

1987

# Child Welfare Decisionmaking: In Search of the Least Drastic Alternative

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## Recommended Citation

75 Geo. L. J. 1745 (1987)

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# Child Welfare Decisionmaking: In Search of the Least Drastic Alternative

MARSHA GARRISON\*

INTRODUCTION .....	1746
I. THE CHILD WELFARE SYSTEM AND HOW IT WORKS.....	1749
A. THE ORIGINS OF THE CHILD WELFARE SYSTEM .....	1750
B. THE CHILD WELFARE SYSTEM AT MID-CENTURY .....	1752
1. Little Had Changed.....	1752
2. The Structure of Child Welfare Decisionmaking: Discretion Unlimited .....	1754
II. THE NEW PHILOSOPHY: MINIMUM INTERVENTION .....	1758
A. THE REFORM PROGRAM.....	1758
B. ITS DEFICIENCIES .....	1762
III. THE MEANING OF MINIMUM INTERVENTION: A FRAMEWORK FOR ANALYSIS.....	1766
A. INFORMATION AND FEASIBILITY CONSTRAINTS .....	1766
B. WHAT TO DO WHEN INFORMATION FAILS .....	1768
1. A Question of Values .....	1768
2. Family Law Tradition: The Model of Family Autonomy.....	1769
C. WHAT TO DO IN THE FACE OF FEASIBILITY CONSTRAINTS: FOSTERING ACCOUNTABILITY, LOWERING EXPECTATIONS .	1774
IV. IMPLEMENTING THE LEAST DRASTIC ALTERNATIVE: STANDARDS FOR INTERVENTION, PLACEMENT, AND TERMINATION OF PARENTAL CUSTODY RIGHTS .....	1775
A. COERCIVE INTERVENTION: THE ISSUES .....	1775
1. Hard and Easy Cases .....	1775
2. How Risky Is Intervention: The Evidence .....	1777
3. The Risks of Nonintervention .....	1787
4. The Benefits of Intervention.....	1792
B. COERCIVE INTERVENTION AND REMOVAL: DERIVING STANDARDS .....	1795
1. The Issues and the Problems .....	1795
2. A Moderate Approach .....	1797

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3. After a Finding of Neglect: Services in the Home or Removal .....	1800
C. AFTER INTERVENTION .....	1802
D. VOLUNTARY CHILD WELFARE SERVICES.....	1807
1. Who Seeks Child Welfare Services and Why .....	1807
2. The Minimum Intervention Perspective .....	1808
3. Another Source of Limitations on Parental Authority: Public Assistance Goals .....	1810
4. Separating Child Protection and Public Assistance Goals .....	1813
5. Standards for Voluntary Child Welfare Services .....	1814
E. TERMINATING FOSTER CARE PLACEMENT .....	1821
1. The Issues .....	1821
2. The Need for Termination: The Evidence .....	1822
3. Feasibility Issues and the Family Autonomy Tradition.	1824
4. Proposed Standards .....	1825
CONCLUSION .....	1826

## INTRODUCTION

Through the child welfare system, the state provides help to endangered children.<sup>1</sup> In dispensing assistance, child welfare officials traditionally enjoyed broad—and unquestioned—discretion to determine when state intervention on behalf of the child was necessary and what form it should take. But over the past twenty years, this authority has been subjected to searching criticism and reappraisal.<sup>2</sup> Critics have argued that the system has inter-

1. Child welfare as used herein primarily refers to a specialized form of social work practice adapted to the needs of service programs for children. States usually provide child welfare services, and state child welfare policy is the focus of the article. All state child welfare systems provide counseling, social casework, and placement in foster family or institutional care. Some child welfare agencies also offer a wider variety of services to children in the home, including daycare, home aides, and parent training.

In 1977, child welfare services were provided to 1.8 million American children. Of these, 28% were in foster care. A. SHYNE & A. SCHROEDER, NATIONAL STUDY OF SOCIAL SERVICES TO CHILDREN AND THEIR FAMILIES: OVERVIEW 1-8 (1978).

2. See generally J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD (2d ed. 1979) [hereinafter GFS I]; J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD (1979) [hereinafter GFS II]; JOINT COMM'N ON JUVENILE JUSTICE STANDARDS, INST. OF JUDICIAL ADMIN., ABA STANDARDS RELATING TO ABUSE AND NEGLECT (1981) [hereinafter ABA STANDARDS] (prepared under auspices of ABA but never adopted by that organization); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975); Mnookin, *Foster Care: In Whose Best Interests?*, 43 HARV. EDUC. REV. 599 (1973); Strauss, *The Relationship Between Promise and Performance in State Intervention in Family Life*, 9 COLUM. J.L. & SOC. PROBS. 28 (1972); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children in Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28

vened too massively and too often, resulting in substantial risks to the children the system purports to serve.

In order to protect children from the risks of unwarranted state action, these critics have urged the adoption of a policy of minimum state intervention in family life.<sup>3</sup> Under such a policy, intervention could not be premised on the contention that it will somehow prove helpful to the child or family. Instead, intervention would be limited to the "least drastic alternative," or to only those steps necessary to protect the child from real, imminent harm.<sup>4</sup> This approach also utilizes stricter legislative standards and more active judicial review in order to limit and prevent abuse of the discretion traditionally afforded child welfare administrators.

Although it is a relatively recent development, the theory of minimum intervention is not controversial. Indeed, in its basic form, the new philosophy states nothing more than the premise that the state should not intervene in family life without good reason. This is a proposition with which no one, including earlier advocates of broad discretionary powers for child welfare officials, would likely disagree.<sup>5</sup>

In order to guide child welfare decisionmaking successfully, however, the new philosophy must be translated from abstract theory into concrete legislative standards to guide child welfare decisionmaking: When is intervention "necessary"? How much and what kind of intervention is necessary in particular types of cases? How long should the state allow the parent to rectify

STAN. L. REV. 623 (1976) [hereinafter Wald, *Standards*]; Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975) [hereinafter Wald, *State Intervention*].

3. E.g., GFS II, *supra* note 2, at 3-14, 17-18; Mnookin, *supra* note 2, at 631-37; Wald, *State Intervention*, *supra* note 2, at 1004-07, 1037.

4. See, e.g., ABA STANDARDS, *supra* note 2, at 128-29 ("goal of all dispositions should be to protect the child from the harm justifying intervention in the least restrictive manner available"); GFS II, *supra* note 2, at 191-92 (state may intervene only if child will be harmed and a "less detrimental alternative" cannot be provided); Mnookin, *supra* note 2, at 627 ("state should not be allowed to remove children unless less drastic means of intervention cannot protect the child"); Wald, *Standards*, *supra* note 2, at 702 ("court should choose those services that least interfere with family autonomy, provided that the services are adequate to protect the child").

5. The twentieth century child welfare system is largely a product of the Progressive movement toward social reform. While the Progressives placed considerable faith in the diagnostic and therapeutic abilities of the new social work profession and thus viewed agency discretion favorably, a paramount theme of the movement was the preservation of the home. Reformers of this era believed that "[h]ome life is . . . the great molding force of mind and of character" and that "children . . . should as a rule be kept with their parents." 2 CHILDREN AND YOUTH IN AMERICA 365 (R. Bremner ed. 1971) (quoting letter to the President embodying the conclusions of the 1909 Conference on the Care of Dependent Children). Therefore, the reformers supported pensions for mothers and other measures to permit the care of children in their own homes. They also favored foster family care over an institutional upbringing. See generally 2 CHILDREN AND YOUTH IN AMERICA, *supra*, at 249-330, 348-97 (providing selection of contemporary documents on issues discussed in this footnote).

the conditions that require intervention before it resorts to further measures? In addressing these specifics, minimum intervention advocates have thus far fallen short of the mark.

The deficiencies in current standards implementing the new philosophy are varied and important. First, some of the factual assumptions on which standards have been based are deeply flawed. Minimum intervention advocates have uniformly asserted, for example, that state intervention poses serious risks to children. But the current evidence simply does not support this claim, and thus does not support the extremely narrow neglect statutes proposed by some minimum intervention advocates.

Minimum intervention advocates have also largely overlooked a major area of child welfare practice, the so-called "voluntary" sector. These cases raise different issues than do those in which the state acts coercively. They also make up what is probably as much as half of the child welfare caseload.<sup>6</sup> A theory of child welfare practice cannot afford to ignore a function this large and important.

Another problem with the proposed minimum intervention standards is that they have generally been drafted without a rigorous methodology. Some commentators have failed to consider all of the evidence, and some have

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6. The proportion of placements that are classified as voluntary has varied widely from state to state, ranging from two percent to 95% in one national survey. NATIONAL COMM'N ON CHILDREN IN NEED OF PARENTS, WHO KNOWS? WHO CARES? FORGOTTEN CHILDREN IN FOSTER CARE 32-33 (1979) [hereinafter NATIONAL COMM'N REPORT]. This variation probably arose because, until fiscal year 1980, federal foster care reimbursement was available only for court-ordered foster care, and in some states, it appears that courts approved voluntary placements before 1980 by converting them into court-ordered placements to satisfy the reimbursement requirement. Rosenthal & Louis, *The Law's Evolving Role in Child Abuse and Neglect*, in THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT 55, 64 (L. Pelton ed. 1981). Reimbursement was provided for voluntarily placed foster children in the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 102(b)(1)(A), 94 Stat. 500, 513 (codified at 42 U.S.C. § 608(a)(1) (1982 & Supp. III 1985)), amended by Pub. L. 99-272, § 12306(c)(2), 100 Stat. 294 (1986). While § 102(c) of the 1980 Act only authorized federal funding for voluntary placements through fiscal year 1983, funding has been extended three times, most recently through fiscal year 1987 in the Comprehensive Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12306(b)(2), 100 Stat. 82, 294 (relevant portions affecting Adoption Assistance and Child Welfare Act to amend Act at 42 U.S.C. § 608(a)(1)).

Surveys by researchers are more reliable and usually indicate that voluntary population constitute at least half of the total foster care population. See CALIFORNIA STATE SOCIAL WELFARE BD., REPORT ON FOSTER CARE: CHILDREN WAITING 7 (1972) (half of surveyed California placements voluntary); A. GRUBER, FOSTER HOME CARE IN MASSACHUSETTS 45 (1973) (58.8% of surveyed Massachusetts placements voluntary); S. JENKINS & M. SAUBER, PATHS TO CHILD PLACEMENT 74 (1966) (58% of surveyed New York placements voluntary). Some "voluntary" placements may, however, involve a plea bargain or coercion by the child welfare agency. See Levine, *Caveat Parens: A Demystification of the Child Protection System*, 35 U. PITT. L. REV. 1, 23 (1973) (without independent court review many placement agreements "may be signed under duress, misinformation, or ignorance"); Mnookin, *supra* note 2, at 601 ("[a] substantial degree of state coercion may be involved in many so-called voluntary placements").

failed to consider any of it. When the evidence is inconclusive—a typical rather than unusual circumstance—policy choices have not always been clearly delineated. A more rigorous approach is necessary both to ensure that standards faithfully embody the least drastic alternative principle, and to expose where the standards ultimately rest on guesswork and compromise. If guesswork and compromise are obscured, so are the issues on which research is desperately needed, as are the limitations on what we can expect the new philosophy to accomplish.

Finally, and perhaps most importantly, minimum intervention advocates have frequently been guilty of excessive optimism about the limitations of their new philosophy. Both the realities of child welfare practice and the severity of the family problems that child welfare workers confront severely limit what we can expect from any child welfare policy. Most families who use the child welfare system are very poor and deeply troubled. Their many problems would challenge the best child welfare system, and ours is certainly not that. High caseloads, poor training, rapid staff turnover, and inadequate funding are endemic to child welfare work and make improvements in practice extremely difficult to achieve. In order to effect any real improvement in child welfare work, standards must be drafted with these realities constantly in view, and expectations about what revised standards can accomplish must be severely limited.

This article attempts to remedy these varied deficiencies in previous legislative standards. Part I examines the child welfare system, and the deficiencies in practice that produced the minimum intervention reform movement. Part II discusses the theory of minimum intervention and describes the deficiencies in standards that have been proposed to implement that theory. Part III develops a methodology for generating better implementation standards, and in part IV that methodology is employed to generate the implementation standards themselves.

## I. THE CHILD WELFARE SYSTEM AND HOW IT WORKS

The child welfare system responds to a wide variety of family problems. Abuse, neglect, abandonment, child behavior problems, a parent's mental or physical illness, and simple poverty all come under its jurisdiction.<sup>7</sup> In order to ameliorate this large array of social ills, the child welfare system provides a variety of services, which are sometimes imposed upon parents who are far from eager to receive them and sometimes granted upon parental request. This complex system descends from a very simple one. The child welfare system originally focused on only one problem, and offered only one solution.

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7. A. KADUSHIN, *CHILD WELFARE SERVICES* 25-27 (3d ed. 1980).

## A. THE ORIGINS OF THE CHILD WELFARE SYSTEM

The American child welfare system traces its descent from an early public assistance scheme, the Elizabethan Poor Laws.<sup>8</sup> Under the poor laws, destitute children were placed in apprenticeship until the age of majority.<sup>9</sup> Such placements could be accomplished without parental consent and divested the parent of both legal custody and the right to obtain the child's return.<sup>10</sup> The poor laws aided only the destitute, however; except for the potential reach of the criminal law, abuse and neglect did not provoke state intervention.<sup>11</sup>

The poor laws were transported to the American colonies along with other English legal institutions. During the colonial era, child welfare administration remained largely synonymous with public assistance administration, and apprenticeship until the age of majority remained the preferred form of aid.<sup>12</sup> During the nineteenth century, as changing economic and social conditions made the indenture of young children increasingly difficult to arrange,<sup>13</sup> the poorhouse, specialized children's institutions, foster care, and adoption came to supplement apprenticeship as methods of relieving childhood destitution.<sup>14</sup> It was not until the latter half of the century, however, that the jurisdiction of child welfare authorities was redefined to include the prevention of harm due to parental abuse or neglect as well as poverty.<sup>15</sup> Even then, abuse

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8. For the Relief of the Poor, 1601, 43 Eliz. 1, ch. 2. See generally Riesenfeld, *The Formative Era of American Public Assistance*, 43 CALIF. L. REV. 175, 177-99 (1955) (discussing origins of poor laws and their operation); tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257, 258-91 (1964) (same).

9. For the Relief of the Poor, 1601, 43 Eliz. 1, ch. 2, §§ I, III.

10. See G. COOPER, C. BERGER, P. DODYK, M. PAWLSEN, P. SCHROG & M. SOVERN, CASES AND MATERIALS ON LAW AND POVERTY 9 (2d ed. 1973) [hereinafter LAW AND POVERTY] (parents could not regain custody even after becoming self-sufficient); tenBroek, *supra* note 8, at 280 n.107 (poor laws do not mention parental rights).

11. Areen, *supra* note 2, at 900; Thomas, *Child Abuse and Neglect: Historical Overview, Legal Matrix, and Social Perspectives* (pt. 1), 50 N.C.L. REV. 293, 299-306 (1972).

12. See Areen, *supra* note 2, at 899-902 ("the majority of neglect statutes continued to focus on family income or idleness"); Riesenfeld, *supra* note 8, at 201-33 (describing public assistance laws in the colonies during 17th and 18th centuries); tenBroek, *supra* note 8, at 291-306 (describing reception of Elizabethan poor laws in New York).

13. See 1 CHILDREN AND YOUTH IN AMERICA 262-63 (R. Bremner ed. 1971) (age at which children were "bound out" rose during 19th century); Presser, *The Historical Background of the American Laws of Adoption*, 11 J. FAM. L. 443, 477-78 (1972) (changes resulted from industrialization).

14. See generally 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 5, at 137-57, 247-330 (discussing development of new forms of public child care, specifically adoption, almshouses, institutions, and foster care).

15. State intervention to protect children from abuse and neglect largely developed from the work of private child protection societies. These societies, which developed as an outgrowth of humane work for animals, lobbied vigorously for child protection laws and were active in investigating and "rescuing" neglected children. E.g., 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 5, at 117-18; Areen, *supra* note 2, at 903-10; Thomas, *supra* note 11, at 306-13.

and neglect were poorly differentiated from mere need,<sup>16</sup> and permanent placement was almost invariably the only service made available to children and their parents.<sup>17</sup>

Not until the dawn of this century did enlightened opinion conclude that financial aid, rather than placement, was the most appropriate service for children of poor but competent parents.<sup>18</sup> Only incompetents should lose their children to the state, reformers argued, and even then should not lose their children permanently. With proper diagnosis and individualized treatment by trained child welfare workers, the reformers claimed, parental inadequacies could be rectified so as to rehabilitate the family and save the state the cost of permanent placement.<sup>19</sup>

With the development of this new philosophy, the modern child welfare system was born. The enactment of state and federal welfare programs for needy children, along with the introduction of social work techniques and personnel into child welfare administration, seemed to ensure that the new goals could be met.<sup>20</sup>

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16. Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 435-36 (1983) (official standard became neglect, but neglect equated with poverty); cf. Thomas, *supra* note 11, at 314 (discussion of blurred distinctions "between poor and neglected children and child offenders"). Many jurisdictions still equate poverty with neglect. Garrison, *supra*, at 436 n.61.

17. A. KADUSHIN, *supra* note 7, at 317-18; Garrison, *supra* note 16, at 437-38.

18. The most influential report was issued by a conference of experts called by President Theodore Roosevelt in 1909 to consider the care of dependent children. It recommended that "[e]xcept in unusual circumstances, the home should not be broken up for reasons of poverty, but only for considerations of inefficiency or immorality." The report thus concluded that home aid, "preferably in the form of private charity rather than public relief," should be given to children living in suitable homes. 2 CHILDREN AND YOUTH IN AMERICA, *supra* note 5, at 365. After the 1909 conference, numerous states enacted "mothers' aid" laws providing for direct financial assistance to women and children in their homes. For descriptions of the mothers' aid programs, see LAW AND POVERTY, *supra* note 10, at 13-14; R. BREMNER, FROM THE DEPTHS: THE DISCOVERY OF POVERTY IN THE UNITED STATES 222-23 (1956).

19. The development of the rehabilitative philosophy within the modern child welfare system paralleled its development in juvenile corrections. See generally D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205-35 (1980) (discussing rehabilitative philosophy in juvenile corrections); E. RYERSON, THE BEST LAID PLANS: AMERICA'S JUVENILE COURT EXPERIMENT 51-54 (1978) (same).

20. By 1935, every state but Georgia and South Carolina had enacted mothers' aid legislation. Coverage varied, however, from one locality to another. LAW AND POVERTY, *supra* note 10, at 13. In 1935, the federal Grants to States for Aid to Dependent Children program was enacted. This Act made federal funds available to support needy children with an absent parent without removing the children from the remaining family. Social Security Act, Pub. L. No. 74-261, §§ 401-406, 49 Stat. 620, 627-29 (1935) (codified as amended at 42 U.S.C. §§ 601-606 (1982 & Supp. III 1985)) (Aid to Families with Dependent Children (AFDC) program). See generally 3 CHILDREN AND YOUTH IN AMERICA 519-609 (R. Bremner ed. 1971) (describing AFDC legislation and its enactment).



## B. THE CHILD WELFARE SYSTEM AT MID-CENTURY

## 1. Little Had Changed

By mid-century it was apparent that the goals of the new child welfare system had not been realized. The change in philosophy simply had not produced the expected changes in child welfare practice. The system continued to serve substantial public assistance functions in addition to protecting children from parental incompetence. The most comprehensive study of foster care undertaken during this period determined that only 14.6% of the children surveyed were in foster care due to abuse or neglect,<sup>21</sup> while problems associated with poverty—poor health, inadequate housing, and insufficient resources—were still responsible for many placements.<sup>22</sup>

At first glance, the continued association between poverty and placement is surprising. Since 1935 federal welfare benefits have been available to needy children in the care of a parent or relative,<sup>23</sup> and by 1960 some three million children and their custodial relatives were receiving such aid.<sup>24</sup> The avowed aim of this federal welfare program was, in fact, to prevent family dissolution occasioned by poverty.<sup>25</sup> But what the large numbers of poor children in foster care made clear was that the benefits provided were insufficient to accomplish this goal.<sup>26</sup> Poor families could seldom obtain the kind of help—daycare, for example, or temporary placement with a boarding school, friend or relative—that enabled wealthier families to cope with their children when an emergency occurred and were thus disproportionately forced to turn to the child welfare system.<sup>27</sup> Moreover, as a result of the high stress levels and

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21. D. FANSEL & E. SHINN, *CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION* 46 (1978) (results of research on children placed in New York City during 1966).

22. H. MAAS & R. ENGLER, *CHILDREN IN NEED OF PARENTS* 380-81 (1959).

23. Social Security Act, Pub. L. No. 74-261, §§ 401-406, 49 Stat. 620, 627-29 (1935) (codified as amended at 42 U.S.C. §§ 601-606 (1982 & Supp. III 1985)) (AFDC program).

24. *LAW AND POVERTY*, *supra* note 10, at 31.

25. As articulated by a 1956 amendment, the program is "[f]or the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives . . ." Social Security Amendments of 1956, Pub. L. No. 880, § 312(a), 70 Stat. 848 (codified as amended at 42 U.S.C. § 601 (1982)).

26. See Sussman, *The Sociology and Economics of Foster Care*, in *FOSTER CARE IN QUESTION: A NATIONAL REASSESSMENT BY TWENTY-ONE EXPERTS* 183, 184 (H. Stone ed. 1970) ("starvation level public assistance grants . . . force children into foster care"). For statistics on the relationship between poverty and placement, see note 212 *infra* and the sources cited therein.

27. Requests for child welfare services were almost invariably made by poor families. For example, a 1969 foster care survey found that 84% of all families requesting placement were from the two lowest socio-economic categories. Rein, Nutt & Weiss, *Foster Family Care: Myth and Reality*, in *CHILDREN AND DECENT PEOPLE* 24, 27-29 (A. Schorr ed. 1974).

Panels charged with developing policy to strengthen the family have consistently identified poverty as one of the principal risks to family functioning. *E.g.*, *ADVISORY COMM'N ON CHILD DEVELOPMENT, NAT'L ACADEMY OF SCIENCES, TOWARD A NATIONAL POLICY FOR CHILDREN AND FAMILIES* 14-39 (1976); *2 CHILDREN AND YOUTH IN AMERICA*, *supra* note 5, at 364-69; K. KENISTON, *ALL OUR CHILDREN: THE AMERICAN FAMILY UNDER PRESSURE* 25-48 (1977).

substandard living conditions associated with long-term indigence, poor parents were more likely to confront childcare crises,<sup>28</sup> and more prone to other serious problems that impeded their ability to cope with them.<sup>29</sup>

The system had also been less than totally successful in its goal of rehabilitating families and thus reducing the length of time children were wards of the state. Although most children did go home within a year or two, long-term placement continued to be fairly common, and some children still stayed in placement until the age of majority.<sup>30</sup> Those parents who did regain their children apparently did so, in most cases, through their own efforts; rehabilitative services to parents were seldom provided,<sup>31</sup> and many agencies did not even stay in touch with parents.<sup>32</sup> During placement, chil-

28. See T. LANGNER & S. MICHAEL, LIFE STRESS AND MENTAL HEALTH 372-97 (1963) (stress of all types more prevalent among poor families).

29. Multiple stresses enhance the risk of psychiatric disorder. Brown, Bhrolchain & Harris, *Social Class and Psychiatric Disturbance Among Women in an Urban Population*, 9 SOCIOLOGY 225, 230 (1975). Psychopathology thus increases as social class declines. *Id.* at 231-34; Dohrenwend & Dohrenwend, *Social and Cultural Influences on Psychopathology*, 25 ANN. REV. PSYCHOLOGY 417, 439-43 (1974). High stress levels have also been linked to parenting problems. See Crnic, Greenberg, Rasozin, Robinson & Basham, *Effects of Stress and Social Support on Mothers of Premature and Full-Term Infants*, 54 CHILD DEV. 209 (1983) (stress negatively affects maternal attitudes on parenting); Land, *Child Abuse: Differential Diagnosis, Differential Treatment*, 65 CHILD WELFARE 33, 37 (1986) (linking high stress to parenting problems); Straus, *Stress and Physical Child Abuse*, 4 CHILD ABUSE & NEGLECT 75 (1980) (parents experiencing high stress and one of several "mediating" variables, such as low socio-economic status or socialization for violence, more prone to child abuse). Therefore, it is not surprising that surveys have found that the rate of child maltreatment rises sharply as income level declines. See NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND OF NEGLECT 21 (1981) (child maltreatment rate 27.3 per thousand for families with 1979 incomes under \$7,000; 2.7 per thousand for families with 1979 incomes in excess of \$25,000).

30. See, e.g., D. FANSEL & E. SHINN, *supra* note 21, at 34, 116-21 (37% of surveyed children discharged from foster care within two years and 60% within five years; children discharged within three months excluded from study); Jenkins, *Duration of Foster Care: Some Relevant Antecedent Variables*, 46 CHILD WELFARE 45, 45 (1967) (54% of surveyed children left foster care within three months, 68% within one year, 75% within two years); Lawder, Poulin & Andrews, *A Study of 185 Foster Children 5 Years After Placement*, 65 CHILD WELFARE 241, 246-47 (1986) (34% of surveyed children left foster care within three months, 56% within one year, 70% within two years).

Most statistics are based on cross-sectional studies which tend to exaggerate the backlog of children unable to move out of foster care. Researchers who conducted the first major study of foster care thus reported that "under present conditions, if a youngster stayed in foster care for more than a year and a half, there is great danger that he will stay indefinitely." H. MAAS & R. ENGLER, *supra* note 22, at 9-10. The researchers found that 31% of their 1957 cross-sectional national sample had been in care for ten or more years, 52% for six or more years, and only 24% for three years or less. Maas, *Children in Long Term Foster Care*, 48 CHILD WELFARE 321, 323 (1969).

31. See A. GRUBER, *supra* note 6, at 2 ("Almost all studies have shown that virtually no services are available to biological families after a child has been placed in foster home care."); J. KNITZER & M. ALLEN, CHILDREN WITHOUT HOMES 24-25 (1978) (problems of parents with children in foster care "widely ignored").

32. E.g., D. CAPLOVITZ & L. GENEVIE, FOSTER CHILDREN IN JACKSON COUNTY, MISSOURI. A STATISTICAL ANALYSIS OF FILES MAINTAINED BY THE DIVISION OF FAMILY SERVICES 53

dren frequently lost touch with their own parents altogether.<sup>33</sup> A few also suffered frequent shifts from one home to the next, thus depriving them of any meaningful familial relationships.<sup>34</sup>

In short, the reality of child welfare practice was a far cry from the theory on which the system had been based. Child welfare experts found this reality troubling for several reasons. First, it seemed apparent that the system was acting in opposition to its avowed aims. Rather than rehabilitating families, it was actively promoting their dissolution. Second, the benefits to children of indiscriminate reliance on foster care over other alternatives—services in the home or adoption by another family—appeared dubious at best. Third, these dubious benefits were being obtained at enormous public expense. In 1971, a year of foster care in New York cost approximately \$4,354.<sup>35</sup> In-home services were frequently cheaper and, if a child was adopted, he cost the state nothing at all.

In analyzing what had gone wrong, researchers discovered a system in which discretion was largely unbounded and frequently abused.

## 2. The Structure of Child Welfare Decisionmaking: Discretion Unlimited

The power to assume parental functions without any specific showing of incapacity that had been enjoyed by the child welfare system of the poor law era had been retained by the "modern" child welfare system because of the supposed need for individual diagnosis and treatment. Child welfare authori-

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(1982) (68% of surveyed families received no visit from agency within previous year; 20% received no contact at all); COMPTROLLER GEN. OF THE U.S., GEN. ACCOUNTING OFFICE, CHILDREN IN FOSTER CARE INSTITUTIONS: STEPS GOVERNMENT CAN TAKE TO IMPROVE THEIR CARE 11 (1977) [hereinafter GAO REPORT] (over 40% of parents surveyed received no visit by agency within first six months of child's placement); S. VASALY, FOSTER CARE IN FIVE STATES 32 (1976) (65% of Iowa mothers and 60% of Massachusetts mothers surveyed had no known contact with foster care agency within six months).

33. *E.g.*, D. FANSHEL, ON THE ROAD TO PERMANENCY: AN EXPANDED DATA BASE FOR SERVICE TO CHILDREN IN FOSTER CARE 31 (1982) (71% of children in care for six or more years never visited by natural mothers); D. FANSHEL & E. SHINN, *supra* note 21, at 88-89 (57% of children in care for five years unvisited by their natural parents); S. VASALY, *supra* note 32, at 36 (two-thirds of parents had not seen child in foster case for over six months).

34. *See* D. FANSHEL & E. SHINN, *supra* note 21, at 138-39 (28% of children experienced more than two placements); J. KNITZER & M. ALLEN, *supra* note 31, at 187 (38% of national sample of foster children moved once or twice and 18% moved more than twice). *See generally* NATIONAL COMM'N REPORT, *supra* note 6, at 32-33 (1979) (state by state estimates of average number of placements per foster child).

35. D. FANSHEL & E. SHINN, DOLLARS AND SENSE IN THE FOSTER CARE OF CHILDREN: A LOOK AT COST FACTORS 23 (1972). Experts estimated that an infant who came into foster care in 1971 and remained in care until maturity would cost the child welfare system \$122,500. Rearing two children at home over the same time and in the same area would cost only \$25,560. *Id.* at 20-21. By 1980, the per year cost of foster care in New York was \$8,376, and the national average was \$4,332. NEW YORK STATE TEMPORARY COMM'N TO REVISE THE SOCIAL SERVS. LAW, FOSTER CARE: A RETROSPECTIVE VIEW 9 (1981).

ties thus possessed broad powers to define the circumstances in which intervention, removal, and return home were appropriate.

These authorities became involved with a family in one of two ways. Either they received a report of suspected abuse or neglect, or the family itself came to the agency and requested assistance.<sup>36</sup> After investigation, the child welfare authorities determined whether and how to intervene on behalf of the child. They could bring abuse or neglect charges against the parents, which would usually lead to a judicial hearing; they could offer placement or other aid without judicial approval; or they could simply do nothing at all.<sup>37</sup> In making this choice, the child welfare authorities possessed virtually unlimited discretion; parents were not legally entitled to aid of any particular sort or indeed to any aid at all.<sup>38</sup> If aid was denied or if parents were offered aid of a different type than that desired, no recourse was available.

To accept agency help also meant doing so on the agency's terms. If the agency offered to place the child in foster care—the type of aid most frequently volunteered—a parental agreement to placement often authorized the agency to retain the child for an indefinite period.<sup>39</sup> In many states, parents were not permitted to add time limits or conditions, nor did a placement agreement bind the agency to do anything to assist the parent in resolving the problem that necessitated placement.<sup>40</sup> Even if the agency chose to press abuse or neglect charges, statutory definitions of neglect were sufficiently vague and procedural requirements in neglect proceedings sufficiently lax that meaningful review was the exception rather than the rule; many courts simply functioned, in effect, as a rubberstamp for the judgment of the child welfare bureaucracy.<sup>41</sup>

After placement, agencies were similarly vested with vast discretionary powers. When a child entered foster care, whether by court order or voluntary placement, the parent was required to cede legal custody—the right to decide where the child lives and the kind of care he will receive—to the

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36. See *supra* note 6 (data on number of cases initiated upon parental request).

37. See generally Wald, *Standards*, *supra* note 2, at 628-31 (providing detailed description of the intervention process).

38. Many parental requests were denied. See Haring, *1975 Census of Requests for Child Welfare Services* (1975).

39. For a typical provision, see N.Y. SOC. SERV. LAW § 383 (McKinney 1983).

40. See Note, *In the Child's Best Interests: Rights of the Natural Parents In Child Placement Proceedings*, 51 N.Y.U. L. REV. 446, 459-60 (1976) (noting lack of statutory provisions to guarantee honoring of parental requests for return of child; discussing lack of financial and legal incentives for agency to offer rehabilitative services to family). See generally Hardin, *Setting Limits on Voluntary Foster Care*, in *FOSTER CHILDREN IN THE COURTS* 70 (M. Hardin ed. 1983).

41. See ABA STANDARDS, *supra* note 2, at 59 ("In many places, courts [hearing neglect cases] have largely abdicated their responsibilities to social work agencies."); Levine, *supra* note 6, at 33-34 (describing as "alarming" "courts' laissez-faire policy towards child welfare agencies and refusal to independently screen and review agency actions").

state's foster care agency.<sup>42</sup> The agency thereafter decided where the child would reside and how long he would remain there;<sup>43</sup> the parent retained no right to be consulted on decisions about the child's care or, typically, to regain custody without agency or court approval.<sup>44</sup> This usurpation of the parental role was invariable. Parents who voluntarily placed their children, no matter what the reason for placement or their parenting ability, lost custody rights just like parents who had been found unfit.

Although the rationale for these broad discretionary powers was the need for individualized treatment in accordance with the specific needs of the child and his family, agencies tended instead to follow uniform practices based on bureaucratic convenience, custom, and funding priorities. Discretion was seldom exercised to meet the individual needs of the child or family. Many parents, for example, reported that daycare or housekeeping assistance could have averted foster care placement, but that agencies seldom offered such alternatives.<sup>45</sup> Foster homes were typically selected with little attempt to match a child with adults who would be sensitive to the child's particular needs,<sup>46</sup> or who lived in a location conducive to retaining ties with the child's

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42. "[Legal custody] includes the right to the care, custody and control of the child and the duty to provide food, clothing, shelter, education, and medical care . . . It does not give an agency the right to consent to adoption unless it is so specified by the court or statute." CHILD WELFARE LEAGUE OF AM., STANDARDS FOR FOSTER FAMILY CARE SERVICES 48 (1959).

43. See, e.g., N.Y. SOC. SERV. LAW § 383(2) (McKinney 1983) ("custody of a [foster] child . . . shall be vested . . . in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded").

44. See *Duchesne v. Sugerman*, 566 F.2d 817 (2d Cir. 1977) (mother of two children placed by agency when she was hospitalized spent years attempting to regain custody); *In re Sanjivini K.*, 47 N.Y.2d 374, 391 N.E.2d 1316, 418 N.Y.S.2d 339 (1979) (mother who voluntarily placed child for financial reasons but contributed to its support and visited regularly unable to regain custody for nine years); *Levine*, *supra* note 6, at 24 n.129 (1973) ("requests for the return of children are only rarely, if at all, honored").

45. According to parents in a Massachusetts study, "there was almost no consideration of options which may have intervened in the necessity of the child going into foster home care." A. GRUBER, *supra* note 6, at 47. Homemaker assistance as an option was discussed in about three percent of cases (as compared to 17% of parents who felt that a homemaker could have averted foster care) while daycare was discussed in less than two percent (as compared to 29% of parents who thought that daycare could have averted foster care). *Id.* at 46-47. See S. JENKINS & M. SAUBER, *supra* note 6, at 184-86 (data suggesting 17% of surveyed foster care placements in New York City preventable if homemakers, daycare, or other appropriate services available); J. KNITZER & M. ALLEN, *supra* note 31, at 15 (survey of communities indicated child welfare policies and practices prevent and discourage parents from keeping children at home).

46. See, e.g., B. BERNSTEIN, D. SNIDER & W. MEEZAN, A PRELIMINARY REPORT: FOSTER CARE NEEDS AND ALTERNATIVES TO PLACEMENT: A PROJECTION FOR 1975-1985, at 13 (1975) (more than one-half of children studied were inappropriately placed initially; over two-fifths inappropriately placed at time of study); D. CAPLOVITZ & L. GENEVIE, *supra* note 32, at 62, 82 (43% of children placed in "unsuitable" foster home during first or second placement; indications that child abused or neglected while in placement in 14% of surveyed cases).

natural parents, family, and friends.<sup>47</sup> Frequently, foster parents were not even advised of a child's special problems prior to receiving the child.<sup>48</sup> Rehabilitative efforts were also standardized, with little or no individualized treatment of the parental and family problems that had occasioned placement.<sup>49</sup>

Moreover, agency practices had the effect of systematically discouraging parent-child contact or reunion. Visiting privileges, for example, were usually inflexible and infrequent.<sup>50</sup> Parents were also given no role in the selection of the foster family and were not involved in decisions about the child's discipline or daily care.<sup>51</sup>

Many factors contributed to the child welfare system's failure to exercise its discretion in accordance with the therapeutic ideal. Legislatures frequently failed to give adequate funding to services other than foster care and thus limited agency options.<sup>52</sup> Agencies themselves also suffered from poor funding and from massive personnel problems. Bureaucratic inertia—unchecked by any review mechanisms—also kept alive the rigid, placement-oriented practices of the poor law era.<sup>53</sup> The net result of these varied problems was that some poor children were unnecessarily placed in foster

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47. See J. KNITZER & M. ALLEN, *supra* note 31, at 23 n.30 (9% of children placed outside of home counties; 40% of San Francisco foster care placements in another county); Festinger, *The New York Court Review of Children in Foster Care*, 54 CHILD WELFARE 211, 241 (1975) (70% of New York City foster care placements outside home borough); see also H.R. REP. NO. 136, 96th Cong., 1st Sess. 48-49 (1979) (distant placements undermine maintenance of family ties). Agencies sometimes even placed children out of state. See J. KNITZER & M. ALLEN, *supra* note 31, at 57-74 (discussing frequency of problems with out-of-state placements).

48. D. CAPLOVITZ & L. GENEVIE, *supra* note 32, at 74 (file indicated information on child's special problems given to foster parents in only two percent or less of surveyed cases); A. GRUBER, *supra* note 6, at 79-80 (only 25% of surveyed foster parents caring for child with disabilities made aware of or realized extent of child's problems before receiving child into their home).

49. See H. MAAS & R. ENGLER, *supra* note 22, at 390-91 (70% of parents had no relationship with foster care agency or relationship erratic or untrusting; staff had no time for continuous work with parents which could effect rehabilitation); NEW YORK CITY COMPTROLLERS' OFFICE, *THE CHILDREN ARE WAITING* 29 (social casework services adequate in only 57.6% of sample cases).

50. See J. KNITZER & M. ALLEN, *supra* note 31, at 22-24 (national foster care survey found "over and over again policies and practices that make it difficult, if not impossible, for parents to visit their children"); R. HUBBELL, *FOSTER CARE AND FAMILIES: CONFLICTING VALUES AND POLICIES* 104-07 (1981) (reporting problems with frequency, duration, location of visits, and restricted communication). In a Massachusetts survey, 37.5% of parents said the caseworker actually prohibited parental visits. S. VASALY, *supra* note 32, at 33-35.

51. See J. KNITZER & M. ALLEN, *supra* note 31, at 23 ("parents who want to exercise parental responsibility must often fight the agencies that ignore their concerns and strengths"); Levine, *supra* note 6, at 21 (parents "rarely made a part of therapeutic planning for their children").

52. See J. KNITZER & M. ALLEN, *supra* note 31, at 8, 16-24 (discussing effects of lack of funding for preventative, restorative, and executive services).

53. See generally Garrison, *supra* note 16, at 431-42 (comparing practices under poor law system and new therapeutic model).

care and some stayed in foster care too long. The hopes of the turn of the century reformers had not been realized.

## II. THE NEW PHILOSOPHY: MINIMUM INTERVENTION

### A. THE REFORM PROGRAM

Growing awareness of problems within the child welfare system produced a new reform movement to remedy the systemic ills that had been uncovered. The vast discretionary powers wielded by child welfare workers were, critics noted, quite out of keeping with the tradition of deference to family autonomy, privacy, and parental authority that had prevailed elsewhere in our legal system.<sup>54</sup> The philosophy of therapeutic intervention that had been used to justify the retention of these poor law powers did not, they urged, provide a sufficient rationale for deviation from this tradition of deference: the philosophy had failed to achieve its expected benefits and did not take account of the fact that state intervention could cause harm as well as good.<sup>55</sup>

In line with this conclusion, over the past decade commentators have been calling for a policy of minimum intervention and the adoption of some form of "least drastic alternative" standard in child welfare decisionmaking.<sup>56</sup> Under this approach, state intervention would not be permitted unless required to protect the child from real, immediate harm;<sup>57</sup> intervention could not be premised on the mere contention that it would somehow prove helpful to the family. Intervention would also be limited to those steps actually necessary to protect the child from the harm threatened. If the child could, for example, be adequately protected by assisting the parent to find better housing, the state would not be justified in placing the child in foster care. In short, minimum intervention requires the least intrusive action that will accomplish the state's goal of protecting the child.

It would, of course, be possible to delegate the implementation of the new

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54. See, e.g., GFS II, *supra* note 2, at 9; Areen, *supra* note 2, at 893; Wald, *State Intervention*, *supra* note 2, at 989-93.

55. See GFS II, *supra* note 2, at 13; Wald, *State Intervention*, *supra* note 2, at 993.

56. See *supra* note 4; see also NATIONAL ADVISORY COMM. FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE 344-45 (1980) [hereinafter NAC STANDARDS] ("[d]ispositions following adjudication of a neglect and abuse petition should adequately protect the juvenile while causing as little interference as possible with the autonomy of the family").

57. See, e.g., ABA STANDARDS, *supra* note 2, at 15 ("coercive state intervention should be premised upon specific harms that a child has suffered or is likely to suffer"); GFS II, *supra* note 2, at 137 ("coercive intervention [should be restricted to protect against] actual and threatened harm about which there is a consensus"); Wald, *State Intervention*, *supra* note 2, at 987-89, 1004-05 (intervention should be permitted only to prevent or alleviate well defined, serious harms to children and when intervention likely to do more good than harm).

philosophy to child welfare authorities. But, because of their past failures to exercise discretion wisely, no proponent of minimum intervention has urged this approach. Instead, the task of implementing the new philosophy has been assigned to legislatures, which are to enunciate statutory standards to confine the discretion of child welfare workers, and courts, which are to play an expanded role in reviewing child welfare decisions under the new, narrower rules.

Proponents of minimum intervention have also agreed on the outlines of a program to effect the new philosophy.<sup>58</sup> The central goal of this program is reducing the use and length of foster care placement, and toward this end the program would alter traditional practice in several respects. The vaguely worded neglect laws that gave broad discretion to child welfare workers would be redrawn to describe in greater detail the circumstances that justify coercive state intervention.<sup>59</sup> These statutes would also require judges to place a child in foster care only after a finding that lesser measures would be unavailing.<sup>60</sup> Periodic review of all placements would be instituted to ensure that children return home as soon as the conditions that led to removal are cured and to make certain that agencies provided the services necessary to achieve this end.<sup>61</sup> Rules regarding termination of parental rights would also be redrawn. Termination of parental rights would no longer be based on parental unfitness. Instead, in order to save the child from the uncertain status of foster care and permit his adoption by another family, termination would be based on parental failure to obtain the child's return after a statuto-

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58. There has been less agreement on the details. Standards for intervention proposed by minimum intervention advocates, for example, vary quite substantially. See, e.g., GFS II, *supra* note 2, at 193-95; Areen, *supra* note 2, at 932-33.

59. See, e.g., ABA STANDARDS, *supra* note 2, at 16-17; GFS II, *supra* note 2, at 193-95; NAC STANDARDS, *supra* note 56, at 254; Areen, *supra* note 2, at 932-33; Wald, *Standards*, *supra* note 2, at 700-01.

60. See ABA STANDARDS, *supra* note 2, at 128-29 ("removal of the child from the home is specifically forbidden unless the child cannot be protected by any other means"); GFS I, *supra* note 2, at 100 (permitting removal from the child's current home only when established "that the child is unwanted and that the child's current placement is not the least detrimental available alternative"); NAC STANDARDS, *supra* note 56, at 344-45 ("state must demonstrate with clear and convincing evidence that one of the alternatives short of removal can adequately protect the child"); Areen, *supra* note 2, at 935-36 (removal permitted only when "services . . . do not within a reasonable time reduce the probability of further neglect or abuse or . . . there is no other way to protect the child from the risk of serious physical injury"); MNOOKIN, *supra* note 2, at 631 ("state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means by which the state can protect the child's health without removing the child from parental custody"); Wald, *Standards*, *supra* note 2, at 643 ("removal should be permissible only when the child cannot be protected in her own home from the specific harm(s) justifying intervention").

61. See ABA STANDARDS, *supra* note 2, at 145 (requiring mandatory review of placements every six months); Areen, *supra* note 2, at 936-37 (requiring submission of progress reports to the court every three months); Wald, *Standards*, *supra* note 2, at 681-82, 699 (requiring mandatory review of placements every six months).



rily fixed period of time.<sup>62</sup>

This reform program has already had a considerable impact. Many states have instituted foster care review procedures.<sup>63</sup> The federal government, spurred by reform program advocates, has required states to provide preventive services as alternatives to placement, to institute case planning and case review mechanisms, and to offer services aimed at either reuniting children with their parents or finding other permanent homes for them.<sup>64</sup> Child welfare demonstration projects across the country are also retraining caseworkers in accordance with the new philosophy.<sup>65</sup> There is also evidence that these measures have produced some concrete results: the number of children in foster care dropped by half in five years, from 500,000 in 1977 to 243,000 in 1982, while the average stay in foster care went from forty-seven to thirty-five months during the same period.<sup>66</sup>

But have the changes benefited the children? Proponents of the minimum intervention approach in child welfare have promised—like the proponents of the rehabilitative philosophy at the turn of the century—that the new strategy will work better and cost less than the old system. However, at least one other minimum intervention reform movement, the deinstitutionalization of mental patients, may already have turned into a major societal trag-

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62. See, e.g., ABA STANDARDS, *supra* note 2, at 74 (establishing presumption in favor of parental rights termination after child in foster care for three years); GFS II, *supra* note 2, at 188, 194-95 (requiring termination of parental rights at request of foster parent who continuously cared for child for two years); Wald, *Standards*, *supra* note 2, at 691 (proposing termination of parental rights in most cases after child in placement for specified period of time). See generally Garrison, *supra* note 16, at 449-53 (examining model standards for terminating parental rights that conform to this position).

63. The first mandatory foster care review procedures were established in New York in 1971. Festinger, *supra* note 47, at 211. By 1981, at least thirteen states had statutorily required review procedures. S. DOWNS, FINAL REPORT OF THE PERMANENCY PLANNING PROJECT §§ 3.13-15 (1981).

64. These requirements were instituted pursuant to the Adoption Assistance and Child Welfare Reform Act of 1980, Pub. L. No. 96-272, § 103, 94 Stat. 500, 514 (codified at 42 U.S.C. § 627 (1982)).

65. See S. DOWNS, *supra* note 63 (final report of national federally funded project to disseminate materials and provide technical assistance on "permanency planning" on a nationwide basis); U.S. DEP'T OF HEALTH AND HUMAN SERVS., A HANDBOOK FOR SOCIAL WORKERS: PERMANENT PLANNING FOR CHILDREN IN FOSTER CARE (1980) (training manual emphasizing permanency planning).

66. *A Place for Foster Children*, N.Y. Times, June 27, 1984, at C15, col. 1; see Magura, *Trend Analysis in Foster Care*, 15 SOC. WORK RES. & ABSTRACTS 29, 32 (1979) (reporting steady decrease between 1973 and 1978 in percentage of children remaining in care from one base year to next in New Jersey). Evidence exists that the trend away from placement may now have reversed, at least in some parts of the country. For example, in New York City, placements rose by 6.9% between 1984 and 1986. Nix, *Lacking Foster Care, Children Sleep in Offices*, N.Y. Times, Apr. 24, 1986, at A1, col. 3. Officials view the increase as a result of a rise in the number of abuse and neglect reports rather than any diminution in impact of the minimum intervention philosophy. *Id.*

edy.<sup>67</sup> During the 1970s, thousands of mental patients in the United States were released from mental institutions into the community.<sup>68</sup> Reformers had anticipated that they would be cared for in small, "less drastic" community based facilities. Early pilot projects demonstrated considerable success, at what appeared to be less cost than hospital treatment.<sup>69</sup> Politicians happily subscribed to the new program, eager to do better and save money simultaneously.<sup>70</sup> But the reformers had misjudged the real cost of deinstitutionalizing and the problems that would arise when the concept was applied on a broad scale. Few community facilities were created, and many patients thus left the institution for the street, where they received no treatment and were forced to fend for themselves in often hostile urban environments.<sup>71</sup> Moreover, in those facilities that did become established, the successes of early, well-funded, well-staffed pilot projects could not be maintained as budgets and staffs were cut.<sup>72</sup> Thus while the deinstitutionalization movement certainly accomplished some good, it also failed to achieve its goals, and it has caused some serious harm as well. The dangers of the minimum intervention reform movement in child welfare pose similar risks: too little intervention can be just as bad as too much. The current reform movement may shrink the total network of available child welfare services without producing benefits.<sup>73</sup> To avoid such dangers,<sup>74</sup> it is necessary to analyze rigorously and pessi-

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67. See H. LAMB, *THE HOMELESS MENTALLY ILL* (1984) (report done for American Psychiatric Association); see also COMPTROLLER GEN. OF THE U.S., GEN. ACCOUNTING OFFICE, *RETURNING THE MENTALLY ILL TO THE COMMUNITY: GOVERNMENT NEEDS TO DO MORE* 172-81 (1977) (reporting problems associated with deinstitutionalization such as incomplete release plans, inadequate referral procedures, haphazard follow-ups).

68. The number of patients in mental hospitals declined significantly between 1955 and 1980. See generally H. LAMB, *supra* note 67.

69. A frequently cited pilot project compared a group of 412 patients in two intensive treatment centers with patients admitted to five mental hospitals in Missouri. Average stays in the mental hospitals were 237 days longer than for similarly diagnosed patients at the treatment centers. See Lyons, *How Release of Mental Patients Began*, N.Y. Times, Oct. 30, 1984, at C1, col. 2.

70. Dr. M. Brewster Smith of the Joint Commission on Mental Illness and Health, an agency highly influential in implementing the new policy, recently noted that the Commission chose its direction because of "the sort of overselling that happens in almost every interchange between science and government. Extravagant claims were made for the benefits of shifting from state hospitals to community clinics . . . . The professional community made mistakes and was overly optimistic, but the political community wanted to save money." *Id.* at C4, col. 2; see Plum, *Moving Forward with Deinstitutionalization: Lessons of an Ethical Policy Analysis*, 57 AM. J. ORTHOPSYCHIATRY 508, 509 (1987) (deinstitutionalization movement came from two different sources: civil libertarians, and fiscal conservatives; former naively assumed deinstitutionalization would produce more humane, community-based care; latter wanted to reduce costs).

71. Morganthau, *Abandoned*, NEWSWEEK, Jan. 6, 1986, at 14, 16 (estimating that approximately one-third of nation's homeless—a population put by various commentators at numbers ranging from 350,000 to 3,000,000—chronically mentally ill); cf. J. KNITZER & M. ALLEN, *supra* note 31, at 45-47 (discussing similar problems of deinstitutionalization in context of juvenile justice system).

72. See Lyons, *supra* note 69, at C1, col. 2 (discussing decline from pilot program success).

73. See Magazino, *Services to Children and Families at Risk of Separation*, in CHILD WELFARE:

mistically the potential impact of changed standards, taking into account the constraints that will likely influence their interpretation and implementation.

#### B. ITS DEFICIENCIES

Rigorous analysis has not typically been employed by the drafters of standards implementing the least drastic alternative. Indeed, the reform movement's leading theoreticians, Joseph Goldstein, Anna Freud, and Albert Solnit, provide an excellent example of cavalier and over-optimistic analysis.

In two books<sup>75</sup> published during the 1970s, Goldstein, Freud, and Solnit propose the most extreme standards that the minimum intervention movement has thus far produced. They also claim that their proposed standards are supported by psychoanalytic theory and research, a theoretical basis other proposals have lacked, and one that thus gives their work a particularly prominent place in the minimum intervention literature. Goldstein, Freud, and Solnit propose that intervention by child welfare authorities be limited to cases of "[s]erious bodily injury inflicted by parents upon their child, or an attempt to inflict such harms, or repeated failure of the parents to prevent the child from suffering such injury"; conviction of a sexual offense against the child; or abandonment.<sup>76</sup> They explicitly argue against intervention in cases of "minor assaults" and other less serious physical harms, and in cases of emotional or intellectual harm, even when these harms are very serious.<sup>77</sup>

Their primary rationale for this position is that state intervention itself poses serious risks to children, risks so substantial that only the most serious harms justify removing the child from his parents or even providing services in the house. A child's placement in foster care, they argue, poses several types of risks. Removal from the home disrupts "[c]ontinuity of relationships, surroundings and environmental influences [that] are essential for a child's normal development."<sup>78</sup> The shared authority between parents and agency creates "insecurity caused by the constant need to find a balance between the competing demands of fostering parents and external authori-

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CURRENT DILEMMAS—FUTURE DIRECTIONS 211, 250-51 (1983); see also Lindsay, *Achievements for Children in Foster Care*, 27 SOC. WORK 491, 495 (1982) (noting potential problems in restrictions on availability of foster care like those that arose in deinstitutionalization movement).

74. See tenBroek & Barth, *Learning the Hard Way: A Pilot Permanency Planning Project*, 65 CHILD WELFARE 281, 292-94 (1986) (describing unanticipated results of a permanency planning project).

75. GFS I, *supra* note 2; GFS II, *supra* note 2.

76. GFS II, *supra* note 2, at 193-95. Other grounds for intervention include parental failure to abide by labor, education, and immunization laws affecting the child, the commission of acts by the child criminal under the adult penal system, and certain instances of medical treatment denial. *Id.*

77. *Id.* at 73-78.

78. GFS I, *supra* note 2, at 31-32.

ties."<sup>79</sup> The multiple placements some children encounter while in care interfere with the "attachments that are essential for an individual's growth."<sup>80</sup> And the child's return to his parents when he has formed attachments elsewhere "causes distress and harm[s] . . . his psychological development."<sup>81</sup> Because of these varied harms from foster care, Goldstein, Freud, and Solnit also urge that foster parents who have cared for a child continuously for one or two years, depending on the child's age, should be able to obtain termination of the natural parents' rights to regain custody automatically, regardless of the reason for placement, the efforts of the natural parents to regain custody, or the level of assistance the natural parents have received from the foster care agency.<sup>82</sup>

Even intervention without removal, Goldstein, Freud, and Solnit opine, poses great risks: "When family integrity is broken or weakened by state intrusion, [the child's] . . . needs are thwarted and his belief that his parents are omniscient and all-powerful is shaken prematurely. The effect on the child's developmental progress is invariably detrimental."<sup>83</sup> Goldstein, Freud, and Solnit thus adopt the same narrow standards for intervention in the home that they favor for removal.

Are these good standards? In order to evaluate the proposal, it is necessary first to assess carefully the risks of intervention in the home and removal from it, and then to balance these risks against the risks of nonintervention and the possible benefits of intervention. Goldstein, Freud, and Solnit not only fail to do this; they also provide no evidence at all, other than vague pronouncements on the tenets of psychoanalytic theory, in support of their claims.<sup>84</sup> They ignore the many studies of how children in fact fare in foster care, along with the evidence on the risks of nonintervention and the benefits of state action. Because Goldstein, Freud, and Solnit are so cavalier about supporting their claims, they also ignore the problem of insufficient evidence: on many issues of child welfare practice the evidence is far from conclusive,

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79. GFS II, *supra* note 2, at 49; see GFS I, *supra* note 2, at 117-18 (court's disruption of parent-child relationship prevents development of needed trust between them).

80. GFS II, *supra* note 2, at 136; see *id.* at 39-45 (long-time "caregivers" entitled to parental rights to promote continuity for child).

81. *Id.* at 136.

82. *Id.* at 46. The one exception mandates a hearing in some circumstances for older children to determine whether their real parents are still their "psychological" parents. *Id.* at 47-48.

83. *Id.* at 9; see *id.* at 25 ("children . . . react to even temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control").

84. Several commentators have recognized the failure of Goldstein, Freud, and Solnit to provide evidentiary support for their conclusions. See, e.g., Katkin, Bullington & Levine, *Above and Beyond the Best Interests of the Child: An Inquiry into the Relationship Between Social Science and Social Action*, 8 LAW & SOC. REV. 669, 672-76 (1974); Miller, Book Review, 23 DE PAUL L. REV. 1093, 1096 (1974); Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child* (Book Review), 78 MICH. L. REV. 645, 669 n.56 (1981).

and the drafter of standards to guide child welfare authorities must somehow take account of this fact.

Goldstein, Freud, and Solnit also fail to recognize that state intervention often does not occur through state coercion. Consider, for example, this case:

Ritchie Adams, six years old, was brought to Juvenile Hall by a baby sitter. The child's mother told the baby sitter to take him there because she had no way of caring for him.

When contacted by the Probation Officer . . . [Mrs. Adams] said she was unable to care for Ritchie. [She requested that he be placed in foster care.] She told of her own unhappy childhood with quarrelsome parents, a sharp sibling rivalry with preference given to boys in the family, and an early and unhappy marriage following a pregnancy with Ritchie. She described Ritchie as subject to temper tantrums beyond her control, hateful like his father, and hyperactive. . . . She talked of her wish to marry again, and was very much involved with a new male friend. She reported that there had been no recent contact with Mr. Adams and she did not know where he was living. Mrs. Adams explained that Ritchie's sister . . . lived with her. An older brother . . . was in a mental hygiene foster home . . . .<sup>85</sup>

Should Ritchie be accepted into foster care? Goldstein, Freud, and Solnit suggest no standards for the voluntary sector of the child welfare system and thus do not address the question.<sup>86</sup> However, their standards for terminating parental rights would apply with full force to parents who had voluntarily placed children in foster care,<sup>87</sup> even if the placement was occasioned by agency failure to provide in-home services that would have met the family's needs and the agency thereafter did nothing to assist the parent in getting the child back. Thus, Goldstein, Freud, and Solnit penalize the parents of children who seek help for their problems by placing them at serious risk of losing their children altogether when they do so.

On a deeper level, Goldstein, Freud, and Solnit pay little attention to the context in which the problems they describe emerge and in which their proposed standards would be administered. Thus, despite their view of instability in placement as an unmitigated evil, they provide no incentives to improve agency performance in this—or any other—area of child welfare practice.

While Goldstein, Freud, and Solnit provide a good short course in how not to implement the minimum intervention philosophy, their views have been extremely influential in shaping the minimum intervention implementation

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85. R. MNOOKIN, *CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 512-13 (1978).

86. *But see* GFS II, *supra* note 2, at 31-36 (dealing only with contested custody after divorce and parental requests to surrender all legal parental rights).

87. *See* GFS I, *supra* note 2, at 75-85 (hypothetical court decision, favored by authors, terminating parental rights of mother who had voluntarily placed her child).

program. The quest for "permanency" in relationships is now often treated as synonymous with the least drastic alternative itself and "permanency planning" has become the new catchword in child welfare work.<sup>88</sup> Although no commentators have urged limiting state intervention as narrowly as Goldstein, Freud, and Solnit,<sup>89</sup> commentators tend to agree with the conclusion that foster care is extremely damaging to children, and that the damage derives from separation, "status anxiety" about the conditional nature of the placement, and disruption of attachments due to multiple placements.<sup>90</sup> Most have also followed Goldstein, Freud, and Solnit in advocating the same standards for intervention in the home that apply to placement,<sup>91</sup> in advocating termination of parental rights based on passage of time,<sup>92</sup> and in giving very short shrift to the voluntary sector of the child welfare system.<sup>93</sup> The work of these other minimum intervention advocates also frequently lacks thorough consideration of the evidence or reasoned explanations for the con-

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88. "In the second half of the seventies, permanency planning became a movement that spread from state to state." S. DOWNS, *supra* note 63, § 1.16; see E. Fein, A. Maluccio, M. Hamilton & D. Ward, *After Foster Care: Outcomes of Permanency Planning For Children*, 62 CHILD WELFARE 485, 486 (1983) [hereinafter *After Foster Care*] (discussing generally permanency planning movement and its spread). Two federal initiatives have facilitated the spread of permanency planning. Since 1976, the federal Children's Bureau has awarded incentive grants to 45 states to carry out permanency planning projects. The Children's Bureau also has funded a national Permanency Planning Project to develop and disseminate written materials and provide technical assistance to state child welfare agencies interested in incorporating permanency planning into their programs. S. DOWNS, *supra* note 63, § 1.16. Moreover, the Adoption Assistance and Child Welfare Act of 1980 conditions federal child welfare funding on state adoption of a number of specific procedures designed to ensure that permanency planning is carried out. 42 U.S.C. § 608(f) (1982); see Allen, Golubock & Olsen, *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in FOSTER CHILDREN IN THE COURTS, *supra* note 40; at 575, 575 (describing act in detail).

89. See ABA STANDARDS, *supra* note 2, at 67-70 (authorizing intervention based on serious emotional damage when parents unwilling to provide treatment); NAC STANDARDS, *supra* note 56, at 178 (authorizing intervention when emotional health is severely impaired); Areen, *supra* note 2, at 932-35 (authorizing intervention based on actual or threatened emotional harm); Wald, *Standards*, *supra* note 2, at 700-01 (authorizing intervention based on serious emotional damage when parents unwilling to provide treatment).

90. ABA STANDARDS, *supra* note 2, at 54-55; Areen, *supra* note 2, at 889, 912-14; Mnookin, *supra* note 2, at 622-26; Wald, *State Intervention*, *supra* note 2, at 993-96.

91. See ABA STANDARDS, *supra* note 2, at 131 (noting danger of all forms of intervention); Wald, *State Intervention*, *supra* note 2, at 996-99 (arguing against lessened deference to parental autonomy when considering in-home intervention).

92. See ABA STANDARDS, *supra* note 2, at 163 (authorizing termination of parental rights in certain situations when child out of home for three years); Areen, *supra* note 2, at 937 (power to consent to adoption vests in state after six months or one year depending on child's age, unless reasonable probability of reunion with parents exists); Wald, *Standards*, *supra* note 2, at 691 (termination would be norm if child not returned home within six months if child under three or 12 months if child over three).

93. See ABA STANDARDS, *supra* note 2, at 183-95 (voluntary sector considered only in final 12 pages of 156-page volume); Areen, *supra* note 2, at 921-22, 935 (devoting few paragraphs to voluntary sector; proposing judicial hearings to ensure voluntariness of placements).

clusions.<sup>94</sup> Even the reform movement's central aim—reducing the use and length of placement—has been supported by rhetoric more often than reasoned analysis.<sup>95</sup> Moreover, a large amount of research data now exists that was unavailable to early minimum intervention advocates.<sup>96</sup> A fresh and comprehensive look at the meaning of the least drastic alternative in child welfare decisionmaking is thus desirable, and overdue.

### III. THE MEANING OF MINIMUM INTERVENTION: A FRAMEWORK FOR ANALYSIS

What harms are serious enough to warrant state intervention? What responses are minimal? In an ideal world, we would consult experts on child development and psychotherapy and obtain answers to these questions. Child welfare workers would then be instructed to behave accordingly, and a perfect system would fall into place. The world is, of course, far from perfect, and the task of implementing the new philosophy is thus far more difficult.

#### A. INFORMATION AND FEASIBILITY CONSTRAINTS

Experts cannot, unfortunately, provide all or even most of the answers on many key issues of child welfare administration. The experts do not agree on the long-term effects of many child rearing practices, or on the efficacy of various treatment strategies.<sup>97</sup> One of the few points on which they do generally agree is the present difficulty of predicting adult personality on the basis of childhood experiences.<sup>98</sup> And there is little empirical research keyed di-

94. Only one commentator has thoroughly reviewed the evidence available. Wald, *Standards*, *supra* note 2, at 644-49, 665-76.

95. *See, e.g.*, NATIONAL COMM'N REPORT, *supra* note 6, at 5 ("the foster care system in America is an unconscionable failure, harming large numbers of the children it purports to serve").

96. *See, e.g.*, D. FANSHIEL & E. SHINN, *supra* note 21; M. JONES, A SECOND CHANCE FOR FAMILIES—FIVE YEARS LATER: FOLLOW-UP OF A PROGRAM TO REDUCE FOSTER CARE (1985); M. WALD, J. CARLSMITH, P. LEDERMAN, R. FRENCH & C. SMITH, PROTECTING ABUSED/NEGLECTED CHILDREN: A COMPARISON OF HOME AND FOSTER PLACEMENT (1985) [hereinafter PROTECTING CHILDREN].

97. *See* S. ESCALONA, THE ROOTS OF INDIVIDUALITY: NORMAL PATTERNS OF DEVELOPMENT IN INFANCY 13 (1968) (summarizing studies and reporting that "[w]hen childrearing techniques . . . are treated as the independent variable, no significant relationship can be shown to exist between childrearing techniques and later personality characteristics"); GFS I, *supra* note 2, at 51 ("[no one] can . . . predict in detail how the unfolding development of a child and his family will be reflected in the long run in the child's personality and character formation"); *cf.* Opaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1137-44 (1976) (describing deficiencies of psychological theory and research findings as aids in resolving child custody cases).

98. One of the best known predictive studies is Macfarlane, *Perspectives on Personality Consistency and Change from the Guidance Study*, 7 VITA HUMANA 115 (1964). Arlene Skolnick has observed that "[t]he most surprising [finding] of the [Macfarlane study] was the difficulty of predicting what thirty-year-old adults would be like even after the most sophisticated data had been gath-

rectly to the types of problems that arise in child welfare decisionmaking.<sup>99</sup> In many instances, then, the available data can produce only a vague design for the least drastic alternative in child welfare practice.

Moreover, much of the available data is highly flawed. Although some very high quality research on child welfare issues has been done, most of the research is simply not very good: control groups are frequently lacking, follow-up is often inadequate, and variable methods of measuring outcomes make comparisons extremely difficult.<sup>100</sup> The conclusions that researchers draw therefore must often be viewed with skepticism, and it is extremely risky to rely on a single research report as establishing a fact. Only when a substantial number of reports reach similar conclusions can claims of fact be tentatively drawn. Even then, conclusions must remain tentative if most of the reports are based on flawed research.

Even if perfect information were available, child welfare workers could not be expected to implement it perfectly. To begin with, child welfare administration has been consistently characterized by its noncompliance with legal standards. A change in child welfare rules simply does not automatically translate into changes in agency behavior. Examples of this phenomenon abound. A recent national survey of foster care agencies, for instance, determined that six-month reviews required by federal law were performed in less than forty percent of surveyed cases.<sup>101</sup> While the law was clear, it was simply being ignored.

One reason for this phenomenon is insufficient resources. Over the last twenty years researchers have repeatedly found that child welfare work suffers from high caseloads,<sup>102</sup> rapid staff turnover,<sup>103</sup> and inadequate training among workers.<sup>104</sup> These conditions virtually ensure shoddy services, and

ered on them as children." A. SKOLNICK, *THE INTIMATE ENVIRONMENT: EXPLORING MARRIAGE AND THE FAMILY* 378 (1973).

99. See generally Wald, *Legal Policies Affecting Children: A Lawyer's Request for Aid*, 47 *CHILD DEV.* 1, 3-5 (1976) (providing list of child welfare research topics in need of further study).

100. See generally *PROTECTING CHILDREN*, *supra* note 96, at 13-17 (describing common methodological problems in child welfare research).

101. GAO REPORT, *supra* note 32, at iii, 9-10.

102. Caseloads of 80 or 90 per worker are common in some states. GAO REPORT, *supra* note 32, at 12; NATIONAL COMM'N REPORT, *supra* note 6, at 15; D. SHAPIRO, *AGENCIES AND FOSTER CHILDREN* 19-24 (1976).

103. See D. CAPLOVITZ & L. GENEVIE, *supra* note 32, at 25-26 (only half of children had fewer than three caseworkers during stay in foster care); A. GRUBER, *supra* note 6, at 58 (only 16% of sampled cases assigned to same worker for more than two years). See generally NATIONAL COMM'N REPORT, *supra* note 6, at 6, 15-18; Freudenberger, *Burn-out: Occupational Hazard of the Child Care Worker*, 6 *CHILD CARE Q.* 90 (1977).

104. See A. KADUSHIN, *supra* note 7, at 687 (quoting New York Commission on Child Welfare that half of child welfare workers surveyed "considered themselves unequipped for [offering] counseling"); D. SHAPIRO, *supra* note 102, at 19-20 (46% of surveyed child care workers had only B.A. degree; median experience two years); Campbell, *The Neglected Child: His and His Family's Treatment under Massachusetts Law and Practice and their Rights under the Due Process Clause*, 4 *SUF-*



they are not easily cured. Caseload reduction alone has shown little effect in improving performance,<sup>105</sup> while the low pay and low prestige of child welfare work makes it extremely difficult to attract committed, well-qualified personnel.<sup>106</sup> And until child welfare administration becomes a high social priority in this country, it is unlikely that a major change in funding will occur, or that the status of child welfare work will improve.

Given these problems, in order to implement the minimum intervention philosophy effectively, we must decide what to do when information fails and make sure that our approach is within the present capability of child welfare personnel.

## B. WHAT TO DO WHEN INFORMATION FAILS

### 1. A Question of Values

If the empirical and theoretical evidence fails to indicate clearly the least drastic alternative, how do we decide what standard to apply? In such cases, we could grant discretion to child welfare workers, but there is no reason to believe that this would achieve results different from those obtained in the past. We could also grant discretion to judges, but without some policy guidelines unpredictable and inconsistent results would likely follow.<sup>107</sup> Or the legislature could establish arbitrary rules or presumptions for child welfare workers and judges to follow. But a preferable approach is surely to enunciate rules that are supported by a coherent policy choice if reliable evidence cannot be obtained.

In my view, the family law traditions and values prevailing within our legal system in other contexts prescribe the best policy to employ. The central values of this tradition—family autonomy, privacy, and parental author-

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FOLK L. REV. 631, 642 (1970) (most Massachusetts child care workers had only B.A. degrees usually in fields other than psychology or social work).

105. See D. SHAPIRO, *supra* note 102, at 90 (workers with smallest and largest caseloads moved children out of foster care more quickly than those with medium size caseloads). Probation and parole researchers have also reported pessimistic conclusions on the value of caseload reduction. See D. LIPTON, R. MARTINSON & J. WILKS, *THE EFFECTIVENESS OF CORRECTIONAL TREATMENT: A SURVEY OF TREATMENT EVALUATION STUDIES* 45-49, 59 (1975).

106. In 1985 the median salary for social workers with a graduate degree was \$19,000, while the median salary was \$15,000 for practitioners with no graduate training. M. BOTSKO & M. JONES, *ANNUAL SALARY STUDY AND SURVEY OF SELECTED PERSONNEL ISSUES* 21 (1985). See A. KADUSHIN, *supra* note 7, at 677 (social work ranked low among professions in terms of prestige; like other traditional women's professions, social work considered a minor, almost marginal profession).

107. See, e.g., M. PHILLIPS, A. SHYNE, E. SHERMAN & B. HARING, *FACTORS ASSOCIATED WITH PLACEMENT DECISIONS IN CHILD WELFARE* 69-84 (1971) (reporting results of simulation study in which three experienced judges were asked to determine, based on actual case files, whether children should be provided services in home or removed; judges agreed in only 48% of cases and "[e]ven in cases in which they agreed on the decision . . . [they] did not identify the same factors as determinants, each seeming to operate to some extent within his own unique value system").

ity—have been ignored by the current child welfare system with no apparent justification and no apparent benefit. These traditional values are entirely consonant with the minimum intervention philosophy. Indeed, minimum intervention advocates have uniformly turned to these values to support the minimum intervention approach. Courts and legislators have also developed and refined rules to embody these values in a variety of family law contexts. The rules that have evolved within the tradition thus reflect lengthy debate, thought, and consensus.

Use of the values underlying the family law tradition would also harmonize child welfare law with the other branches of family law. This is appealing, first of all, on grounds of logic: Why should one set of principles apply to the family in relation to the child welfare system and another in all other contexts? Using these principles would, additionally, end a long history of confusion between public assistance and child protection aims. As we have seen, the child welfare system originated as part of the poor laws, where public assistance goals took precedence over the family law values applied elsewhere. Continued rejection of these values within the child welfare system, coupled with its continued service of disproportionate numbers of poor families, has, indeed, led one commentator to describe child welfare law as “the family law of the poor.”<sup>108</sup> But there is no good reason for a family law that differentiates on the basis of wealth. Reliance on the family law rules that have been applied in other contexts can thus serve the salutary function of ending a long history of discrimination against the indigent, in addition to promoting a coherent family law and policy. To the extent that empirical data does not adequately describe the least drastic alternative, I therefore believe that child welfare decisionmaking should be guided by the principles that govern American family law in other contexts.

## 2. Family Law Tradition: The Model of Family Autonomy

Outside the child welfare system, our legal tradition has generally accepted the premise that parents have a paramount claim to the care and custody of their minor children in all but exceptional circumstances.<sup>109</sup> Courts have usually held that parents have the right to determine their child’s care and upbringing without interference by the state unless the child is threatened with serious harm,<sup>110</sup> and that the claims of other relatives and strangers,

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108. tenBroek, *supra* note 8, at 262.

109. See 67A C.J.S. *Parent and Child* § 16, at 201 (1978) (parental rights “may be limited or interfered with only for the most compelling and sufficient reasons”); *cf.* *Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) (“primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition”).

110. The medical decision is the context in which the limits of parental authority have been most frequently tested. Courts usually require a showing that the child will suffer serious harm before overruling a parental decision. See, e.g., *In re Custody of a Minor*, 375 Mass. 733, 752, 379 N.E.2d

even if based on the best interests of the child, must give way to parental rights.<sup>111</sup> Since the nineteenth century, this "parents' rights" doctrine has been justified both as a natural outgrowth of a parent's duty to support and maintain the child and because it serves the child's best interests. "The wants and weaknesses of children," courts and commentators have urged, "render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person."<sup>112</sup>

This deference to parental authority reflects a social consensus that the family, rather than the state or other organized interests, should play the primary role in educating and training the young.<sup>113</sup> Deference to parental child rearing, commentators have suggested, also serves society's interests in fostering social pluralism and diversity, and supports our basic social institu-

1053, 1065 (1978) (ordering chemotherapy when child's life at stake and parents unwilling "to provide the type of medical care necessary and proper for child's well-being"); *In re Hofbauer*, 47 N.Y.2d 649, 656, 393 N.E.2d 1009, 1013-14, 419 N.Y.S.2d 936, 940-41 (1979) (courts may not choose most effective treatment when parents considered reasonable alternatives); *In re Green*, 448 Pa. 338, 348, 292 A.2d 387, 392 (1972) (state may not override parental judgment about medical care that is based on religious belief when child's life not immediately imperiled). *But see In re Sampson*, 29 N.Y.2d 900, 901, 278 N.E.2d 918, 918-19, 328 N.Y.S.2d 686, 687 (1972) (affirming lower court's ordering of nonvital operation over parent's religious objection). *See generally* Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645 (1977) (discussing circumstance under which state should overrule parental decision to deny medical care to child).

Courts have also given substantial deference to parents' educational decisions. *See Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (refusal of Amish parents to send child to public schools allowed); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925) (statute requiring all children to attend public schools struck down as interfering with parents' right to direct upbringing and education of child).

111. *See, e.g., In re B.G.*, 11 Cal. 3d 679, 688-89, 523 P.2d 244, 257-58, 114 Cal. Rptr. 444, 457-58 (1974) (court may award custody of child to "nonparent" against claim of parent only upon "clear showing that such award is essential to avert harm to the child"); *Dickson v. Lascaris*, 53 N.Y.2d 204, 208, 423 N.E.2d 361, 363-64, 440 N.Y.S.2d 884, 886 (1981) (only extraordinary circumstances justify removal of child from parent's custody); *Barstad v. Frazier*, 118 Wis. 2d 549, 554-55, 348 N.W.2d 479, 482 (1984) (best interests of child not proper standard in custody dispute between natural parent and third party; compelling reason necessary to justify denying custody to natural parent). *But see Painter v. Bannister*, 258 Iowa 1390, 1396, 140 N.W.2d 152, 156 (1966) (custody of child awarded to nonparent since "primary consideration is the best interest of the child"); *Ellerbe v. Hooks*, 490 Pa. 363, 367-68, 416 A.2d 512, 513-14 (1980) (in custody disputes between parent and third party, parent has prima facie right to custody which may be forfeited if convincing reasons appear that best interests of child will be served by awarding custody to someone else). *See generally* H. CLARK, *LAW OF DOMESTIC RELATIONS* § 17.5 (1968) (analyzing relevant cases). When parents have abandoned their children to others for a lengthy period, however, their claims have been accorded less deference. *See infra* notes 121-22 and accompanying text.

112. tenBroek, *supra* note 8, at 905.

113. *See* S. KATZ, *WHEN PARENTS FAIL* 1-3, 12-13 (1971) (America has "cultural preference" for deferring to family decisions); Heymann & Barelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765, 772 (1973) (state should not interfere with "fundamental decisions that shape family life"); *see also Bellotti v. Baird*, 443 U.S. 622, 638 (1979) (the parent's role in training children for adulthood "in large part is beyond the competence of impersonal political institutions").

tions and values,<sup>114</sup> which presuppose a social system of family units in which members provide for each other's economic and emotional needs.<sup>115</sup>

Indeed, this tradition of deference to parental rights is now, at least in some circumstances, constitutionally mandated. The constitutional rights of parents were first established more than a half-century ago and have been repeatedly reaffirmed. In a long series of cases the Supreme Court has held that the state may not contravene parental decisions regarding the child's education and training for adulthood absent compelling justification.<sup>116</sup>

Although the family autonomy doctrine has not been systematically applied to the child welfare system, the Supreme Court has held that child welfare authorities may not deprive an unwed father who has lived with and supported his children of their custody on the presumption that he is unfit; instead, the state must demonstrate his unfitness at an evidentiary hearing.<sup>117</sup> And the importance of the interests at stake have led the Court to require clear and convincing evidence before a parent's rights are terminated.<sup>118</sup> A few lower courts, influenced by the reform movement, have also recently

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114. See AREEN, *supra* note 2, at 893 (deference to parental autonomy promotes diversity and personal freedom); Wald, *State Intervention*, *supra* note 2, at 991-93 (same); cf. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (state may not "standardize its children by forcing them to accept instruction from public teachers only"); *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923) (state may not "foster a homogeneous people with American ideals" by forbidding teaching of foreign languages to children).

115. See *Moore v. City of East Cleveland*, 431 U.S. 494, 505 (1977) (discussing family's role in protecting its members from economic and personal hardship); *Smith v. Organization of Foster Families*, 431 U.S. 816, 844 (1977) (importance of familial relationships stems from "the emotional attachments that derive from the intimacy of daily association").

116. Vague assertions of benefits to the child are apparently insufficient to meet this test; a clear demonstration of harm to the physical or mental health of the child or to the public safety, peace, order, or welfare has been required. See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (before restriction of right to choose family living arrangements permitted, court "must examine carefully the importance of the governmental interests"); *Wisconsin v. Yoder*, 406 U.S. 205, 213-15 (1972) (state interest in compulsory education not great enough to overcome parents' rights absent harm to child or to public welfare); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972) ("de minimis" state interest insufficient to justify restriction on parental rights of unwed father); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (state generally may not enter "private realm of family life"); *Pierce v. Society of Sisters*, 268 U.S. 510, 535-36 (1925) (statute requiring all children to attend public schools interferes with rights of parents to direct upbringing and education of child); *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (state interest in encouraging American ideals by prohibiting teaching of foreign languages not sufficient to permit infringement of rights of parents to raise children as they see fit). See generally *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1235-42 (1980) (discussing parents' constitutional right to control custody and upbringing of children). The Supreme Court has also recognized a fundamental right of privacy in other family matters. See *Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977) (state statute restricting and prohibiting sale of contraceptives to minors; restriction of right of privacy can only be justified by compelling state interest); *Griswold v. Connecticut*, 381 U.S. 479, 484-86 (1965) (state statute forbidding use of contraceptives; bill of rights implies a right of privacy).

117. *Stanley v. Illinois*, 405 U.S. 645 (1972).

118. *Santosky v. Kramer*, 455 U.S. 745 (1982).

struck down child welfare laws that give the state broad discretion to intervene coercively in family life. In *Roe v. Conn.*,<sup>119</sup> for example, a federal district court struck down a child neglect statute that authorized termination of parental rights if the child "has no proper parental care." In view of the constitutional protection due the "fundamental right of family integrity," the court held that the severance of the parent-child relationship was permissible "only when the child is subjected to real physical or emotional harm and less drastic measures would be unavailing."<sup>120</sup>

These cases suggest that, when information is lacking on where the least drastic alternative lies, the state should, in general, defer to the parent. In recent years, however, courts have increasingly been forced to confront cases that test the boundaries of parents' rights. These cases have made it apparent that deference to parental judgment must vary with differences in parental commitment, childhood maturation, and the decisionmaking context.

For example, it now appears that parental rights may be entitled to less deference if the parent has not maintained an ongoing relationship with his child. As early as the nineteenth century, scholars have found, courts sometimes gave precedence to the claims of nonparents who had cared for a child at parental request for substantial periods of time.<sup>121</sup> This trend seems to have accelerated in recent years, and a number of courts have held that prolonged voluntary cessation of contact is sufficient to defeat a parent's attempt to regain custody.<sup>122</sup> This distinction between biological and "psychological" parentage has even crept into the constitutional parents' rights doctrine. In *Quilloin v. Walcott*,<sup>123</sup> the Supreme Court declined to hold that an unmarried father who had never sought actual or legal custody of his child was entitled to veto a proposed adoption of the child by the mother and stepfa-

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119. 417 F. Supp. 769 (M.D. Ala. 1976).

120. *Id.* at 779. Cf. *Alsager v. District Court*, 406 F. Supp. 10, 24 (S.D. Iowa 1975), (termination of parental rights permissible only "where more harm is likely to befall the child by staying with his parents than by being permanently separated from them") *aff'd*, 545 F.2d 1137 (8th Cir. 1976). See generally Note, *Constitutional Limits on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719 (1979) (arguing that many child neglect statutes overly broad in light of constitutional "right to family integrity").

121. See generally Zainaldan, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts*, 73 NW. U.L. REV. 1038, 1075-84 (1979).

122. See, e.g., *In re Marino*, 30 Cal. App. 3d 952, 958, 106 Cal. Rptr. 655, 661 (1973) (awarding custody to aunt who cared for child for six years); *Ross v. Hoffmann*, 280 Md. 172, 192, 371 A.2d 582, 594 (1977) (upholding custody award under best interests of child standard to babysitter who provided full time care five days each week for eight years); *Reflow v. Reflow*, 24 Or. App. 365, 373-75, 545 P.2d 894, 899-900 (1976) (awarding custody to relatives who provided care during most of five-year period). See generally McGough & Schindell, *Coming of Age: The Best Interest of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978) (examining constitutional and psychological aspects of parental rights doctrine); Annotation, *Award of Custody of Child Where Contest is Between Natural Parent and Stepparent*, 10 A.L.R.4TH 767 (natural parents' voluntary lack of contact with child often factor when child awarded to stepparents.)

123. 434 U.S. 246 (1978).

ther absent a showing of his parental unfitness. While the Court had "little doubt that the Due Process Clause would be offended if a state were to attempt to force the breakup of a natural family without some showing of unfitness,"<sup>124</sup> in this situation a best interests test was sufficient. In a subsequent case, the Court noted that "[t]he mere existence of a biological link does not merit the same constitutional protection accorded a parent who acts as a father toward his children."<sup>125</sup>

Parents' rights may also merit less weight when they conflict with the wishes of a mature minor regarding a matter of significant, long-term importance. Courts have, for example, routinely deferred to the wishes of older children regarding the choice of a custodial parent in the case of divorce.<sup>126</sup> Adoption statutes similarly require consent of children over a certain age.<sup>127</sup> And in reviewing parental decisions about an older child's medical care, courts have also sometimes turned directly to the child to determine whether the parental judgment should stand or fall.<sup>128</sup> Once again, constitutional doctrine appears to be moving in a similar direction. In *Bellotti v. Baird*,<sup>129</sup> for example, the Supreme Court held that the state could not permit a parent to veto a mature minor's decision to have an abortion. The importance of the interest at stake and the magnitude of the impact of the decision on the child required the state to permit mature minors to make their own choice.<sup>130</sup>

The Court has also made it clear that, at least in some instances, parental willingness to waive a child's constitutional rights is insufficient to absolve the state of responsibility for providing the child with due process protection. In *Parham v. J.R.*,<sup>131</sup> for example, the Court limited the right of parents to place their children in mental health institutions. The risks inherent in institutionalization and the possibility of parental error required the state to con-

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124. *Id.* at 255 (quoting *Smith v. Organization of Foster Families*, 431 U.S. 816, 862-63 (1977)).

125. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983).

126. Annotation, *Child's Wishes as Factor in Awarding Custody*, 4 A.L.R.3d 1396 (1965). A child's wishes are also considered in a contest between parent and "nonparent," and they may be determinative when a parent has largely abdicated his responsibilities. *Id.* at 1445-46.

127. See UNIF. ADOPTION ACT § 5(a)(5), 9 U.L.A. 11 (1971) (requiring consent of minor adoptee "if more than [10] years of age, unless the court in the best interest of the minor dispenses with the minor's consent").

128. See *In re Seiferth*, 309 N.Y. 80, 84-85, 127 N.E.2d 820, 822-23 (1955) (refusing to order custody of boy who had cleft palate and harelip transferred to state when boy and father opposed corrective operation); *In re Green*, 448 Pa. 338, 349-50, 292 A.2d 387, 392 (1972) (when mother unwilling to consent to dangerous operation requiring blood transfusions and child's life not in danger child's wishes should be determined).

129. 443 U.S. 622 (1979) (*Bellotti II*).

130. *Id.* at 642. Under this opinion, even if a minor has not been able to convince a court that he or she is mature enough to make the abortion decision alone, the minor still must be given an opportunity to convince the court that the abortion is in his or her best interests. *Id.* at 647-48. The minor is entitled to attempt these showings before parental notification occurs. *Id.* at 647.

131. 442 U.S. 584 (1979).

duct an inquiry to determine whether the medical standards for admission had been met.<sup>132</sup>

All of these developments within traditional family law have implications for child welfare decisionmaking. This is not surprising, since the same issues—the appropriate scope of parental authority, child autonomy, and state intervention—are central to both. When information fails to reveal clearly the least drastic alternative, we should thus turn to the developed body of family law for direction.

It is important to keep in mind, however, that family law principles, like empirical data, will often fail to yield precise directives. For example, in establishing standards to govern state intervention into family life, the principles of traditional family law clearly point to harm to the child as a requisite for state action; neglect statutes that point to parental conduct, or simple poverty, as a basis for state intervention thus are certainly suspect. But the notion of “serious harm” does not specify what harms are indeed serious, and thus does not help in evaluating a very strict standard of serious harm such as that proposed by Goldstein, Freud, and Solnit, in comparison with another that employs a broader definition of serious harm. Family law concepts can thus supplement empirical data, but on many issues both will yield indeterminate results.

#### C. WHAT TO DO IN THE FACE OF FEASIBILITY CONSTRAINTS: FOSTERING ACCOUNTABILITY, LOWERING EXPECTATIONS

Even if information is adequate or, failing that, if traditional family law provides clear guidance on an issue, the least drastic alternative cannot be formulated without considering feasibility constraints: if a result cannot be accomplished, it cannot be the least drastic alternative.

The feasibility constraint demands, first of all, that standards implementing the least drastic alternative approach be drafted to promote agency accountability. To this end, they should be as clear as possible and should structure agency discretion. They should also incorporate grievance mechanisms and provisions for review of key agency decisions.<sup>133</sup>

The feasibility constraint also demands pessimism. Standards must be drafted with the current deficiencies of child welfare practice in mind. As we have seen, these deficiencies are considerable, and many obstacles stand in the way of improvement. We must therefore be wary of basing predictions about agency performance on demonstration projects that involve low caseloads or special staffing. As in the deinstitutionalization context, these

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132. *Id.* at 606-07.

133. This is consistent with the views of other minimum intervention theorists. *See supra* note 61.

results may prove extremely difficult to replicate in a nondemonstration project. Instead, standards should generally reflect the assumption that increased funding or better personnel will not materialize. Thus if the present child welfare system, with all its imperfections, cannot be expected to implement successfully what would appear to be the least drastic alternative, another feasible alternative should be substituted in its place.

The feasibility constraint also demands pessimism in the larger arena within which child welfare reform will be carried out. If the least drastic alternative is too costly, we cannot expect it to be implemented. If it would encounter widespread opposition, we cannot expect that opposition to disappear. If it conflicts with other state policies, we cannot expect these to be passed over or subordinated.

In short, the feasibility criterion demands that we attempt to improve agency performance by making agencies more accountable for their decisions, but that we maintain low expectations about the quality of child welfare work and the social and political sphere in which that work is performed.

#### IV. IMPLEMENTING THE LEAST DRASTIC ALTERNATIVE: STANDARDS FOR INTERVENTION, PLACEMENT, AND TERMINATION OF PARENTAL CUSTODY RIGHTS

This section employs this analytic framework to develop standards for child welfare decisionmaking. But a *caveat* is first in order: the standards can approach the least drastic alternative, but cannot precisely define it. Not only will reliable information on the variety of constraints that the standards reflect (e.g., child development and rehabilitative strategies, family law principles, bureaucratic capability, cost, public opinion) often be lacking, but the direction suggested by one constraint will not always, or even typically, comport with that suggested by another. On many issues, the standards must ultimately rest on guesswork and compromise.

##### A. COERCIVE INTERVENTION: THE ISSUES

###### 1. Hard and Easy Cases

How much harm is enough to justify intervention? When is removal necessary to protect the child? In some cases, the need for intervention or removal is so apparent that it arouses little controversy. Few would dispute that state intervention on behalf of the child is justified in cases of parental abandonment, intentional infliction of serious injuries, sexual abuse, or other behavior that creates grave risks of death or serious physical harm. All current jurisdictional statutes permit state intervention in these circum-



stances,<sup>134</sup> and every minimum intervention advocate has agreed that they should.<sup>135</sup> By the same token, every recent commentator has held that a parent's unconventional beliefs or behavior should *not* suffice to justify intervention unless it results in real risks to the child.<sup>136</sup>

The more difficult cases fall between these two extremes. They are typical "neglect" cases—those which involve deficiencies in parental capacity or behavior that create risks to the child's emotional or intellectual development, or that create less grave risks to the child's physical well-being. The following cases are representative of this middle ground:

Mrs. Harvey's situation was referred to the agency by the police . . . . The police had been called to her home the previous night, upon complaint of neighbors that Mrs. Harvey's six children, ranging in ages from one to six years, were alone in the apartment and were not being cared for. . . . The police described Mrs. Harvey's children as dirty and unkempt. The two-year-old twins were unclothed except for undershirts. They had remnants of feces on their bodies, and were sleeping in a bed with a worn-out dirty mattress. The baby was nursing a bottle of curdled milk. All of the children seemed to be underweight . . . .<sup>137</sup>

Liz [Flynn], age 7, was living with her father and mother and two dogs in a van. They had been living there for six months. Liz was found locked in the car, while it was parked in a shopping center lot. Close to her was a pan containing sand, placed there for her toileting needs. . . . Her mother had a history of mental illness, her father a severe alcohol problem. When the police found Liz, they took her to a County Children's Home.<sup>138</sup>

The [Barnes] family was reported to the agency by the school's learning disability specialist and the school nurse . . . . [The mother] reports that

134. See Katz, Howe & McGrath, *Child Neglect Laws in America*, 9 FAM. L.Q. 1, 75-349 (1975) (digest of state statutes).

135. ABA STANDARDS, *supra* note 2, at 70-72; GFS II, *supra* note 2, at 193-94; Areen, *supra* note 2, at 932-33 (no specific mention of sexual abuse in proposed neglect and abuse statutes, but these grounds probably subsumed within emotional harm aspect of neglect statute); Wald, *State Intervention*, *supra* note 2, at 1008-14, 1024-31. *But see* GFS II, *supra* note 2, at 62-72, 91-110 (urging limits for jurisdiction based on sexual abuse to cases in which parent convicted, or acquitted on grounds of insanity; limit jurisdiction for medical neglect to cases in which child's life at stake).

136. *E.g.*, GFS II, *supra* note 2, at 77-85; Areen, *supra* note 2, at 918-19; Wald, *State Intervention*, *supra* note 2, at 1033-34. While there are instances in which child protection proceedings have been brought in such circumstances in recent years, *see* *Roe v. Conn*, 417 F. Supp. 769, 781 & n.16 (M.D. Ala. 1976) (mother living with man out of wedlock not sufficient ground for termination of parental rights); *In re Raya*, 255 Cal. App. 260, 63 Cal. Rptr. 252 (1967) (same), these cases are rare. *See* Pelton, *Child Abuse and Neglect and Protective Intervention in Mercer County, New Jersey*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT*, *supra* note 6, at 90 (describing circumstances in surveyed neglect cases); Wald, *State Intervention*, *supra* note 2, at 1033-34 (same).

137. A. KADUSHIN, *supra* note 7, at 243-44.

138. PROTECTING CHILDREN, *supra* note 96, at 1.

her welfare check runs out within the first two weeks of the month. Two of her children sleep in blankets on the floor.

[She] is a heavy drinker and she has hypertension. She has been described as a manic depressive. Her children also have many problems. The 8-year-old . . . is described as having a poor self-concept and is growing obese. The 9-year-old boy has a hearing loss and is neurologically impaired.

The mother screams and yells at the children and calls them names such as "dunce" and "stupid." She threatens to have them put away. One child came to Head Start with a clump of hair pulled out, and the mother admitted having pulled it. She describes herself as being dead tired when she comes home from the night shift, which makes her very impatient with the children . . . . A worker from another agency has seen the mother . . . hit one of the children for no apparent reason.<sup>139</sup>

Yet Goldstein, Freud, and Solnit and some other minimum intervention advocates have urged the adoption of standards that would preclude intervention in all of these cases.<sup>140</sup> Substantial numbers of judicial child protection proceedings involve fact patterns like these. Although estimates vary, neglect cases probably outnumber abuse cases by at least two to one.<sup>141</sup> Where should the line be drawn? We look first at the evidence on the risks of intervention.

## 2. How Risky Is Intervention: The Evidence

*Foster Care.* There is no doubt that separation from parents, family, and community poses *some* risks to the child. The crucial question, of course, is just how considerable these risks are.

Goldstein, Freud, and Solnit's claim that continuity is essential for the young child derives from a substantial body of literature describing the effects of maternal deprivation on childhood development.<sup>142</sup> This concept de-

139. Horowitz & Wolock, *Material Deprivation, Child Maltreatment and Agency Interventions Among Poor Families*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT*, *supra* note 6, at 137, 160-61.

140. Under the Goldstein, Freud, and Solnit standards, intervention would be impermissible in all of these cases. See GFS II, *supra* note 2, at 193-94 (describing grounds for intervention). Under other narrow standards, jurisdiction might be appropriate in some cases. The standards created under the auspices of the ABA, for example, sufficiently circumscribe the definition of emotional neglect that intervention would not be justified in any of the cases on this ground. See ABA STANDARDS, *supra* note 2, at 67-70. If, however, the definition of disfigurement were stretched to include the pulled hair in the Barnes case, jurisdiction might be justified on the serious physical injury ground. *Id.* at 63-65. One could argue the Harvey case justifies intervention because the lack of supervision creates a "substantial risk . . . of serious physical injury," *id.* at 63, but the commentary appears to restrict intervention based on parental absence to situations when a very young child is repeatedly left unattended because of a parent's mental illness, alcoholism, or drug abuse. *Id.* at 67.

141. Estimates of the ratio of neglect to abuse cases range from 2:1 to 10:1. See Wolock & Horowitz, *Child Maltreatment as a Social Problem: The Neglect of Neglect*, 54 AM. J. ORTHOPSYCHIATRY 530, 534 (1984) (citing reports).

142. For a detailed review of research on maternal deprivation, see M. Rutter, *Maternal Deprivi-*

rives from studies of institutionalized children conducted during the 1940s in which researchers found that language and intellectual retardation, and delinquency and serious personality disorders were all associated with institutional care or multiple separations from parents.<sup>143</sup> These researchers theorized that it was essential to mental health for "the young child [to] . . . experience a warm, intimate and continuous relationship with his mother (or permanent mother substitute) in which both find satisfaction and enjoyment."<sup>144</sup>

The concept of maternal deprivation was used by researchers of this era, however, to include inadequate care (i.e., neglect) as well as discontinuous care, and for some time it was unclear which of the two posed the greater risks.<sup>145</sup> Goldstein, Freud, and Solnit strongly suggest that discontinuity is the more damaging, but the current evidence in fact suggests the opposite. As one expert recently put it, "research has confirmed that, although an important stress, separation is not *the* crucial factor in most varieties of deprivation."<sup>146</sup> The "failure to thrive" syndrome that researchers first reported in institutionalized children<sup>147</sup> has since been well documented in families that remained intact.<sup>148</sup> In fact, some researchers have reported that there is less deviant or disturbed behavior in children of divorce or separation than in those living in intact homes where there is chronic conflict.<sup>149</sup> Recent studies

vation Reassessed (2d ed. 1981). See generally DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS (World Health Organization ed. 1962); Yarrow, *Maternal Deprivation: Toward an Empirical and Conceptual Reevaluation*, 58 PSYCHOLOGICAL BULL. 459 (1961).

143. See J. BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 15-51 (1952) (describing early research in area).

144. *Id.* at 11.

145. See generally Ainsworth, *The Effects of Maternal Deprivation: A Review of Findings and Controversy in the Context of Research Strategy*, in DEPRIVATION OF MATERNAL CARE: A REASSESSMENT OF ITS EFFECTS, *supra* note 142, at 97, 98-99, 108-09 (describing definitional issue and problems it has created).

146. M. RUTTER, *supra* note 142, at 217 (emphasis in original). This is apparently the current view of even John Bowlby, who has long been the foremost proponent of the maternal deprivation thesis. See J. BOWLBY, *ATTACHMENT AND LOSS II: SEPARATION* 208-10 (1980).

147. The classic study of institutionalized children is described in Spitz, *Hospitalism: An Inquiry Into the Genesis of Psychiatric Conditions in Early Childhood*, in 1 PSYCHOANALYTIC STUDY OF THE CHILD 53 (1945). See also Spitz, *Hospitalism: A Follow-Up Report*, in 2 PSYCHOANALYTIC STUDY OF THE CHILD 113 (1946).

148. See, e.g., Coleman & Provence, *Environmental Retardation (Hospitalism) in Infants Living in Families*, 19 PEDIATRICS 285 (1957); Elmer, *Failure to Thrive: Role of the Mother*, 25 PEDIATRICS 717 (1960); Evans, Reinhardt & Succop, *Failure to Thrive: A Study of 45 Children and Their Families*, 11 J. AM. ACAD. CHILD PSYCHIATRY 440 (1972); Fischhoff, Whitten & Pettit, *A Psychiatric Study of Mothers of Infants with Growth Failure Due to Maternal Deprivation*, 72 J. PEDIATRICS 209 (1971).

149. See, e.g., W. McCORD & J. McCORD, *THE ORIGINS OF CRIME: A NEW EVALUATION OF THE CAMBRIDGE-SOMERVILLE YOUTH STUDY* 104-23 (1959); Nye, *Child Adjustment in Broken and Unhappy Unbroken Homes*, 19 MARRIAGE & FAM. LIVING 356 (1957); Power, Ash, Schoenberg & Sorey, *Delinquency and the Family*, 4 BRIT. J. SOC. WORK 13 (1975); Rutter, *Parent-Child*

have also shown strong links between marital discord and conduct disorders in children in the absence of any separation experience.<sup>150</sup> Nor have childhood neuroses been clearly linked to discontinuity per se.<sup>151</sup>

Evidence that inadequate care poses greater risks than discontinuity also comes from a growing body of research that suggests that the child's adjustment following separation from his or her parents varies significantly depending on the type of care the child then receives. Children who are separated from severely disturbed homes and then experience a more harmonious family environment seem to improve.<sup>152</sup> Conversely, children who develop a psychiatric disorder following loss of a parent are more likely to have received deficient care following the loss than those who do not.<sup>153</sup> And there is some evidence that the risks of psychiatric disturbance increase the longer the child is subjected to a disturbed family environment.<sup>154</sup> In short, the available evidence does not suggest continuity is essential for normal

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*Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOLOGY & PSYCHIATRY 233, 241-42 (1971). See generally M. RUTTER, *supra* note 142, at 109-11, 135-36 (describing research).

150. See Rutter, *supra* note 149, at 243 (discord more important than family break-up in predicting antisocial behavior). See generally J. BOWLBY, *supra* note 146, at 208-310 (discussing separation and whether it is crucial factor); S. WOLFF, CHILDREN UNDER STRESS 126-41 (2d ed. 1981) (chapter entitled "The Neurotic Family").

151. See Rutter, *supra* note 149, at 243 (separation experiences "have never been shown to be associated with child neurosis").

152. See Rutter, *supra* note 149, at 245-46 (among children separated from parents due to family problems, those who went to happy homes exhibited reduced antisocial behavior); Hetherington, Cox & Cox, *Play and Social Interaction in Children Following Divorce*, 35 J. Soc. ISSUES 26 (1979) (reporting that children who experienced parental divorce showed significantly less psychiatric disturbance two years later than children who remained in intact homes with continuing marital conflicts); Wallerstein & Kelly, *The Effects of Parental Divorce: Experiences of the PreSchool Child*, 14 J. AM. ACAD. CHILD PSYCHIATRY 600 (1975) (reporting relation between post-divorce changes in mother-child relationship and child's psychological condition); cf. M. ALLERHAND, R. WEBER & M. HAUG, ADAPTATION AND ADAPTABILITY: THE BELLEFAIRE FOLLOW-UP STUDY 140 (1966) (among boys discharged from residential treatment center, adaptation at discharge not itself indicative of adaptation at follow-up; current living situation was main determinant for majority); Tizard & Hodges, *The Effect of Early Institutional Rearing on Eight Year Old Children*, 19 J. CHILD PSYCHOLOGY & PSYCHIATRY 99, 113 (1978) (reporting that subsequent development of institutionalized child depends "very much on the environment to which he is moved"). See generally M. RUTTER, *supra* note 142, at 72-73 (surveying reports).

153. See Elizur & Kaffman, *Factors Influencing the Severity of Childhood Bereavement Reactions*, 53 AM. J. ORTHOPSYCHIATRY 668, 675 (1983) (post-traumatic factors, such as quality of mother-child relationship and mother's ability to cope, most influential in determining child's long-term response to bereavement). See generally J. BOWLBY, ATTACHMENT AND LOSS III: LOSS 312-19 (1980) (surveying studies showing importance of child's experience after loss of parent).

154. See M. SHEPHERD, B. OPPENHEIM & S. MITCHELL, CHILDHOOD BEHAVIOR AND MENTAL HEALTH 162 (1971) (favorable change in family circumstances associated with marked reduction in psychiatric risk); E. WERNER & R. SMITH, VULNERABLE BUT INVINCIBLE: A LONGITUDINAL STUDY OF RESILIENT CHILDREN AND YOUTH 124 (1982) (among high-risk children with serious learning and/or behavior problems by age 10, improvement most consistently associated with more favorable parental attitudes and fewer stressful life experiences). See generally M. RUTTER, *supra* note 142, at 72-73 (summarizing studies).

childhood development. Quite the contrary—although the research data is not yet definitive, separation from a disturbed home, which produces an improvement in the child's care, is often preferable to a child's remaining in the disturbed environment.

Nor does any evidence support Goldstein, Freud, and Solnit's assertion that the conditional nature of foster placement inherently creates a sense of instability or causes other problems. To the contrary, researchers generally have not found that children suffer status anxiety based simply on the conditional and impermanent nature of foster care placement. Weinstein, for example, found that two-thirds of the long-term foster children he studied expected to remain indefinitely in their current homes. The expectations of the children were also, he found, "highly realistic"; in only twenty percent of the cases did the children's impression deviate from the social worker's.<sup>155</sup> More recently, Fanshel found that the majority of a group of children who had been in the same foster home for an average of six years thought of their foster homes as their "real homes."<sup>156</sup> Other researchers have reported that neither a child's functioning nor sense of permanence correlates with his placement status in foster care, an adoptive home, or with the child's natural parents.<sup>157</sup>

On the issue of stability during placement, the evidence does provide some support for Goldstein, Freud, and Solnit's position, although the results are far from uniform. The most thorough study of foster care to date found no association between the number of placements a child had experienced and the number of negative behavioral symptoms exhibited,<sup>158</sup> and some other researchers have reported similar findings.<sup>159</sup> But others have found an asso-

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155. E. WEINSTEIN, *THE SELF IMAGE OF THE FOSTER CHILD* 35-36 (1960).

156. D. FANSHIEL, *COMPUTERIZED INFORMATION FOR CHILD WELFARE: FOSTER CHILDREN AND THEIR FOSTER PARENTS* 63 (1979).

157. See *After Foster Care*, *supra* note 88, at 508-12 (placement status—returned to family, adoption, or permanent foster home—not significantly correlated with family adjustment, emotional/developmental functioning, child behavior, or school functioning after 12 to 16 months); A. KADUSHIN, *supra* note 7, at 389 (describing study finding no statistically significant differences in functioning of children in long-term foster care and children in adoptive homes); J. LAHTI, K. GREEN, A. EMLIN, J. ZADNY, Q. CLARKSON, M. KUEHNEL & J. CASCIATO, *A FOLLOW-UP STUDY OF THE OREGON PROJECT 9.1* (1978) [hereinafter *OREGON PROJECT*] (child's functioning not correlated with placement status).

158. D. FANSHIEL & E. SHINN, *supra* note 21, at 452.

159. See *After Foster Care*, *supra* note 88, at 508-14 (number of foster care placements significant predictor of emotional/developmental functioning and school success at 6 to 10 months after permanent placement, but not at 12 to 16 months after permanent placement); E. MEIER, *FORMER FOSTER CHILDREN AS ADULT CITIZENS* 382-85, 465-66 (1962) (doctoral dissertation, Columbia University) (social effectiveness ratings and well-being scores of adults who were foster children not significantly related to number of placements); *OREGON PROJECT*, *supra* note 157, at 4.18 (number of foster care placements did not account for significant amounts of variation in current status ratings of children).

ciation between the number of placements and emotional problems.<sup>160</sup> Moreover, researchers have found that the perceived stability of the placement is an important factor in determining its success. In one study, researchers found that “a sense of permanence was one of the best predictors of a child’s well-being.”<sup>161</sup> Children in three status categories—still in long-term foster care, returned home from foster care, or adopted—were all more likely to be in the high status group<sup>162</sup> if their parents (or parent substitutes) viewed the placement as durable and likely to last until the child’s majority.<sup>163</sup> It is also important to keep in mind, however, that most foster children do not suffer multiple placements.<sup>164</sup>

But perhaps the best evidence on the impact of removal and placement comes from research on the functioning of current and former foster children, a body of evidence that Goldstein, Freud, and Solnit, and many other minimum intervention theorists have totally ignored. This evidence does indicate that substantial numbers of children in foster care exhibit signs of emotional impairment.<sup>165</sup> But researchers have also reported that these problems are not found more frequently than among disadvantaged children generally.<sup>166</sup> And while some research has reported that longer stays in fos-

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160. H. MAAS & R. ENGLER, *supra* note 22, at 354 (negative psychological symptoms positively associated with number of moves, not with length of time spent in care); E. WEINSTEIN, *supra* note 155, at 66-67 (significant relationship between number of placements and emotional development); R. ZIMMERMAN, FOSTER CARE IN RETROSPECT 90 (1982) (over half of inadequately functioning adults who were foster children had lived in five or more homes, versus only one-sixth of those in adequately functioning group); Caplan & Douglas, *Incidence of Parental Loss in Children with Depressed Moods*, 10 J. CHILD PSYCHOLOGY & PSYCHIATRY 225, 227 (1969) (significantly higher incidence of depression in children subject to more than one foster placement).

161. OREGON PROJECT, *supra* note 157, at 9.3.

162. Each child included in the study was scored on seven factors designed to assess the quality of his current placement. A child was ranked as high status if his scores on five or more factors were above the mean. For a description of the factors and score distribution, see *id.* at 4.6-11.

163. *Id.* at 4.14. Sense of permanence was measured by interviews that assessed the beliefs of the parents about the durability of the placement. The parents’ permanence score also included an interviewer rating of whether or not the placement was likely to last. *Id.* at 4.12. Perceived permanence did not correlate with the legal character of the placement. Seventy-two percent of the foster parents of children who had been placed in special caseloads designed to facilitate their adoption or return home, and for whom such efforts had failed, said that the child would stay in their home no matter what happened. Fifty-six percent of a group of nonproject foster homes made the same statements, and parents in this group who described the placement were not necessarily those who had had the child for longer periods of time. *Id.* at 8.6-8. Oddly, the interviewers felt that more of these homes (62%) would remain intact than would project foster homes (45%). *Id.*

164. Most children experience only one or two placements. See *supra* note 34; *infra* notes 375-78.

165. See S. VASALY, *supra* note 32, at 62 (35% of surveyed children in Arizona, 45% in California, and 53% in Iowa exhibited some emotional or behavioral problems). See generally D. FANSHEL & E. SHINN, *supra* note 21, at 14-16 (surveying clinical reports).

166. D. FANSHEL & E. SHINN, *supra* note 21, at 494-95 (reporting that emotional impairment rate of 25% to 33% for foster children “quite in line” with data on children from similar social circumstances not in foster care).

ter care are associated with a greater likelihood of emotional difficulties,<sup>167</sup> more recent and better research has failed to find signs of deterioration during foster care.<sup>168</sup> The most careful and thorough of these studies reported that “[c]ontinued tenure in foster care is not demonstrably deleterious with respect to IQ change, school performance or measures of emotional adjustment.”<sup>169</sup> Indeed, some recent studies have reported definite improvements in emotional and cognitive functioning during placement.<sup>170</sup>

Research on adults who were foster children reports similar conclusions. Although former foster children may exhibit higher than average delinquency rates<sup>171</sup> and lower than average educational attainments,<sup>172</sup> researchers have repeatedly found that the vast majority are functioning adequately in terms of social, family, and work roles.<sup>173</sup> The best-known American

167. R. HOLMAN, *TRADING IN CHILDREN: A STUDY OF PRIVATE FOSTERING* 121 (1973); S. VASALY, *supra* note 32, at 63. *See generally* A. KADUSHIN, *supra* note 7, at 380 (listing studies on incidence of emotional problems among foster children).

168. *E.g.*, D. FANSHIEL & E. SHINN, *supra* note 21, at 490-91; S. PALMER, *CHILDREN IN LONG-TERM CARE: THEIR EXPERIENCES AND PROGRESS* 31-46 (1976); Kent, *A Follow-Up Study of Abused Children*, 1 *J. PEDIATRIC PSYCHOLOGY* 25 (1976).

169. D. FANSHIEL & E. SHINN, *supra* note 21, at 491. The researchers also determined that “staying in care as opposed to returning home does not seem to compound the difficulties of the children.” *Id.* There was “some greater tendency for problems to be reported for the children who were at home as opposed to those [who remained] in care,” although this tendency apparently was not statistically significant. *Id.* at 423.

170. *Id.* at 490-91 (length of tenure in foster care positively related to enhancement in IQ); S. PALMER, *supra* note 168, at 32 (reported behavior problems decreased over five-year period in foster care); Kent, *supra* note 168, at 28-30 (after at least a year in foster care, surveyed children showed gains in weight, height, IQ scores, academic performance, and “nearly all problem behaviors”).

171. *See* T. FERGUSON, *CHILDREN IN CARE AND AFTER* 135 (1966) (31% of males who were foster children in Scotland convicted of crime versus 16% of boys who left school at earliest permitted age); R. ZIMMERMAN, *supra* note 160, at 76, 86 (18% of former foster children—28% of male foster children—convicted of crime and incarcerated at least six months in New Orleans; but sample disproportionately composed of individuals at high risk of incarceration); Bohman & Sigvardsson, *Negative Social Heritage*, 3 *ADOPTION & FOSTERING* 25 (1980) (males reared from infancy in foster care had higher levels of criminality than those reared at home or those adopted); McCord, McCord & Thurber, *The Effects of Foster Home Placement in the Prevention of Adult Anti-Social Behavior*, 34 *SOC. SERV. REV.* 415, 417 (1960) (males placed in foster care during early adolescence had higher criminal record rate than matched control group). *But see* T. FESTINGER, *NO ONE EVER ASKED US . . . A POSTSCRIPT TO FOSTER CARE* 208-09 (1983) (when ethnicity taken into account no significant difference in arrest rates between foster children and others).

172. *See* T. FERGUSON, *supra* note 171, at 127 (many foster children weak academically); T. FESTINGER, *supra* note 171, at 236-38 (men from foster care tended to have less education than men nationally while women did not differ substantially); E. MEIER, *supra* note 159, at 318-24 (educational achievements of girls in foster care only slightly below state norms for age range but boys markedly below norms); R. ZIMMERMAN, *supra* note 160, at 66-67 (median education level of foster care children between 10th and 11th grades; educational achievements of group low “even compared with other groups of minority youngsters”; no significant differences found on basis of race, sex, or whether the children returned home or stayed in foster care).

173. *See, e.g.*, E. BAYLOR & E. MONACHESI, *THE REHABILITATION OF CHILDREN: THE THEORY OF CHILD PLACEMENT* 422 (1939) (among former foster children 21 or older, 73.5% “had not

study of former foster children examined adults between twenty-eight and thirty-two who had been in foster care for at least five years and had never been returned to their natural families.<sup>174</sup> The researchers measured their current social effectiveness<sup>175</sup> and sense of well-being.<sup>176</sup> With few exceptions, the group compared favorably with the general population. The majority were self-supporting individuals with stable marriages who adhered to accepted community mores.<sup>177</sup> A few with out-of-wedlock children had placed them for adoption or in foster care, but no legitimate child had been placed.<sup>178</sup>

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misbehaved" and 70.5% lived in "favorable" environment); T. FERGUSON, *supra* note 171, at 136-37 (80% of adults who were formerly foster children rated as having "a reasonable chance of making good, of living reasonably happy and useful lives"); T. FESTINGER, *supra* note 171, at 4 (citing R. SALO, MUNICIPAL CHILD WELFARE WORK AS PROMOTER OF SOCIAL ADJUSTMENT (1956) (former adult foster children showed less criminality, less alcoholism, better occupational status and increased success in life than siblings who remained in natural parent's home)); T. THEIS, HOW FOSTER CHILDREN TURN OUT 23-25 (1924) (former foster children at least 18 years old evaluated by "experienced supervisors"; over three-quarters considered "capable," defined as law-abiding, honest, and able to manage affairs sensibly); Rest & Watson, *Growing Up in Foster Care*, 63 CHILD WELFARE 291, 297 (1984) (13 subjects aged 19 to 31 "were functioning for the most part at quite an acceptable level"); Roe & Burks, *Adult Adjustment of Foster Children of Alcoholic and Psychotic Parentage and the Influence of the Foster Home*, in 3 MEMOIRS OF THE SECTION ON ALCOHOL STUDIES, YALE UNIVERSITY 1, 69 (1945) (approximately two-thirds of former foster children, many from completely disorganized homes with alcoholic or psychotic parents, rated as well or satisfactorily adjusted); Triseliotis, *Growing Up in Foster Care and After*, in NEW DEVELOPMENTS IN FOSTER CARE AND ADOPTION 131, 155-56 (J. Triseliotis ed. 1980) (of 40 former foster children, all from "socially disorganized and deprived families" and with average of four moves, 60% "generally coping well," 15% had "many satisfactions but also some identifiable difficulties," and 25% "gave cause for some concern"; researchers attributed most poor outcomes to "the type of interactions that occurred between the children . . . and foster parents"). See generally T. FESTINGER, *supra* note 171, at 3-10 (discussing studies); R. ZIMMERMAN, *supra* note 160, at 8 (same).

174. E. MEIER, *supra* note 159.

175. Social effectiveness ratings were obtained by positive or negative ratings in each of the following five areas of adaptation: (1) homemaking and living arrangements, (2) employment and economic circumstances, (3) health, (4) care of children, and (5) social relationships outside the family group. *Id.* at 56-62, 349-51.

176. "Well-being" was defined as "a feeling of adequacy in performing the functions for which the individual is responsible and the experience of pleasure in carrying out the activities in the various areas of adaptation." *Id.* at 389. Ratings were obtained from self-reports, and evaluations of indicators derived from interviews and observation. *Id.* at 403. Well-being scores were not compared with those of the general population.

177. *Id.* at 2. A total of 92% were self-supporting or living within self-supporting family units. Eighty percent of the female subjects were married, which is a figure equivalent to census data for the general population in the age range of the sample studied. *Id.* at 278. Male subjects, however, did have a lower marriage rate (68%) than general population norms (78%) and a higher divorce/separation rate (14%) than the general male population (3.8%). *Id.* at 281-83. Only 11% of the women and 19% of the men were rated negatively for "social effectiveness," i.e., exhibiting "criminal or anti-social behavior which brought punishment or ostracism, repeated difficulties with associates, landlords, employers or official agencies, [and] drinking which was accompanied by or followed by job loss or conflicts with associates." *Id.* at 380-81.

178. Approximately 10% of the women had had a total of 12 illegitimate children, a rate considerably in excess of general population norms. *Id.* at 287-88. Ten of the 12 illegitimate children had



Two recent, more sophisticated studies report similar findings. Researchers who studied young adults who had grown up in foster care in New York City discovered that they generally "were managing their lives adequately and feeling quite satisfied with their physical, social and psychological environments."<sup>179</sup> There were few differences between them and others of their age nationally.<sup>180</sup> Another study,<sup>181</sup> which evaluated young adults<sup>182</sup> who had spent at least one year in foster care in New Orleans,<sup>183</sup> found that two-thirds of the sample were functioning in a "good" or "adequate" manner.<sup>184</sup> The subjects were law abiding citizens, supporting themselves by working or obtaining education, who were adequately caring for their children if they had any.<sup>185</sup> Although health<sup>186</sup> and education levels<sup>187</sup> were below normal, in most other respects, the subjects were not substantially different from similar population groups.<sup>188</sup>

Moreover, the inadequately functioning group in the New Orleans study consisted largely of those who had *left* foster care. All children who were in foster care for seven or more years and whose foster homes received a posi-

been placed elsewhere for care, either in independent adoptions arranged by the mother or through social agency services. None of the legitimate children born to the former foster children had been placed in foster care, and only four parents (three male and one female, seven percent of those surveyed) had lost children by adoption following divorce. *Id.* at 285, 289.

179. T. FESTINGER, *supra* note 171, at 133.

180. *Id.* at 229-52. Those discharged from group homes showed worse results. *Id.*

181. R. ZIMMERMAN, *supra* note 160.

182. Subjects were aged 19 through 29 when interviewed. *Id.* at 21.

183. Sixty-nine percent had been discharged to a parent or relative; the rest had grown up in foster care. *Id.* at 22. They had been placed for varied reasons. Approximately one-third had been neglected or abused; 18% were placed because of parental unwillingness or inability to provide care; and 17% were placed because of parental mental illness. *Id.*

184. *Id.*

185. *Id.* at 88.

186. *Id.* at 86.

187. *Id.* at 84 (only 39% completed high school, compared to 69% of all southern blacks aged 25-34 in 1975).

188. The public assistance rate among the group was close to the rate for the area. *Id.* at 82; *cf.* T. FESTINGER, *supra* note 171, at 241, 251 (slightly higher public assistance rate among younger group of adults who had grown up in foster care; same rate among older group). The employment rate of the New Orleans subjects was "not out of line" with that of comparable population groups. R. ZIMMERMAN, *supra* note 160, at 82; *cf.* T. FESTINGER, *supra* note 171, at 238-40 (females and white males had employment rate similar to that of general population; black and hispanic males from foster group homes had worse employment rate). Their marriage and divorce rate was comparable to national age group averages. R. ZIMMERMAN, *supra* note 160, at 84; *cf.* T. FESTINGER, *supra* note 171, at 234, 249 (marriage rate lower than national rate but similar to regional rate; divorce rate and reported marital satisfaction same as national norms). Of the 46% with children in the New Orleans study, none had placed any children in foster care. R. ZIMMERMAN, *supra* note 160, at 84-85; *cf.* T. FESTINGER, *supra* note 171, at 43-44 (49 of 53 mothers had all of their children at home; only one had offspring in foster homes, although "a few others" had in previous years used foster care temporarily). Between two-thirds and three-quarters of the New Orleans subjects were content with their lives. R. ZIMMERMAN, *supra* note 160, at 79; *cf.* T. FESTINGER, *supra* note 171, at 247, 252 (sense of happiness and satisfaction comparable to national averages).

tive rating in emotional climate were in the adequately functioning group.<sup>189</sup> The researchers thus concluded that "long-term foster care in and of itself was not injurious to the youngsters in the study. When judged by the criteria of the current adjustment of the former foster children, long-term foster care provided a better environment for rearing the majority of youngsters than did natural homes."<sup>190</sup> The conclusion by these researchers that foster care was preferable to remaining at home is not unique. Other researchers have reached similar conclusions,<sup>191</sup> and one recent study also reports that children in long-term foster care did as well as those who left foster care for adoptive homes.<sup>192</sup>

This is not to say that long-term foster care is an unmitigated blessing. Researchers have reported that some former foster children find it difficult to talk about their experience and suffer from unresolved feelings about their biological families.<sup>193</sup> These problems, like those reported in some adopted children,<sup>194</sup> support the proposition that children feel keenly the lack of a normal home life. Foster care research also largely describes the results of foster *family* care, not institutions of the sort that first led to the maternal deprivation thesis on which Goldstein, Freud, and Solnit rely. There is reason to believe that institutional care does pose more serious risks to the child. These settings typically deprive the child of all family life, and thus of normal developmental experiences. In some institutional settings, the child may be subject to confinement or to association with other children who are delinquent or seriously disturbed.<sup>195</sup> Multiple caretakers are likely in these settings, which impedes the formation of parental-type relationships.<sup>196</sup>

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189. R. ZIMMERMAN, *supra* note 160, at 91.

190. *Id.* at 105.

191. See OREGON PROJECT, *supra* note 157, at 4.15-.16 (63% of children returned to natural parents scored lower on various measures of adjustment than children adopted or remaining in foster care); T. FESTINGER, *supra* note 171, at 4 (citing R. SALO, *supra* note 173 (former adult foster children showed less alcoholism, less criminality, better occupational status, and increased success in life than siblings who remained at home)); Leitenberg, Burchard, Healy & Fuller, *Nondelinquent Children in State Custody: Does Type of Placement Matter?*, 9 AM. J. COMMUNITY PSYCHOLOGY 347 (1981) (status offenders placed in foster homes had better school attendance and fewer police contacts than those placed in institutional care or at home); Roe & Burks, *supra* note 173, at 69-70 (low number of serious disorders in children of alcoholic and psychotic parents who were foster children attributed to being brought up in homes other than their own).

192. OREGON PROJECT, *supra* note 159, at 4.15, 9.6 (children remaining in foster care not worse off on variety of measures than those adopted).

193. See Rest & Watson, *supra* note 173, at 299-304 (discussing comments of group of foster children concerning biological and foster families).

194. See Garrison, *supra* note 16, at 469-72 (surveying research concerning emotional problems of adopted children).

195. Cf. *In re Andrew R.*, 115 Misc. 2d 937, 454 N.Y.S.2d 820 (Fam. Ct. 1982) (foster child "voluntarily" placed in institution containing juvenile delinquents and disturbed children).

196. Early proponents of the maternal deprivation thesis attributed the poor outcomes of institutionalized children to the lack of "parental-type" relationships. More recent research tends to sup-

Institutional settings are also stigmatizing, implying that the child needs some sort of treatment. Moreover, inadequate facilities and treatment are not uncommon,<sup>197</sup> and in some institutions the child may actually suffer serious abuse or neglect.<sup>198</sup>

But foster care typically does not entail institutional care,<sup>199</sup> and, while institutional placements should certainly be subject to strict limitations,<sup>200</sup> no evidence supports the proposition that coercive state intervention must be severely limited because *all* forms of care outside the family home are injurious. Inadequate parental care appears to outweigh discontinuity as a determinant of long-range psychological problems, and although the instability of foster care may cause problems for some children, the available evidence suggests that foster care is not injurious to *most* children who experience placement. Although the evidence is based on research that varies widely in timing, technique, and quality, and thus can serve as the basis for only tentative conclusions, the findings are quite uniform and some of the research is quite good. On balance, it suggests that the vast majority of foster children mature without serious problems, while many seem to benefit from the experience of placement.

*Intervention in the Home.* No evidence supports limiting intervention in the home because children suffer from the imposition of outside rules or

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port this conclusion, at least for younger children. See Tizard & Rees, *The Effect of Early Institutional Rearing on the Behavior Problems and Affectional Relationships of Four Year Old Children*, 16 J. CHILD PSYCHOLOGY & PSYCHIATRY 61, 73 (1975) (four-year-old children reared in institutions less likely to experience deep relationships than family reared children); Wolkind, *The Components of "Affectionless Psychopathy" in Institutionalized Children*, 15 J. CHILD PSYCHOLOGY & PSYCHIATRY 215, 219 (1974) (reporting fewer behavioral disturbances in institutionalized children in the care of same house mother for at least two years).

Institutional care may have transient effects. One research team reported no significant differences in intelligence or psychopathology between adults who were foundlings and reared in institutions for a mean period of 24 to 27 months and adults who were foundlings and reared in family homes. Heston, Denny & Pauly, *The Adult Adjustment of Persons Institutionalized as Children*, 112 BRIT. J. PSYCHIATRY 1103, 1107-08 (1966).

197. See GAO REPORT, *supra* note 32, at 23-24 (over half of foster care institutions inspected by Department of Health, Education, and Welfare either unlicensed or had serious physical deficiencies); J. KNITZER & M. ALLEN, *supra* note 31, at 42 (documenting inadequate institutional care); *cf.* New York State Ass'n for Retarded Children v. Rockefeller, 357 F. Supp. 752 (E.D.N.Y. 1973) (granting preliminary relief to correct deficiencies threatening physical safety of inmates at institution for mentally retarded).

198. See generally K. WOODEN, *WEeping IN THE PLAYTIME OF OTHERS: AMERICA'S INCARCERATED CHILDREN* (1976) (detailing abuses in juvenile detention system).

199. See 1980 U.S. CODE CONG. & ADMIN. NEWS 1460 (Department of Health and Human Services estimates that 400,000 in foster families, 35,000 in group homes, and 73,000 in residential treatment or child care institutions out of 500,000 total).

200. There are numerous reports of children inappropriately placed in institutions. See generally J. KNITZER & M. ALLEN, *supra* note 31, at 39; D. PAPPENFONt & D. KILPATRICK, *CHILD CARING INSTITUTIONS 1966: SELECTED FINDINGS* 458 (1969).

other requirements that may shake their belief that their parents are omniscient and all-powerful. Goldstein, Freud, and Solnit provide no evidence to support this proposition, nor do they cite other authorities who share the same view. In fact, there appear to be none. Experts have at times questioned the efficacy of intervention with a noncooperative parent<sup>201</sup> or the impact of intervention on a parent's self-image,<sup>202</sup> but no expert has suggested that intervention is harmful because it damages a child's belief in his parents' omniscience.

Nor does common sense support Goldstein, Freud, and Solnit's view.<sup>203</sup> Parents are not, in fact, omniscient or all-powerful, and evidence of this reality is available daily from a variety of sources. It is thus quite unlikely that intervention by child welfare authorities would provide the first evidence of parental limitations. Additionally, only very young children are likely to maintain such beliefs, and the ability of these young children to comprehend that the authorities pose a challenge to parental authority seems doubtful. Given these facts, it is not surprising that studies of intervention have only rarely reported negative effects.<sup>204</sup>

In sum, the available evidence about the impact of placement in foster care and intervention in the home largely fails to substantiate the risks as extremely grave. Thus, on the basis of the risks from intervention, there is no reason to define neglect in extremely narrow terms.

### 3. The Risks of Nonintervention

The minimum intervention philosophy requires more, of course, than a showing that intervention is not demonstrably harmful. State intervention must also be necessary in order to be justified. Unless the harms risked by nonintervention are greater than those risked by intervention, the state should not intervene.

While minimum intervention advocates have tended to greatly overestimate the risks of intervention, they have devoted little attention to the relative risks of intervention versus nonintervention. The risks of nonintervention are, of course, far more variable and difficult to define; every case presents a different and complex evaluation problem. Moreover,

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201. See generally G. BROWN, *THE MULTI-PROBLEM DILEMMA: A SOCIAL RESEARCH DEMONSTRATION WITH MULTI-PROBLEM FAMILIES* (1968).

202. See Davoren, *Working with Abusive Parents: A Social Worker's View*, 4 *CHILDREN TODAY* 2, 39 (1975) (parents reported for child abuse feel blamed, "picked on," and interfered with in raising child); cf. Elmer, *Hazards in Determining Child Abuse*, 45 *CHILD WELFARE* 28, 32-33 (1966) (false accusations by caretakers can cause serious psychological damage to parents).

203. See Wald, *supra* note 84, at 669-70 (although children rely on parents and trust them, only very young children do not doubt their parents).

204. See M. JONES, *supra* note 96, at 79 (services found harmful in only one percent of surveyed cases).

although researchers have reported that separation from a disturbed or inadequate home can improve a child's emotional condition, they have not specified the precise level of disturbance that mandates intervention or removal. We do not know the relative importance of biological, interpersonal, and environmental factors, nor can we describe exactly how they operate in combination. We do know, however, that deficits in any of these three areas may place a child at significant risk.<sup>205</sup> For example, a biological defect, a congenital disease, or even low birth weight interferes with normal developmental progress and may render an infant particularly vulnerable to adverse environmental conditions.<sup>206</sup> Psychologists also agree that a child's relationship with his parents is a key factor in his development,<sup>207</sup> and that a serious disturbance in the parent-child relationship places the child at risk. An irresponsible, unpredictable, or simply unloving parent cannot provide an environment conducive to normal emotional or intellectual growth. Clinical studies thus show that disturbed children often have disturbed parents.<sup>208</sup>

Studies also report risks from environmental deficits. Lack of a social support network has been identified as a significant correlate of inadequate child care,<sup>209</sup> and low socio-economic status has consistently been linked to poor

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205. Even normal infants vary significantly in reaction patterns and temperament. These differences may influence parental behavior and the child's subsequent development. *See generally* A. THOMAS, S. CHESSE & H. BIRCH, *TEMPERAMENT AND BEHAVIOR DISORDERS IN CHILDREN* (1968).

206. *See* E. WERNER & R. SMITH, *supra* note 154, at 32-33 (60% of surveyed 10-year-old children determined to need long term mental health services; 30% of those with learning disabilities had records of moderate perinatal stress, low birthweight, congenital defects, or central nervous system dysfunctions, while control groups of same age, sex, socio-economic, and ethnic background "did not display these factors to a significant extent"; learning disabled and disturbed children also displayed infant temperamental traits distressing to caretakers more frequently than controls).

207. *See, e.g.*, A. FREUD, *NORMALITY AND PATHOLOGY IN CHILDHOOD* 179 (1965) (severe disturbances of socialization arise when identification with parent disrupted through separations, rejections, and other interference with emotional ties); M. RUTTER, *supra* note 142, at 110-11, 135-136 (conduct disorders in part response to family discord and disturbed interpersonal relationships); Winnicott, *The Theory of the Parent-Infant Relationship*, 41 *INT'L. J. PSYCHOANALYSIS* 585, 594 (1960) (inadequate maternal care may disturb infant development).

208. *See, e.g.*, M. RUTTER, *CHILDREN OF SICK PARENTS: AN ENVIRONMENTAL AND PSYCHIATRIC STUDY* 34 (1966) (one in five children attending psychiatric clinic had parent who had been under psychiatric care; three times more frequent than control groups); Wolff & Acton, *Characteristics of Parents of Disturbed Children*, 114 *BRIT. J. PSYCHIATRY* 593, 595-96 (1968) (51% of mothers and 29% of fathers with children attending psychiatric clinic had personality disorders, compared to 18% of control mothers and 14% of control fathers). Studies that focus on the children of parents known to have personality disorders report similar conclusions. E. WERNER & R. SMITH, *supra* note 154, at 108 (55% of children born to parents diagnosed as schizophrenic or depressive developed antisocial behavior or mental health problems by age of 18). *See generally* M. RUTTER & N. MADGE, *CYCLES OF DISADVANTAGE: A REVIEW OF RESEARCH* 198-201, 209-211 (1977) (surveying relevant reports).

209. *See* N. POLANSKY, M. CHALMERS, E. BUTTENWIESER & D. WILLIAMS, *DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT* 89 (1981) [hereinafter *DAMAGED PARENTS*] (78% of control group but only 15% of neglecting families classified as "supported," that is, having at least

emotional and intellectual functioning. Children from poor families in poor neighborhoods, it appears, tend to exhibit higher levels of emotional disturbance<sup>210</sup> and lower levels of intellectual and social functioning than their better-off counterparts.<sup>211</sup>

The risks inherent in low socio-economic status are particularly significant for child welfare decisionmaking because virtually all of the child welfare system's clientele come from these circumstances.<sup>212</sup> Indeed, one recent report suggests that this factor alone correlates with developmental defects as often as abuse.<sup>213</sup> Of course poverty will not by itself produce developmental

one family member and two friends available for help); D. SHAPIRO, PARENTS AND PROTECTORS: A STUDY IN CHILD ABUSE AND NEGLECT 26-28 (1979) (describing low level of family and social supports in surveyed families receiving child protective services).

210. See D. FANSHEL & E. SHINN, *supra* note 6, at 493-94 (surveying reports). *But cf.* M. RUTTER & N. MADGE, *supra* note 208, at 213 (correlation between social class and mental disorder in children variable and inconsistent).

211. See, e.g., H. BIRCH & J. GUSSOW, DISADVANTAGED CHILDREN: HEALTH, NUTRITION & SCHOOL FAILURE 266 (1970) (environments of disadvantaged children relatively less conducive to intellectual growth); Guidubaldi & Perry, *Divorce, Socioeconomic Status and Children's Cognitive-Social Competence at School Entry*, 54 AM. J. ORTHOPSYCHIATRY 459 (1984) (presence of single parent and socio-economic status more predictive of school entry competency than other family background factors, developmental history, and health variables).

212. Researchers have found that the vast majority of children in foster care come from an impoverished environment, and that the majority receive public assistance benefits. See, e.g., A. EMLEN, J. LAHTI, G. DOWNS, A. MCKAY & S. DOWNS, OVERCOMING BARRIERS TO PLANNING FOR CHILDREN IN FOSTER CARE 19 (DHEW Publ. No. (OHDS) 78-30128 1978) [hereinafter OVERCOMING BARRIERS] (76% of sample mothers "always or usually" on public assistance); S. JENKINS & E. NORMAN, FILIAL DEPRIVATION AND FOSTER CARE 25-29 (1972) (two-thirds of the surveyed New York City families with children in foster care had incomes at or below poverty line; 52% received public assistance, compared to 7.9% of general New York City population); D. SHAPIRO, *supra* note 207, at 21 (80% of child welfare caseload wholly or partially supported by public assistance); Pelton, *supra* note 136, at 94 (81% of child protective caseload in New Jersey county received welfare benefits at same time; 58% wholly or partially supported by welfare benefits at time of case acceptance; 79% had income of \$7,000 or less at time of case acceptance). Also, studies have found that families who utilize placement usually are more seriously disadvantaged, with fewer friends and neighbors to whom they can turn than families to whom services in the home are offered. See A. KADUSHIN, *supra* note 7, at 325-26 (reviewing relevant studies).

213. E. ELMER, FRAGILE FAMILIES, TROUBLED CHILDREN—THE AFTERMATH OF INFANT TRAUMA 110 (1977). The study compared the long-term development of abused and non-abused children. The abused children were matched on the basis of age, race, sex, and socio-economic status with un-abused children. The two groups were then compared in terms of health, cognitive development, language development, nervous mannerisms, neurological problems, school achievement, self-concept levels, impulsivity, aggression, and empathy. The researchers found that the abused children did not vary significantly from their un-abused peers on any of these measures. *Id.* at 80. The researchers concluded that because of "membership of the majority in the lower social classes, which connotes poverty and its well-known companions—poor education, menial jobs, inadequate housing, undernutrition, poor health and environmental violence," all of the children studied were doing poorly. *Id.* at 84. Ninety percent had chronic disorders, of which marked speech and language problems were the most common. Eighty-six percent had behavioral and/or learning difficulties. The study team therefore concluded "that the results of child abuse are less potent for the child's development than his class membership." *Id.* at 110; see Elmer, *A Follow-Up Study of Traumatized Children*, 59 PEDIATRICS 273 (1977) (describing same research); Elmer,

problems; most poor children mature without problems. Poverty is linked to developmental problems so often because it increases the likelihood of other risks, and the likelihood of developmental problems increases along with the number of adverse factors.<sup>214</sup> A recently published report, which attempted to assess the factors differentiating those children who grew up in high risk environments and emerged relatively unscathed from those who experienced developmental problems, provides evidence of this fact.<sup>215</sup> The men and women who proved "resilient" reported a significantly smaller number of cumulative life stresses than did those who developed serious coping problems.<sup>216</sup> Moreover, as the cumulative number of stressful life events increased, more protective factors in the children and their caregiving environment were necessary to ensure a positive developmental outcome.<sup>217</sup>

We also know that the children served by the child welfare system have typically experienced such multiple risks.<sup>218</sup> These children typically live in extreme poverty, in inadequate housing, with inadequate social and community supports.<sup>219</sup> Most parents show massive disability in their functioning,<sup>220</sup> and many are mentally ill, alcoholic, or addicted to drugs.<sup>221</sup>

*Traumatized Children, Chronic Illness, and Poverty*, in *THE SOCIAL CONTEXT OF CHILD ABUSE AND NEGLECT*, *supra* note 6, at 185, 185 (same). Socio-economic background may also be a significant factor in determining placement success. *See* Fein, *supra* note 88, at 545.

214. *See generally* L. MURPHY & A. MORIARITY, *VULNERABILITY, COPING AND GROWTH FROM INFANCY TO ADOLESCENCE* (1976) (discussing children's coping abilities and interplay between vulnerability, stress, and resilience); M. SHEPHERD, B. OPPENHEIM & S. MITCHELL, *supra* note 154, at 1978 (deviant children more likely from less healthy, less successful families and more likely exposed to stress at home and school than control group); Richardson, Koller & Katz, *Continuities and Change in Behavior Disturbance: A Follow-Up Study of Mildly Retarded Adults*, 55 *AM. J. ORTHOPSYCHIATRY* 220, 227 (1985) (among retarded male youths those with persistent behavior disturbance from significantly more unstable conditions of upbringing than those whose disturbance behavior did not persist); *see also* Douglas, *Early Hospital Admissions and Later Disturbances of Behavior and Learning*, 17 *DEVELOPMENTAL MED. & CHILD NEUROLOGY* 456 (1975) (strong evidence that one admission to hospital of more than week or repeated admission before age of five increased rate of behavior disturbances and poor reading in adolescence); Quinton & Rutter, *Early Hospital Admissions and Later Disturbances of Behavior: An Attempted Replication of Douglas' Findings*, 18 *DEVELOPMENTAL MED. & CHILD NEUROLOGY* 447 (1976) (repeated hospital admissions significantly associated with emotional and conduct disorders in children, especially children from disadvantaged homes). *See generally* Rutter, *Early Sources of Security and Competence*, in *HUMAN GROWTH AND DEVELOPMENT* 33 (J. Bruner & A. Garten eds. 1978) (research findings of conditions facilitating normal development of emotional security and social competence).

215. E. WERNER & R. SMITH, *supra* note 154.

216. *Id.* at 94-95.

217. *Id.* at 132.

218. *See* M. JONES, *supra* note 96, at 55 (surveyed families had average of 3.4 problems); D. SHAPIRO, *supra* note 207, at 36 (only 25% of surveyed families receiving child protection services experienced three or fewer stresses); T. STEIN, E. GAMBRILL & K. WILTSE, *CHILDREN IN FOSTER CARE: ACHIEVING CONTINUITY OF CARE* 70 (1978) (43% of cases had six or more problems).

219. *See* *DAMAGED PARENTS*, *supra* note 207, at 87-89 (only 15% of neglectful families surveyed found to be "supported" by social or family ties).

220. D. FANSHEL, *supra* note 33, at 8.

Frequently, they or their children have chronic physical illnesses.<sup>222</sup> They are seldom employed and poorly educated.<sup>223</sup> Multiple stresses and severe deprivation overwhelm these families, with the result that many parents become unable to cope with their children.<sup>224</sup>

Given this picture, it is not surprising that researchers have failed to find large numbers of children receiving child welfare services on frivolous grounds. In a survey of New York City foster care case records, for example, trained case readers with extensive experience in child welfare casework found that in only 7.3% of cases examined should the children be returned to their own homes;<sup>225</sup> of this group, 98% were found to require one or more services in order to make the return home possible and stable; 40% required 3 or more services.<sup>226</sup> In another survey, composed largely of families receiving services in the home, researchers rated the level of child maltreatment as "severe" or "very severe" in two-thirds of the surveyed cases.<sup>227</sup>

The laxity of traditional standards has undeniably permitted intervention in some cases in which there were no discernible problems in family functioning,<sup>228</sup> but these egregious abuses of discretion appear to be the exception rather than the rule.<sup>229</sup> Thus, at least based on the risks children who receive

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221. See M. JONES, *supra* note 96, at 56 (according to social workers, 49% of parents had "emotional problem or mental illness"); D. SHAPIRO, *supra* note 209, at 105-06 (chronic pathology such as alcoholism or severe depression present in "substantial minority" of surveyed parents); Horowitz & Wolock, *supra* note 139, at 146 (33% of main caretakers suffered from "severe" mental or emotional problem, 60% of families included an adult member who used alcohol excessively, and 20% had at least one member who had been heroin user).

222. See M. JONES, *supra* note 96, at 56 (19% of parents had a physical illness or disability); *cf.* Horowitz & Wolock, *supra* note 139, at 146 (53% of main caretakers had severe physical illness or condition; 76% of families had at least one child with serious health problem).

223. See A. GRUBER, *supra* note 6, at 72-73 (over 67% of biological parents unemployed or hold unskilled jobs; almost 70% never finished high school); M. JONES, *supra* note 96, at 19 (83% of biological mothers and 85% of fathers never went past eighth grade; only 8% of mothers and 44% of legal fathers could report "having had a steady employment at the same job or consistent, though not steady employment").

224. D. FANSHEL, *supra* note 33, at 8 (38.3% of New York City foster care placements in 1979 involved parent "unable to cope").

225. B. BERNSTEIN, D. SNIDER & W. MEEZAN, *supra* note 46, at 23. This finding was made despite the fact that "the criteria for placement placed heavy stress on keeping or returning [the child] home wherever possible," and any study staff bias was in the same direction. *Id.* In only 16% of cases where children were "at home awaiting placement" was remaining home was found to be possible. *Id.* at 25.

226. *Id.* at 32. About 40% needed help from a comprehensive family service center. Another 40% needed help from a casework agency. Approximately 15% of children required help from a child guidance agency, 16% needed a homemaker, and 22% needed alternate schools or special education programs. *Id.* at 32-33.

227. Horowitz & Wolock, *supra* note 139, at 144-45, 151.

228. See *Roe v. Conn.*, 417 F. Supp. 769 (N.D. Ala. 1976) (white child removed from his home because he and his white mother lived with black man in black neighborhood).

229. See Wald, *State Intervention*, *supra* note 2, at 1033-34 (noting that intervention based on parental "immorality" or lifestyle relatively rare). Surveys of child welfare recipients also show that



child welfare services typically confront, and the evidence regarding the risks of intervention, we cannot say that neglect should be redefined to exclude large numbers of families currently served by the child welfare system.

#### 4. The Benefits of Intervention

The minimal intervention philosophy also holds that intervention is not justified unless it is beneficial. The question thus remains: What good does intervention accomplish?

One major problem in judging the effectiveness of intervention programs is that the impact of various types of programs has not been evaluated in any systematic or rigorous way.<sup>230</sup> Many project reports describing successful outcomes provide little substantiating evidence and are made on the basis of highly subjective criteria.<sup>231</sup> Among the reports, estimates of effectiveness also vary enormously, even among very similar client populations. A number of reports, for example, describe the results of efforts to provide in-home treatment to abusive parents. One indicates that intervention based on two or more years of intensive therapeutic services resulted in a reincidence rate of 2.2%,<sup>232</sup> while the next, describing a similar approach over a comparable time period, reports a reincidence rate of 54%.<sup>233</sup> Success rates also vary considerably with the measurement selected<sup>234</sup> and the type of service

most have significant problems. See Horowitz & Wolock, *supra* note 139 (describing circumstances in surveyed cases); Pelton, *supra* note 136 (same).

230. A. KADUSHIN, *supra* note 7, at 205-06.

231. See *id.* at 206-07 (providing representative examples). See generally Halpern, *Lack of Effects for Home-Based Early Intervention? Some Possible Explanations*, 54 AM. J. ORTHOPSYCHIATRY 33 (1984); Simeonson, Scheiner & Cooper, *A Review and Analysis of the Effectiveness of Early Intervention Programs*, 69 PEDIATRICS 635 (1982).

232. M. HOLMES, CHILD ABUSE AND NEGLECT PROGRAMS: PRACTICE AND THEORY 24 (1977).

233. E. BAHER, AT RISK: AN ACCOUNT OF THE WORK OF THE BATTERED CHILD RESEARCH DEPARTMENT, NSPCC 173 (1976). Research has yielded equally varied outcomes on other evaluation measures, such as changes in parental attitude and behavior. Compare M. SULLIVAN, M. SPASSER & G. PENNER, BOWEN CENTER PROJECT FOR ABUSED AND NEGLECTED CHILDREN: A REPORT OF A DEMONSTRATION IN PROTECTIVE SERVICES 107 (1977) (comprehensive treatment project for abusive and neglectful parents, reporting that "all of these mothers, except those with psychotic conditions, made considerable progress") with E. BAHER, *supra*, at 171 (similar project employing similar techniques reporting "minimal" change in behavior of mothers).

234. For example, one research project provided intervention services to half of a group of mothers determined to be high risks for abusive behavior and gave no services to the other half. At the end of 17 months, the children in both groups and a control group were evaluated. The study found no significant statistical differences between the two groups in the area of abnormal parenting practices, accidents, immunizations or Denver Developmental Screening Test scores. Gray, *Prediction and Prevention of Child Abuse Neglect*, in 2 PROCEEDINGS OF THE SECOND NATIONAL CONFERENCE ON CHILD ABUSE AND NEGLECT 249 (1978). There was, however, a statistically significant difference in the number of children who suffered injuries warranting hospitalization. *Id.* at 250.

provided.<sup>235</sup>

Intervention projects aimed specifically at preventing foster placement pose similar evaluation problems. Although the measure of success—placement prevention—is uniform among these reports, most have failed to use control groups and have measured entry into care over only a short period and in an unsystematic way.<sup>236</sup> Reported entry rates also vary substantially from one study to the next,<sup>237</sup> and as the client groups and services vary substantially from one project to the next, comparisons of projects are also difficult.<sup>238</sup>

While overall assessments are thus extremely difficult to make, the evidence suggests that only a minority of parents show significant improvement as a result of intervention programs. A recently published five-year report from a well-designed and carefully evaluated program to reduce placement shows, for example, that only twenty-three percent of the project cases receiving intensive services were closed because “things seemed to be going well,”<sup>239</sup> and that the project ultimately achieved a placement rate only twelve percent lower than the rate in the control group receiving typical services.<sup>240</sup> Another recent, well-designed study reports equally pessimistic conclusions.<sup>241</sup> The assertion of one expert that child welfare intervention programs have achieved only a “modest measure of success”<sup>242</sup> thus appears to be an apt appraisal.

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235. For example, early childhood education programs have recently reported significant success. See J. BERRUTA-CLEMENT, *CHANGED LIVES* 31 (1984) (youngsters who participated in one-year early childhood education program exhibited at age 19 rates of participation in college or vocational training past high school nearly double those of youths without preschool education; teenage pregnancy rate slightly more than half; number of arrests 20% lower; drop-out rate 20% lower); Royce, *Minority Families, Early Education and Later Life Chances*, 53 *AM. J. ORTHOPSYCHIATRY* 706, 715-16 (1983) (program participants significantly more likely than controls to attain high school degree and have white collar aspirations; significantly less likely to require special education).

236. See M. JONES, *supra* note 96, at 35-37 (providing a good description of methodological problems in these studies).

237. For a survey of foster care prevention projects, see *id.* at 32-33.

238. *Id.* at 28-33.

239. *Id.* at 79.

240. *Id.* at 86.

241. *PROTECTING CHILDREN*, *supra* note 96, at 89 (among families with children at risk of foster placement given in home services, only four of 23 (17%) showed any improvement, and only two (nine percent) “changed substantially”); see Horowitz & Wolock, *supra* note 139, at 152, 169 (in 73% of surveyed cases receiving child protective services, there was either no improvement or conditions worsened).

Although a study relying on social work records reports more positive results, it was less rigorous and employed shorter follow-up periods. See *COMPTROLLER GEN. OF THE U.S., GEN. ACCOUNTING OFFICE, MORE CAN BE LEARNED AND DONE ABOUT THE WELL BEING OF CHILDREN* 17 (1976) (report to Congress) (in 10 agencies throughout country 37% of surveyed children improved as result of child protective services).

242. A. KADUSHIN, *supra* note 7, at 212.

There is, to date, very little research analyzing the efficacy of rehabilitative efforts directed at the natural parents of children placed in foster care. What is apparent, however, is that rehabilitation has been a low priority among foster care agencies. It has been reported that work with natural parents receives a disproportionately low level of agency resources,<sup>243</sup> and that many parents go unvisited by workers.<sup>244</sup> On the other hand, although coercively placed children may be underrepresented among this group,<sup>245</sup> it is important to keep in mind that most children who enter foster care apparently do go home within a year or two.<sup>246</sup> Moreover, while we should be wary of presuming that these results can be replicated in general child welfare practice, special demonstration projects aimed at releasing children from foster care to their natural parents have shown considerable success.<sup>247</sup> While it is unclear how many of these returns were advisable,<sup>248</sup> most of them appear to be stable.<sup>249</sup>

Thus, while intervention and removal do not appear to pose grave risks to the child, they appear, at least under current circumstances, to offer less than certain benefits in terms of ameliorating family problems. This is not surprising given the level of problems many families exhibit, and the modest level of services most programs provide. Lengthier, more intensive, more expensive treatments do appear to be generally more successful than shorter, less intensive treatments.<sup>250</sup> But the feasibility criterion suggests that such intensive

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243. See, e.g., D. SHAPIRO, *supra* note 102, at 20 (reporting that only 10% of childcare workers were assigned to natural families, while 27% were assigned to admission procedures or supervisory responsibilities).

244. See *supra* note 32 (describing survey results).

245. Lawder, Poulin & Andrews, *supra* note 30, at 249.

246. See *supra* note 30 (describing survey results).

247. See OREGON PROJECT, *supra* note 157, at 5.1 (26% of children classified as unlikely ever to return home returned to natural parents four years after project initiation); T. STEIN, E. GAMBRILL & K. WILTSE, *supra* note 218, at 56 (56% of planned outcome cases resulted in children returned to natural parents). *But see* E. SHERMAN, R. NEUMAN & A. SHYNE, CHILDREN ADRIFT IN FOSTER CARE: A STUDY OF ALTERNATIVE APPROACHES 47 (1973) (children with specially trained workers returned to their parents at approximately same rate as children with regular workers).

248. See OREGON PROJECT, *supra* note 157, at 4.20-.22 (63% of children returned to natural parents scored significantly lower on various measures of current adjustment than children adopted or retained in foster care).

249. See OREGON PROJECT, *supra* note 157, at 9.3 (no more than 20% of children returned to parents returned to foster care); N. BLOCK & A. LIBOWITZ, RECIDIVISM IN FOSTER CARE 25 (1983) (only 30.5% of children returned to natural parents or other relatives returned to foster care within two years); *After Foster Care*, *supra* note 88, at 549 (only 32% of children returned to natural parents from foster care went back to foster care within 12 to 16 months).

250. See, e.g., M. JONES, *supra* note 96, at 125-26 (children whose families given services to prevent foster care significantly less likely to enter care if preventive worker had year or more of social work experience and family received preventive services for "a long time"); D. SHAPIRO, *supra* note 209, at 74-75 (among cases active for 37 or more months 42% showed high improvement while only 22% of cases active 12 or fewer months so rated); Land, *supra* note 29, at 37-43 (abusive parents who received therapy for at least 12 hours a week for minimum of four to six months more

programs will continue to be the exception rather than the rule. Of course, some families are helped through intervention, and where placement is employed, parents gain a temporary respite from child care responsibilities that often permits them to resolve problems themselves. But for many children whose families receive child welfare services, state intervention appears to offer few tangible benefits.

## B. COERCIVE INTERVENTION AND REMOVAL: DERIVING STANDARDS

### 1. The Issues and the Problems

Intervention in the home appears to pose no risks, while the circumstances typically present in neglect cases appear to pose clear risks. But in-home intervention is successful in only a relatively small minority of cases, and the feasibility criterion requires us to predict that the ability of the child welfare network to rehabilitate natural families will not improve and may even diminish with additional cases. Foster care agencies appear to be no more successful in rehabilitating families, although their failures are less damaging to the child since he is not in the parental home. However, if the child is returned to a still disorganized family—a quite likely result under current practice—the gains from removal will probably be lost. If he is not returned, he may suffer from instability in placement. We must also assume that agencies will not improve in rehabilitating families of children in foster care, or in protecting children from unstable placements and ill-advised returns to natural parents.

The crucial question, of course, is what does this data tell us about how to define neglect? In my view, it does not, unfortunately, provide any definitive answers. A case can be made that Goldstein, Freud, and Solnit and other minimum intervention theorists who have advocated extremely narrow intervention standards are ultimately right: as intervention apparently fails far more often than not, families should not be forced to undergo intrusion into familial privacy for such uncertain benefits. However, an equally convincing case can be made for a fairly broad definition of neglect, coupled with a more drastic form of intervention: if neglected children were neither given services in the home nor placed in foster care, but instead were immediately made available for adoption, both the perils of inadequate parenting and the risks of incompetence by child welfare personnel in rehabilitating the family or providing a stable foster care placement would be avoided. This approach

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likely assessed as rehabilitated than control group receiving less intensive therapy over shorter term); Ramey, Bryant & Suarez, *Pre-School Compensatory Education and the Modifiability of Intelligence: A Critical View*, in *CURRENT TOPICS IN HUMAN INTELLIGENCE* 27 (D. Detterman ed. 1984) (results from infancy intervention programs aimed at improving intellectual development support an "intensity hypothesis"; home visits alone not found to alter IQ at all while daycare plus other family services effected largest improvement).

would also save the substantial sums now expended on rehabilitative efforts and maintenance payments to foster families; rehabilitative efforts would no longer be needed, and adoptive parents—like natural parents but unlike foster families—would be liable for the child's support.<sup>251</sup> At least for younger children, such an approach is also eminently practicable. Although adults willing to adopt were in short supply at the time the philosophy of rehabilitation became popular,<sup>252</sup> this is no longer the case. Instead, there is now a severe shortage of adoptive infants, and even older children can often be found adoptive homes.<sup>253</sup> Finally, a case can also be made for the status quo: intervention, even in the form of removal, poses few risks while nonintervention in the types of cases in which neglect jurisdiction is typically exercised poses clear risks. A significant number of families definitely benefit from intervention, and because foster care can provide adequate protection against continuing abuse or neglect, immediate termination of parental rights is unnecessary. Unfortunately, the empirical evidence is not adequate to establish a conclusive winner among these arguments.

Nor does the family autonomy tradition provide clear answers. The Goldstein, Freud, and Solnit approach is extremely deferential to family autonomy, the adoption approach extremely nondeferential, and the status quo approach somewhere in between. At first glance, this suggests that at least the second option could be eliminated, and possibly the third. After all, the Supreme Court has held that, based on the importance of the interests at stake, clear and convincing evidence is required in order to terminate parental rights,<sup>254</sup> and a number of state courts, on similar grounds, have decided that termination can be obtained only when the parent is unfit, and not on the basis of vague assertions of the child's best interest.<sup>255</sup> But a finding of neglect could, of course, be taken to demonstrate unfitness, and many state statutes do permit termination of parental rights as an immediate disposition in a neglect action. Moreover, the family autonomy tradition clearly does not mandate the Goldstein, Freud, and Solnit approach. Because the evidence strongly suggests that a much broader array of circumstances can cause serious harm to the child, a broader definition of neglect is warranted. The least drastic alternative thus turns out to be an extremely elusive concept.

In the face of uncertain information and conflicting values, I believe that

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251. See D. FANSHEL & E. SHINN, *supra* note 35, at 24-25 (savings from adoption of 17 children estimated at \$1,132,098).

252. See Garrison, *supra* note 16, at 437-38 (describing changes in adoption scene).

253. *Id.* at 443; A. KADUSHIN, *supra* note 7, at 470-73.

254. *Santosky v. Kramer*, 455 U.S. 745 (1982).

255. See, e.g., *In re J.L.W.*, 102 Wis. 2d 118, 306 N.W.2d 46 (1981); *Petition of the Department of Public Welfare to Dispense with Consent to Adoption*, 421 N.E.2d 28 (Mass. 1981); *In re J.P.*, 648 P.2d 1364 (Utah 1982).

the moderate, status quo approach, is preferable. This conclusion is based on several factors. First, both of the extreme approaches entail some fairly extensive costs. The Goldstein, Freud, and Solnit approach leaves virtually all neglected children to their fate, even in circumstances in which almost any observer would find the balance of harms to mandate intervention.<sup>256</sup> The adoption approach ensures that neglected children get help but also ensures permanent separation for some families who perhaps could have resolved their problems and offers nothing to parents who may themselves be victims of forces beyond their control or understanding. Second, both approaches let the child welfare system off very easily; in both approaches, the system's deficiencies become the rationale for making no attempts to improve it. Finally, when certainty is unavailable, it seems safest to choose a standard for intervention that embodies a balance between the rights of children and parents, and between the deficiencies and responsibilities of the child welfare system. This conclusion is, of course, open to argument. A moderate approach itself entails costs: families for whom intervention does not work, children returned home inappropriately, and children subjected to unstable placements.

Only one conclusion cannot be gainsaid: the evidence quite unequivocally points out that no standards for intervention can work any major improvements in the lives of the children and families whom the child welfare system serves. As long as we remain unwilling to give families sufficient support to avert the extreme stresses that produce neglect there will be damaged children and families. And unless our financial commitment to rehabilitation and our rehabilitative ability improve markedly, many of these children and families will stay that way.

## 2. A Moderate Approach

Having concluded that the moderate approach is, on balance, preferable to either of the extremes, it remains to define moderate. Moderate does not, in my view, mean that the extremely vague neglect statutes that characterize traditional child welfare law are appropriate: under these standards, intervention has occurred in some cases in which it is unwarranted. Moreover, both family law principles and the feasibility constraint require that the standards be as precise as possible: parents must receive adequate notice of the circumstances that may lead to intervention, and agency discretion must be circumscribed. But neither should neglect jurisdiction be rigidly confined. Unlike the advocates of extremely narrow intervention standards, for example, I believe that intervention is warranted in each of the cases described earlier.<sup>257</sup> The comparative risks of intervention versus nonintervention, the

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256. See Wald, *supra* note 84, at 666 (describing variety of outrageous cases in which Goldstein, Freud, and Solnit standards would preclude intervention).

257. See *supra* text accompanying notes 137-39.

relatively minor interference with family autonomy occasioned by services in the home, and the improvement of some families from state intervention all suggest this result. The moderate approach thus requires that standards governing intervention be broad enough to encompass the more serious cases traditionally subject to neglect jurisdiction—apparently the bulk of the caseload—while providing sufficient definitional clarity to ensure that less serious neglect cases do not lead to state intervention.

A high level of definitional clarity is not, however, easy to achieve, particularly given the wide range of fact patterns encompassed by neglect. In some circumstances, of course, the need for intervention can be determined from relatively objective criteria. Symptoms in the child evidencing serious harm are the most obvious objective test. Medical personnel can diagnose malnutrition and major developmental delays, for example, on the basis of physical evidence, and even emotional damage is sometimes accompanied by clear symptomology. Standards drafted under the auspices of the American Bar Association thus provide that jurisdiction over neglect that does not create a risk of serious physical injury should extend—but should also be limited—to cases in which “a child is suffering serious emotional damage, evidenced by severe anxiety, depression, or withdrawal, or untoward aggressive behavior toward self or others, and the child’s parents are not willing to provide treatment for him/her.”<sup>258</sup>

While this emphasis on symptomology is well placed, exclusive reliance on the short number of symptoms listed would preclude intervention in many cases in which the evidence suggests that it is appropriate. In infants these particular symptoms may be impossible to detect, while other symptoms, such as feeding and sleep disturbances or developmental delay, will be more appropriate and more easily measurable indicators of harm.<sup>259</sup> Even for older children, other symptoms—serious school problems, major problems in cognitive development, poor results on psychological tests, for example—may be more reliable indicators of harm than vaguely defined states such as depression or withdrawal.

Requiring symptomological evidence in every case also prevents intervention before serious damage has been done, even in instances where eventual harm is virtually guaranteed. An infant living alone with an acutely

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258. ABA STANDARDS, *supra* note 2, at 67-68.

259. Because infants cannot be tested through play, games, or verbal assessment, psychologists typically rely on symptoms of emotional disturbance such as interaction with parents and disturbances in feeding, sleep, and activity to determine the existence of emotional problems in infants. Marcus, *Examination of the Infant and Toddler*, in BASIC HANDBOOK OF CHILD PSYCHIATRY 509, 527-28 (J. Noshpitz ed. 1979). Standardized developmental tests such as the Bayley Scales of Infant Development, N. BAYLEY, BAYLEY SCALES OF INFANT DEVELOPMENT: MANUAL (1969), are also widely used in assessing infants and toddlers. None of these measurements are included in the list developed under the auspices of the ABA.

psychotic parent, for example, is in danger of serious harm. To incorporate such cases into a definition of neglect, one could provide for intervention based on parental conditions, such as serious mental illness, retardation, alcoholism, or addiction, that render the parent incapable of providing child care. But this approach is on balance inadequate. Some parents who are retarded, mentally ill, or addicted and incapable of providing adequate care themselves live in a stable situation—for example with a grandparent or other relative—that does provide the child with adequate care.<sup>260</sup> In these circumstances, the child is not endangered and intervention is therefore inappropriate. Moreover, many parents who fail to provide adequate care are not victims of an overt mental illness or addiction, and their children may not show clear symptoms until a lengthy period of inadequate care has passed.

In view of the varied circumstances that can evidence a serious risk to a child's well-being, and the concomitant difficulty of formulating a precise definition of the circumstances in which intervention is appropriate, I believe that a somewhat open-ended definition of neglect, which relies on a broad array of symptoms and measurements, is warranted.<sup>261</sup> If the risks of intervention were greater, or if neglect findings were more frequently made on the basis of frivolous evidence, a narrower, less discretionary standard would be appropriate. But on the basis of the current evidence, the needs of children are better served by a model that recognizes the infinite variability of family life.

This conclusion is reinforced by the availability of other devices to reduce the risks of unstructured agency and judicial discretion. For example, descriptive definitions can contain precatory examples to demonstrate the type of circumstances in which a neglect finding is appropriate.<sup>262</sup> More detailed judicial findings, specifying the type of harm and supporting evidence on which the decision is based, can also be required. Stricter evidentiary requirements can be imposed: expert testimony on the child's current functioning can be mandated, and standardized measurements of family functioning<sup>263</sup>

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260. Focusing on parental symptomology also creates the danger that judges will assume inadequate care from a parental condition without carefully considering the child's condition. This danger is exacerbated by the fact that traditional neglect statutes typically focus on parental behavior without requiring that it endanger the child.

261. For a similar approach, see NAC STANDARDS, *supra* note 56, at 254-56 (jurisdiction over neglect should include "[j]uveniles whose emotional health is seriously impaired and whose parents . . . fail to provide or cooperate with treatment"; child psychology not advanced enough to provide definitions of emotional abuse and neglect); Areen, *supra* note 2, at 933 ("A 'neglected' child is one whose physical or emotional health is significantly impaired, or is in danger of being significantly impaired, as a result of the action or inaction of his parent, guardian, or primary caretaker. . . . Until the experts in child behavior reach greater consensus . . . a general phrase is most appropriate.").

262. *Cf.* N.Y. FAM. CT. ACT § 1012 (McKinney 1983).

263. *See, e.g.*, L. GEISMAR, FAMILY AND COMMUNITY FUNCTIONING (1971) (describing Family



can be required to supplement impressionistic evidence.

Given the availability of procedural mechanisms to structure decisionmaking, and the need for a broader and more flexible definition of neglect, I believe that "parental failure to provide minimally adequate child care which has caused serious emotional, mental, or physical harm, or which creates a substantial and imminent probability of serious emotional, mental or physical harm to the child," is an appropriate neglect standard if coupled with examples of serious harm<sup>264</sup> and lack of minimally adequate care<sup>265</sup> and accompanied by strict evidentiary requirements like those outlined above.

One *caveat* to this definition is also in order: a child whose house has burned down may be in imminent danger of serious harm, but we would not deem it appropriate for the state to intervene unless the parent undertook no steps to obtain other shelter. Therefore the standards should also provide that intervention is impermissible if the parent is willing to provide or obtain adequate treatment, or if the parent's failure to provide adequate treatment has been occasioned solely by financial inability to do so.<sup>266</sup>

### 3. After a Finding of Neglect: Services in the Home or Removal

Choosing between services in the home and removal is, unfortunately, no easier than determining appropriate standards for intervention. At first glance, this would appear to be an easier issue: services in the home entail no apparent risk, some potential benefits, and minimal intrusions upon parental authority. Moreover, in-home treatment also offers improved therapeutic opportunities. With child and parent apart, problems in their relationship are harder to treat. The family may also reorganize in ways that make the

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Functioning Scale); R. MOOS & B. MOOS, FAMILY ENVIRONMENT SCALE MANUAL (1981); Curtis, Rosman & Pappenfont, *Developing an Instrument for Measuring Psychosocial Assessment in Clinical Child Welfare*, 64 CHILD WELFARE 309 (1985) (describing development of research instrument that can be used to quantify caseworker's assessment of child and family functioning); Polansky, *Assessing Adequacy of Child Care: An Urban Scale*, 57 CHILD WELFARE 439 (1978) (describing Childhood Level of Living Scale).

264. Examples include conditions such as malnutrition, major developmental delays, self-destructive or aggressive behavior, truancy, or other serious defects in school achievement.

265. Specific examples of minimally adequate care are hard to provide, because a situation that falls below the minimum will typically include deficits in several areas of care. The statutory standard should make this clear. For example, the standard could specify that less than minimally adequate child care typically combines deficiencies in the following areas: physical care, including irregular or insufficient feeding and hygiene, or the failure to obtain needed medical treatment; supervision, including leaving a young child unattended for lengthy periods; discipline, including repeated excessive corporal punishment or unreasonably cruel punishment; stimulation and attention; concern and emotional warmth; and other inappropriate or uncontrolled parental behavior.

266. This is consistent with the approach taken by other minimum intervention standards. ABA STANDARDS, *supra* note 2, at 66; Areen, *supra* note 2, at 925-26; Wald, *Standards, supra* note 2, at 701.

child's reentry more difficult.<sup>267</sup> As an apparent result of these factors, one study recently found that ninety-seven percent of children who stayed in their own homes while the family was treated remained there, while only sixty-eight percent of children who had been placed and then returned were able to remain.<sup>268</sup> These various advantages suggest that intervention in the home should presumptively be preferred to placement, and most minimum intervention theorists have argued for this approach. There are, however, significant, countervailing factors. As we have seen, intervention in the home seldom works. While this fact alone would not weigh that heavily if the children could be adequately protected from further abuse and neglect while rehabilitative efforts were underway, the inadequacies of child welfare practice suggest that such protection will not always be available.

Two recent and very thorough research efforts make it clear that these potential disadvantages of in-home intervention are indeed significant problems. One researcher evaluated the impact of a special demonstration project in New York City designed to reduce the use of foster care by giving families at high risk of placement intensive casework and other services in the home.<sup>269</sup> Outcomes in these families were compared to a control group that had received typical agency services. Almost half of the control group and a third of the experimental group receiving intensive services were ultimately placed in foster care.<sup>270</sup> Moreover, in approximately one-quarter of the families in both groups, substantiated child maltreatment reports were made.<sup>271</sup> The other researchers evaluated a special demonstration project in California that provided intensive services in the home to children who would otherwise have been placed in foster care.<sup>272</sup> They reported even more sobering conclusions. Although only twenty percent of the children who initially remained at home were placed during the two years of the study,<sup>273</sup> approximately two-thirds were subject to continuing neglect or to physical or sexual abuse.<sup>274</sup> Moreover, while the data did not permit firm conclusions, it appeared that a control group composed of children who were placed in foster care fared slightly better in terms of self-esteem, school and peer satisfaction, and adult-child conflict than their counterparts who remained at home.<sup>275</sup>

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267. Heying, *Family Based, In-Home Services for the Severely Disturbed Child*, 64 CHILD WELFARE 519, 526 (1985).

268. *Id.*

269. M. JONES, *supra* note 96.

270. *Id.* at 86.

271. *Id.* at 95.

272. PROTECTING CHILDREN, *supra* note 96.

273. *Id.* at 88.

274. *Id.* at 88-89.

275. *Id.* at 125, 157-58.

Because of these disadvantages of in-home intervention, I find it difficult to agree with other minimum intervention theorists who urge that in-home services should presumptively be preferred to placement.<sup>276</sup> However, the evidence is not sufficient to establish a presumption in favor of foster care either. The California study did not find unequivocal evidence that foster care resulted in better emotional and behavioral development than remaining at home,<sup>277</sup> nor did foster care result in major gains for the children who experienced it. In most areas of functioning, foster care produced only marginal improvements over the two years of the study.<sup>278</sup> Moreover, the California study evaluated only a small group of children in a relatively narrow age range.<sup>279</sup> Further research is thus necessary before firm conclusions can be drawn. Finally, unless foster care becomes permanent placement, there is no evidence that gains the child has made while in care will be retained when the child is returned home.

The lack of conclusive evidence suggests that the choice between foster care and in-home services should be made without a presumption in favor of either approach. Instead, the decision should be based on a careful balancing of the long-term risks of continued care in the home against the trauma and long-term risks inherent in removal. In striking this balance, a judge should consider the severity of the harm risked by leaving the child in the home, the parents' apparent capacity for change, the type and level of services and surveillance available, and the relative advantages and disadvantages of placement.<sup>280</sup> This determination will frequently be extremely difficult. The evidence will often be lacking on many issues, and sometimes the balance will be quite equivocal; in such a case, the family autonomy tradition requires that the child be left at home. But a more structured method of decision-making is simply not justifiable on the basis of the current evidence.

### C. AFTER INTERVENTION

The intervention decision is only the first phase in the relationship between the family and child welfare system. A treatment plan for the child and

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276. *E.g.*, ABA STANDARDS, *supra* note 2, at 129; GFS II, *supra* note 2, at 15-29; NAC STANDARDS, *supra* note 56 at 360-61; Wald, *Standards*, *supra* note 2, at 681-84.

277. PROTECTING CHILDREN, *supra* note 96, at 157-58. At the initial evaluation a few weeks after placement the foster children were much better off on several measurements than their counterparts who remained at home. The researchers could not determine whether the difference resulted from foster placement or other factors. *Id.* at 70-71. A small group of black children in the study exhibited no improvement in foster care. *Id.* at 161.

278. *Id.* at 157-58, 161.

279. Sixty-five children between the ages of 5 and ten were evaluated. *Id.* at 3.

280. If a relative or family friend is available, for example, the trauma of removal and the risks of instability may be diminished substantially. On the other hand, a child with serious behavioral problems is at great risk of multiple, or even institutional, placement. For him, the risks of foster care are enhanced. Or an older child might vehemently want—or reject—the idea of placement.

family must be developed and implemented, and the rights and future relationships among the parent, child, and agency must be determined. If placement has been ordered, an appropriate foster home for the child must also be found. Traditionally, these tasks were the sole province of child welfare authorities; after determining whether neglect had been established and ordering a disposition, a court retained no further involvement in the case. But the notable failure of agencies to provide careful, individualized planning and treatment requires greater judicial scrutiny of agency decisionmaking and implementation efforts.<sup>281</sup>

Minimal intervention advocates have typically proposed periodic judicial review of child welfare cases in order to ensure agency accountability.<sup>282</sup> Standards drafted under the auspices of the American Bar Association go further and require, during the dispositional phase of the neglect proceeding, judicial supervision of a case plan specifying where the child will be placed, the steps that will be undertaken to return the child home, and the actions that will be undertaken to maintain parent-child ties.<sup>283</sup> This additional form of judicial involvement appears to be warranted, in light of consistent reports of agency failure to plan and implement treatment programs carefully. In performing these supervisory and review functions, courts should, of course, attempt to maximize the chances of successful intervention. While the available data do not provide definitive evidence on how to achieve such success, the data do suggest some basic guidelines.

The treatment plan should, first of all, be formulated in consultation with the parent and, depending on age and maturity, the child. Social work literature frequently asserts, for example, that active involvement and participation by clients in formulating treatment plans is helpful in achieving change.<sup>284</sup> This process is thought to foster motivation and self-confidence as well as to create a less punitive atmosphere.<sup>285</sup> Although there appears to be no empirical research substantiating these claims, there is evidence that parental willingness to participate in the treatment planning process is a good

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281. See *supra* notes 38-51 and accompanying text (discussing failures of child welfare agencies).

282. See *supra* note 61 and accompanying text (describing various proposals). No state provided for review of foster care placements until 1971. T. FESTINGER, *supra* note 47, at 211.

283. ABA STANDARDS, *supra* note 2, at 138.

284. See, e.g., D. KLINE & H. OVERSTREET, *FOSTER CARE OF CHILDREN: NURTURE & TREATMENT* 167-76 (1972) (describing importance and development of working alliance with parent); Sinanoglu, *Working with Parents: Selected Issues and Trends as Reflected in the Literature*, in *THE CHALLENGE OF PARTNERSHIP: WORKING WITH PARENTS OF CHILDREN IN FOSTER CARE* 3, 13-15 (1981) (describing characteristics of successful techniques for involving parents).

285. See D. KLINE & H. OVERSTREET, *supra* note 284, at 172-73 (absence of efforts to engage parent in treatment scheme often leads to lack of self-esteem, shame, guilt, regressions, and frustration of parental desire to maintain contact with child); Blumenthal, *Involving Parents: A Rationale*, in *ESTABLISHING PARENT INVOLVEMENT IN FOSTER CARE AGENCIES* 1-12 (1984) (when parents not involved children more likely to remain in foster care for prolonged periods).

predictor of case outcome.<sup>286</sup> Moreover, the involvement of parent and child offers both the opportunity to ask questions and provide information that may be useful in the planning process. The family autonomy tradition also supports this approach. Courts have not considered parental failure to protect the child from serious harm of one type to be a sufficient ground for divesting the parent of authority on other issues. A parent's failure to provide adequate medical care, for example, has not been considered an adequate ground for divesting him of authority over the child's education, discipline, or upbringing.<sup>287</sup> This tradition also suggests that older children should have a voice in the planning process. If older children are routinely given a voice in decisions regarding their caretaker after divorce or in the context of adoption,<sup>288</sup> there is no reason to ignore their wishes here.

Treatment plans should also specify concrete tasks to be accomplished by the parent and services to be provided by the agency within a given time frame. In one study, workers used contracts with parents in order to clarify precisely what parents had to do in order to regain their child and what the agency would do to assist them.<sup>289</sup> The contracts detailed what was expected on a daily or weekly basis and set out assessment points. Not only was the reaction of the parents who signed the contracts overwhelmingly positive,<sup>290</sup> but the experimental workers who used the contracts were also considerably more successful than regular workers in averting long-term placement.<sup>291</sup> Moreover, the clearly specified goals and timetables facilitated case management, transfer, and judicial review.<sup>292</sup>

For children who are placed, the plan should also maximize parent-child contact. Researchers have reported that parents are more likely to regain their children when they visit regularly.<sup>293</sup> Parental contact also appears to

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286. See Stein, Gambrell & Wiltse, *Contracts and Outcome in Foster Care*, 22 SOC. WORK 148 (1977) (in 70% of cases where families signed restoration agreements children returned to parents; only 16% returned where agreements not signed).

287. See *supra* note 110 (cases where parental treatment choice is overridden, but state intervenes in no other respect).

288. See *supra* notes 126-27 and accompanying text (older child's wishes considered in custody and adoption cases).

289. See Stein & Gambrell, *Facilitating Decision Making in Foster Care: The Alameda Project*, 51 SOC. SERV. REV. 502 (1977) (describing project); Stein, Gambrell & Wiltse, *supra* note 286, at 156 (same); see also T. STEIN, E. GAMBRILL & K. WILTSE, *supra* note 218, at 43-54 (describing similar techniques); Simmons, Gumpert & Rothman, *Natural Parents as Partners in Child Placement*, 54 SOC. CASEWORK 224 (1973) (same); Rooney, *A Task-Centered Reunification Model for Foster Care*, in THE CHALLENGE OF PARTNERSHIP: WORKING WITH PARENTS OF CHILDREN IN FOSTER CARE, *supra* note 284, at 135, 137-38, 141 (same).

290. Stein & Gambrell, *supra* note 289, at 507.

291. Seventy-eight percent of the experimental cases were closed or in the process of being closed at the end of two years, whereas only 40% of the control group cases were closed. *Id.* at 505.

292. E. GAMBRILL & T. STEIN, *SUPERVISION IN CHILD WELFARE: A TRAINING MANUAL* 16-17 (1978).

293. D. FANSHEL & E. SHINN, *supra* note 21, at 98-104, 486-90; Mech, *Parental Visiting and*

be an important factor in helping the child cope with separation. Over the years an impressive body of data has established that children in foster care who are visited by their natural parents exhibit higher levels of well-being on a variety of measures than children who do not.<sup>294</sup>

Finally, placement plans should foster continuity and quality of care for the child. Researchers have found that the presence of a sibling and the provision of care by a familiar parent substitute that creates, to the maximum extent, a situation like that in the child's home helps to reduce the trauma of separation.<sup>295</sup> Placement in a home with an intellectually stimulating environment has also been linked with positive behavioral changes,<sup>296</sup> and a significant relation between the emotional climate of the foster home and the adequacy of adult functioning has been reported.<sup>297</sup> These are not surprising findings in view of research that suggests that the quality of care over time is the best predictor for long-range development.<sup>298</sup>

The feasibility criterion requires us to predict, however, that, even with judicial involvement at the dispositional stage, these guidelines will be extremely difficult to effectuate. Maximized parental involvement and visitation, concrete and goal-oriented planning, and sound placement management are quite contrary to past agency practice;<sup>299</sup> they are not, however, novel

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*Foster Care*, 64 CHILD WELFARE 67, 69-70 (1985); Milner, *An Ecological Perspective on Duration of Foster Care*, 66 CHILD WELFARE 113, 116-17 (1987). *Contra* D. FANSHEL *supra* note 33, at 97.

294. *See, e.g.*, D. FANSHEL & E. SHINN, *supra* note 21, at 486-90; E. WEINSTEIN, *supra* note 155, at 64-67; *cf.* Bergman, *The Influence of Family Visiting Upon Boys' Behavior in a Juvenile Correctional Institution*, 64 CHILD WELFARE 629 (1985) (describing similar beneficial effects for institutionalized children). *See generally* Garrison, *supra* note 16, at 461-67 (surveying research on visitation and its impact on children in foster care).

Recent research on adults who were foster children has produced contradictory findings on the long-term impact of visitation. *Compare* R. ZIMMERMAN, *supra* note 160, at 91 (of subjects who had been in long-term placement, those visited were more frequently represented in adequately functioning group; of total group frequent parental visiting associated with low adult functioning but "these were the youngsters who for the most part were returned to the custody of the natural parents, and it is that fact rather than the visiting itself that is thought to be truly associated with outcome") with T. FESTINGER, *supra* note 171, at 95-96 (among those discharged from foster homes contact with kin generally had no impact on "their view of themselves and their lives" at time of interview; only among those from group care was contact with kin associated with "more positive appraisal of themselves and their lives").

295. *See* Robertson & Robertson, *Young Children in Brief Separation: A Fresh Look*, 26 PSYCHOANALYTIC STUDY OF THE CHILD 264 (1971) (preseparation introductions to foster parents, familiar toys and possessions, family visits, familiar methods of care, and talking to child about absent parent reduced disturbance caused by separation of several weeks to manageable levels and permitted positive development to continue); D. KLINE & H. OVERSTREET, *supra* note 284, at 87-150 (urging preplacement visits, continuity of child care routines, and supportive care during initial stages of foster placement).

296. D. FANSHEL & E. SHINN, *supra* note 21, at 364-65.

297. R. ZIMMERMAN, *supra* note 160, at 33.

298. *See supra* notes 145-54 and accompanying text (discussing evidence).

299. *See supra* notes 45-51 and accompanying text (discussing agency failures).

suggestions. Child welfare experts have urged changes of this sort for years, although few improvements have been noted. Nor is there reason to expect significant improvements in the future. While case review mechanisms can help somewhat in ensuring agency accountability,<sup>300</sup> some states have provided for review for years, but still have massive case management problems. Moreover, commentators have found that automatic periodic reviews tend to become quite perfunctory.<sup>301</sup> A court can, of course, refuse to approve a placement until it has received adequate assurances that an appropriate home has been found. It can also provide some additional safeguards—for example, in an appropriate case, ordering the agency to accord the parent a right to consultation on decisions regarding the child's care, or even to joint custody with the agency. But it cannot effect drastic improvements in agency practice, and thus, when push comes to shove, it cannot ensure that agencies continue to act in accordance with its orders after the dispositional phase has passed.

This judicial inability to improve agency practice is, of course, a serious problem, because what happens after judicial disposition determines whether intervention succeeds or fails. More workers, fewer cases, better training and supervision, and much more are undoubtedly needed in addition to an enhanced judicial role in order to ensure that change really occurs. But these additional resources are not likely to materialize and there are no other methods available for ensuring improvement. In this most important area of child welfare practice, a realistic least drastic alternative thus appears to be an unattainable mirage.

Because of the difficulties in changing agency practice, and the magnitude of the problems among many child welfare clients, it must be anticipated that the proposed treatment plan will simply fail in many cases. Children whose parents are given a chance at rehabilitation in the home will, we can expect, very frequently go into placement. Massive parental problems—or simple lack of parental motivation—will prove too much for the limited capabilities and resources of child welfare personnel. Similarly, many parents of children

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300. In New York City, foster parents may request an administrative hearing prior to removal of a foster child from their home to another foster home. In approximately 45% of cases in which hearings are held, the agency decision is reversed. Chambers & Wald, *Smith v. OFFER*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM AND PUBLIC POLICY* 115 (R. Mnookin ed. 1985). Only 20 to 30 foster parents a year take advantage of this hearing opportunity. *Id.* Reversal rates in public assistance administrative hearings are similar. See Note, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 WIS. L. REV. 145, 198 (estimates from 23% to 65% in various Wisconsin counties).

301. See Mnookin, *Child Custody Adjudication: Judicial Function in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 234 (1975) (usually neither parent nor social worker present at hearing); Wald, *Standards*, *supra* note 2, at 683 (“[I]n most cases neither the parent nor the social worker was present and the hearing lasted only seconds. Even when parents were present, the hearings averaged less than five minutes.”).

in placement can be expected to fail in making needed improvements; agencies will fail to provide needed services and fail to keep parents involved in their children's lives. But despite these massive, systemic problems, the court must eventually confront the next difficult decision—whether to terminate the parent's right to regain custody and permit the child's adoption into a new family. This decision must be made, moreover, not just for children who have been coercively placed, but also for those who were voluntarily placed. Thus, before looking at termination, we first turn to the voluntary sector of the child welfare system.

#### D. VOLUNTARY CHILD WELFARE SERVICES

##### 1. Who Seeks Child Welfare Services and Why

We have seen that the least drastic alternative is an elusive and likely unattainable goal in coercive child welfare efforts. But what is the least drastic alternative when a parent *seeks* child care help or foster placement? The question is an important one because court-imposed services—and even placements—amount to no more than a fraction of the total services provided by child welfare agencies. Probably more parents seek help from the child welfare system than are coerced into accepting it.<sup>302</sup> Services in the home typically are requested when parents feel that they cannot manage on their own, while requests for placement occur for more varied reasons. Sometimes the parent cannot obtain the help—housing, daycare, a homemaker—necessary to continue caring for the child at home. Sometimes the parent cannot cope with the child's disability or behavior problem.<sup>303</sup> Sometimes the parent decides, for reasons good or bad, that he is unwilling or unable to care for the child at present.<sup>304</sup> And sometimes the request for placement represents a plea bargain of sorts, in which the parent agrees to placement rather than contest an imminent abuse or neglect action.<sup>305</sup>

Because foster care agencies do not keep good records, it is difficult to

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302. See *supra* note 6 (discussing percentage estimates).

303. See A. GRUBER, *supra* note 6, at 15 (7% of surveyed placements due to child's behavior); S. JENKINS & M. SAUBER, *supra* note 6, at 62-66 (8% of placements due to child's personality or emotional problems). More recent surveys tend to indicate that a higher percentage of cases result from certain child-related problems. See, e.g., GAO REPORT, *supra* note 32, at 5 (33% of foster children in California and 16% in New York City placed because of child-related problems such as behavior or disability); A. KADUSHIN, *supra* note 7, at 322-23 (15-20% of placements caused by child-related problems); T. LASH & H. SIGAL, STATE OF THE CHILD 176 (1976) (39.3% of New York City children placed for child-related reasons).

304. See D. FANSHIEL AND E. SHINN, *supra* note 21, at 47 (21.6% of voluntary placements caused by parent unwillingness to assume or continue care). This category includes a wide range of situations. Cf. *Duchesne v. Sugerman*, 566 F.2d 817 (2d Cir. 1977) (parent placed child during hospitalization); *In re William S.*, 120 Misc.2d 790, 466 N.Y.2d 914 (Fam. Ct. 1983) (parent placed child in foster care in order to punish him).

305. Levine, *supra* note 6, at 23.



estimate the proportion of placements which fall into these categories,<sup>306</sup> and more than one reason is often present. But available information suggests that many voluntary placements do not involve parents who are pleading guilty and soon would be coerced into accepting help from the state.<sup>307</sup> Substantial numbers simply involve parents who have recognized problems and have thus sought state aid. Sometimes, of course, these parents are not entirely sympathetic figures. Reconsider the case of Ritchie Adams:

Ritchie Adams, six years old, was brought to Juvenile Hall by a baby sitter. The child's mother told the baby sitter to take him there because she had no way of caring for him.

When contacted by the Probation Officer . . . [Mrs. Adams] said she was unable to care for Ritchie. [She requested that he be placed in foster care.] She told of her own unhappy childhood with quarrelsome parents, a sharp sibling rivalry with preference given to boys in the family, and an early and unhappy marriage following a pregnancy with Ritchie. She described Ritchie as subject to temper tantrums beyond her control, hateful like his father, and hyperactive. . . . She talked of her wish to marry again, and was very much involved with a new male friend. She reported that there had been no recent contact with Mr. Adams and she did not know where he was living. Mrs. Adams explained that Ritchie's sister . . . lived with her. An older brother . . . was in a mental hygiene foster home . . . .<sup>308</sup>

Should Ritchie be accepted into foster care? If so, on what terms?

## 2. The Minimum Intervention Perspective

In looking at this case, and at the voluntary sector generally, it is important to keep in mind that the minimum intervention philosophy supports state child protection efforts only when intervention is necessary to protect the child from harm. If parents who volunteer for services are not found to pose any threat to their children, there is no basis, under the minimal intervention view, to support state interference with the parent's decision to ob-

306. Additionally, classification procedures are neither uniform nor reliable. Even foster care studies conducted by professional researchers employ a wide range of classification schemes. *See, e.g.*, A. Gruber, *supra* note 10, at 15; S. JENKINS & M. SAUBER, *supra* note 6, at 47. Some fail to distinguish between voluntary and court-ordered placements. *See, e.g.*, E. SHERMAN, R. NEUMAN & A. SHYNE, *supra* note 247, at 26. Moreover, many children enter foster care for multiple reasons. One of the most reliable studies to date reports the following breakdown of voluntary placements: mental illness of childcarer person (25.1%), child behavior (11.9%), physical illness of childcarer person (12.8%), abandonment or desertion (12.3%), parent unwilling to assume (10.9%) or continue (10.7%) care (21.6%), family problem (9.5%), abuse or neglect (4.3%). D. FANSHEL & E. SHINN, *supra* note 21, at 47.

307. D. FANSHEL & E. SHINN, *supra* note 21, at 47 (abuse or neglect reason for only 4.3% of voluntary placements). This figure, however, almost certainly underestimates the level of neglect. For example, a fairly high proportion (25.1%) of the placements were caused by mental illness of the person caring for child, *id.*, which is a situation often leading to neglect.

308. R. MNOOKIN, *supra* note 85, at 512-13.

tain child welfare services unless the very receipt of the services threatens the child with harm. As noted previously, the services offered by the child welfare system generally do not pose sufficient risks to warrant interference on this basis.<sup>309</sup> In Ritchie's case, the minimum intervention perspective thus suggests that, unless investigation reveals evidence of Ritchie's abuse or neglect by Mrs. Adams, she should be permitted to place him in foster care, and to retain her right to regain custody.<sup>310</sup>

This model is, of course, essentially identical to the model that has prevailed when parents seek child care help outside the child welfare system. Parents with the resources to obtain help without state aid have been permitted to choose the type of care their child receives without qualification. When a parent privately places his child in a boarding school, or with a friend or relative, no state agency interferes. These parents lose no legal rights, they may continue to direct the child's care and upbringing, and, except in extraordinary circumstances, they may also regain physical custody of the child upon demand.

This model also stands, however, in marked contrast to the traditions of the child welfare system, which has treated parents who request help just like those parents the courts have found incapable of functioning without it. As we have seen, parents who request help were traditionally given no choice as to the type of services they would receive; placement was, in fact, often the only service made available. Following placement, these parents—like those who had been found neglectful by a court—lost legal custody of their child and thus retained no right to be consulted on decisions about the child's care or, frequently, to get the child back without agency approval.<sup>311</sup>

Surprisingly, minimum intervention advocates have not urged that the voluntary sector be governed by the minimum intervention philosophy. Although standards proposed under the auspices of the American Bar Association urge,<sup>312</sup> and some states have adopted,<sup>313</sup> laws that permit parents to reclaim their children more easily, parental control over choice of services and parental retention of custody and decisionmaking authority have nowhere been proposed or adopted. Indeed, the minimum intervention movement has largely ignored the voluntary sector of the child welfare system

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309. See *supra* notes 202-03 and accompanying text.

310. Given the greater risks of institutional care and multiple placements, minimum intervention could support restrictions on a parent's ability to unilaterally subject his child to these conditions. See *infra* notes 342-44 and accompanying text.

311. See *supra* notes 42-44 and accompanying text (describing child welfare agency practices).

312. ABA STANDARDS, *supra* note 2, at 188-89.

313. For example, N.Y. SOC. SERV. LAW § 384-a(2)(a) (McKinney 1983), specifies that a placement agreement may provide for return of a child on a particular date or upon occurrence of an identifiable event. If the agreement fails to specify a return date, the agency must return the child within 20 days of the parental request, unless the agency obtains a court order.

altogether. Most commentators fail to mention the voluntary sector,<sup>314</sup> and recent changes in federal law, motivated by the minimum intervention philosophy, similarly sweep most of the issues under the rug. The legislation actually goes so far as to deny federal funding to nonjudicial placements,<sup>315</sup> thus encouraging states to convert what are in reality voluntary placements into court-ordered placements by virtue of pro forma judicial review.<sup>316</sup>

### 3. Another Source of Limitations on Parental Authority: Public Assistance Goals

One reason that recipients of voluntary child welfare benefits have been so poorly differentiated from those who are coerced is that they come from the same socio-economic group. Most are welfare recipients and almost all are poor. The reasons for this pattern are not hard to fathom. When families with resources suffer a crisis, they acquire the help they need—a babysitter, daycare, psychotherapy, temporary placement with a relative or in a boarding school—by themselves. But for those families that lack social and economic resources, the state is likely to be the only resort. Just like its ancestor agency that administered the poor laws, the voluntary sector of the child welfare system thus serves many of the functions of a public assistance agency.

Therefore, while child protection rationales provide no basis for limiting the rights of parents like Mrs. Adams, public assistance rationales do provide such limits. Indeed, the state has no obligation to provide families with any type of childcare assistance. Its child protection authority serves to justify, but not to require, state action. In other words, the state could, if it chose, provide no child welfare services at all.

Moreover, under current constitutional standards, if the state chooses to provide child welfare benefits, it is probably not obligated to do so in a way that comports with the minimum intervention philosophy. Under the Constitution, the Supreme Court has held that the state may allocate public assistance benefits in any way that is minimally rational, even if such allocation has some impact on the exercise of constitutionally protected parental

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314. The ABA standards are the one major exception, but even these standards devote little attention to voluntary sector issues. ABA STANDARDS, *supra* note 2, at 183-95.

315. 42 U.S.C. § 608 note (1982) (discussing effective and termination dates of 1980 amendment). Funding of voluntary placements had been provided from Sept. 30, 1979, to Oct. 1, 1984.

316. R. HUBBELL, *supra* note 50, at 147-48. The federal child welfare legislation markedly contrasts with federal legislation for children with special educational needs, which grants parents a voice in decisions regarding their children's schooling. See CHILDREN'S DEFENSE FUND, 94-142 AND 504: NUMBERS THAT ADD UP TO EDUCATIONAL RIGHTS FOR CHILDREN: A GUIDE FOR PARENTS AND ADVOCATES (1978) (discussing rights of parents whose children have special educational needs).

rights. Thus, in *Dandridge v. Williams*,<sup>317</sup> the Court held that a state could specify maximum welfare payments regardless of family size, despite the impact of the restriction on the plaintiff's rights of family integrity.<sup>318</sup> Similarly, in *Maher v. Roe*<sup>319</sup> and *Harris v. McRae*,<sup>320</sup> the Court upheld state and federal statutes that provided indigent women with free childbirth treatment but no abortion services, despite the fact that a woman's right to choose whether to bear a child is constitutionally protected.<sup>321</sup>

Whether the Constitution requires some deference to the rights of a parent who seeks state aid is unclear. In *Parham v. J.R.*,<sup>322</sup> the Supreme Court held that the rights of a parent who wished to place his child in a public mental hospital could be subordinated to "the child's substantial liberty interest in being confined unnecessarily for medical treatment"<sup>323</sup> and the state's "significant interest in confining the use of its mental health facilities to cases of genuine need."<sup>324</sup> The Court did stress, however, that the parent should play "a substantial, if not the dominant role" in the placement decision.<sup>325</sup>

Lower federal courts have not agreed on how to harmonize *Parham* with the *Dandridge* line of cases. In *Joyner v. Dumpson*,<sup>326</sup> one federal court of appeals recently relied on *Dandridge*, *Maher*, and *Harris* to dismiss a challenge to a New York statute requiring parents to relinquish legal custody of their children as a condition of their voluntary admission into state foster care institutions.<sup>327</sup> Although a district court had sustained the challenge, finding that the impact of the challenged statute on the plaintiffs' constitutionally protected rights of family privacy and integrity was significant,<sup>328</sup> and that the state had failed to show any legitimate fiscal or administrative justification for its infringement of the parents' constitutional rights,<sup>329</sup> the Second Circuit reversed. Characterizing the plaintiffs as parents who "want their children to enjoy the benefits of a voluntary state subsidized program while they retain the right to dictate how the service should be adminis-

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317. 397 U.S. 471 (1970).

318. *Id.* at 474-75, 486. The Court thus rejected the plaintiff's contention that this restriction violated the equal protection clauses.

319. 432 U.S. 464, 470, 474 (1977).

320. 448 U.S. 297, 326 (1980).

321. *See Black v. Beame*, 550 F.2d 815, 816 (2d Cir. 1977) ("long line of precedents indicating that the state may not unreasonably interfere with . . . the freedom to conceive and raise one's children as one wishes").

322. 442 U.S. 584 (1979).

323. *Id.* at 600.

324. *Id.* at 605.

325. *Id.* at 604.

326. 712 F.2d 770 (2d Cir. 1983).

327. *Id.*

328. *Joyner v. Dumpson*, 533 F. Supp. 233, 240, 241-42 (S.D.N.Y. 1982).

329. *Id.*

tered,"<sup>330</sup> the court held that "[t]he severing of ties cannot be attributed to the state's administration of the program, but to the parents' placement of the child in the program."<sup>331</sup>

Another federal court of appeals recently relied on *Parham* in reversing a district court decision directing the transfer of a voluntarily committed, profoundly retarded child from a state hospital to a community home arrangement over his parents' opposition.<sup>332</sup> Although the hearing master's finding that community living would be "more beneficial" to the child was not clearly erroneous,<sup>333</sup> the parents' opposition to the move, the court held, had not been given sufficient consideration. Citing *Parham*, the court declared that, as the evidence did not support a significant countervailing governmental interest, the parents' wishes should have been given the dominant role in the transfer decision.<sup>334</sup>

While it is unclear whether the Supreme Court will ultimately adopt the *Parham-Pennhurst* or the *Dandridge-Joyner* approach to the rights of parents who seek child welfare services, under either approach the state's interest in conserving scarce resources may be used to justify some limitations on parental rights. Some limitations of this kind are also appropriate. The state does have legitimate fiscal and administrative concerns that must be addressed in designing a voluntary child welfare services program. If, for example, a parent chose to enroll his child in an expensive boarding school when home help would suffice to meet the child's needs, we would not expect the state to pick up the tab.

But it is important to keep in mind that these concerns do not justify unlimited restrictions on parental autonomy, and indeed do not justify most present restrictions on parental rights within the voluntary sector of the child welfare system; parental rights are now routinely ignored even if the result would be less costly to the state. Practices such as offering parents placement when a cheaper service is requested are thus justifiable neither on child protection nor public assistance grounds. They appear to serve no purpose whatsoever.

What these practices in fact represent is confusion between public assistance and child protection interests: child welfare agencies have simply not attempted to differentiate between families in which the child requires protection from his parent, and those in which the child requires protection from inadequate resources. To be sure, in many instances, the line is a thin one. Not only do voluntary service recipients come from the same socio-

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330. *Joyner v. Dumpson*, 712 F.2d at 780.

331. *Id.* at 781.

332. *Halderman v. Pennhurst State School & Hosp.*, 707 F.2d 702, 708-09, 710 (3d Cir. 1983).

333. *Id.* at 705-06.

334. *Id.* at 711.

economic background as those who are coerced, but they share many of the same problems. Physical and mental illness, alcoholism and drug addiction, lack of education, and inadequate social supports are common in both groups, and many voluntary recipients thus need multiple services. But under no minimum intervention standard is coercive intervention permissible when a parent is willing to provide adequate childcare were adequate resources available. Moreover, while the statistical evidence permits only general conclusions, it is safe to say that a significant number of parents who seek state aid could not be coerced into accepting child welfare services even under traditional neglect standards. Some, like the parents in both *Joyner* and *Pennhurst*, have sought state help simply because their child's physical or emotional condition cannot be cared for in the home.<sup>335</sup> Others temporarily need assistance due to a family illness, death, or crisis.<sup>336</sup> To treat these parents like those adjudicated to be neglectful serves no valid state interest.

#### 4. Separating Child Protection and Public Assistance Goals

Since the child welfare system has not distinguished between its public assistance and child protection goals, one could argue for separation of the two functions. A public assistance sector could distribute needed childcare benefits to parents who request them on the basis of their lack of resources, while a child protection sector could impose services on the basis of parental incapacity. Such a bifurcated system is not infeasible in terms of cost or the capacity of child welfare personnel, and would end the confusion of goals that now besets the child welfare system.

But this approach also entails risks. These risks derive from a simple fact: neglected children are popular, but welfare recipients are not.<sup>337</sup> Recent history makes this abundantly clear. At the same time that the federal government has instituted new foster care and adoption programs,<sup>338</sup> it has tightened eligibility requirements for public assistance.<sup>339</sup> Payment rates for

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335. See *supra* notes 303, 306 and accompanying text.

336. See *supra* note 306 and accompanying text.

337. Negative images of welfare recipients are held even by actual recipients. In one study, 58% of the recipients interviewed indicated a belief that more than a quarter of all welfare recipients remain on welfare longer than necessary. Nearly one-half indicated that more than a quarter "cheat" welfare authorities. Most of the recipients also termed the other recipients as "they," not "we." Briar, *Welfare from Below: Recipients' Views of the Public Welfare System*, 54 CALIF. L. REV. 370, 375 (1966).

338. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500.

339. The changes removed an estimated 700,000 children from the AFDC and Medicaid rolls and reduced benefits to others. CHILDREN'S DEFENSE FUND, AMERICAN CHILDREN IN POVERTY ix, 12-131 (1984). Substantial reductions were also made in childcare and maternal and child health services. *Id.* at ix, 17. During the same period child abuse and neglect reports skyrocketed, a phenomenon which some attribute to family tensions exacerbated by the severe cutbacks and concurrent high unemployment. *Id.* at 14-15.

children in foster care also remain considerably higher than those for children who receive welfare benefits in their own homes.<sup>340</sup> The lack of rigid eligibility requirements for voluntary child welfare benefits—made possible because the conditions of receiving such “benefits” are sufficiently onerous to ensure that no one but the truly needy would care to apply—has disguised the fact that it is really public assistance that is being distributed and fostered the impression that the program assists only neglected children. While this image has undoubtedly contributed to stereotyping all parents who use the system as neglectful, therefore ensuring acceptance of limitations on their parental rights, it has also served to increase public and legislative support for child welfare services. By restructuring the system and clearly labeling welfare benefits as such, strong incentives are created for instituting rigid eligibility requirements. The program would also surely forfeit a certain amount of popular and legislative support. Failure to restructure, however, encourages the retention of significant restrictions on parental rights as a substitute for eligibility criteria and ensures the continuing confusion between public assistance and child protection goals.

There is no totally satisfactory solution to this dilemma without a state commitment to provide meaningful child care benefits to all citizens. This approach—analogs include social security and public education—ensures broad popular support, but would undoubtedly require legislation at the federal level and is extremely costly.<sup>341</sup> Given the lack of any tradition of publicly funded childcare in this country and the current retrenchment in public funding for welfare benefits, it is simply not a viable option at this time. What would appear in principle to be the least drastic alternative is simply not achievable. The retention of public assistance functions by the child welfare system—but with greater differentiation between public assistance and child protection cases—is thus the best available solution now. Even this will be extremely difficult to achieve.

##### 5. Standards for Voluntary Child Welfare Services

Standards for voluntary child welfare services must therefore achieve a delicate balance. They must be sensitive to both the minimum intervention

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340. See R. HUBBELL, *supra* note 50, at 127-29 (describing differences and noting that in one community, a family of 10 children that would have received \$8,196 in AFDC payments at home cost \$18,000 in foster care payments). Such differences have been upheld. *Ramos v. Montgomery*, 313 F. Supp. 1179 (S.D. Cal. 1970), *aff'd*, 400 U.S. 1003 (1971).

341. Many other industrialized nations do have universal maternal and child health programs that help identify and treat abused or neglected children without differentiating them and their families from others. A 1975 study of eight nations reported that only the United States and Canada found it necessary to develop special programs for detecting these children. Kammerman, *Cross National Perspectives on Child Abuse and Neglect*, CHILDREN TODAY, May-June 1975, at 34, 36.

philosophy in regard to child protection and the state's interests in regard to cost control and administrative efficiency.

*Acquiring Services.* The minimum intervention approach to child protection supports only very limited restrictions on parental ability to acquire child welfare services. As in-home services pose no apparent dangers, there is no child protection rationale to interfere with a parental decision to obtain any such service whenever desired. The risks posed by short-term placement outside the home also appear to be minimal, and are well within the scope of discretion traditionally permitted parents in the private sector. There is thus no minimum intervention rationale for restricting parental access to short-term foster care either. For a parent's choice to seek institutional placement for his child, the appropriate scope of parental discretion is less clearcut. While parents who place their children privately are, of course, entirely free to send them off to boarding school, the type of institutions the state provides pose greater risks.<sup>342</sup> Moreover, parental competence to evaluate treatment options is particularly suspect at the time of any foster care placement, since such a step usually occurs during a period of family crisis. Given the risks and possibilities of error, even the minimum intervention approach could arguably support careful scrutiny of parental choice in regard to institutional care. This approach also finds support in *Parham*,<sup>343</sup> since the Supreme Court held that the risks of institutionalization in a state hospital for mental health care were sufficient to mandate "some kind of inquiry, using all available sources and including an interview with the child, in order to determine whether the medical standards [for admission] have been met."<sup>344</sup>

Public assistance goals also support scrutiny of parental decisions to place a child in institutional care, due to its higher cost than foster family care or services in the home.<sup>345</sup> These goals also mandate more comprehensive limits on parental choice. The state must be able to ensure that children most in need of services have access to the limited resources available, and that the service granted is the one that meets the child's needs at least cost; if daycare will do, private boarding school should not be required. The child welfare system thus should be able to restrict the availability of its services to those families that meet established eligibility criteria, as long as services are not denied to families in which the child is so endangered that services could be coercively imposed.

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342. See *supra* notes 195-98 and accompanying text (discussing problems with institutional settings).

343. 442 U.S. 584 (1979).

344. *Id.* at 606.

345. See D. FANSHEL & E. SHINN, *supra* note 35, at 12-13 (reporting average annual costs in New York City from 1966-70: residential treatment center, \$22,089; other institutions, \$12,779; family care, \$7,321).



But public assistance goals cannot justify the system's traditional practice of forcing a parent into "volunteering" a child for foster care by virtue of offering no less intrusive alternatives. As in-home services are typically less costly than placement, the state cannot assert public assistance goals as a ground for denying this type of aid. Such a limitation on state authority is particularly crucial in view of the fact that separation of the child from home and parents will disrupt the child's family and community ties and may cause him to suffer some distress and anxiety.<sup>346</sup> If this harm can be averted, the state should not be justified in spending more money than necessary in order to inflict it. The state thus should be able to scrutinize parental decisions in order to ensure that a less costly alternative would not suffice, but it should not be able to impose one that is more costly.

Because of the state's justifiable interests in determining that less expensive alternatives have been fully explored, some type of inquiry is appropriate before a parent's request is acted on.<sup>347</sup> The social work evaluation that child welfare standards currently require as an antecedent to the provision of services is an appropriate format for such an inquiry.<sup>348</sup> This evaluation would typically include interviews with the parents and child, and, where appropriate, the acquisition of further information from schools, relatives, neighbors, and other social agencies that have been involved with the family.

Such an inquiry would also serve the state's interest in ascertaining whether there are grounds for coercive intervention. If investigation reveals such grounds, child protection goals permit greater restrictions on parental rights. If, for example, the parent does not wish services that are adequate to resolve the problems that would support intervention, the state would be justified in imposing them; or, if circumstances would ultimately support removal should in-home services fail, a higher level of agency scrutiny than that desired by the parent may be necessary. In such a case, a parent should be informed that his request will be accepted subject to the same limitations on parental rights that would apply had the case gone to court. Because such an agreement between parent and agency is tantamount to an admission of

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346. See J. BOWLBY, ATTACHMENT AND LOSS II: SEPARATION 8-11, 34-56 (1973) (describing experimental separations and comparing juvenile behavior with and without mothers); J. DUNN, DISTRESS AND COMFORT 73-74 (1977) (discussing response of children to long separation); M. RUTTER, *supra* note 142, at 31-54 (describing short-term effects of maternal deprivation).

347. Such an inquiry also prevents parental misuse of the child welfare system. See *In re* William S., 120 Misc. 2d 790, 790-91, 466 N.Y.S.2d 914, 914 (Fam. Ct. 1983) (parent placed 10-year-old child in foster care to punish him); *In re* Andrew R., 115 Misc. 2d 937, 454 N.Y.S.2d 820 (Fam. Ct. 1982) (parent placed "intelligent, appealing" 13-year-old boy in facility housing delinquents as well as foster children for more than seven months without review).

348. See generally CHILD WELFARE LEAGUE OF AM., STANDARDS FOR SERVICE FOR CHILDREN AND FAMILIES IN THEIR OWN HOMES 21-26 (rev. ed. 1984) (suggesting potential standards); T. STEIN & T. RZEPNICKI, DECISIONMAKING AT CHILD WELFARE INTAKE: A HANDBOOK FOR PRACTITIONERS (1983) (discussing how to conduct evaluation).

neglect, prompt judicial review should be required in order to ascertain the voluntariness of the waiver, and the court should remain involved in the dispositional process as outlined above in part IV.c. If circumstances appear to support state intervention, but there is no dispute between the parent and agency as to the type of services required and level of agency involvement, court intervention should not be required. Instead, the parent should be informed that evidence of parental noncooperation might lead to future court involvement.

Requiring agencies to focus on whether there are grounds for intervention and judicial coercion serves to ensure that the state's valid child protection goals are met, and to differentiate child protection from public assistance needs. But, once again, these changes in traditional practice will not be easily achieved. In order to promote agency accountability, legislation should specify the various services that child welfare authorities are to provide, require that service denials be made in writing with reasons, and provide for prompt administrative review.<sup>349</sup> Moreover, while review should ordinarily be initiated by parental request, when an institutional placement is made, review should be automatic; the lack of precise standards, coupled with the low level of staff training and experience prevalent among child welfare workers, suggests that there is a fairly high risk of error in agency staff decisions about the type of placement needed by the child.<sup>350</sup> This does not mean, however, that a full-blown preadmission hearing is required. The need for immediate treatment of children who cannot remain at home and the desirability of avoiding family discord, which might result from requiring parents to provide evidence on the need for special treatment, suggest instead a prompt postadmission review.<sup>351</sup>

These review mechanisms cannot, however, be expected to achieve remarkable improvements in agency performance.<sup>352</sup> All one can hope is that they will encourage greater deference to parental rights and more careful scrutiny of public assistance goals.

*After Services Are Granted.* When child welfare services are judicially imposed, the court and the foster care agency determine what services the parent is to receive and, if placement is ordered, its location and duration.

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349. Similar standards apply to federal public assistance programs. 42 U.S.C. § 602(a)(4) (1982 & Supp. III 1985) (Aid to Families With Dependent Children); *id.* § 1383(c)(1) (Supplemental Security Income).

350. See B. BERNSTEIN, D. SNIDER & W. MEEZAN, *supra* note 46, at 13-25 (reporting that 42.8% of surveyed placements inappropriate); see also J. KNITZER & M. ALLEN, *supra* note 31, at 39 (reporting high rates of inappropriate institutionalizations).

351. Cf. *Parham v. J.R.*, 442 U.S. 584, 633-36 (1978) (Brennan, J., concurring in part and dissenting in part) (urging that institutionalized juveniles receive traditional due process protection).

352. See *supra* notes 300-01 (describing review procedures that have not been completely successful).

The agency, not the parent, determines what the parent must do to obtain the child's return, and when services and placement are no longer necessary. This assumption of the parental role is appropriate if the parents have been found abusive or neglectful. The minimum intervention philosophy suggests, however, that when families voluntarily receive services, the parent, not the state, should bear principal responsibility for deciding when the need for services has ended and, if the child is in placement, when the child should come home. The mere fact of requesting services from the state does not justify intrusions on parental prerogatives beyond those which would be placed on parents who obtain child care services privately.

Although the family autonomy tradition lends support to this approach, it also provides some support for restrictions on the right of parents to make placement decisions for older children. Although parents generally have broad latitude to determine where their children will live, older children may not be adopted without their consent and their wishes are often determinative in a custody fight.<sup>353</sup> Parent-child conflict—a frequent reason for the placement of older children—has also been considered a valid ground for state intervention and coercive placement.<sup>354</sup>

Public assistance goals provide an even stronger case for limiting parental rights in the case of older children and for further restricting parents' rights generally. Public assistance goals demand that services be terminated as quickly as possible, and that they be administered so that the child's and family's needs are met at the lowest possible cost. Public assistance goals thus require that the state be permitted to impose conditions to ensure that the child goes home as soon as possible. The state would thus be justified in consulting an older child about his placement in order to avoid unnecessary transfers and runaways.<sup>355</sup> The state would also be justified, in all cases, in requiring periodic case review, and imposing requirements on parents which would facilitate return, such as visitation and participation in counseling or other services designed to speed reunion.

But, in most cases, neither child protection nor public assistance goals provide a basis for denying parents in the voluntary sector the final say in their

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353. *See supra* notes 126-27 (describing current practices).

354. *See* IOWA CODE ANN. § 232.125-27 (West 1985) (statutory scheme allowing child, parent, or child's guardian to petition to have family declared in need of assistance); WASH. REV. CODE § 13.32(A) (1986) (allowing child to petition for alternative residential placement); *see also In re Sumey*, 94 Wash. 2d 757, 621 P.2d 108 (1980) (upholding constitutionality of state intervention based on parent-child conflict).

355. Research suggests that encouraging child participation can enhance placement stability. *See* Bush & Gordon, *The Case for Involving Children in Child Welfare Decisions*, 27 SOC. WORK 309, 310 (1982) (foster children who had visited their current placement, had their views solicited on choice of placement, and had chosen their placement significantly more satisfied than group of children for whom at least one of these conditions not met).

child's placement. The administrative costs of giving parents a choice among available placements are obviously negligible. Furthermore, parental selection of a foster family would improve the likelihood that parents would play an active role in the child's upbringing, strengthening his sense of parental competence and thus improving the possibility of reunification. Parents are likely to select a placement that is convenient and facilitates visitation.<sup>356</sup> They are also likely to select a placement in which they feel that a cooperative relationship with the foster caretaker can be maintained.

The issue of parental retention of custody rights after placement is more complicated. Legal custody entails the right to make decisions regarding how the child is cared for and where he resides.<sup>357</sup> Parental retention of custody rights would therefore require the agency to defer to parents on issues regarding the child's day-to-day care and discipline. While this would facilitate parental involvement in the child's upbringing and might enhance the prospects of reunion, it would also impose greater administrative burdens on the state. It is unclear how significant this burden would be. For children in foster family homes, for example, the agency could reduce this burden by encouraging a direct relationship between parent and foster parent. A number of child welfare experts have, in fact, recently advocated greater communication between foster and natural parents as a way of increasing the natural parents' self-esteem, reinforcing their efforts toward return of the child, providing them with role models, and offering a more consistent and stable emotional environment for the child.<sup>358</sup> But conflict between a parent and foster parent could also erupt,<sup>359</sup> which would not only increase administrative costs but might also necessitate an otherwise unnecessary transfer. Moreover, if parental custody rights were absolute, parents could demand a transfer from one home to another, even if such transfer were not in the child's best interests.

On balance, I believe that parents should retain a substantial voice in their children's upbringing, but not absolute custody rights. This approach is similar to that taken in *Parham*<sup>360</sup> and *Pennhurst*,<sup>361</sup> in which the parents were

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356. Parents are more likely to select a family friend or relative, resources that child welfare workers have often ignored. See J. KNITZER & M. ALLEN, *supra* note 31, at 20-21.

357. See *supra* note 42 (quoting definition of custody).

358. See, e.g., Davies & Bland, *The Use of Foster Parents as Role Models for Parents*, 57 CHILD WELFARE 380 (1978) (describing use of foster parents as role models); Ryan, McFadden & Warren, *Foster Families: A Resource for Helping Parents*, in THE CHALLENGE OF PARTNERSHIP: WORKING WITH PARENTS OF CHILDREN IN FOSTER CARE, *supra* note 284, at 189 (same); Watson, *A Bold New Model for Foster Family Care*, PUBLIC WELFARE, Spring, 1982, at 14 (describing foster family as temporary extension of biological family).

359. Ryan, McFadden & Warren, *supra* note 358, at 190. Therefore, some experts advocate contacts only in selected cases. Seaberg, *Foster Parents as Aides to Parents*, in THE CHALLENGE OF PARTNERSHIP: WORKING WITH PARENTS OF CHILDREN IN FOSTER CARE, *supra* note 284, at 209.

360. 442 U.S. 584, 609 (1979).

given a dominant—but not exclusive—role in decisions regarding their children. Parents should retain a presumptive right to make decisions in regard to their child's day-to-day care. They should be notified of and have the right to attend parent-teacher conferences, doctor's appointments, and other events at which decisions about the child's care will be made, and, in most cases, to make decisions without state interference. Only when the agency has reason to believe that deference to parental judgment would be seriously harmful to the child—for example if the parent refused to consent to needed medical care—should the agency take steps to limit parental prerogatives. Before such limitations could be effected, the parent should, of course, be entitled to a hearing. Parental decisionmaking regarding transfer should be more circumscribed, however, due to the greater risks and costs of transfer. Here, the parents' wishes should be solicited and given considerable deference, but other factors should also be considered. In order to effectuate these custody rights, parents should be clearly advised, in writing, of the rights they retain and relinquish at placement. They should also be entitled to a hearing to contest agency decisions of which they disapprove.

The minimum intervention philosophy also suggests that parents should have primary responsibility for determining when services are to be terminated, and when their child is ready to come home. But public assistance goals mandate that the state also have the right to terminate services if, after review, it finds that need has ended or that no progress is being made.

*Feasibility Issues.* Were the voluntary placement system to be reformed as described above, there can be little doubt that it would better serve both its child protection and public assistance goals. But problems can be expected to arise, once again, in regard to feasibility. The model suggested is quite contrary to past agency practice and thus it is likely that, even with changed rules, significant changes in operation will be extremely difficult to achieve. The model incorporates a number of review and hearing provisions, but given the limited gains that have been achieved through foster care review mechanisms,<sup>362</sup> it cannot be expected that review will cure more than the most egregious defects. Moreover, in regard to many agency actions—for example denying a parent's choice of services or placement—review must, of necessity, be initiated by the aggrieved parent. In other public assistance programs, appeal rates have been extremely low,<sup>363</sup> despite rela-

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361. 707 F.2d 702, 709 (3d Cir. 1983).

362. See *supra* notes 300-01 (describing review procedures that have not been completely successful).

363. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of Social Welfare Claims*, 59 CORNELL L. REV. 772, 784 (1974) (reporting short-term studies showing two percent appeal rate in public welfare programs; one percent appeal rate in Social Security disability).

tively high agency reversal rates<sup>364</sup> and continuing agency abuses of discretion.<sup>365</sup> Since clients of these welfare programs have the same background as parents who use the voluntary sector of the child welfare system, markedly different results cannot be anticipated.

Once again, the least drastic alternative manifests its elusiveness. A bifurcated system is not feasible. No other alternatives are available. The paucity of realistic choices and the difficulty of meaningful change simply ensures that only the most modest improvements are likely to be achieved. For many children who are voluntarily placed, along with many who are coercively placed, courts will thus be forced to confront the question of when parental rights to obtain the child's return should be terminated.

#### E. TERMINATING FOSTER CARE PLACEMENT

##### 1. The Issues

When should a parent lose the right to regain his or her child?<sup>366</sup> Traditionally, statutory standards for termination of parental rights to regain the child relied on parental fault—the same ground that provided a justification for state intervention.<sup>367</sup> Thus, after a child had been in placement for some time, mustering the evidence to support a termination petition was often difficult. Foster care agencies also typically did not undertake to bring petitions to terminate parental rights after a child was in care.<sup>368</sup> The usual course, even for parents who would clearly never retrieve their children, was to preserve the status quo.

Minimum intervention advocates have uniformly urged that termination should be based primarily on the length of time the child has remained in foster care, and that termination proceedings should be brought quickly.<sup>369</sup> Two reasons have been advanced to support this approach: the child's

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364. See *supra* note 300 (describing reversal rates between 23% to 65%).

365. N.Y. Times, Sept. 28, 1981, at A15, col. 2 (describing abuses in AFDC program).

366. In an earlier article, Garrison *supra* note 16, I urged that termination of parental *visitation* rights should be considered separately from termination of parental *custody* rights and, based on the evidence regarding the value of continuing parental contact for most children, *id.* at 55-74, that visitation rights should not be terminated unless there was clear and convincing evidence that such termination was necessary in order to protect the child from specific significant harm that could not be averted without termination. *Id.* at 495. When speaking of termination herein, I am thus referring to termination of custody rights only.

367. Katz, Howe & McGrath, *supra* note 133, at 68 (typical termination statute includes neglect, abandonment, moral unfitness, and parental consent as grounds for termination).

368. See R. HUBBARD, *supra* note 50, at 137-38 (describing infrequency of termination petitions); Wald, *Standards*, *supra* note 2, at 689 (few statutes require agency to explore need for termination).

369. See *supra* note 92 and accompanying text (describing various termination proposals); Garrison, *supra* note 16, at 449-52 (describing and comparing termination standards inspired by minimum intervention philosophy).

chances of returning home decrease the longer he is in care, while his chances of experiencing multiple placements increase.<sup>370</sup> Termination of parental rights has therefore been urged as necessary to provide children at risk of long-term foster care with stable and permanent homes.

Two types of termination proposals have emerged from this thinking. Goldstein, Freud, and Solnit have proposed that a child's foster parent (or any other person who had continuously cared for the child) could, by petition, divest the parent of the right to regain the child after that foster parent had cared for the child for a fixed period of time.<sup>371</sup> Other standards provide for termination of parental rights after the child has been in care for a fixed period of time, regardless of how long he has been in the care of a particular foster parent and whether that foster parent wants to adopt him.<sup>372</sup> These standards vary in the amount of time required as a precondition to termination and whether other factors, such as parental conduct and agency performance of its obligations, should be taken into account.<sup>373</sup>

What approach to termination is best? Ideally, a termination standard should serve several goals: first and foremost, it should protect children from harm occasioned by instability or being returned to a home which has ceased to have real meaning. But, in keeping with the family autonomy tradition, it should provide parents with an adequate period to resolve the problems that necessitated placement and adequate notice of what they must do to avoid termination. In keeping with the feasibility criterion, it should also give child welfare agencies adequate incentives to ensure that parents receive services needed to achieve reunification. These goals are not necessarily harmonious. If, for example, the statute requires agency efforts at reunification as a precondition to termination, some children may stay in foster care for lengthy periods, perhaps subject to multiple placements, because the agency has not performed as expected. As child protection is a paramount goal, we look first at the evidence on children's needs in relation to the termination decision.

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370. Mnookin, *supra* note 2, at 634; Wald, *Standards*, *supra* note 2, at 691.

371. GFS II, *supra* note 2, at 46, 194-95. Goldstein, Freud, and Solnit permit an exception to automatic termination when: a child over five at the time of placement had been in continuous care and control of his parent for not less than three years; and the child has not been separated from his parents because they inflicted or attempted to inflict serious bodily injury upon him or were convicted or acquitted by reason of insanity of sexual offense against him; and the court determines that the parents are still psychological parents of the child and that his return to them would provide the least detrimental alternative. *Id.*

372. See *supra* note 92 and accompanying text (collecting various proposals); Garrison, *supra* note 16, at 452 (describing proposed ABA standards).

373. See Garrison, *supra* note 16, at 452 (describing various sets of standards).

## 2. The Need for Termination: The Evidence

While the evidence is not conclusive, it appears that multiple placements may have deleterious effects on a child in foster care.<sup>374</sup> A longer period in care, of course, increases the risks of multiple placements.<sup>375</sup> Although figures vary from one study to the next, only a small number of children suffer multiple placements during their first year in foster care.<sup>376</sup> By the time five years have passed, however, it appears that more than a third of the children who remain in care have suffered three or more placements.<sup>377</sup> There is also some evidence, however, that the risks of multiple placement decline after three years in placement. One researcher found that, while children who had been in care for at least three years had a much greater chance of having experienced unstable care than children in care for less than three years, there were no significant differences in the likelihood of unstable care for children in care for more than three years.<sup>378</sup> It should also be kept in mind that, even after five years in foster care, most children experience only one or two placements. It is therefore unclear whether extended foster care poses significantly increased risks of multiple placements.

It is clear that the likelihood that the child will go home does diminish over time. One group of researchers found that almost sixty percent of the children who went home within five years did so during the first two.<sup>379</sup> Moreover, parental involvement and contact with the child—the best predictors of return home—also decline over time. In one study, seventy-one percent of the children who had been in care for six years or more were unvisited.<sup>380</sup>

The empirical evidence thus suggests that after several years in placement, a child may need protection against instability, and that terminating his par-

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374. See *supra* notes 158-63 and accompanying text (describing results of various studies).

375. See D. FANSHIEL & E. SHINN, *supra* note 21, at 141-43 (children in placement for long periods of time experience higher turnover rates); Fanshel & Maas, *Factorial Dimension of the Characteristics of Children in Placement and Their Families*, 33 *CHILD DEV.* 123, 128 (1962) (same).

376. D. FANSHIEL & E. SHINN, *supra* note 21, at 140 (2.1% of children discharged during first year experienced three or more placements). But see T. PARDECK, *THE FORGOTTEN CHILD: A STUDY OF THE STABILITY AND CONTINUITY OF FOSTER CARE* 38 (1982) (18% of children in foster care less than three years experience three or more placements).

377. D. FANSHIEL & E. SHINN, *supra* note 21, at 140 (45.8%); T. PARDECK, *supra* note 376, at 38 (32% of children in care more than three years had experienced three or more placements).

378. See T. PARDECK, *supra* note 376, at 38-39 (children in care for as long as 17 years have no greater chance of suffering three or more placements than those in care for three years).

379. D. FANSHIEL & E. SHINN, *supra* note 21, at 121; T. STEIN, E. GAMBRILL & K. WILTSE, *supra* note 218, at 87-88 (chances of leaving care markedly reduced after placement for three or more years; from an 82% chance in the first three years to a 55% chance of leaving foster care after the first three years for youngsters in experimental group and from 44% to 26% for youngsters in control group).

380. D. FANSHIEL, *supra* note 33, at 30-31.



ents' right to regain custody in order to provide it is not likely to conflict with the child's prospects for reintegration into his family. For children in care only a year or two, however, the need for termination to protect against instability is slight and the possibility of return home is still very high.

### 3. Feasibility Issues and the Family Autonomy Tradition

The feasibility criterion suggests that the rate of multiple placements will probably remain constant, and that agency efforts in reunifying families are not likely to improve appreciably. The likelihood of improvement would be even less if termination were permitted simply on the basis of passage of time, because such a standard provides no incentive for improved agency performance. There is some evidence that specially trained caseworkers with smaller caseloads can achieve more returns than can regular caseworkers with "normal" loads, even when returns appear quite unlikely.<sup>381</sup> But large scale efforts of this sort do not appear likely, and the limited resources available for casework suggest that continuing efforts for years on end should not be made in "hopeless" cases. Average stays in foster care have been declining,<sup>382</sup> however, and for most of these children a return home,<sup>383</sup> rather than termination of parental rights, is the reason for the shortened stay.

While the family autonomy tradition generally demands deference to parental rights, these rights have been given considerably less weight when parents have voluntarily abandoned their responsibilities. The Supreme Court has held that unwed fathers who have not willingly shouldered parental responsibilities can be denied the right to consent to their child's adoption,<sup>384</sup> and, when a parent leaves a child with a custodian for a protracted period without any meaningful involvement in the child's life, courts have frequently upheld the custodian's right to retain the child permanently.<sup>385</sup> The family autonomy tradition thus supports a policy of terminating parental rights when parents have not remained involved with their children and have

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381. E. GAMBRILL & T. STEIN, *supra* note 292, at 505 (project workers found permanent placements for 41% of cases as opposed to 25% for control group); OREGON PROJECT, *supra* note 157, at 4.2-3 (project workers found placements for 66% of cases as compared to 43% and 46% for control groups).

382. *See supra* note 66 and accompanying text (describing findings of various studies).

383. Natural parents have proven to be the most likely source of permanency for children in most studies to date. *See* D. FANSHEL & E. SHINN, *supra* note 21, at 115 (after five years 56% of surveyed foster children returned to natural parents while 4.6% adopted); E. GAMBRILL & T. STEIN, *supra* note 292, at 505 (48% of project and 64% of control group who found permanent placements returned to natural parents while 25% of project and 17% of control group adopted); Lawder, Poulin & Andrews, *supra* note 30, at 246-47 (after five years 61% of surveyed children returned to their natural parents while 16% adopted). *But see* OREGON PROJECT, *supra* note 157, at 4.1 (40% of project children adopted and 26% returned to natural parents).

384. *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978).

385. *See supra* note 122 (citing relevant cases).

made no serious efforts to obtain their return. However, it does not support termination for parents who remain actively involved with their children and who are working to achieve reunification.

#### 4. Proposed Standards

In light of the evidence and other criteria, none of the standards proposed to date by minimum intervention advocates is totally satisfactory. The Goldstein, Freud, and Solnit proposal protects the child who has formed ties to a foster parent who wants to keep him, but does nothing for children who do not develop such ties. Children in this group, of course, are most likely to suffer multiple placements. The standards based on passage of time in foster care alone have the advantage of including all children, but the disadvantage that they do not assure a child of an ongoing stable placement; very few of these time-based standards require the existence of an available permanent home as a condition of termination.<sup>386</sup> The net result may be to leave the child at continuing risk of multiple placements but without any prospect of returning home.<sup>387</sup> Moreover, because both the Goldstein, Freud, and Solnit standards and those based solely on passage of time ignore parental efforts and involvement, they risk terminating the rights of parents who might well regain their children. They also ignore the problem that agencies have been notoriously lax in providing parents with the assistance necessary to cure the problems that caused removal.

On balance, given the low risks of instability during the early years of placement and the fact that many parents regain their children during this time, I believe that termination should not be permitted before the child has been in care for at least three years. Indeed, it can be argued that a three-year period is too short, given that the evidence in regard to both the likelihood and the effects of instability is inconclusive. But agencies still fail to initiate termination proceedings even when there is no possibility of a return home,<sup>388</sup> and the prosecution of a termination action may itself be quite time consuming. Because of these problems, I believe that automatic initiation of a termination petition after three years in placement is appropriate.

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386. At least two standards do require the existence of an available permanent home as a precondition to termination. See ABA STANDARDS, *supra* note 2, at 175; MODEL DISSOLUTION OF PARENT-CHILD RELATIONSHIP Act § XXI(B)(3) (1976), reprinted in M. HARDIN & P. TAZZARA, TERMINATION OF PARENTAL RIGHTS: A SUMMARY AND COMPARISON OF GROUNDS FROM NINE MODEL ACTS 40, 41 (ABA Nat'l Legal Resource Center for Child Advocacy & Protection 1981).

387. This is a significant risk. For example, in New York City, 39.6% of the children available for adoption in 1980 had been available for more than a year. NEW YORK STATE CHILD WELFARE INFORMATION SERV., CHARACTERISTICS OF CHILDREN IN CARE OR RECENTLY DISCHARGED (1980) (copy on file at *Georgetown Law Journal*).

388. See D. FANSHEL, *supra* note 33, at 138-39 (in 37% of surveyed cases both mother and father unavailable); see also R. HUBBELL, *supra* note 50, at 136-38 (describing infrequency of termination petitions).

But termination itself should not be automatic. In order to ensure that the rights of parents who are committed to their children and willing to work to achieve their return are not terminated, the state should be required to show: (1) the existence of conditions that require continued foster care; and (2) the parent's failure to make substantial progress toward achieving reunification, despite meaningful assistance from the foster care agency. If foster care were more damaging, it might be necessary to permit termination after three years without mandating that agencies perform their duties. But, since the evidence does not establish that foster care is damaging to most children, a three-year period coupled with these requirements is reasonable.<sup>389</sup>

Termination should also be available without placement in the foster care system. If a parent has abandoned his child and cannot be found, has been sentenced to life imprisonment or has an incurable mental disorder, there is no reason for the child to remain in foster care before terminating the parent's rights; the parent could not, under these circumstances, make progress toward achieving the child's return home. Termination should therefore be available in case of abandonment or if, due to mental or physical illness, mental retardation, or long-term imprisonment, the parent is incapable of providing adequate child care in the foreseeable future.

A showing that one of these grounds exists should be a necessary, but not a sufficient, basis for termination. No parent's rights should finally be terminated unless and until a permanent placement is available. If the aim of termination is the achievement of stability, there is no reason to terminate unless such stability is in fact available. All termination orders should therefore be conditioned on the child's adoption by a new family.<sup>390</sup>

### CONCLUSION

No child welfare system can operate perfectly. Our knowledge of child

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389. Most termination standards drafted by minimum intervention theorists do not mandate agency performance as a precondition to termination. *But see* ABA STANDARDS, *supra* note 2, at 162-63 (mandating agency satisfaction of court-ordered obligations as precondition to termination of parental rights when child involuntarily placed but not when voluntarily placed); MODEL DISSOLUTION OF PARENT-CHILD RELATIONSHIP ACT § IX(B) (1976) (if child has been subject to court jurisdiction and parent has made "reasonable efforts to maintain a continuing relationship with the child and to adjust his circumstances . . . to provide for the child's return and . . . it is probable that the provision of such services would be successful in effecting the return of the child within the reasonable future," agency failure to provide social services is a defense), *reprinted in* M. HARDIN & P. TAZZARA, *supra* note 386, at 40, 41. Some standards do permit the court to consider agency efforts as one factor in determining whether termination is appropriate. *See, e.g.*, MODEL ACT TO FREE CHILDREN FOR PERMANENT PLACEMENT § 4(c), 4(d)(2) (1986), *reprinted in* Katz, *Freeing Children for Permanent Placement Through a Model Act*, 12 FAM. L.Q. 203, 217-18 (1978).

390. In order to enhance the child's chances of achieving stability while in foster care, foster parents who have cared for a child for a continuous period of two years should also be entitled to a judicial hearing before the child is removed from their care except for return to his parents.

development is limited, as is our commitment and ability to cure the family problems that necessitate state intervention. Competing, and sometimes incompatible goals, must be harmonized. Each generation of reformers, operating within these constraints, tries anew to effect improvements. Some of these ideas work, but seldom do they work as well as their proponents had hoped or promised. Often the "solutions" cause new problems, creating the need for new reforms.

The most recent reform movement has sought to create a new child welfare system based on the philosophy of minimum intervention. While the previous reform movement succeeded in removing children from institutions and establishing a right to minimal public assistance benefits, it failed to accomplish its central aims of preserving families that could be kept together and rehabilitating those who could not. The previous reform movement also created new problems of unnecessary and protracted placement. The new reform movement has succeeded in reducing the use and length of foster care placement, but at the risk of depriving children who genuinely need state assistance. Proposed standards for intervention have been drawn too narrowly. The dangers of placement have been overemphasized, and insufficient attention has been paid to improving child welfare practice. The minimum intervention movement has also failed to initiate meaningful reforms in the voluntary sector of the child welfare system. This article has attempted to correct these deficiencies, to chart a more balanced, realistic course for child welfare reform, and to emphasize the limits of what reform can accomplish.

The problems that the child welfare system confronts, however, can be expected to remain with us. The need for child welfare services—and the difficulty of providing them successfully—springs largely from the chronic stresses and deprivations of poverty. It is no accident that virtually all of the children in foster care come from families that are impoverished or that children who stay in foster care seem to fare better than those who go home. If we, as a society, are not willing to give families sufficient support to avert the extreme stresses that produce abuse, neglect, and family dysfunction, then we must expect a population of damaged children with diminished potential. And given our limited therapeutic abilities and commitment to rehabilitation, we must expect that child welfare services will fail to help many of these children.

The child welfare system thus functions much like a hospital located next to a mosquito-filled swamp that provides diagnostic and therapeutic services to malaria victims. The least drastic alternative, a rational observer would probably say, is not better diagnosis and treatment, but draining the swamp. The least drastic alternative for child welfare problems is not, then, embodied in the standards proposed herein anymore than it could be found in the plans of the hospital administrator; child welfare administration must take its place

in the broader context of public assistance administration in order to achieve meaningful least drastic alternatives for children and families. Unless we reduce poverty and its related stresses, the least drastic alternative will remain an elusive goal.

The artificial separation of child welfare administration from this broader context is not, of course, an accident. It reflects values, prejudices, and politics that are deeply rooted in American tradition and difficult to eradicate. The standards proposed are thus premised on the assumption that the demographics of child welfare work will remain constant. But children's advocates must begin to focus on the larger picture, for only when there is a national commitment to provide families with sufficient resources to ensure adequate child care can the least drastic alternative for needy children truly be achieved.