing historical convictions: that the state has the responsibility and ability to care for children who are suffering at the hands of their parents; and that parents have the right to procedural and substantive protections against state involvement in how they raise their children. Although derived from very different sources, neither conviction questions the presumption that the physical safety, emotional well-being, education, health care, and mental health treatment that children experience in state care are, at a minimum, adequate. This section describes the development of these two core foundations of removal standards, and critiques their inherent presumption in the adequacy of state care.

A. *Parens Patriae and the Child Savers*

The legal authority of the state to interfere with parents' rights to the care, custody, and control of their children originally stems from the state's *parens patriae* role.²⁶ The common law *parens patriae* doctrine had long been used in England as the basis for the Crown's right and responsibility to protect individuals who are not able to care for themselves, including children and the

²⁶ Literally "parent of the country." See BLACK'S LAW DICTIONARY 1144 (8th ed. 2004).

mentally ill.²⁷ For wealthy families, the doctrine was used to protect the orderly transfer of property where the family patriarch had died before the heir had reached majority.²⁸ For poor families, *parens patriae* led to the passage of a series of statutes in 1601 known as the Poor Laws,²⁹ which authorized a highly intrusive level of intervention by the state.³⁰ Among the state's powers was the ability to remove children from poor families and place them in other homes for apprenticeships, without the consent of parent or child, and for no reason other than the family's economic status.³¹

When common law passed to the American courts after the Revolution, the *parens patriae* doctrine passed with it. The removal of poor children from their homes for apprenticeships became an important part of the North American version of the Poor Laws.³² These removals were, as in England, justified purely on the basis of a family's economic status. While there were very few instances of removals due to child maltreatment prior to the nineteenth century, there were statutory and common law harbingers that legal grounds for removal, besides financial status,

²⁷ JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS 236 (1997).

²⁸ PETERS, *supra* note 27 at 237, citing Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 287 (1964) (discussing that until 1660, property was passed on through primogeniture to the eldest son. The intervention also served the Crown, of course, by ensuring that it could efficiently collect all appropriate inheritance and other property taxes).

²⁹ 43 Eliz. c. 2, § 1 (1601) (Eng.).

³⁰ Prior to the Poor Laws, the church bore the responsibilities of administering relief to the poor, and wielded much power over the indigent families in its jurisdiction. These laws stemmed from a decline in church involvement in providing relief to the poor as well as an increased concern over beggars and crime. tenBroek, *supra* note 29, at 279, 286.

³¹ *Id.* at 279-82; see also Judith Areen, *Intervention between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 896 (1975). The Poor Laws also restricted the ability of poor persons to work in their chosen field, to live where they wanted, and their freedom to marry, have a family, and raise children. PETERS, *supra* note 29, at 239-40.

³² See Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, CHILD. LEGAL REP. RTS. J., Winter 1999-2000, at 2, 6.

would eventually develop.³³ In pre-Revolution Puritan communities, for example, designated groups of men were granted the authority to remove children from their home and place them in apprenticeships whenever the parents were not “able and fit to employ and bring them up.”³⁴ There were economic roots to such a standard – the towns in the colonies had a strong interest in keeping the economy vital and discouraging any increase in beggars and the indigent. There was also, however, an aspect of this early legislation which evinced a nascent concern with a proper upbringing for children, and removals did occur based on a parent’s perceived failure to provide adequate education or religious training. In one 1675 Massachusetts case, the court authorized the removal of a child from his parents because the child’s father did not “dispos[e] of his children as may be for their good education...”³⁵ Another case, decided in 1678, ordered that children be removed from their father because, among other things, the father was deemed unfit due to his failure to attend religious services.³⁶

Soon after American independence, legal doctrine began openly to encompass grounds for removal beyond simple poverty.³⁷ In the Pennsylvania Supreme Court case of *Ex parte*

³³ See CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 41-42 (Robert H. Bremner, ed., 1970). Much more common were cases where a child apprentice was removed from his master after suffering abuse at the hands of the master. See *id.* at 124-126.

³⁴ *Id.* at 39-40.

³⁵ *Id.* at 41.

³⁶ *Id.*

³⁷ See, e.g., JUSTICE JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1341-1342 (1834) (“[P]arents are intrusted [sic] with the custody of the persons, and the education, of their children, yet this is done upon the natural presumption, that the children will be properly taken care of... and that they will be treated with kindness and affection. [But, whenever a father] acts in a manner injurious to the morals or interests of his children... the Court of Chancery will interfere... The jurisdiction, thus asserted, to remove infant children from the custody of their parents... seems indispensable to the sound morals, the good order, and the just protection of a civilized society.”).

*Crouse*³⁸ a major court for the first time articulated a legal justification for removal from a parent that was based solely on the premise of protecting the child from the parent's neglectful care-taking.³⁹ The *Crouse* case soon became a cornerstone of state intervention in families where parents had failed to provide adequate care for their children beyond "subjecting" them to poverty.⁴⁰ As the nineteenth century progressed, reformers began in earnest to use the *parens patriae* doctrine as a tool to protect children from environments the reformers deemed unsafe, including abusive and neglectful parents. By 1850, eight cities had established "Houses of Refuge" for indigent and delinquent children.⁴¹ The Society for the Prevention of Cruelty to Children, the nation's first organization devoted to protecting children from neglectful and abusive parents, was established in 1875 in New York.⁴²

The reformers who explicitly and implicitly pushed for the application of *parens patriae* to instances of child maltreatment tended to be middle-class and wealthy women who were well-educated and who sought to champion "social outsiders."⁴³ They

³⁸ *Ex parte Crouse*, 4 Whart. 9, 11 (Pa. 1839).

³⁹ See *Crouse*, 4 Whart. at 11. ("[T]he natural parents, when unequal to the task of education, or unworthy of it, [may] be superseded by the *parens patriae*, or common guardian of the community... The right of parental control is natural, but not an unalienable one.")

⁴⁰ See *Roth v. House of Refuge*, 31 Md. 329 (1869); *Prescott v. State*, 19 Ohio St. 184 (1869); *New Hampshire ex rel. Cunningham v. Ray*, 63 N.H. 406 (1885); *Milwaukee Indus. School v. Supervisors of Milwaukee County*, 40 Wis. 328 (1876); *In re Ferrier*, 103 Ill. 367 (1882). Note that while some of these cases are what today we would consider delinquency matters, at the time such activities were considered failures of the parent and were not differentiated statutorily or in common law.

⁴¹ See HERBERT H. LOU, *JUVENILE COURTS IN THE UNITED STATES* 15-16 (1927) (discussing Houses of Refuge).

⁴² ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 108 (1969).

⁴³ Some say these altruistic inclinations were also driven in part by a need to fill a void in their own lives left by the decline of traditional religion, more free

considered themselves altruists and humanitarians dedicated to rescuing those who were “less fortunately placed in the social order,”⁴⁴ and their chief concern was to protect children’s morality and physical safety.⁴⁵ They came to be known as the “child savers.”⁴⁶

Ironically, the zeal of the child savers, while derived from admirable impulses to protect children, was powerful and uncompromising, and had no room for broader considerations of the harms children might suffer from being separated from their families and communities. The statutory provisions relating to removals and foster care placements that grew out of the child savers’ vehement advocacy reflect this narrow perspective, and it is these limited provisions which still form the basis of today’s statutes. The Illinois Juvenile Court Act of 1899, generally regarded as the first statute to formalize grounds for state intervention into the lives of families based on child abuse and neglect,⁴⁷ states that:

[p]ending the final disposition of any case the child may be retained in the possession of the person having the charge of same, or may be kept in some suitable place provided by the city or county authorities.⁴⁸

time, better and more available public education, and the rise of less community-oriented and more impersonal urban lifestyles. *Id.* at 77.

⁴⁴ PLATT, *supra* note 42, at 3.

⁴⁵ *Id.* at 99.

⁴⁶ See generally PLATT, *supra* note 42 (describing origin and history of movement).

⁴⁷ *Id.* at 9-10 (indicating there is some dispute over whether it was first, but it certainly was the first official enactment and is generally acknowledged as the model statute for other states and countries.).

⁴⁸ For the full text of the Act, see *The Illinois Juvenile Court Act of 1899*, 49 JUV. & FAM. CT. J., Fall 1998, at 1, 2.

The statute provides no detail on what standard a court must consider to deem a removal warranted, nor does it recognize that removal of a child poses its own risks. While the current version of Illinois' removal statute provides much more detail on how to determine whether the child's home presents a sufficient degree of risk to warrant removal, it also does not engage in any analysis of the risks inherent in the removal itself:

[i]n determining the health, safety and best interests of the minor to prescribe shelter care, the court must find that it is a matter of immediate and urgent necessity for the safety and protection of the minor.... that the minor be placed in a shelter care facility or that he or she is likely to flee the jurisdiction of the court.⁴⁹

Illinois' statute is not unique in its narrow focus. In fact, there exists not a single state's removal standard which requires an analysis of the risks of removal.⁵⁰

B. Due Process Limitations on the State's Right to Remove

The state does not, of course, have unfettered latitude to remove children from the care of their parents. The state's power to interfere in its capacity as *parens patriae* was first limited through the application of the substantive due process clause in a series of landmark Supreme Court cases, beginning with *Meyer v. Nebraska*⁵¹ and *Pierce v. Society of Sisters*⁵² in the 1920s. The liberty interest of parents in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests

⁴⁹ 720 ILL. COMP. STAT. ANN. 405/2-10(2) (West 2004).

⁵⁰ See *supra* notes 18-24 and accompanying text.

⁵¹ 262 U.S. 390 (1923).

⁵² 268 U.S. 510 (1925).

recognized by [the Supreme] Court.”⁵³ In *Meyer* and *Pierce*, and later in *Prince v. Massachusetts*,⁵⁴ the Court found that a child was not a “mere creature of the State”⁵⁵ but that there was a constitutional dimension to the right of parents to be free from state intrusion into their upbringing of their children.⁵⁶ Current standards for the temporary removal of children from their parents must therefore account for the substantive and procedural due process rights of parents’ rights to custody and control of their children.

In constitutional challenges to removals, the focus of courts has remained limited, only on rare occasions including in their analysis a consideration of the real or potential harm of removals.⁵⁷ Generally, courts considering the rights of parents to the custody and care of their children have used a traditional three-part analysis to determine whether a substantive due process right is at stake.⁵⁸

⁵³ *Troxell v. Granville*, 530 U.S. 57, 65 (2000).

⁵⁴ 321 U.S. 158 (1944).

⁵⁵ *Pierce*, 268 U.S. at 535.

⁵⁶ Over forty years later, in *In re Gault*, the Supreme Court found that due process protections also existed for children. 387 U.S. 1(1967). The Court ruled that alleged juvenile delinquents were entitled to most of the same due process protections afforded adults in criminal cases, including notice of charges, the right of confrontation and cross examination, and the right to counsel. Seen by some as a long-overdue recognition of children’s rights, and others as a tragic undermining of the juvenile court’s ability to treat children as children, *Gault* applied only to delinquency cases and not other kinds of child-centered legal matters. *Gault* consequently did nothing to affect the *parens patriae* authority of the juvenile court in child maltreatment matters, and in fact the Court specifically stated that it did not “consider the impact of these constitutional provisions upon the totality of the relationship of the juvenile and the state.” *Gault*, 387 U.S. at 12.

⁵⁷ *But see* *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), discussed *infra* in section III(B).

⁵⁸ *See, e.g.,* *Smith v. Org. of Foster Families For Equality & Reform*, 431 U.S. 816, 848-49 (1977) [hereinafter OFFER]; *J.B. v. Washington County*, 127 F.3d 919, 927-28 (10th Cir. 1997); *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 293 (S.D.N.Y. 2000). *See also* *Mathews v. Eldridge*, 424 U.S. 319 (1976) (detailed analysis of the three-part test described above).

First, the interest at stake must be of such a fundamental nature that it is a protected by the Fourteenth Amendment.⁵⁹ The right of

⁵⁹ The Fourth Amendment provides one further constitutional limitation to the state's *parens patriae* authority to remove children temporarily from the care of their parents. A temporary removal typically involves the intervention of a state actor, usually a police officer or a caseworker. Any seizure therefore implicates the Fourth Amendment protections. While there has been some question of whether a child is truly deprived of a liberty interest when removed from his parents, *Lossman v. Pekarske*, 707 F.2d 288, 290 (7th Cir. 1983), courts have generally granted standing to a child under the Fourth Amendment to contest the constitutionality of a removal. *Donald v. Polk County*, 836 F.2d 376, 384 (7th Cir. 1988); *J.B. v. Washington County*, 127 F.3d 919, 928 (10th Cir. 1997); *Tenenbaum v. Williams*, 193 F.3d 581, 602 (2d Cir. 1999). More specifically, standing exists to show whether or not there was probable cause for the seizure. *J.B.*, 127 F.3d at 929; *Donald*, 836 F.2d at 384; *Tenenbaum*, 193 F.3d at 603-04. The Supreme Court has not considered whether the temporary removal of children in cases of suspected abuse or neglect is governed by the probable cause standard. It could be argued that such removal is based on "'special needs, beyond the normal need for law enforcement,'" *O'Connor v. Ortega*, 480 U.S. 709, 720 (1987) (*quoting* *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985)), and therefore permissible in the absence of probable cause. *See, e.g.*, *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding scheme of suspicionless drug testing of student-athletes under special needs doctrine); *T.L.O.*, 469 U.S. at 347-48 (permitting warrantless search of student's purse grounded in reasonable suspicion of presence of cigarettes; state's interest in maintaining discipline in schools provides special need beyond criminal law enforcement obviating need for probable cause). Case law in most circuits indicates that emergency removal of a child by caseworkers is not a "special needs" situation. *See, e.g.*, *Good v. Dauphin County Soc'y. Servs. for Children & Youth*, 891 F.2d 1087, 1092-94 (3d Cir. 1989) (applying ordinary probable-cause standard to inspection of child's nude body by caseworker and police officer); *Donald*, 836 F.2d at 384 (applying probable-cause standard to caseworkers' removal of child from parents' custody). *But see* *Darryl H. v. Coler*, 801 F.2d 893, 901-02 (7th Cir. 1986) (neither warrant nor probable cause necessary for visual inspection of child's body for signs of abuse so long as relatively stringent state regulations were followed and therefore does not need to meet the ordinary probable cause standard). Most courts have nevertheless analyzed the legality of temporary removals based on the probable cause standard. Probable cause has been found in situations where evidence indicated a risk of immediate injury if the child were not removed. This standard comports with the removal standard contained in most state statutes. As usual, there is no analysis of the potential harmful effect of a removal on the child.

parents to retain care and custody of their children has long been recognized as such a fundamental right.⁶⁰ In fact, there exists substantive due process protection for a parent in the “companionship, care, custody and management of his or her children,” and also “...of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.”⁶¹ Second, the State must have infringed upon that fundamental right.⁶² Where a child has been removed for any substantive amount of time, such an infringement has been found.⁶³ Finally, the state must be found to have no significant state interest which justifies the intrusion.⁶⁴ While courts have never disputed that there is a significant state interest in protecting children from maltreatment in emergency circumstances, they have also found that there must be an “objectively reasonable basis for believing an emergency situation exists.”⁶⁵ Courts have simply not considered the realities of the harms caused to children by removals at any stage of their substantive due process analysis, most likely because it clearly

⁶⁰ See *Meyer*, 262 U.S. at 390; *Pierce*, 268 U.S. at 510; *Troxell v. Granville*, 530 U.S. at 65.

⁶¹ *Smith v. OFFER*, 431 U.S. 816, 844 (1977); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977); *People United*, 108 F. Supp. 2d at 293. This one phrase is the only facet of the analysis which accounts at all for the effect on children of removal, and is never fleshed out in any substantive manner.

⁶² See, e.g., *Smith*, 431 U.S. at 848-49; *J.B.*, 127 F.3d at 927-28; *People United*, 108 F. Supp. 2d at 293. See also *Mathews*, 424 U.S. at 319.

⁶³ Compare *Tenenbaum v. Williams*, 193 F.3d 581, 600-01 (2d Cir. 1999) (holding removal for a single afternoon not severe enough to constitute violation), with *Yuan v. Rivera*, 48 F. Supp. 2d 335, 347 (S.D.N.Y. 1999) (finding separation of approximately three months constituted significant infringement).

⁶⁴ See, e.g., *Smith*, 431 U.S. at 848-49; *J.B.*, 127 F.3d at 927-28; *People United*, 108 F. Supp. 2d at 293; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

⁶⁵ *Cecere v. City of New York*, 967 F.2d 826, 830 (2d Cir. 1992); *People United*, 108 F. Supp. 2d at 294.

goes beyond the constitutional issue of a parent's right to be free from state intervention.⁶⁶

Cases in which courts have scrutinized the *procedural* due process safeguard have also stayed narrowly focused. These cases have focused almost exclusively on whether a hearing was provided, and whether it was provided at "a meaningful time and in a meaningful manner."⁶⁷

More specifically, to satisfy procedural due process three distinct factors are considered: the private interest that is affected by the state action; the risk that the procedures used will lead to an erroneous deprivation of that private interest; and, the state's interest in supporting the use of the challenged procedure, including any interest in minimizing financial and administrative burdens.⁶⁸ These factors have rarely had occasion to be applied in the context of temporary removals authorized after a court hearing,⁶⁹ presumably in large part because the hearing itself provides sufficient procedural safeguards to parents.⁷⁰

⁶⁶ There have been federal civil rights actions brought on behalf of children harmed in the foster care system. They have focused, however, on the failure of the state to meet its duty to adequately protect children in its care, not on the removal decision itself. See *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001); *White v. Chambliss*, 112 F.3d 731 (4th Cir. 1997); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 854 (7th Cir. 1990); *S.S. v. McMullen*, 225 F.3d 960 (8th Cir. 2000); *Milburn v. Anne Arundel County Dep't of Soc. Servs.*, 871 F.2d 474 (4th Cir. 1989). There have also been tort lawsuits focusing on negligent actions by the state in placing children with foster parents who were known to be abusive, again though without a focus on the removal determination itself. See *Miller v. Martin*, 83 So.2d 761 (La. 2003); *State Dep't of Health and Rehabilitative Services v. T.R.*, 847 So.2d 981 (Fla. Dist. Ct. App. 2002).

⁶⁷ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Gottlieb v. Country of Orange*, 84 F.3d 511, 520 (2d Cir. 1996); *Cecere*, 967 F.2d at 829.

⁶⁸ *Smith*, 431 U.S. at 848-49, citing *Mathews*, 424 U.S. at 335.

⁶⁹ They have been applied to other types of removals such as the removal of a child from a specific foster placement care, see, e.g., *Smith*, 431 U.S. 816 (1977) and in cases involving a permanent removal from a parent, see, e.g., *Santosky v. Kramer*, 455 U.S. 745 (1982) and *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981).

⁷⁰ Generally, it is emergency removals *prior* to court authorization which have been challenged.

Two Supreme Court cases from the early 1980s, *Santosky v. Kramer*⁷¹ and *Lassiter v. Department of Social Services*,⁷² which address removals from caretakers in a slightly different context, underscore how narrow the focus has remained in challenges to temporary removals. *Santosky* and *Lassiter* concern procedures used for terminations of parental rights cases, in other words, *permanent* deprivations of a parent's right to care, custody, and control of her child. *Santosky* involved a challenge to New York's standard of proof at termination hearings.⁷³ The plaintiffs had lost their parental rights to three of their children at a hearing where the state proved its case by a preponderance of the evidence, as required by the New York statute at the time.⁷⁴ In weighing the *Santosky*'s claim that this standard was inconsistent with due process requirements, the Court found that the private interest of the parents in preventing a permanent termination of their parental rights was compelling, that the risk of error using a preponderance standard was substantial, and that the government interest favoring the standard was comparatively slight.⁷⁵ The Court found that a "clear and convincing evidence" standard of proof was appropriate in termination cases, comparing the individual interest of the parents here to the persons subjected to hearings on civil commitment, deportation, and denaturalization matters.⁷⁶

In stark contrast to temporary removal cases, the *Santosky* Court's analysis acknowledges, albeit on a basic level, that removals involve risks of their own. The Court asserts, in fact, that given the harsh consequences of an unnecessary termination, the state should actually have an interest in avoiding the increased risk of erroneous terminations inherent in the lower standard of proof:

⁷¹ *Santosky*, 455 U.S. 745.

⁷² *Lassiter*, 452 U.S. 18.

⁷³ *Santosky*, 455 U.S. at 752.

⁷⁴ *Id.*

⁷⁵ *Id.* at 758.

⁷⁶ *Id.* at 756.

...the consequences of an erroneous termination is the unnecessary destruction of [the] natural family... Even when a natural home is imperfect, permanent removal from that home will not necessarily improve his welfare... Nor does termination of parental rights necessarily ensure adoption.⁷⁷

Even such a basic and general recognition of the potentially harmful effects of removing children from their parents as this, however, has rarely played any role in the statutory standards a state must meet to justify *temporary* removals.⁷⁸

Courts simply have been far less willing to acknowledge the harmful effects temporary removals can have on children than they are to acknowledge the harm of permanently breaking apart a family. In *Santosky* and *Lassiter* the state's interest of providing permanence to children is tempered by the additional state interest of avoiding erroneous destructions of families.⁷⁹ In temporary

⁷⁷ *Santosky*, 455 U.S. at 766 n.15.

⁷⁸ *But see* *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002), discussed *infra* in section III(B). In *Lassiter*, the Court had considered another procedural due process claim on the part of a parent whose rights to her child had been terminated. The issue was whether the due process clause should be interpreted to guarantee respondents the right to counsel at a termination of parental rights hearing. The Court again balanced the *Eldridge* factors, and again found a compelling interest at stake, a potentially high risk of an erroneous decision, and a relatively weak state interest. *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 27, 31 (1981). Although the analysis was similar, however, the Court found that there was no blanket guarantee to counsel. Instead, trial judges are required to conduct an individual analysis and balancing of the *Eldridge* factors for each case before them. *Id.* at 32. The *Santosky* Court distinguished *Lassiter* by asserting that case-by-case review cannot preserve fundamental fairness in the case of an evidentiary standard, even if it could in a right to counsel issue. *Santosky*, 455 U.S. at 757. If the parents' interests were particularly strong, and the risks of error were high, counsel is required. If the state's interests were at their highest, counsel might not be required. *Lassiter*, 452 U.S. at 31. For a cogent and stinging dissent of the case-by-case methodology, see Justice Blackmun's dissent at 452 U.S. at 48 – 53.

⁷⁹ *Lassiter*, 452 U.S. at 27; *Santosky*, 455 U.S. 745 at 766.

removal cases, no parallel state interest is recognized in avoiding the trauma to child and family of an unnecessary removal.

The deprivations at stake at temporary removal hearings are undoubtedly of a different nature,⁸⁰ but two of the significant presumptions which are working against the recognition of harms inherent in temporary removals are questionable at best. First, there is a presumption that the removals are of a short duration.⁸¹ Indeed, cases addressing standards for temporary removals only rarely address removals of more than a few months.⁸² These removals are made on a temporary basis, usually upon evidence of an imminent risk to a child's health or safety, and prior to a full hearing on the underlying allegations of neglect or abuse. In reality, however, once a child is removed, the inertia of the child welfare system often makes the process of the child's return a lengthy and Kafkaesque experience.⁸³ In fact, fifty percent of all children in foster care stay longer than one year.⁸⁴ Second, there is a presumption that a short separation will have little or no negative impact on a child. It is well documented, though, that separation from parents for even a relatively short time can have a devastating

⁸⁰ Interestingly, courts have nevertheless accorded the same weight to parents' interest to be free from state intervention in raising their children. See, e.g., *Smith v. OFFER*, 431 U.S. 816, 848-49 (1977); *J.B. v. Washington County*, 127 F.3d 919, 927-28 (10th Cir. 1997); *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275, 293 (2000); *Mathews v. Eldridge*, 424 U.S. 319 (1976); *Troxell v. Granville*, 530 U.S. 57, 65 (2000); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); See also *supra* accompanying text of notes 58, 60.

⁸¹ See, e.g., *People United*, 108 F. Supp. 2d at 280-83; *Nicholson*, 203 F. Supp. 2d at 168-93.

⁸² See, e.g., *People United*, 108 F. Supp. 2d at 280-83; *Nicholson*, 203 F. Supp. 2d at 168-93.

⁸³ Temporary removal is a first, necessary, step toward permanent termination. Once a child is removed the child welfare system tends to show a great deal of reluctance to return children until a variety of procedural hoops have been jumped through by parents. See *Chill, supra* note 17, at 542-45.

⁸⁴ CHILD WELFARE INFO. GATEWAY, *supra* note 2, at 6. Even more disturbing, children were staying in foster care for these lengths of time in spite of the fact that only twenty percent had goals of adoption. *Id.* at 4.

impact on a child emotionally and physically.⁸⁵ Knowing the limitations and misconceptions embedded in our current standards, then, how can we work toward a standard which will accommodate the reality of the risks inherent in temporary foster care placements and better serve the interests of the children we purport to be “protecting”?

III. TOWARD A MORE COMPREHENSIVE, REALISTIC, AND COMPASSIONATE STANDARD

Part II of this paper illustrated how current legal standards are based on long-standing legal principles which developed without accounting for the inherent risks of removals and foster care placements. This part introduces a standard recently developed by two child welfare professionals and scholars which calls for more balanced risk assessments by child protection agencies, and analyzes how judges can apply the standard in removal hearings. This part then examines a recent high-profile New York case which implements a version of that standard and should be seen as a model for its adoption by other states.

⁸⁵ See JOSEPH GOLDSTEIN et al., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 41 (1996):

Children 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.

See also *Nicholson*, 203 F. Supp. 2d at 198-200, for an account of extensive expert testimony to this effect.

A. "Comprehensive Risk Assessments" and Their Potential Application to Judicial Assessments

In 2001, social workers Eileen Gambrill and Aron Shlonsky co-authored a research article advocating the use of more "comprehensive risk assessments" by child welfare professionals prior to removals of children from their homes and subsequent placement in foster care.⁸⁶ Gambrill and Shlonsky argued that comprehensive risk management in the child protection system means more than assessing risks posed to children by respondent parents, but also includes assessing risks posed to children by foster parents, child welfare staff and service providers, and agency procedures.⁸⁷

Gambrill and Shlonsky begin their research article with a concise description of the problem with the current one-sided focus of risk assessments in the child welfare arena:⁸⁸

Currently, risk assessment in the child welfare system is characterized more by what is not done than what is done. The term "risk assessment" implies that there is an effort to assess risk to children when, if one examines what is done, only some potential sources of risk are addressed (e.g., risk of biological parents to their children). A narrow approach has been taken to assessing risk to children who are potentially or actually involved in the child welfare system: developing risk assessment instruments to predict which children

⁸⁶ Eileen Gambrill & Aron Shlonsky, *The Need for Comprehensive Risk Management Systems in Child Welfare*, 23 CHILD. & YOUTH SERV. REV. 79 (2001).

⁸⁷ *Id.*

⁸⁸ *Id.* Gambrill and Shlonsky's recommendations and analysis are in the context of child welfare professionals and agencies, but deal with the same determinations of whether or not to remove a child from her parent pending the final resolution of a case.

should come into care and which should not. This narrow approach ignores a host of other factors that may influence risk to children including the quality of assessment and services provided to children and families and the validity of evaluation methods. If we are concerned about risk to children, we should make efforts to identify and minimize *all* sources or risk.⁸⁹

Expanding this concept of comprehensive risk assessment described by Gambrill and Shlonsky beyond its use by child welfare professionals and encoding it into legal doctrine is the next essential step in child welfare reform.

Applying comprehensive risk assessments to the legal process would add a critical second step to judicial determinations at temporary removal hearings and offer a whole new level of protection to the children at issue. First, as always, the judge would decide whether the agency has demonstrated the requisite level of risk in the child's home to justify a removal, whether that level be "imminent," "substantial," or some other standard. But then – and critically – the judge would expressly weigh those risks of *remaining* in the home against the risks of harm to the child if she were *removed* from her home, select the least detrimental alternative, and determine placement for the child. The second, new, step requires an assessment of the risk of harm to the child from *all* sources, including the risks of removal from a parent's custody and placement in foster care, as well as the risks of continued placement with a child's parents.⁹⁰

The first step, as has been the practice, ensures that governmental child protection agencies continue to be held to the legal standards developed through the long line of Supreme Court cases that describe the substantive and procedural due process

⁸⁹ Gambrill, *supra* note 86, at 79-80. The authors go on to propose a variety of measures for measuring and reducing the risks inherent in foster care placements.

⁹⁰ See Chill, *supra* note 17, at 547; see also Gambrill, *supra* note 86, at 80.

rights of parents to the care and custody of their own children. The second step would ensure that removal determinations are made with a realistic view of which placement will truly be least detrimental to the child. The following case description contrasts how a current imminent risk standard and the proposed two-step process would work.

The Case of James L.⁹¹

James L. was seven years old at the time of his removal hearing. He had been living with his mother; his father's whereabouts were unknown. The neglect petition filed against his mother alleged that she used cocaine to the point that she was unable to care for James adequately. About a year previously, James had begun having behavioral problems in school and was diagnosed by his pediatrician as suffering from Attention Deficit Hyperactivity Disorder (ADHD). Although medication had helped somewhat with the ADHD, when separated from his mother for any extended length of time James became very anxious, had increased behavior problems at school, and exhibited self-mutilating behaviors.

Under the existing imminent risk statute, the judge assessed only whether or not James' life or health would be in imminent risk if he remained in the care of his mother. The judge assessed the validity of the allegation that Mrs. L uses drugs, the nature of that drug use, and any evidence relevant to the effect the drug use had on Mrs. L's ability to care for James. The judge also considered how James' ADHD might be exacerbated by Mrs. L's drug use. In the end, the judge ordered James temporarily removed from the care of his mother.

While in foster care for nearly two years, James' behavior deteriorated rapidly; he was transferred to four different

⁹¹ The background facts in this example are based on an actual case of the Hofstra Child Advocacy Clinic. All identifying information has been changed to protect confidentiality.

placements, and he attempted to commit suicide on two separate occasions. James explained both suicide attempts as efforts to get to heaven, where he was prepared to wait for the time when his mother could again be together with him.

Under the proposed two-step judicial process, several factors would have been analyzed at the temporary removal hearing once the judge had found imminent risk existed in the home of Mrs. L. The judge would have been required to consider the effect a separation would have on James' ADHD. She would have heard evidence at the hearing on James' increased anxiety, behavioral problems, and self-mutilating behaviors when he is separated from his mother. The judge would have weighed how a removal from Mrs. L might exacerbate these problems, perhaps hearing testimony from an expert mental health witness. The judge would also have been required to consider what sort of safeguards the agency would need to put in place to mitigate the potential harm to James if he were removed from his mother's care, and what sort of contact between James and his mother could be maintained to minimize the problems associated with the separation. Each of these facts would have been relevant to a determination of whether remaining with his mother would be in his best interests. In the end, the placement decision would have been made with a much more meaningful consideration of minimizing the risks to James' physical, emotional and mental health.

The over-arching mandate of nearly every family or juvenile court to protect children from injury, and to safeguard their physical, mental, and emotional well-being, can be adhered to more faithfully in a judicial system that requires comprehensive risk assessment than it can under the current legal standards. The judge in James' case might still ultimately have decided to temporarily remove James from the care of his mother, but her ruling would have been a significantly more informed and refined one, and consequently James' interests would have been more carefully safeguarded.

Support for the underlying rationale behind comprehensive risk assessments – that removals from parents are done without a thorough analysis of all relevant information – is growing rapidly among scholars and practitioners in the field of child welfare.⁹² Nevertheless, valid concerns exist about its effect and its implementation. One major concern is that such a two-step analysis will overly tip the balance against removing children from parents even where there is significant risk of harm in the home. Risk assessments will doubtlessly make removal more difficult, leading at times to the maltreatment of children by their parents before a removal can be legally justified. While this concern is valid, it is mitigated by the fact that the *overall* harm to children would be reduced. Judges will have more complete and accurate information at the outset when assessing whether removal of a child more likely will cause harm than non-removal. Judges are therefore more likely to place children in environments, whether it be with their parents or in foster care, that are *less* likely to cause them harm. Thus, while there may be a small increase in incidents of harm to children not removed, there should be a dramatic decrease in the number of children who suffer the long-term emotional, and at times physical, harms that are known to arise from removal and placement in an over-burdened foster care system.

Another objection to implementing comprehensive risk assessment involves limitations on two scarce resources in family

⁹² See Chill, *supra* note 17, at 543; Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139 (1995); Ariela Dubler et al., *Women's Rights: Reframing the Issues for the Future*, 12 COLUM. J. GENDER & L. 333, 348 (2003); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted out of Foster Care or That Too Many Children Are Entering Foster Care?* 2 U. PA. J. CONST. L. 141 (1999); *Symposium: The Rights of Parents With Children In Foster Care: Removals Arising From Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61 (2003); Andrew Schepard & Theo Liebmann, *The High Stakes in Temporary Removal Determinations*, N.Y. L.J., July 9, 2004, at 3.

and juvenile courts – time and financial support. The additional inquiry required to assess the risks and benefits of each potential placement would necessarily expand the amount of time needed to conduct a temporary removal hearing. Further, the witness fees for any mental health experts called to testify at the hearings would require additional financial expenditures by the court. These concerns about comprehensive risk assessment are serious, but miss the larger picture. The outlay of time and money at this first stage of a removal proceeding would more likely result in saving money that might have been unnecessarily spent on payments to foster parents and expenditures for foster care services, and would also free time that would have been spent at additional, unnecessary court hearings.⁹³ In the larger sense, the court's resources might actually increase.

B. Nicholson v. Scoppetta: The Beginning of Applied Comprehensive Risk Standards

One recent New York case – *Nicholson v. Scoppetta*⁹⁴ – provides an encouraging example of application by the courts of a more comprehensive risk standard. This case should stand as a model for other states serious about foster care reform.⁹⁵

⁹³ See Gambrill, *supra* note 86, at 83.

⁹⁴ *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) (the lower court case is captioned *Nicolson v. Williams*).

⁹⁵ While there has been much discussion of *Nicholson* and its effect on domestic violence jurisprudence, there exists relatively little on the radical change it points towards with respect to the legal standard for a temporary removal. See, e.g., Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217 (2003); Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613 (2004); Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mother for Failure to Protect*, 50 LOY. L. REV. 565 (2004); Maureen K. Collins, *Nicholson v. Williams: Who Is Failing to Protect Whom? Collaborating the Agendas of Child Welfare Agencies and Domestic Violence Services to Better Protect and Support Battered Mothers and Their Children*, 38 NEW ENG. L. REV. 725 (2004); Amanda J. Jackson, *Nicholson v. Scoppetta: Providing a Conceptual Framework for Non-*

Nicholson began as a federal class action brought against the Commissioner of New York City's Administration for Children's Services ("ACS").⁹⁶ The *Nicholson* plaintiffs – victims of domestic violence whose children had been removed from their care, as well as the children themselves – claimed that ACS violated the plaintiffs' Fourteenth Amendment due process rights and Fourth Amendment protections against unreasonable searches and seizures by removing children from their parents solely because, as victims of abuse by their partners, the parents had "engaged in domestic violence."⁹⁷ The District Court granted a preliminary injunction prohibiting ACS from removing children from their mothers solely because their partners battered them.⁹⁸

The stories of the temporary removals are heart-wrenching, and the District Court's decision granting the plaintiff's request for a preliminary injunction barring removals in certain domestic violence cases discussed at length the ramifications of those removals on the subject children.⁹⁹ The decision notes consequences ranging from physical maltreatment while in foster care,¹⁰⁰ to medical neglect by the foster parents and foster care agency,¹⁰¹ to lasting psychological trauma due to separation.¹⁰² In

Criminalization of Battered Mother and Alternatives to Removal of Their Children from the Home, 33 CAP. U. L. REV. 821 (2005). But see Andrew Shepard & Theo Liebmann, '*Nicholson*': *Defining Neglected Child, Taking Child from Parents*, N.Y. L.J., Mar. 2005, at 3.

⁹⁶ *Nicholson*, 203 F. Supp. 2d at 163-64.

⁹⁷ *Nicholson*, 203 F. Supp. 2d at 164-65.

⁹⁸ *In re Nicholson*, 181 F. Supp. 2d 182, 188 (E.D.N.Y. 2002). The injunction was stayed for 6 months for ACS to attempt reform on its own without court involvement. The Court also made findings of fact that ACS routinely charged mothers with neglect and removed their children on the sole basis that the mothers were victims of domestic abuse; ACS rarely provided the mothers access to the social services they needed; ACS caseworkers lacked adequate training in working with victims of domestic violence; and ACS separated mothers from their children when less harmful alternatives were available. *Id.*

⁹⁹ *Id.* at 198-199, 203-204.

¹⁰⁰ *Nicholson*, 203 F. Supp. 2d at 172.

¹⁰¹ *Nicholson*, 203 F. Supp. 2d at 176.

¹⁰² *Id.* at 187.

the case of two of the child plaintiffs, after eight days in foster care one three-year old girl had a rash on her face, yellow pus running from her nose, and scratches; her eight-year old brother had a swollen eye and, when transferred to a new foster parents asked, "You are not going to hit me, are you?"¹⁰³ Another young plaintiff was returned to her mother two weeks after removal filthy, in a dirty diaper, and suffering from an ear infection that required a trip to the emergency room.¹⁰⁴ Her three-year old brother had bruises, had pus and blood coming out of his lip, and also had to be taken to the hospital.¹⁰⁵ A two-year old child separated from his mother for five and a half months, now screams whenever his mother walks into another room and gets hysterical at the sound of the doorbell ringing.¹⁰⁶

At the hearing for the temporary injunction, numerous experts testified on the potential harm to a child when removed from his parents.¹⁰⁷ While many spoke on the harm specific to removals in domestic violence cases, a substantial portion of the testimony was related to removals generally. The testimony emphasized the importance of the attachment between a child and a parent, calling it the "basis of who we are as humans".¹⁰⁸ Disruptions in the parent-child relationship "provoke fear and anxiety in a child and diminish his or her sense of stability and self."¹⁰⁹ One expert described the typical response of young child who is removed from his parent: "At first, the child is very anxious and protests vigorously and angrily."¹¹⁰ Then he falls into a sense of despair, though still hypervigilant, looking, waiting and hoping for her return...¹¹¹

¹⁰³ *Nicholson*, 203 F. Supp. 2d at 172.

¹⁰⁴ *Id.* at 176.

¹⁰⁵ *Id.* at 176.

¹⁰⁶ *Id.* at 187.

¹⁰⁷ *Id.* at 198-199.

¹⁰⁸ *Nicholson*, 203 F. Supp. 2d at 199.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 199.

Other experts spoke of the risk to children's health posed by the foster care system itself, described as potentially "much more dangerous and debilitating than the home situation."¹¹² Failures of the foster care agencies to provide adequate medical care, increases in incidence of child abuse and child fatality in foster homes, and disruption in the child's relationship with his community, school, and siblings were all cited as detrimental aspects of removal.¹¹³

Based on the extensive evidence at the hearing indicating the adverse physical and psychological effects on children removed from their parents, and, in this case, the comparatively low risk of harm to children who remain in the care of a mother who is a domestic violence victim, the District Court found no valid state interest in the temporary removals of the child plaintiffs from the plaintiff parents.¹¹⁴

Applied to temporary removals generally, the *Nicholson* analysis means that merely assessing the risk of harm to a child if he remains in the care of his parent is not sufficient; the risk of harm from the removal itself, and the risk of harm of the subsequent placement, must be balanced against that harm in continued parental custody. A removal is then legal only if the balancing results in a state interest sufficiently compelling to justify interference with the parent's fundamental right to the care, custody, and control of her child.¹¹⁵

¹¹² *Nicholson*, 203 F. Supp. 2d at 199.

¹¹³ *Id.*

¹¹⁴ *Id.* at 250-51.

¹¹⁵ *Nicholson* is one of the few cases to cite international law on the subject of forced removals of children from their family. 203 F. Supp. 2d at 234. The court cited provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child to bolster its recognition of family integrity as a fundamental right. *Id.* While there may be some potential for the use of international law as a tool for preventing unwarranted separations of a child and his parents, there is little specific guidance on how to balance the rights of children to be free from parental abuse and neglect, and the right of the family to be free from governmental intrusion. See generally, Sonja Starr and Lea Brilmayer, *Stefan A.*

The District Court's decision in *Nicholson* has already led to a new interpretation of New York's removal standard. When ACS appealed the court's injunction, the Second Circuit certified three questions to New York State's highest court, its Court of Appeals.¹¹⁶ One of those questions involved what standard must be used to justify a removal.¹¹⁷ The Court of Appeals' answer explicitly requires Family Court judges now to balance the harm that a removal will cause against the imminent risk to a child of remaining in the parent's care:

. . . a blanket presumption favoring removal was never intended. The court *must do more* than identify the existence of a risk of serious harm... It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests.¹¹⁸

Previously, New York's Family Court judges were required to scrutinize only one side of the equation – the imminent risk. There was no need for attorneys to show, or courts to consider, evidence of how a removal would affect the child. In fact, courts frequently ordered removals merely because they were deemed the “safer course of action.”¹¹⁹ In these cases, the lower courts found that the

Riesenfeld Symposium 2002: Family Separation as a Violation of International Law, 21 BERKELEY J. INT'L L. 213, 272-73 (2003) (describing the various international laws which enumerate both of these rights).

¹¹⁶ *Nicholson v. Scoppetta*, 344 F.3d 154, 176-77 (2d Cir. 2003).

¹¹⁷ *See id.* at 177.

¹¹⁸ *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 378 (2004) (emphasis in original).

¹¹⁹ *See In re Kimberly H.*, 673 N.Y.S.2d 96, 99 (N.Y. App. Div. 1998) (“safer course” of action, where child's older sibling had been beaten with a belt, causing welts and scars, was to remove child from mother's care); *In re Erick C.*, 632 N.Y.S.2d 126, 128 (N.Y. App. Div. 1995) (“safer course” of action, where five-month-old infant had unexplained bruising and fractures, was to keep children in foster care pending hearing); *In re Jean L.* 639 N.Y.S.2d 487, 489 (N.Y. App. Div. 1996) (“safer course” of action where mother attacked police officer in presence of children, children were hungry and poorly clothed, was for children to remain in foster care until a full trial).

safer course of action was to remove children from their parents, despite significant evidentiary gaps in the case presented by ACS to show imminent risk to the child in the parent's care.¹²⁰ The *Nicholson* decision specifically repudiates the application of the safer course doctrine.¹²¹

After *Nicholson*, New York Family Court judges can no longer ignore the detrimental effect on a child of being removed from her home and placed in foster care when deciding where the child will live pending the resolution of her case. Courts and agencies are now required to consider evidence of the harm that would likely result to the child from removal, and not only the harm that would likely result if the child were to remain with his parents. A particularly encouraging sign for the standard's robustness in New York is that at least one intermediate appellate court has already reversed a family court removal determination

¹²⁰ *Kimberly H.*, 673 N.Y.S.2d at 99. *Kimberly H.* in particular provides a powerful illustration of how the previously required one-sided analysis in New York could lead to a very loose application of removal standards. When the child Kimberly H. was born, her three siblings had already been removed from the care of their mother, Elizabeth H., due to a previous finding that Ms. H. had beaten one of Kimberly's siblings with a belt. *Id.* at 97. At the time of the hearing to determine whether Kimberly should be removed, Ms. H. was under the supervision of two caseworkers and engaging in individual counseling sessions and parenting classes. *Id.* at 98. Ms. H. had all provisions necessary to care for Kimberly, and the caseworkers who visited the child testified that she appeared "fine." *Id.* The appellate court overturned the trial judge's refusal to order a removal, reasoning that "[a] new infant is the most vulnerable or creatures... we must ensure that our laws and our courts provide them with all the protection available... the safer course of action is for Kimberly to also remain removed..." *Id.* at 99. The gaping hole in the Court's analysis, of course, is that the safety of remaining in the home is not actually compared with the safety of Kimberly in foster care. There is no analysis of the type of foster setting in which Kimberly will be placed, what type of separation anxiety may or may not develop for Kimberly, or what long-term effect separation will have on Kimberly's ability to bond with her mother. It is as though the risk for Kimberly in the care of Ms. H. exists in a vacuum with no consequences ascribed to a placement in foster care.

¹²¹ *Nicholson v. Scopetta*, 3 N.Y.3d. 357, 380 (2004).

made without balancing the risk of removal against the imminent risk in the home.¹²²

Another fact augurs well for *Nicholson's* impact beyond New York. The New York statute which was interpreted to require a comprehensive balancing before a removal is fairly typical:

In determining whether temporary removal of the child is necessary to avoid imminent risk to the child's life or health, *the court shall consider and determine in its order whether continuation in the child's home would be contrary to the best interests of the child...*¹²³

Such "best interests" language can be found in removal statutes in many states,¹²⁴ and provides a solid legal basis for inquiring into areas consistent with a comprehensive risk assessment. After determining that an imminent risk to a child's life or health exists in the care of the parents, thereby justifying the intrusive measure of removing the child from the parent's care, judges can subsequently conduct a "comprehensive risk assessment" on whether the risks to that particular child *with* his parents are actually greater than the risks to the child's life or health if *removed* from his parents. Thus, while no existing statutory provision *requires* that judges take into account factors such as the

¹²² *In re Alexander B.*, 814 N.Y.S.2d 651 (N.Y. App. Div. 2006). In *Alexander B.*, the New York appellate court overturned a removal determination by the family court judge where mental health examinations of the family indicated that the children were emotionally damaged by not being able to see their mother and speak with her while in foster care, and that continued removal would be extremely detrimental to their emotional and physical well-being. *Id.* at 652.

¹²³ N.Y. Fam. Ct. Act §§ 1022(a), 1027(b)(i), 1028(b) (Consol. 2003) (emphasis added).

¹²⁴ See *supra* notes 22-23. Note that some of these statutes require *only* a best interest analysis without any finding of imminent risk. There are serious potential Constitutional problems with the complete omission of the imminent risk component, but such a discussion is beyond scope of this Article.

risk of emotional or physical harm to a child if removed from the custody of a parent at a temporary removal hearing, many states' standards do contain language which *permits* an inquiry into those areas of risk.¹²⁵ A case that has the right combination of expert testimony, horrific removal stories, and enlightened judges, can inspire the many states with similar statutes to develop similarly comprehensive and realistic standards.¹²⁶

IV. CONCLUSION

Foster system reform is an omnipresent agenda item for federal and state governments. Policy makers, judges, and lawyers who truly want to better serve children must recognize that changing initial removal standards is a crucial component of that reform. Placing children in foster care who are better off with their

¹²⁵ N.Y. Fam. Ct. Act § 1027(b) (2006) (“...if the court finds that removal is necessary to avoid imminent risk to the child’s life or health, it shall remove or continue the removal of the child and remand him or her to a place approved for such purpose by the social services district...”).

¹²⁶ While *Nicholson* has already been cited in several cases for a wide variety of propositions, New York is so far the only state that has taken up the argument that there must be a balancing of the two risks – the potential harm of removal, and the potential harm of non-removal – in assessing the strength of the state interest in removing children from their parents. *See, e.g.,* *Johnson v. City of New York*, 2003 U.S. Dist. LEXIS 5670 (S.D.N.Y. Apr. 8, 2003) (removal from kinship foster parent may be justified by showing of “objectively reasonable basis” that child is immediately threatened from harm); *Velez v. Reynolds*, 325 F. Supp. 2d 293 (S.D.N.Y. 2004) (denying motion to dismiss in case brought challenging, *inter alia*, temporary removal of children in domestic violence neglect case); *N.J. Div. of Youth & Family Servs. v. S.S.*, 855 A.2d 8 (N.J. Super. Ct. App. Div. 2004) (dismissing abuse case filed against victim of domestic violence); *In re Israel S.*, 764 N.Y.S.2d 96 (N.Y. App. Div. 2003) (vacating neglect finding in corporal punishment case); *In re Jessica Marie Q.* (Anonymous), 757 N.Y.S.2d 304 (N.Y. App. Div. 2003) (upholding termination of parental rights); *N.Y. County Lawyers’ Ass’n v. State*, 763 N.Y.S.2d 397 (N.Y. Sup. Ct. 2003) (pay rates for lawyers representing indigent respondents in family court inadequate); *McEvoy v. Brewer*, 2003 Tenn. App. LEXIS 832 (Tenn. Ct. App. Nov. 25, 2003) (domestic violence can be grounds for change in custody of child).

parents, even if there is some level of risk in the home, serves no one's interests. Parents lose custody of their children, the foster care system becomes over-burdened, and children suffer the trauma of separation and uncertainty. In order to reach more comprehensive, realistic, and compassionate decisions about removing children from their homes, it is imperative that from the outset judges consider *all* the risks to children – whether those risks be in the child's home, inherent in the removal of that child, or due to the uncertain or even unsafe nature of the foster care placement of that child. Yet remarkably, almost no state requires its family court judges to take those risks and concerns into account. The development of more comprehensive risk assessments by social service professionals and the enlightened reasoning of cases like *Nicholson* confirm that our legal system has the tools to make the necessary changes in practice. Now we must just develop the will to do so.