

Take the Child and Run: Tales From the Age of ASFA

Richard Wexler*

- In Orange County, California, an impoverished single mother cannot find someone to watch her children while she works at night, tending a ride at a theme park. So she leaves her eight, six, and four-year-old children alone in the motel room that is the only housing they can afford. Someone calls child protective services. Instead of helping her with babysitting or daycare, they take away the children on the spot.¹

- In Akron, Ohio, a grandmother raises her eleven-year-old granddaughter despite being confined to a wheelchair with a lung disease. Federal budget cuts cause her to lose housekeeping help. The house becomes filthy. Instead of helping with the housekeeping, child protective services takes the granddaughter away and throws her in foster care for a month. The child still talks about how lonely and terrified she was – and about the time her foster parent took her picture and put it in a photo album under the heading: “filthy conditions.”²

- In Paterson, New Jersey, parents lose their three children to foster care solely because they lack adequate housing. When the children are returned, one of them shows obvious signs of abuse – bruises and new and old burn marks – from foster care. The parents are suing. And so is their first caseworker. He never wanted the children taken away. The caseworker even found the family a better apartment. That is, however, not what his superiors wanted. Indeed, the caseworker says that because he insisted on trying to help the family, and refused to alter his reports to make the parents look bad, he was fired. Why were his superiors so anxious to take away the children? There was a rich, suburban couple ready and waiting to adopt them. And according to the lawsuit filed by the caseworker, a supervisor told him that “children should be taken away

* Executive Director, National Coalition for Child Protection Reform (NCCPR); Author, *Wounded Innocents: The Real Victims of the War Against Child Abuse* (Prometheus Books: 1990, 1995).

1. See Laura Saari, *Checking Up on the Children*, ORANGE COUNTY REGISTER, Jan. 17, 1999, at E1.

2. See Donna J. Robb, *Child Abuse Charge Unfair, Group Says*, THE PLAIN DEALER, March 11, 1998, at 1B.

from poor parents if they can be better off elsewhere.”³

• In Los Angeles, California, the pipes in a grandmother’s rented house burst, flooding the basement and making the home a health hazard. Instead of helping the grandmother find another place to live, child protective workers take away the granddaughter and place her in foster care. She dies there, allegedly killed by her foster mother. The child welfare agency that would spend nothing to move the family offers \$5,000 for the funeral.⁴

Welcome to child welfare in the age of ASFA, the so-called Adoption and Safe Families Act.⁵ ASFA is a federal law helping to turn the nation’s child welfare systems into the ultimate middle-class entitlement. Step right up and take a poor person’s child for your very own.

ASFA was the culmination of an assault on safe, effective programs to keep families together that began in the 1990’s.⁶ The law has caused untold misery for thousands of children. While supposedly intended to solve the problems of the foster care system, it has, in fact, worsened those problems. In the name of promoting adoption, it is creating a generation of legal orphans. And worst of all, in the name of child safety, it has made children less safe.

There is nothing really new about the ASFA approach. Its guiding philosophy can be boiled down to a single sentence: “take the child and run.” And that approach is, in fact, an old story. Indeed, it dates back to the inception of the system in the mid-nineteenth century when Charles Loring Brace, a Protestant clergyman in New York City with an abiding hatred of urban Catholic immigrants, preached that those immigrants were genetically inferior and that the only hope for their children was immediate removal from their parents’ “evil influence.”⁷

Brace practiced what he preached. He shipped tens of thousands of children around the country on “orphan trains,” although many were not orphans.⁸ Once taken, the children were handed out to farmers looking for cheap labor.⁹ As one observer noted at a Conference of Charities in 1883, “[t]heir slaves [having been] set free, these men needing labor take these

3. See Jennifer V. Hughes, *Lawsuit Says DYFS Ordered False Reports – Caseworker Claims He Was Fired For Refusing*, THE RECORD, May 4, 2001 at L3.

4. See Nicholas Riccardi, *Grandmother Blames County in Latest Death of Foster Child*, LOS ANGELES TIMES, June 15, 1999, at B1.

5. See An Act to Promote the Adoption of Children in Foster Care, Pub. L. No. 105-89, 117 Stat. 2115 (1997).

6. See *id.*

7. See CHARLES LORING BRACE, THE DANGEROUS CLASSES OF NEW YORK AND TWENTY YEARS’ WORK AMONG THEM 26-31 (Wynkoop and Hallenbeck, 1872).

8. See generally MIRIAM LANGSAM, CHILDREN WEST: A HISTORY OF THE PLACING-OUT SYSTEM OF THE NEW YORK CHILDREN’S AID SOCIETY, 1853-1890 (1964).

9. See *id.* at 21-26.

boys and treat them as slaves.”¹⁰

Today, it is generally not considered fashionable to brand the poor genetically inferior. Instead, we label them psychologically inferior. A mother who works two jobs to make ends meet and sleeps with the lights on so the rats will not come out at night and bite her children may have good reason to believe the world is not an altogether friendly place. But instead of addressing her problems by getting her a better job and a better place to live, the child protection system is likely to take away her children, brand her as suffering from, for example, “apathy futility syndrome,”¹¹ and force her into counseling sessions that only add one more burden to her life.

No matter what problem may have led to removal of the children from a family, the parents almost always are required to endure “counseling” and “parent education” before they can get their children back.

CONFUSING POVERTY WITH NEGLECT

There is substantial evidence that cases like those described at the beginning of this article are far more typical than horror story cases involving the very few parents who really are brutally abusive or hopelessly addicted. For example, a study of “boarder babies,” children who spend months in hospitals, found that the biggest single factor causing their forced hospital stays was lack of housing.¹² Families struggling to keep their children out of foster care are stymied by two major problems: homelessness and low public assistance grants.¹³

Similarly, a study of “lack of supervision” cases in New York City by the Child Welfare League of America found that in fifty-two percent of the cases studied, the service needed most was, as one might expect, day care or babysitting.¹⁴ However, the “service” offered most often was foster care. Courts in New York and Illinois have found that families are repeatedly kept apart solely because they lack decent housing.¹⁵ In

10. *Id.* at 59.

11. See NORMAN POLANSKY, ET AL., DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT (1981).

12. CITY OF NEW YORK OFFICE OF THE COMPTROLLER, OFFICE OF POLICY MANAGEMENT, WHATEVER HAPPENED TO THE BOARDER BABIES? 11-12 (Jan. 1989).

13. KAREN BENKER & JAMES REMPEL, INEXCUSABLE HARM: THE EFFECT OF INSTITUTIONALIZATION ON YOUNG FOSTER CHILDREN IN NEW YORK CITY 25 (May 1989).

14. See MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCES OF A MAJOR CHILD NEGLECT PROBLEM 19-25 (1987).

15. See *Cosentino v. Perales*, 524 N.Y.S.2d 121 (S. Ct. 1987); *Norman v. Johnson*, 739 F. Supp. 1182 (N.D. Ill. 1990); see also Janita Poe & Peter Kendall, *Cases of Neglect May Be Only Poverty in Disguise*, CHI. TRIB., Dec. 24, 1995, at C1.

Washington D.C., where the foster care system was taken over for several years by the federal courts, the first receiver named by the court to run the agency found that between one-third and one-half of D.C.'s foster children could be returned to their parents right now, if they just had a decent place to live.¹⁶ In California, homeless children were given emergency shelter only on the condition that they be separated from their parents, until a successful lawsuit put an end to the practice.¹⁷ The National Commission on Children found that children often are removed from their families "prematurely or unnecessarily" because federal aid formulas give states "a strong financial incentive" to do so rather than provide services to keep families together.¹⁸ Indeed, state laws make the confusion of poverty with neglect almost inevitable, by "defining in" almost every poor family.

In Ohio, a child is considered neglected when his or her "condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship."¹⁹ In Illinois, parents neglect a child when they fail to provide for a child's well being.²⁰ Mississippi defines neglect as treating a child "without proper care, custody, supervision, or support."²¹ In South Dakota, a child is neglected when his "environment is injurious to his welfare."²²

Among the most tragic cases are those involving battered women. Rather than work to remove the abuser from the home, child protection agencies often behave as they did in the case of Rosa.²³ They target the battered woman, for "failure to protect" her children from witnessing her abuse. Whatever trauma the child already has endured by witnessing domestic violence then is compounded by his or her removal from the mother. According to the New York City Interagency Task Force Against Domestic Violence: "[i]ncreasingly in New York City, abuse and neglect proceedings are brought against battered mothers whose children are removed from them where the only allegation is their children's exposure to domestic violence."²⁴

According to The Village Voice:

16. See Tamar Lewin, *Child Welfare Is Slow to Improve Despite Court Order*, THE N.Y. TIMES, Dec. 30, 1995, at 6.

17. Hansen v. McMahon, Cal. Sup. Ct. April 22, 1986 (No. CA000974).

18. NAT'L COMM'N ON CHILD., BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 289-90 (May, 1991).

19. OHIO REV. CODE ANN. § 2151.04 (West 2000).

20. 23 ILL. COMP. STAT. § 2053 (2000).

21. MISS. CODE ANN. § 43-21-105 (2000).

22. S.D. CODIFIED LAWS §§ 26-8-2, 26-8-6 (2000).

23. See Zanita E. Fenton, *Foster Care: The Border of Family Identity Maintaining, (Re)creating, Destroying*, 36 NEW ENG. L. REV. 59 (2001).

24. Karen Houppert, *Victimizing the Victims*, VILLAGE VOICE, June 15, 1999, at 41.

[T]his is happening even in cases ... where the mother has already left her abuser and the kids are in no danger. Domestic violence advocates across the city report a flood of new failure-to-protect cases crossing their desks and assert that the city, in its prosecutorial zeal, is punishing victims rather than batterers, and traumatizing kids rather than rescuing them.²⁵

The task force report states: "[k]nowing that they may be investigated by child protective services, battered mothers are more likely to remain in the abusive home, isolated and afraid, so that they can remain with their children."²⁶ The practice is now the subject of a lawsuit for which plaintiffs are seeking class action certification.²⁷

New York City is not alone. According to *The Ledger*, a newspaper in Central Florida: "[f]earful of losing their children to state child abuse workers, many women avoid the streets by staying in abusive relationships, living with friends or leaving children with relatives."²⁸ "There is some validity to the fear of losing their children,' said Ruth Olinger of Lighthouse Ministries, 'and it prevents many homeless women from asking for help. It's sad. They don't know what else to do to feed their children and protect them from the (foster care) system.'"²⁹ Advocates who are "in denial" about the problem of wrongful removal offer only one piece of counter-evidence, a single report based on a case reading from a single state, New Jersey.³⁰

Case readings, however, are inherently biased against families. The case records reflect only the caseworker's view of events, not the family's. Judging whether a family should have been destroyed based on reading a case record, is like judging the guilt or innocence of a criminal defendant based solely on reading an indictment. For example, reading a New Jersey case in this way may be particularly dubious. Children's Rights Inc. (CRI) alleged widespread falsification of case records in New Jersey – in order to make those records look better for a case reading that CRI wants to conduct in connection with a class action lawsuit.³¹ A federal judge

25. *Id.*

26. *Id.*

27. *See* *Nicholson v. Williams*, No. 00-CV-2229 (E.D. NY 2000) (Plaintiffs' co-counsel, Carolyn Kubitschek, is a member of the NCCPR Board of Directors).

28. Eric Pera, *Address Unknown: New Report Shows a 64 Percent Rise in Polk's Homeless; A Place to Call Home*, *THE LEDGER*, Dec. 16, 2000, at A1.

29. *See id.*

30. *See* CECELIA ZALKIND, *STOLEN FUTURES: A REPORT ON PREVENTING FOSTER CARE PLACEMENT IN NEW JERSEY* 21-33 (1994).

31. *See* Press Release, Children's Rights, Inc., *New Jersey Child Welfare Agency Accused of Corrupting Evidence in Federal Lawsuit Seeking Its Reform*, March 7, 2001; *see also* Nancy Parello *DYFS Witnesses Differ on Audits of Child Abuse*, *THE RECORD*, March 30, 2001, at A4.

dismissed the claim of the falsification.³² As noted at the start of this article, in a separate action, a New Jersey caseworker is suing the state child welfare agency, alleging he was fired for refusing to falsify a case record to make parents look bad.³³

Other cases fall on a broad continuum between the extremes, the parents are neither all victim nor all villain. Sometimes these cases involve substance abuse. When the issue is drugs, another question arises: Why even bother with drug treatment for such parents? Would not the children simply be “better off” if they were confiscated on the spot and never returned? The answer is that we should not provide treatment for the sake of the parent, but for the sake of the child. In a University of Florida study of infants born addicted to crack cocaine, one group was placed in foster care, and the other with birth mothers able to care for them.³⁴ After six months, the babies were tested using all the usual measures of infant development: rolling over, sitting up, reaching out.³⁵ Consistently, the children placed with their birth mothers did better.³⁶ For the foster children, the separation from their mothers was more toxic than the cocaine.³⁷

It is extremely difficult to take a swing at “bad mothers” without the blow landing on their children. Therefore, if we really believe all the rhetoric about the needs of the children coming first, we must put those needs before anything – even our anger at their parents. But of course we do not do that. Instead, we have built a child welfare system on a foundation of myths about who is in that system and why. That is why the system is constantly on the verge of collapse, and why the latest effort to fix it – ASFA – is backfiring.

THE MYTH OF THE VAST FAMILY PRESERVATION CONSPIRACY

To hear the child welfare establishment explain it, the system is in its current condition because of a fanatical devotion to keeping families together. It is argued that children are forced to languish in foster care

32. Nancy Parello, *Group Brushes Off Losses in Suit Against DYFS*, THE RECORD, Oct. 9, 2001, at A3.

33. See Hughes, *supra* note 3.

34. See *Family Preservation and Substance Abuse*, Issue Papers (citing Kathleen Wobie, et al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, (paper presented at joint annual meeting of the American Pediatric Society and the Society for Pediatric Research) (May 3, 1998)), at <http://www.nccpr.org/newissues/12.html> (last visited Nov. 2, 2001).

35. See *id.*

36. See *id.*

37. See *id.*

while agencies lavish services on their ne'er-do-well parents, or worse, return those children to unsafe homes. George Orwell would have appreciated the extent to which the real history of child welfare has been sent down the "memory hole" and replaced by this fake history. Understanding the real history is crucial to understanding why ASFA is backfiring.

By the late 1970's, there were more than 500,000 children in foster care in the United States – about as many, relative to the total child population, as today.³⁸ Alarmed by this, Congress passed a bill in 1980 called the Adoption Assistance and Child Welfare Act (AACWA).³⁹ This law often is wrongly blamed for forcing children to languish in foster care. That in itself indicates a crucial flaw in the revisionist history of child welfare: If the problem is a law passed in 1980, what were all those children doing stuck in foster care in the late 1970's?

In fact, the 1980 law was the first effort to try to prevent children from languishing in foster care. It was the first federal law to set time limits on foster care. It was the first to require permanent placements for children either through return home or through adoption.⁴⁰ It was the first to provide federal aid for adoptions.⁴¹ Nowhere in that law was there a requirement that judges or social workers focus solely on reunification or on keeping children out of foster care – indeed, it would be a violation of the law to do so. The law required only that states make "reasonable efforts" to keep families together.⁴²

For a while the law worked. The foster care population fell to about 243,000 by 1982.⁴³ By then, however, the Reagan Administration was in office. The administration disliked the AACWA and pulled back Department of Health and Human Services regulations to enforce it. This action sent a signal to the states, which was that they could return to business as usual. By 1983, the foster care population was rising again,⁴⁴ and by 1998, it had more than doubled.⁴⁵ If family preservation advocates

38. See LEROY PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES 6 (1989).

39. 42 U.S.C. § 670 (1988).

40. See Adoption Assistance and Child Welfare Act, 8 U.S.C. §670 (1988) [hereinafter AACWA].

41. See *id.*

42. See *id.*

43. See Pelton, *supra* note 38, at 6.

44. See *id.*

45. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADOPTION AND FOSTER CARE REPORTING SYSTEM (AFCARS) REPORT, (Jan., 1999), available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/rpt0199/> (last visited May 14,

were as influential as alleged by critics, why were there so many children in foster care? Drugs are part of the explanation; the increase in the foster care population preceded, however, the crack epidemic, and it continues even as that epidemic has waned. Indeed, at a time when almost every other social indicator is moving in the right direction, the foster care population continues to rise, standing at 588,000 children as of March, 2000.⁴⁶ This is a stark testament to the failure of ASFA.

To attribute the fact that children are languishing in foster care to efforts to keep families together requires a belief in a kind of institutional schizophrenia. It requires us to believe that workers were perfectly willing to take huge numbers of children away from their parents and then, suddenly, a family preservation gene kicks in and these same workers move heaven and earth to get them back out. As one investigative reporter, however, said in a lecture: “[w]hen there is a complicated explanation and a simple explanation, the simple explanation is almost always correct.”⁴⁷

The simple explanation is “take the child and run,” which has always been the ethos of the child welfare system. Once the states were free to go back to business as usual, too many children were taken too quickly from their homes. They were placed in a foster care system that did not focus solely on reunification. In fact, it did not focus on reunification at all. Rather the children were filed away and forgotten as overwhelmed workers rushed on to the next case. The “reasonable efforts” requirement was never enforced by the federal government, and in 1989, the U.S. Supreme Court ruled that individuals could not sue to enforce it.⁴⁸

FOSTER CARE IS DANGEROUS

ASFA requires putting its version of “child safety” ahead of “family preservation,” because Congress failed to realize that family preservation in fact makes children safer. Indeed, the family preservation movement always has made child safety its first priority. ASFA effectively equated child safety with child removal, which is another example of dangerous

2001).

46. See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION FOR CHILDREN AND FAMILIES, ADOPTION AND FOSTER CARE REPORTING SYSTEM (AFCARS) REPORT, (Apr., 2001), available at <http://www.acf.dhhs.gov/programs/cb/publications/index.htm> (last visited May 14, 2001). [hereinafter AFCARS Report 2001].

47. Bruce Locklin, former investigative reporter for The Record, Hackensack, New Jersey, made the comment during a lecture to reporters and editors at the Albany Times Union.

48. See *Suter v. Artist M*, 503 U.S. 347 (1992).

historical revisionism.

In the late 1970's, a Washington State agency devised a new way of providing intensive intervention to keep families together, which they called Homebuilders.⁴⁹ The term "family preservation" was invented specifically to apply only to programs that rigorously follow the Homebuilders model.⁵⁰

These programs actually have a far better track record for safety than foster care – both because Homebuilders' programs are so safe, and because foster care can be very dangerous.

National data on child abuse fatalities show that a child is more than twice as likely to die of abuse in foster care than in the general population.⁵¹

A study of reported abuse in Baltimore, found the rate of "substantiated" cases of sexual abuse in foster care more than four times higher than the rate in the general population.⁵² Using the same methodology, an Indiana study found three times more physical abuse and twice the rate of sexual abuse in foster homes than in the general population.⁵³ In group homes there was more than ten times the rate of physical abuse and more than twenty-eight times the rate of sexual abuse as in the general population, in part because so many children in the homes abused each other.⁵⁴

Those studies deal only with reported maltreatment. The actual amount of abuse in foster care is likely to be far higher, since agencies have a special incentive not to investigate such reports, since they are, in effect, investigating themselves.

In New York City, for example, where Children's Rights Inc. settled a lawsuit against the child welfare system,⁵⁵ they found that, "[a]buse or neglect by foster parents is not investigated because [agencies] tolerate behavior from foster parents which would be unacceptable by birth parents."⁵⁶ Additionally, a lawyer who represents children in Broward

49. See generally, National Coalition for Child Protection Reform's Issue Paper # 9, available at <http://www.nccpr.org> (last visited Sept. 10, 2001).

50. See *id.*

51. See U.S. DEPT. OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES CHILD MALTREATMENT 1999 viii, 41 (2001).

52. See MARY I. BENEDICT & SUSAN ZURAVIN, FACTORS ASSOCIATED WITH CHILD MALTREATMENT BY FAMILY FOSTER CARE PROVIDERS 27-30 (1992).

53. See J. William Spencer & Dean D. Kundsén, *Out of Home Maltreatment: An Analysis of Risk in Various Settings for Children*, in CHILD. AND YOUTH SERV. REV. 485, 485-92 (1992).

54. See *id.*

55. See *Marisol A. v. Giuliani*, No. 95-Civ-10533 (S.D.N.Y., filed Dec. 13, 1995).

56. Complaint, at 75, *Marisol A. v. Giuliani*, No. 95-Civ-10533.

County, Florida, says in a sworn affidavit that over a period of just eighteen months he was made personally aware of fifty instances of child-on-child sexual abuse involving more than 100 Broward County foster children.⁵⁷ The official number of child-on-child sexual abuse instances during the same period was seven, because until the “epidemic of child-on-child sexual abuse” was exposed, the state child abuse hotline did not accept reports of such abuse.⁵⁸

It is not surprising that studies not limited to official reports produce even more alarming results. Another Baltimore study, this one examining case records, found abuse in twenty-eight percent of the foster homes studied—more than one in four.⁵⁹

Even what is said to be a model foster care program, where caseloads are kept low and workers and foster parents get special training, is not immune. When alumni of the Casey Family Program were interviewed, twenty-four percent of the girls said they were victims of actual or attempted sexual abuse in their foster homes.⁶⁰ Furthermore, this study asked only about abuse in the foster home that the children had lived in the longest. A child who had been moved from a foster home where she had been abused, after only a short stay, would not even be counted.⁶¹ Officials at the program say they have since lowered the rate of all forms of abuse to “only” twelve percent, but this is based on an in-house survey of the program’s own caseworkers, not outside interviews with the children themselves.⁶²

This does not mean that all, or even many, foster parents are abusive. But the abusive minority is large enough to cause serious concern, and it is probably growing as the influx of children into the system caused by ASFA increases pressure on agencies to overcrowd foster homes and lower standards. Furthermore, abuse in foster care does not always mean abuse by foster parents. It can be caused by foster children abusing each other.

FAMILY PRESERVATION IS SAFER

Compare the record of foster care to the record of family preservation.

57. See Affidavit of David S. Bazerman, Esq. at 4, *Ward v. Feaver*, No. 98-7137, (S.D. Fla. filed Dec. 16, 1998).

58. See *id.*

59. See *L.J. v. Massinga*, 699 F. Supp. 508 (D. Md. 1988).

60. See DAVID FANSHEL, ET AL., *FOSTER CHILDREN IN A LIFE COURSE PERSPECTIVE* 90 (1990).

61. See *id.*

62. See PETER J. PECORA ET AL., *HOW ARE THE CHILDREN DOING? ASSESSING YOUTH OUTCOMES IN FAMILY FOSTER CARE* 18-19 (1998).

The original Homebuilders program has served 12,000 families since 1982.⁶³ No child has ever died during a Homebuilders intervention and only one child, more than a decade ago, has since died.⁶⁴ Michigan has the nation's largest family preservation program. The program rigorously follows the Homebuilders model. Since 1988, the Michigan family preservation program has served 90,000 children.⁶⁵ During the first two years, two children died during the intervention.⁶⁶ In the decade since, there has not been a single fatality.⁶⁷ In contrast, when Illinois effectively abandoned family preservation during the mid-1990s, there were five child abuse deaths in foster care in just one year.⁶⁸

The other state in the forefront of family preservation efforts in recent years is Alabama. Alabama is implementing a consent decree resulting from a federal lawsuit requiring it to reframe its whole approach to child welfare by following family preservation principles.⁶⁹ Learning from the failures of other states that tried to change their systems overnight, the Alabama approach calls for gradual, county-by-county change. But the results already have been dramatic: in counties adopting a family preservation approach, foster care placements have declined by thirty-three percent.⁷⁰ More important, an independent, court-appointed monitor concluded that children in Alabama are safer now than before the system switched to a family preservation model. The monitor wrote that “the data strongly support the conclusion that children and families are safer in counties that have implemented the R.C. reforms[.]”⁷¹

One advocate for taking even more children from their parents, Elizabeth Bartholet, repeatedly argues that as bad as foster care is, children removed from their homes are better off there than in their own

63. Personal communication with Charlotte Booth, Executive Director, Homebuilders.

64. *See id.* Even in the one case in which a child died after the intervention, in 1987, Homebuilders had warned that the child was in danger, but the warning from Homebuilders was ignored. *See id.*

65. Personal Communication with Susan Kelly, former director of family preservation services, Michigan Family Independence Agency.

66. *See id.*

67. *See id.*

68. *See* Peter Kendall & Terry Wilson, *Boy's Death Casts Shadow on Relatives' Foster Care*, CHI. TRIB., Feb. 28, 1995, at 7.

69. *See* R.C. v. Hornsby, 88-D-1170-N (M.D. Ala., filed 1988).

70. *See Issue Paper # 1: Foster Care vs. Family Preservation: The Track Record on Safety* (citing IVOR D. GROVES, A SUMMARY REPORT ON IMPLEMENTATION STATUS OF THE R.C. v. PETELOS CONSENT DECREE 10 (1999)), at <http://www.nccpr.org/newissues/1.html> (last visited Nov. 2, 2001).

71. IVOR D. GROVES, SYSTEM OF CARE IMPLEMENTATION: PERFORMANCE, OUTCOMES, AND COMPLIANCE 3 (Mar. 1996).

homes.⁷² Although she makes the claim repeatedly, her evidence appears limited to one study and two articles that make brief references to official statistics.⁷³ The study compared two matched, but very small, groups of children. Because the differences in outcomes and the sample size were so small, the authors did not conclude that foster care is preferable to home placement.⁷⁴ Additionally, the lead author of the study says they compared average services for birth families with a better-than-average foster care program.⁷⁵ The relevant comparison is children who are kept at home with real family preservation services versus typical foster care.

Bartholet also cites two studies, which make brief reference to claims that children are more likely to be reabused at home than abused in foster care.⁷⁶ But these references use only officially-reported maltreatment – a major flaw that biases the results in ways discussed above. They also refer only to physical safety, ignoring the emotional trauma of foster care. And again, they do not compare foster care to leaving children at home with real family preservation services. They are also out of date. A newer study comparing foster children to children monitored by child protective services in their own homes found the children left in their own homes were safer.⁷⁷ Bartholet also cites one other study, but this one compared all violent deaths, not just child abuse fatalities.⁷⁸

But more fundamentally, this is a case in which knowing what works best on average is particularly unhelpful. Though the evidence is strong that, on average, real family preservation programs are safer than foster care, it would be ludicrous – and dangerous – to leap to the conclusion that therefore every family should be offered such services and no child should be placed in foster care. It is equally ludicrous, therefore, even if one believes foster care is safer on average, to use that as justification to abolish family preservation and use foster care for thousands of children who would be safer in their own homes.

72. See generally ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE* (1999).

73. See *id.*

74. See *id.*

75. See MICHAEL WALD ET AL., *PROTECTING ABUSED AND NEGLECTED CHILDREN* 187-91 (1988).

76. See *id.* at 97.

77. See *Child Protection Oversight: Hearing on H781-20 Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 1999 Leg., 1st Sess. 80 (Wash. 2000) (testimony of Jess McDonald, Dir., Illinois Department of Children and Family Services) [hereinafter McDonald Testimony].

78. See generally Richard P. Barth & Debra L. Blackwell, *Death Rates Among California's Foster Care and Former Foster Care Populations*, 20 *CHILD. AND YOUTH SERV. REV.* 601 (1998).

There are many cases in which foster care, horrible though it can be, is better than leaving a child at home. When we know a child is being severely beaten, tortured, raped, starved, abandoned or similarly harmed, obviously the risks of foster care are worth taking. But contrary to the claims of family preservation critics, many cases do not even come close to falling within these categories. And in many of those cases, foster care is indeed far worse.

It is worse because of the emotional devastation wrought by tearing a child, who has not been seriously abused or neglected, from everything loving, friendly and familiar. But it also is worse because of the alarming possibility that the child who was not abused at home will be abused in foster care.

FAMILY PRESERVATION IS EFFECTIVE

Evidence for the effectiveness of the Homebuilders model also is strong:

- Michigan's Families First program sticks rigorously to the Homebuilders model. The Michigan program was evaluated by comparing children who received family preservation services to a "control group" that did not. After one year, among children who were referred because of abuse or neglect, the control group children were nearly twice as likely to be placed in foster care, as the Families First children. Thirty-six percent of children in the control group were placed, compared to only 19.4 % of the Families First children.⁷⁹

- Another Michigan study went further. In this study, judges actually gave permission to researchers to "take back" some children they had just ordered into foster care and place them in Families First instead. One year later, ninety-three percent of these children still were in their own homes.⁸⁰ And Michigan's State Auditor concluded that the Families First program "has generally been effective in providing a safe alternative to the out-of-home placement of children who are at imminent risk of being removed from the home The program places a high priority on the safety of children."⁸¹

- An experiment in Utah and Washington State also used a comparison group. After one year, 85.2 % of the children in the comparison group

79. See CAROL BERQUIST, ET AL., EVALUATION OF MICHIGAN'S FAMILIES FIRST PROGRAM (1993).

80. See BETTY J. BLYTHE & SRINIKI JAYARATNE, FAMILIES FIRST EFFECTIVENESS STUDY: A SUMMARY OF FINDINGS 18 (Sept. 28, 1999).

81. STATE OF MICHIGAN, OFFICE OF THE AUDITOR GENERAL, 1998 PERFORMANCE AUDIT OF THE FAMILIES FIRST OF MICHIGAN PROGRAM 2-4 (July 1998).

were placed in foster care, compared to only 44.4 % of the children who received intensive family preservation services.⁸²

- A study in California found that fifty-five percent of the control group children were placed, compared to only twenty-six percent of the children who received intensive family preservation services.⁸³

- A North Carolina study comparing 1,254 families receiving Intensive Family Preservation Services (IFPS) to more than 100,000 families who did not find that “IFPS consistently resulted in fewer placements”⁸⁴

- And still another study, in Minnesota, found that, in dealing with troubled adolescents, fully ninety percent of the control group children were placed, compared to only fifty-six percent of those who received intensive family preservation services.⁸⁵

Some agencies are now using IFPS to help make sure children are safe when they are returned home after foster care. Here again, researchers are beginning to see impressive results. In a Utah study, 77.2 % of children whose families received IFPS help after reunification were still safely with their birth parents after one year, compared with 49.1 % in a control group.⁸⁶

Critics ignore all of this evidence, preferring to cite a study done for the federal government which purports to find that IFPS is no better than conventional services. While critics of family preservation claim that this study evaluated programs that followed the Homebuilders model, this is not true. In a rigorous critique of the study, Prof. Ray Kirk of the University of North Carolina School of Social Work notes that the so-called IFPS programs in this study actually diluted the Homebuilders model, providing service that was less intensive and less timely.⁸⁷ At the same time, the “conventional” services sometimes were better than

82. See MARK W. FRASER, ET AL., *FAMILIES IN CRISIS: THE IMPACT OF INTENSIVE FAMILY PRESERVATION SERVICES* 168 (1991).

83. See Sally Wood et al., *In-Home Treatment of Abusive Families: Cost and Placement at One Year*, 25 *PSYCHOTHERAPY* 409, 409-14 (1988) (cited in Howard Bath & David Haapala, *Family Preservation Services: What Does the Outcome Research Really Tell Us*, *SOCIAL SERV. REV.*, Sept., 1994, at 400 app. A).

84. See Ray S. Kirk, *Tailoring Intensive Family Preservation Services for Family Reunification Cases: Research, Evaluation and Assessment*, available at www.nfpn.org/resources/articles/tailoring.html (last visited Nov. 2, 2001).

85. See I.M. Schwartz, et al., *Family Preservation Services as an Alternative to Out-of-Home Placement of Adolescents*, in *FAMILY PRESERVATION SERVICES: RESEARCH AND EVALUATION* 33-46 (K. Wells & D.E. Biegel, eds., 1991).

86. See Robert E. Lewis, et al., *Examining Family Reunification Services: A Process Analysis of a Successful Experiment*, 5 *RES. ON SOC. WORK PRAC.* 259, 261 (1995).

87. See RAY S. KIRK, *A CRITIQUE OF THE “EVALUATION OF FAMILY PRESERVATION AND REUNIFICATION PROGRAMS: INTERIM REPORT”* (May 2001).

average. In at least one case, they may well have been just as intensive as the IFPS program – so it is hardly surprising that the researchers would find little difference between the two.⁸⁸

Furthermore, efforts to truly assign families at random to experimental and control groups sometimes were thwarted by workers in the field who felt this was unethical. Workers resisted assigning what they considered to be “high risk” families to control groups that would not receive help from IFPS programs.⁸⁹ In addition, the study failed to target children who actually were at imminent risk of placement.⁹⁰ Given all these problems, Professor Kirk writes, “a finding of ‘no difference between treatment and experimental groups’ . . . is simply a non-finding from a failed study.”⁹¹

Professor Kirk’s findings mirror those of an evaluation of earlier studies purporting to show that IFPS was ineffective.⁹² The evaluation found that these studies “did not adhere to rigorous methodological criteria.”⁹³ In contrast, “there is a growing body of evidence that IFPS works, in that it is more effective than traditional services in preventing out-of-home placements of children in high-risk families.”⁹⁴

It was neither the safety nor the effectiveness of Intensive Family Preservation Services that prompted the backlash. Rather, it was the fact that the model was a threat to more than 100 years of child welfare orthodoxy, combined with the threat by Congress in the early 1990’s to actually put some money behind the concept, raising the possibility that funds might be diverted from substitute care.⁹⁵

So “family preservation” became the scapegoat whenever any child was left in any home under any circumstances and something went wrong – regardless of whether the child had been anywhere near a real family preservation program. And the horror stories eventually had an impact on

88. *See id.*

89. *See id.*

90. *See id.*

91. *Id.*

92. *See id.*

93. Amy M. Heneghan, et al., *Evaluating Intensive Family Preservation Programs: A Methodological Review*, 97 PEDIATRICS 535-42, cited in RAY KIRK, FINAL REPORT: A RETROSPECTIVE EVALUATION OF NORTH CAROLINA’S INTENSIVE FAMILY PRESERVATION SERVICES PROGRAM (Chapel Hill, N.C.: Jordan Institute for Families, School of Social Work, University of North Carolina, Aug. 2000).

94. Kirk, *supra* note 87.

95. Congress ultimately passed the Family Preservation and Family Support Act of 1993, reauthorized four years later as part of ASFA, with the name changed to the Promoting Safe and Stable Families program. The program funds a huge array of programs, even including foster care and adoption. It does not actually require that any money be spent on family preservation, and certainly does not require any spending on Homebuilders-type programs.

Congress, prompting the passage of ASFA.

ASFA is filled with broad, vague catch-all clauses that blow huge holes in what little was left of the “reasonable efforts” clause in AACWA.⁹⁶ ASFA states, for example, that states don’t have to make “reasonable efforts” in cases of “chronic abuse,” a term that is not further defined.⁹⁷ And ASFA declares that “the child’s health and safety shall be the paramount concern.”⁹⁸

That was always the case – a fact made clear in the legislative history of the AACWA and in guidance from the Department of Health and Human Services.⁹⁹ By placing it in a new law as though it were some sort of change, Congress has invited agencies to take away children, even when there are alternative means to ensure safety. Worse, Congress has sent a message that boils down to: child safety equals child removal, so take away even more children.

Indeed, far more important than any specific language in ASFA was its overall message – a message that reinforced the traditional “take the child and run” approach to child welfare. And that is why, even as crime, unemployment, poverty and reports of child abuse itself have declined, the foster care population continues to go up.

ASFA was supposed to reduce the number of children in foster care. That has not happened. When ASFA was passed, there were 520,000 children in foster care.¹⁰⁰ As of March, 2000, the figure stands at 588,000.¹⁰¹

ADOPTION AS PANACEA

ASFA was based on the false premise that children were languishing in foster care because the Vast Family Preservation Conspiracy was holding them hostage. Get rid of family preservation, it was argued, and the foster care system would empty out as children were quickly and eagerly adopted. It has not worked out that way.

Although adoptions are up significantly in percentage terms, in raw numbers the improvement has been minimal. Between 1996 and 2000,

96. *See supra*, note 5, tit. I, § 101.

97. *See id.*

98. *Id.*

99. *See generally* H.R. 867, *The “Adoption Promotion Act of 1997” Before the House Subcomm. on Human Resources of the Comm. on Ways and Means*, 105th Cong. 44-55 (1997) (testimony of MaryLee Allen, Director, Child Welfare and Mental Health Division, Children’s Defense Fund).

100. *See* AFCARS Report 2001, *supra* note 46.

101. *See id.*

adoptions of foster children increased from 28,000 to 50,000 per year.¹⁰² That is an average increase of 5,500 adoptions per year.¹⁰³ However, 5,500 accounts for less than one percent of the children in foster care on any given day. Meanwhile, because ASFA also encourages the “take the child and run” mentality, more children are being needlessly taken from their homes. So despite the increase in adoptions, the foster care population continues to rise by about four percent per year.¹⁰⁴ Obviously, America is not going to adopt its way out of the foster care crisis. And it is not because states have not tried. ASFA gives states a bounty of \$4,000 to \$6,000 for every finalized adoption over a baseline number. As a result, states have been falling all over themselves pushing adoption at all costs. But the families simply are not out there. The rush to embrace adoption as panacea has had some serious side effects.

In the early 1990’s, Professor Martin Guggenheim found that even before ASFA, state efforts to expedite termination of parental rights were creating a generation of “legal orphans” with no ties to birth parents but without adoptive homes either.¹⁰⁵ Thanks to ASFA, the problem is spreading. In New Jersey, between 1997 and 1999 almost four children had parental rights terminated for every one actually adopted.¹⁰⁶ A study of urban counties in Nebraska found that more than a year after parental rights were terminated, fewer than half the children had permanent homes.¹⁰⁷

Furthermore, the adoption bounties in ASFA create a perverse incentive for quick-and-dirty, slipshod placements that are more likely to fail. That is because if an adoption of a foster child fails, states do not have to return the bounty. In fact, they can place the same child again and collect another bounty. That means the “disruption” rate for adoption of foster children,

102. See Press Release: *HHS Awards Adoption Bonuses* (Sept. 10, 2001), available at <http://www.acf.dhhs.gov/news/press/2001/adoption.html> (last visited Nov. 2, 2001).

103. See *id.*

104. See *Child Abuse Prevention Program, House Ways and Means Comm., Subcomm. on Human Resources*, 107th Cong. 2001 WL 21754863 (May 10, 2001) (testimony of Dr. Fred H. Wulczyn, Chapin Hall Center for Children).

105. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L. Q. 121 (Spring 1995) (Prof. Guggenheim is president of the National Coalition for Child Protection Reform).

106. See Nancy Parello, “*Legal Orphans*” *Languish With Understaffed State Agencies, Busy Courts*, ASSOCIATED PRESS NEW JERSEY WIRE, April 12, 2000.

107. See generally VICTORIA WEISZ & ANGELA WILLIAMS, COURT FILE REVIEWS: ASFA REQUIREMENTS NOV. 1999 TO MARCH 2000, NEBRASKA COURT IMPROVEMENT PROJECT (2000).

already estimated at roughly fifteen to twenty-five percent,¹⁰⁸ is likely to increase.

Professor Richard Gelles of the University of Pennsylvania, who was involved in the writing of ASFA, has said: “[i]nitially, this was just supposed to be a safe families bill, not really an adoption bill at all. The adoption component was a way of sanitizing the bill, to make it more appealing to a broader group of people. Adoption is a very popular concept in the country right now.”¹⁰⁹

FOSTER CARE PANICS

In passing ASFA, Congress failed to learn the lessons some states have begun to learn after experiencing foster care panics – huge, sudden increases in placements that follow intensive media coverage of the death of a child who was known to the system. In April, 1993, three-year-old Joseph Wallace was killed by his mother.¹¹⁰ Joseph was “known to the system.”¹¹¹ “Family preservation” quickly became the scapegoat. Family preservation was attacked relentlessly by politicians and much of the media – even though most of the programs in Illinois bore little resemblance to the effective, Homebuilders-based models used in other states.

As a result, workers and judges became terrified to leave or return any child home for fear of becoming the next target of politicians and the Chicago media. Almost all efforts to keep families together were effectively abandoned amid claims that such efforts contradict “child protection.” But instead of saving lives, child abuse deaths went up. They rose from seventy-eight before family preservation was abandoned to eighty-two the first year after it was abandoned, to ninety-one in 1997.¹¹² By 1996, a child was more likely to be placed in foster care in Illinois than in any other state.¹¹³ Indeed, an Illinois child was more than four times as

108. See National Adoption Information Clearinghouse, *Disruption and Disolution*, at http://www.calib.com/naic/pubs/s_disrup.htm (last visited Sept. 10, 2001); see also *Adoption: What to do When Love is Not Enough*, THE DESERT NEWS, April 15, 1999, at C1; *Nobody's a Winner When Adoption Fails*, ARIZONA REPUBLIC, March 9, 1999, at B1; *Number of Children in DHS Care to Grow*, SUNDAY OKLAHOMAN, July 19, 1998, at 1.

109. *My Law's 'Flawed' Says Richard Gelles*, CHILD WELFARE WATCH (Winter 2000) available at http://www.nycfuture.org/child_welfare/cww_06.htm (last visited Nov. 18, 2001).

110. See *Peace Comes to Amanda Wallace*, CHI. TRIB., Aug. 5, 1997, at 10.

111. See *id.*

112. See EXECUTIVE STATISTICAL SUMMARY STATE OF ILLINOIS, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, OFFICE OF QUALITY ASSURANCE (Jan. 1998).

113. See CONNA CRAIG & DEREK HERBERT, THE STATE OF THE CHILDREN: AN

likely to be placed in foster care than a child in New Jersey.¹¹⁴ Yet Illinois children were twice as likely to die of abuse as New Jersey children.¹¹⁵

The abandonment of family preservation led to a foster care panic that overwhelmed the system to the point that it created a backlog of more than 5,000 uncompleted investigations.¹¹⁶ At the same time, foster care placements increased by thirty percent in just fourteen months, further straining the system.¹¹⁷ Child abuse deaths in foster care in Illinois went from zero in the year before the foster care panic to five in the first year afterwards - an all-time record.¹¹⁸

The pattern showed itself in a new way in 1998 when the Illinois foster care panic finally began to abate.¹¹⁹ That year, the number of child abuse deaths finally fell below the number before the panic began. And that year also was the first year since the panic in which the total number of Illinois children in foster care actually declined.¹²⁰ The decline has continued and a new study documents that as the numbers have fallen, children have gotten safer.¹²¹ The foster care panic caused other tragedies in Illinois:

- Having supposedly “put children first,” Illinois officials soon found they had no place to put children at all. So they were jammed into a hideous shelter, then overflowed into offices. Streetwise teens were thrown together with vulnerable younger children; infants were jammed into urine-soaked cribs. An eleven-year-old got hold of a gun and fired it.¹²²

- Children were jammed into any foster home with a bed, with little screening of foster parents or foster children. As a result, according to

EXAMINATION OF GOVERNMENT-RUN FOSTER CARE 9 (1997).

114. *See id.*

115. *See* CHING-TUNG WANG & DEBORAH DARO, CURRENT TRENDS IN CHILD ABUSE REPORTING AND FATALITIES: THE RESULTS OF THE 1996 ANNUAL FIFTY STATE SURVEY 13 (1997).

116. *See* Sharman Stein, *DCFS Coordinator Puts Family Values to Work*, CHI. TRIB., Mar. 8, 1995, at 2.

117. *See id.*

118. *See* Kendall & Wilson, *supra* note 68.

119. *See* CRAIG & HERBERT, *supra*, note 113.

120. *See id.*

121. *See* McDonald Testimony, *supra* note 77; *see also* Illinois Department of Children and Family Services, *Signs of Progress in Child Welfare Reform*, available at www.state.il.us/dcf/signscrap.shtml (last visited Nov. 2, 2001).

122. *See generally* Rob Karwath, *Abused Kids Sleep in DCFS Offices*, CHI. TRIB., June 29, 1993, at 1; Ellen Warren, *Toddlers, Troubled Teens All Wait Together at DCFS*, CHI. TRIB., July 21, 1993, at 1; Douglas Holt, *Boy Finds Gun at DCFS, Injured*, CHI. TRIB., Sept. 3, 1993, at 1; Rob Karwath, *Child Welfare Specialist Hired to Coordinate Overhaul of DCFS Site*, CHI. TRIB., Sept. 10, 1993, at 4; Rob Karwath, *DCFS Center Receives OK to House Kids*, CHI. TRIB., Dec. 17, 1993, at 1.

Benjamin Wolf of the Illinois Affiliate of the American Civil Liberties Union, the Illinois foster care system became like “a laboratory experiment to produce the sexual abuse of children.”¹²³

• A study by the Child Welfare Institute found that at least one third of the children taken from their parents at the height of the foster care panic could safely have been returned to their own homes.¹²⁴ Abandoning family preservation took a bad system and made it, in Wolf's words, “unquestionably worse.”¹²⁵

And what about the case that started it all? What was the role of family preservation in the case of Joseph Wallace? A family preservation worker recommended that the Wallace family not be preserved – he recommended to a judge that the child be removed. The judge agreed. The child was removed, but the records were lost when the family moved to another county. Only then was the child sent home to his death.¹²⁶ Not only was family preservation not the cause of the Wallace death -- family preservation almost saved Joseph Wallace's life.

Two years later, a child “known to the system” died in Connecticut.¹²⁷ Rather than learn from the Illinois experience, Connecticut officials repeated it. They too scapegoated family preservation. The result: the foster care population went up seventy-three percent,¹²⁸ there was a scandal over abuse in foster care,¹²⁹ and, as in Illinois, child abuse deaths increased.¹³⁰

Then it was New York City's turn. Again, this time in late 1995, a child “known to the system” died.¹³¹ Again officials blamed “family preservation,” even though child abuse deaths had declined in New York City for four years in a row. Once again, the attacks set off a foster care

123. See Richard Wexler, *The Children's Crusade*, CHI. READER, Mar. 25, 1995, at 1.

124. See Bruce Dold, *Kids Suffer Under DCFS Reform Efforts*, CHI. TRIB., Sept. 22, 1995, at 19.

125. See Wexler, *supra* note 123.

126. See Joel J. Bellows, et al., THE REPORT OF THE INDEPENDENT COMMITTEE TO INQUIRE INTO THE PRACTICES, PROCESSES, AND PROCEEDINGS IN THE JUVENILE COURT AS THEY RELATE TO THE JOSEPH WALLACE CASES (Oct. 1, 1993).

127. See Valerie Finholm, *Report Raises Questions About Foster Care Organization*, HARTFORD COURANT, May 9, 1997, at A3.

128. See Susan Pearsall, *Just Who Should Care for the Children?*, N.Y. TIMES, April 20, 1997, at 13CN.

129. See Finholm, *supra* note 127.

130. Personal Communications with David Dearborn, and James Wiltse, former spokesmen, Connecticut Department of Children and Families. Child abuse and neglect fatalities in Connecticut rose from five in 1995, the year before the foster care panic, to nine in 1996; they fell to seven in 1997 and six in 1998. See *id.*

131. See Rachel L. Swarns, *For Children, Another Night on Office Cots*, N.Y. TIMES, Nov. 29, 1997, at B1.

panic, overwhelming the system. The result: thousands of children were forced to sleep, often on chairs and floors, in a violence-plagued, emergency makeshift shelter created from city offices.¹³² A four-year-old foster child was beaten and starved to death in a foster home opened by one private agency, apparently desperate for beds after another had closed it down.¹³³ The decline in child abuse deaths ended. In 1996, for the first time in five years, child abuse deaths increased.¹³⁴ They increased again in 1997 and 1998.¹³⁵ A study that looked only at deaths of children “known to the system” found that deaths had increased by fifty percent during that same time period.¹³⁶ Just as in Illinois, the death toll among children “known to the system” fell below the pre-panic level only in 1999 – by which time the panic had abated and the city was taking away fewer children.¹³⁷

The fact that child abuse deaths actually increased after foster care panics is not surprising when one considers the real reasons children “known to the system” sometimes die. Those reasons have nothing to do with a supposed bias toward family preservation. Child welfare agencies are arbitrary, capricious, and cruel. They do leave some children in dangerous homes, even as they take others from homes that are safe or could be made safe with the right kinds of services. That is because overwhelmed, undertrained workers are given impossible caseloads and are sent out to make life and death decisions. The more the system is overloaded with children who do not need to be in foster care, the less time workers have to find children in real danger. As a result, they make more mistakes in both directions, and more children die.

The same mentality that led to the foster care panics in Illinois, Connecticut, and New York City, and the same extrapolation from a few

132. See *id.*; Russ Buettner, *Foster Kids Glut System; Surge Worst Since Crack Heyday*, N.Y. DAILY NEWS, May 12, 1997, at 17; Russ Buettner, *Bid to End ACS Office Hell*, N.Y. DAILY NEWS, May 14, 1997 at 8.

133. See Rachel L. Swarns, *Agency Was Warned About Foster Mother Charged in Girl's Death*, N.Y. TIMES, July 2, 1997, at B3.

134. In 1995, there were thirty-one “substantiated” child abuse deaths in New York City (down from sixty in 1991). The number rose to thirty-eight in 1996. Personal Communication, Terry McGrath, spokesman, New York State Department of Children and Families.

135. There were forty-six “substantiated” child abuse deaths in 1997 and forty-seven in 1998. Personal Communication with Terry McGrath, spokesman, New York State Department of Children and Families.

136. See Nina Bernstein, *Agency Head Defends Effort for Children*, N.Y. TIMES, July 23, 1999, at B1.

137. See Nina Bernstein, *Girl's Death Underscores Complexity of Child Welfare*, N.Y. TIMES, May 21, 2000, at 37.

widely publicized horror stories, ultimately forced Congress into passing ASFA. ASFA further overloads child welfare systems all over the country and places more and more children at risk. In contrast, the few places that have refused to embrace the ASFA mentality have shown real improvements. One, mentioned earlier, is Alabama. Another is Pittsburgh and surrounding Allegheny County, Pennsylvania.

In the mid-1990's, the child welfare system in Allegheny County was typically mediocre or worse. Foster care placements were soaring and those in charge insisted every placement was necessary.¹³⁸ New leadership changed all that. Since 1997, the foster care population has been cut by twenty percent.¹³⁹ When children must be placed, half stay with relatives, and siblings are kept together eighty-two percent of the time.¹⁴⁰

Allegheny County has done it by tripling the budget for primary prevention, more than doubling the budget for family preservation, embracing innovations like the Annie E. Casey Foundation's Family to Family program,¹⁴¹ and adding elements of their own, such as housing counselors in every child welfare office so families are not destroyed because of housing problems.¹⁴² And as in Alabama, children are safer. Re-abuse of children left in their own homes has declined. In addition, since January 1997, there has been only one child abuse fatality in a family previously known to the agency.¹⁴³

Illinois also is turning itself around, undoing the damage wrought by the state's foster care panic. The main reason for the change was simple: the state finally realized that you get what you pay for. Until recently, Illinois paid private foster care agencies the way most states do – the agencies were paid for each day they kept a child in foster care. Thus, while the agencies were told their job was to keep children in their own homes or place them with adoptive parents, the agencies actually were paid for allowing children to languish in foster care. Under intense pressure from the Illinois branch of the American Civil Liberties Union, which had settled a comprehensive class action suit against the state some years before,¹⁴⁴ the state adopted a new system under which agencies are

138. See Allegheny County Department of Human Services, *Ensuring Permanency in Allegheny County*, available at <http://trfn.clpgh.org/acdhs/CYF/permrep799.htm> (last visited Sept. 10, 2001) [hereinafter Allegheny County].

139. See *id.*

140. See *id.*

141. The Annie E. Casey Foundation also helps to fund NCCPR.

142. See Allegheny County, *supra* note 138.

143. Personal communication with Karen Blumen, Deputy Director, Allegheny County Department of Human Services.

144. See *B. H. v. McDonald*, No. 88 C 5599 (N.D. Ill., filed June 9, 1988).

rewarded financially for achieving permanence for children and penalized for prolonged foster care.

Suddenly, the intractable became tractable, the dysfunctional became functional, and the Illinois foster care population plummeted from more than 51,000 at the height of the foster care panic, to 27,000 as of June 30, 2001.¹⁴⁵

Although the Illinois child welfare agency likes to claim the turnaround is due solely to increased adoptions, which is where all the political points are to be scored, in fact, Illinois is returning more children to birth parents, and it has dramatically reduced the number of children it takes from their families. In 2000, the most recent year for which data are available, Illinois took away twenty-two percent fewer children than it did in 1997.¹⁴⁶

Furthermore, when Illinois must place children, forty-four percent of family foster home placements are with relatives¹⁴⁷ -- a form of care that also has been the target of smears by family preservation opponents.¹⁴⁸ And more than half of the state's adoptions are, in fact, formalizations of these kinship placements.¹⁴⁹ All of this was done while making children safer. Today, a child in Illinois is less likely to be re-abused in his own home than he is to be abused in foster care. And, contrary to the fears of those who smear kinship care, kinship placements are safer than placements with relatives.¹⁵⁰

Illinois still has a long way to go. A federal judge recently ruled in favor of plaintiffs in a class action lawsuit alleging that the state is far too quick to label people child abusers, while offering little or no effective means of appeal.¹⁵¹ And all of the progress made since 1997 has done little more than undo the damage wrought by the foster care panic. But the progress illustrates how much of the child removal caused by that panic was, in fact, unnecessary. And it illustrates that, contrary to the philosophy behind ASFA, an approach that emphasizes family preservation makes

145. Illinois Department of Children and Family Services, Executive Statistical Summary, September 2001, *Children Placed in Foster Care, Foster Care*, available at http://www.state.il.us/dcf/com_communications_execstats.shtml (last visited Nov. 5, 2001).

146. *See id.*

147. *See id.*

148. *See* BARTHOLET, *supra* note 72.

149. *See* Jason Method, *Tragedy Spurred Illinois Reforms*, ASBURY PARK PRESS, Feb. 25, 2001.

150. Illinois Department of Children and Families, *Signs of Progress in Child Welfare Reform*, available at <http://www.state.il.us/dcf/signsplshtml> (last visited Nov. 2, 2001).

151. *See* Dupuy v. McDonald, No. 97 C 4199, (N.D. Ill. filed on March 30, 2001), available at <http://www.hsllda.org/docs/news/hsllda/200104041.pdf> (last visited Nov. 2, 2001).

children safer.

ALTERNATIVES

Although ASFA encourages states to do a lot of bad things, by and large, it does not require them. In theory, the mandates of ASFA can be met just as easily with a renewed commitment to keeping families together as they can by embracing the “take the child and run” approach. There is nothing in ASFA that prohibits states from providing rent subsidies so children are less likely to lose their parents because those parents lack decent housing. And there is nothing to prohibit states from providing day care so single working parents do not lose their children because of “lack of supervision.”

Intensive Family Preservation Services now has a record of safely and effectively helping families that dates back more than two decades. The Casey Foundation’s Family to Family initiative and the Edna McConnell Clark Foundation’s Community Partnerships for Child Protection are pioneering new ways to tap the strengths of individual families and whole communities to keep families safely together.

Alabama, Pittsburgh, and to some extent Illinois are beginning to discover what the framers of ASFA never understood: the claim that child protection and family preservation are at odds is a false dichotomy. These communities are learning that there is no real child protection without family preservation.