

1. Law Journal Articles and Related Materials

- Shanta Trivedi, The Harm of Child Removal, 43 New York University Review of Law & Social Change 523 (2019),
https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=2087&context=all_fac.

This article explores how the child welfare system's goal of protecting children would be better served if all involved parties utilized information about the harm of removal when making decisions. Trivedi notes that this includes passing legislation, allocating funding, considering removals, and lawyers advocating for clients in an effort to keep their families together. *Id.* At 526. Trivedi argues that all potential harms of removal should be considered and weighed against the risks of remaining in the home before deciding whether removal is in the child's best interest. *Id.* The article considers harm caused by parent/child separation (including anxiety and attachment disorders), the trauma of actually being removed from the home, the grief and confusion surrounding removal and "the unstable nature and high rates of abuse in the foster system." *Id.* at 523 Trivedi notes that removing "minority children from their communities inflicts additional distinct trauma..." as removal affects "their sense of identity and cultural belonging." *Id.* at 540

The Adoption and Safe Families Act of 1977 ("ASFA") based removal decisions on "the child's health and safety" being "the paramount concern." However, this requirement, along with coinciding societal factors, lead to an increase in removal rates. Trivedi focuses on the ineffectiveness of the ASFA's undefined requirement that "reasonable efforts" be made before children are removed. While Trivedi agrees "reasonable efforts should be required in all cases," only a few states have offered guidance on the language. *Id.* 558 Most jurisdictions do not require courts to consider the harm of removing a child from home when deciding whether to do so. New Mexico is the only state that "identifies the harm of removal as a specific factor in the reasonable efforts inquiry." New York and the District of Columbia are the only jurisdictions that *overtly require* government officials to consider the harm of removal in their substantive removal statutes." The District of Columbia affirmatively requires such consideration in its substantive removal statute. *Id.* 566-567 According to Trivedi, existing laws can be improved (for instance, a "statute that simply codifies New York's case law") and reforms can be implemented within the existing child welfare framework at state and federal levels to better protect children from harm.

- Vivek Sankaran, Easy Come, Easy Go: The Plight of Children Who Spend Less Than 30 Days in Foster Care, 19 U. Pa. J. L. & Soc. Change 207-37 (2016),
<https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2850&context=artiles>.

In this article, Sankaran explores the plight of "short stayers," children who spend less than 30 days in the foster care system. According to Sankaran, "removing children—even abused and neglected children—from the custody of their parents harms them emotionally, developmentally, and socially." Citing the work of Joseph Doyle, Sankaran calls attention to the increased severity and frequency of these problems for children

removed to foster care compared to similar children who have remained in the home. Presenting a more “child-centered narrative,” he calls for the harm caused by removal to be balanced with the other factors traditionally considered by the courts (e.g., the interests of parents and child welfare agencies). Ultimately, Sankaran argues that “juvenile courts are failing to use two tools—the federal reasonable efforts requirement and the early appointment of parents’ counsel—to prevent the unnecessary entry of children into foster care.” According to Sankaran, the federal government “must acknowledge the problem of short stayers by utilizing data related to children who may unnecessarily enter foster care in the Child and Family Services Review, the accountability process used to assess state compliance with federal child welfare requirements.”

- Vivek Sankaran, Christopher Church & Monique Mitchell, A Cure Worse than the Disease? The Impact on Children and Their Families, 102 Marq. L. Rev. 1163 (2019)

This article focuses on how parents and children interacting with the child welfare system experience the removal process and analyzes the gaps and emergent issues in practice, research, and policy related to child removal. The article establishes 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, details the profound trauma removal inflicts on children and their parents and haphazard nature of the removal process, revealing the fact that far too many children are likely unnecessarily removed from their parents. The article concludes with specific policy and practice recommendations aimed at curbing child welfare's reliance on removal to foster care as its predominant safety intervention such as requiring a timely emergency hearing following an emergency removal to evaluate such removal and narrowing the parties that can remove children from their parents without a court order.

- David Pimentel, Protecting the Free-Range Kid: Recalibrating Parents’ Rights and the Best Interest of the Child, 38 Cardozo L. Rev. 1 (2016)

Focusing more on the impact on the parents’ rights as a result of temporary removal and the importance of legal representation of the parents from the beginning, Pimentel argues that “even a temporary removal is an enormous imposition on parents’ constitutionally protected interests” *Id.* at 52. Noting that “[o]nce removed, it can be very difficult to obtain the return of the children to their parents,” he concludes that “parents’ rights to the care, custody, and control of their children can be meaningfully protected only if the parents can keep custody of their kids from the outset.” *Id.* at 52-53.

- Developing a Trauma-Informed Child Welfare System, Children’s Bureau (May 2015), https://www.childwelfare.gov/pubPDFs/trauma_informed.pdf

This brief discusses “the steps that may be necessary to create a child welfare system that is more sensitive and responsive to trauma.” According to the National Child Traumatic Stress Network, a trauma-informed system “is one in which all parties involved recognize and respond to the impact of traumatic stress on those who have contact with the system, including children, caregivers, and service providers.” Trauma-informed practices, the brief argues, are better able to address children’s safety,

permanency, and well-being needs. The brief provides an overview of trauma and its effects and then focuses on the primary areas of consideration in the child welfare process (workforce development, screening and assessment, data systems, evidence-based and evidence-informed treatments, and funding).

- Rebecca Bonagura, Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York, 18 Colum. J. Gender & L. 175 (2008)

Bonagura asserts that “[r]emoval and placement in foster care may have a worse impact on the child than neglect Just as neglect can contribute to cognitive, social, and emotional problems, removal may also cause emotional problems by disrupting a child’s ability to bond with his or her caregiver.” Id. at 196.

- Theo Liebmann, What’s Missing from Foster Care Reform?: The Need for Comprehensive, Realistic, and Compassionate Removal Standards, 28 Hamline J. Pub. L. & Pol’y 141 (2006).

Liebmann argues that in order to protect children from the perils of the foster care system, “we must examine the outdated and short-sighted standards nearly every state currently uses to justify initially removing children from their parents.” Liebmann contends that the exclusive focus on the harm caused by parents fails to acknowledge that placement in foster care, even temporarily, poses a risk of harm to children. Specifically, Liebmann highlights data regarding the poor outcomes for many foster children with respect to education and financial well-being as well as mental, emotional, and physical harm (e.g., separation anxiety, depression). According to Liebmann, applying Grambrill and Shlonsky’s comprehensive risk assessment analysis (see annotation above) 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.” Under this assessment, in order to determine placement of the child, the judge would weigh the risks of *remaining* in the home against the risks of harm to the child if she were *removed* from the home, and select the least detrimental alternative.

- Sonja Starr & Lea Brilmayer, Family Separation as a Violation of International Law, 21 Berkeley J. Int’l L. 213 (2003)

Though addressed in the context of international law, the authors recognize that “[c]hild removals are frequently traumatic for all concerned.” Id. at 272. The authors specifically address temporary removals, emphasizing that they “may cause lasting harm to the children and to the stability of the family relationship” Id. They go on to criticize the “too-hasty resort to removal any time a child’s well-being is at all in doubt—a practice that, indeed, is the official policy of many child protective services agencies.” Id.

- Andrea Charlow, Race, Poverty, and Neglect, 28 Wm. Mitchell L. Rev. 763 (2001)

Discussing the adverse effects of removal on children, Charlow notes that “[c]hildren in foster care exhibit high rates of emotional, behavioral and developmental problems.” Id. at 782. She ties into this concept attachment theory’s (discussed supra at

p. 1) recognition of “the need for children to bond with their adult care-givers in order them to develop self-esteem.” *Id.* Charlow concludes that “the negative effect of removal likely outweighs any intellectual impairment that may have been caused by neglect.” *Id.* at 783.

- Eileen Gambrill & Aron Shlonsky, Need for Comprehensive Risk Management Systems in Child Welfare, 23 *Child & Youth Servs. Rev.* 79 (2001).

This article advocates for the use of a more “comprehensive risk assessment” analysis by child welfare professionals prior to removal. While this study is targeted specifically at social workers and child welfare professionals, it provides insight into the various factors that should be balanced in determining whether removal is in the best interest of the child. The study suggests that the current focus on the harm posed by parents “ignores a host of other factors that may influence risk to children.” Instead, the study calls for an assessment that extends beyond the posed threat to children by their parents to include risks presented by foster parents, child welfare staff, and service providers and agency procedures. The study concludes, “[i]f we are concerned about risk to children, we should make efforts to identify and minimize *all* sources of risk.”

- Joseph Goldstein et al., Best Interests of the Child: The Least Detrimental Alternative (1996).

This book explores the principles that should guide courts in determining the fate of children involved in child welfare proceedings. The book presents a child-centric approach to child welfare and calls upon readers to “put [themselves] in a child’s skin’--the infant, the toddler, the preschooler, the schoolchild, or the teenager—as you consider what ought to be the guiding principles.” According to the authors, the “least detrimental alternative” in such cases is the continuity of the child’s relationship with his or her caregiver. The book provides various guiding questions for the “professional participant in the child placement process” (e.g., judges, lawyers, social workers, psychiatrists, other experts) in an effort to recognize the “boundaries of their knowledge and of their authority to act, the boundaries between their personal and professional beliefs, and the boundaries between the profession and parental roles.” Of particular interest is the emphasis on the time period sufficient to disrupt the psychological child-parent relationship. Noting the unique temporal abilities of young children, the authors contend that “[f]or children under the age of five years, an absence of parents for more than two months is intolerable.” For younger school-age children, an absence of six months or more may be similarly detrimental.

- Joseph Goldstein, Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 *Yale L.J.* 645 (1977)

This article explores the importance of the rights to parental autonomy and family privacy, and “the reciprocal liberty interest of parent and child in the familial bond between them, noting that they require “no greater justification than that they comport with each state’s fundamental constitutional commitment to individual freedom and human dignity.” *Id.* at 649. Goldstein further advocates “for a policy of minimum state intervention” into the parent-child relationship because of the law’s inability “to deal on

an individual basis with the consequences of its decisions or to act with the deliberate speed required by a child's sense of time and essential his well-being." *Id.* at 650. Moreover, the fact that parents are imperfect and may sometimes take actions against their child's interests does not justify greater intervention—it justifies less. *Id.* Indeed, there is no evidence "that the state necessarily can or will do better." *Id.* at 650-51.

- Michael S. Wald, State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children From Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights, 28 *Stan. L. Rev.* 623 (1976)

Among other things, this article walks through the harms associated with removal from the family home. Wald argues that "there is substantial evidence that coercive intervention often is harmful, not benevolent, to both children and parents. Because children are strongly attached to their parents, even 'bad' parents, intervention that disrupts the parent-child relationship can be extremely damaging to the child." *Id.* at 639-40. For that reason, he argues that the courts' discretion to decide removal issues should be strictly limited "by defining in advance those harms justifying intervention and the steps that may be taken to alleviate the harm . . ." *Id.* at 640.

- Michael Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 *Stan. L. Rev.* 985 (1975)

Wald advances similar arguments to those he advanced in the article immediately above. He notes that "[i]t is well recognized by psychiatrists that 'so far as the child's emotions are concerned, interference with [parental] tie[s], whether to a 'fit' or 'unfit' psychological parent, is extremely painful.'" *Id.* at 993-94 (quoting J. Goldstein, A. Freud, & A. Solnit, Beyond the Best Interests of the Child 20 (1973)). For that reason, "[r]emoving a child from his family may cause serious psychological damage—damage more serious than the harm intervention is supposed to prevent." *Id.* at 994. And even after the child is placed in a foster home—and the initial damage already done—the child is "frequently subjected to numerous moves, each destroying the continuity and stability needed to help a child achieve stable emotional development." *Id.* That conclusion segues neatly into the next topic, which concerns the adverse effects often associated with a child's removal into foster care.