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OF CHILD WELFARE AND WELFARE REFORM: THE IMPLICATIONS FOR CHILDREN WHEN CONTRADICTORY POLICIES COLLIDE

KAY P. KINDRED*

On August 22, 1996, President Bill Clinton signed into law the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (hereinafter, "PRWORA" or the "welfare reform law"), which replaced the Aid to Families with Dependent Children Program ("AFDC"), the nation's primary cash-assistance program, with the Temporary Assistance to Needy Families Program ("TANF"), funded by block grants to states.¹ PRWORA represented a dramatic change in social welfare policy in the United States. Among the many changes effected by the law in the nation's social welfare programs were: (1) the increased authority of the states over cash-assistance programs for needy families, giving states flexibility in designing programs within the block grant scheme and significantly reducing federal oversight; (2) the establishment of work requirements for recipients of assistance who are able to work, to be enforced through work participation rate requirements in the states; (3) the establishment of a five year time limit on the receipt of federally funded assistance; and (4) the generation of about \$54 billion in social welfare program savings, largely by reducing food stamp expenditures and benefits to immigrants.² One of the most significant changes resulting from the welfare reform law is that welfare is no longer a federally guaranteed entitlement on which a family can rely to support needy children. PRWORA eliminated any entitlement to assistance by recipients, as well as the federal guarantee of matching assistance to states.³

In 1995, just one year prior to enactment of PRWORA, more than 14 million children were classified as poor in the United

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1. Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of Title 42 of the United States Code).

2. Important changes with regard to food stamp expenditures and benefits to immigrants that lessened the severity of the legislation in those areas were made as part of the Balanced Budget Act of 1997, Pub. L. No. 105-33, 111 Stat. 1344 (1997).

3. For discussion of the features of PRWORA, particularly TANF, see *infra* text accompanying notes 90-96.

States.⁴ Although the federal welfare reform law ostensibly sought to reduce the number of children living in impoverished single-parent families, child well-being received little direct attention during the pre-enactment debates. The goal of the reform was to increase self-sufficiency by promoting marriage and requiring mothers to move from welfare to work.⁵ A number of scholars and commentators cautioned, that as a result of the reform of the nation's social welfare system, the numbers of poor children would swell. What would become of the children of poor families without the safety net of federal public assistance?⁶

As Congress considers the reauthorization of the welfare reform law, critical reexamination of the goals of the law, its interconnection with the existing child welfare structure, and the impact of this intersection on the development and well being of children are crucial.⁷ Did the law accomplish its stated goals? What has been the effect of the law on children from low-income families? How might welfare programs be structured to work more effectively with the child welfare system? How can the interplay of welfare reform and child protection services be structured to enhance prevention over protection? In considering reauthorization of the 1996 welfare law, issues affecting children must take center stage.

I. INTRODUCTION

The debates surrounding welfare reform prior to the enactment of PRWORA seldom included genuine consideration or direct discussion of how best to reduce child poverty, or of the likely effect

4. ELEANOR BAUGHER & LEATHA LAMISON-WHITE, U.S. DEPT OF COMM., PUB. NO. 160-194, *POVERTY IN THE UNITED STATES*: 1995, vii, 61A (1996) [hereinafter *POVERTY IN THE U.S.*]. See discussion *infra*, Part I(A).

5. 42 U.S.C. § 601(a)(2)-(4) (1997). In an effort to enhance self-sufficiency, three of the four stated purposes of TANF relate to family formation: promoting marriage, reducing out-of-wedlock births, and encouraging the formation and maintenance of two-parent families. *Id.*

6. Just prior to passage of PRWORA, the Urban Institute released a study which concluded that welfare reform as reflected in the new legislation would increase the number of children in poverty in the United States by approximately 1.1 million. Barbara Vobejda, *Welfare Measure Would Increase Child Poverty, Study Says*, WASH. POST, July 26, 1996, at A11.

7. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 expired in the Fall of 2002. Congress began consideration of the reauthorization of the Act in Spring 2002, the conference committee of House and Senate are expected to present bills for resolution during the Fall session. J. Lawrence Abner, In *Poverty, Framing the PRWORA/TANF Reauthorization Debate*, Nat'l Center for Child., at <http://www.nccp.org/news/spsuo2/1sprsumo2.html> (last visited Apr. 10, 2003).

the reform efforts would have on the well being of children of poor families, even though proponents of PRWORA presumed that the increased promotion of job training, work and marriage would benefit children.⁸ The lack of critical analytical attention to children is not uncommon when the subject is the development of welfare programs. Discussions of welfare policy and those of child welfare and protection have rarely intersected though, in reality, the nature and availability of assistance programs for the poor affect poor children, both directly and indirectly.⁹ However, the potential impact of the many changes brought about as a result of passage of the PRWORA raised concerns among socio-legal observers that the numbers of impoverished families would sky rocket, forcing many more destitute children into foster care.¹⁰ It was feared that the reduction in overall benefits and spending on poor children resulting from incentives for states to cut welfare spending,¹¹ from the federally imposed five-year time limit on receipt of assistance (with shorter state time limits permitted),¹² and from the imposition of work requirements without adequately addressing the need for safe and affordable childcare,¹³ would result in wider and deeper poverty and increased unemployment, with devastating consequences for poor children.

It appears, however, that the picture of the state of child well-being presented five years after enactment of the welfare reform law is somewhat murky. The improved economy throughout the 1990's and the changes in welfare laws in 1996 did help many poor families move from welfare into jobs, and thus contributed to the

8. Public debate of welfare reform centered on: promoting devolution of policymaking authority from the federal government to the states; reducing government spending; requiring work instead of welfare and imposing time limits for the receipt of welfare; promoting self-sufficiency; restricting benefits eligibility for legal immigrants; and reducing out-of-wedlock births. See generally Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL'Y 89 (2002).

9. See Karen Syma Czapanskiy, *Parents, Children, and Work-First Welfare Reform: Where is the C in TANF?*, 61 MD. L. REV. 308, 310-11 (2002). See also Brenda G. McGowan & Elaine M. Walsh, Child Welfare League of America, 79 POLICY CHALLENGES FOR CHILD WELFARE IN THE NEW CENTURY, CHILD WELFARE 1 (2000).

10. See, e.g., Shannon DeRouselle, *Welfare Reform and the Administration For Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403 (1999); Katherine Hunt Federle, *The Consequences of Welfare Reform for Children*, 60 OHIO ST. L.J. 1505 (1999); Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990's Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL'Y & L. 3 (1996).

11. 42 U.S.C. §§ 601-603 (1997).

12. *Id.* at § 608(a)(7)(A).

13. *Id.* at § 607.

increased number of children living in low-income *working* families.¹⁴ However, those families typically earned incomes near the poverty level, which in the year 2000 amounted to roughly \$26,000 for a family of four.¹⁵ In 2000, the number of children living in families on the verge of poverty surpassed 10 million after steadily increasing throughout the 1990s.¹⁶ Many families that left welfare entered low-paying jobs without employer-provided benefits; roughly 40% of the families that left welfare are not working.¹⁷ Further, overall economic resources for many poor families declined as a result of the combined loss of cash-assistance and food stamps.¹⁸ Disturbingly, this decline in resources occurred during a period of relatively sustained economic growth nationwide. However, in the wake of the September 11, 2001 terrorist attack on the World Trade Center in New York, more than one million jobs were lost, and according to the U.S. Bureau of Labor Statistics, the increase in the jobless rate has been particularly severe among blue-collar workers in low-wage jobs in manufacturing, transportation and service jobs; the very types of jobs welfare recipients would be likely to obtain.¹⁹

In light of the general economic downturn that began after September 2001, Congress' reauthorization of the welfare reform law should include a reconsideration of the objectives of the welfare law. In passing PRWORA, Congress identified as fundamental problems of the former system the long-term dependency on welfare benefits, the large numbers of out-of-wedlock births, and the lack of two-parent families among welfare recipients. Thus, the primary goals of the original reform legislation were promotion of job pre-

14. In August 1996, 4.4 million families were receiving government cash assistance. As of September 2000, the number of families receiving cash assistance had declined to 2.2 million. U.S. DEPT OF HEALTH AND HUMAN SERVICES, ACF DATA AND STATISTICS: U.S. WELFARE CASELOADS INFORMATION, at <http://www.acf.dhhs.gov/news/stats/afdc.htm> (last visited Apr. 10, 2003).

15. David Ho, *Children Near Poverty Tops 10 Million in 2000*, LAS VEGAS REV. J., May 23, 2002.

16. In 1990, 7.6 million children, or 12.2% of all American children, lived in low-income families with at least one parent working. By 2000, the number of children living in such low-income families had increased to 10.2 million, or 14.7%. *Id.*

17. WENDELL PRIMUS, ET AL., CENTER ON BUDGET & POL'Y PRIORITIES, THE INITIAL IMPACTS OF WELFARE REFORM ON THE INCOMES OF SINGLE-MOTHER FAMILIES 16 (Aug. 1999).

18. Census bureau data indicate that between 1995 and 1997, total annual resources for the poorest 10% of single-mother households declined from \$5,687 to \$4,873; among the next poorest 10%, resources declined from \$11,584 to \$11,265. *Id.* at 16.

19. *The Employment Situation: November 2001, Hearing Before the Joint Econ. Comm.*, 107th Cong. 18-23 (2001) (Statement of Lois Orr, Acting Commissioner, Bureau of Labor Statistics).

paration, work and marriage among welfare recipients, along with increasing administrative flexibility for the states. Ostensibly, the numbers of children growing up in poor, single-parent households would be reduced by promoting marriage and requiring mothers to move from welfare to work. But reduction of child poverty and prevention of its effects, including prevention of child maltreatment associated with poverty,²⁰ were not central to the development and structure of the legislation. As Congress considers reauthorization of PRWORA, the time is right for making the elimination of child poverty and its effects a direct and primary goal.

In a related vein, many child welfare researchers consider the major weakness of the child protection system to be its lack of attention to prevention.²¹ Concentrating most of the resources of the child protection system at the end of the services continuum results in a greater need for child welfare intervention and treatment than would be required if families were provided support before their problems reached crisis levels that put children in jeopardy.²² Under current practice, the child protection system focuses the provision of family support services on families who enter the system as a result of child maltreatment report mechanisms, i.e., in response to reports of child neglect or abuse. In some states, support services are available only after a maltreatment report to protective services has been filed.²³ In the case of reported child maltreatment, the response of the child protection system is all too often to remove a child from the home and to place him or her in foster care. In cases of child neglect, as opposed to child abuse, this response may be primarily a function of a greater availability of funding for foster care than funding for other alternative services. Thus, removal and out placement often becomes the default child protection method of choice. As a result, the number of children entering temporary foster care continues to rise, and the number of children in foster care "limbo" grows.²⁴

20. Many of the social ills associated with poverty, such as unemployment, inadequate housing, inadequate nutrition, homelessness, improper medical care, exposure to violence, drug abuse, play a pivotal role in child maltreatment as well.

21. See generally Sarah H. Ramsey, *The United States Child Protection System: A Triangle of Tensions*, 13 CHILD & FAM. L. Q. 25 (2001).

22. See generally Jane Waldfogel, *Protecting Children in the 21st Century*, 34 FAM. L. Q. 311 (2000).

23. See generally Ramsey, *supra* note 21.

24. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care - An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 122 (1995).

In 1991, the National Commission on Children published its final report calling for the creation of a national child and family policy strategy.²⁵ It proposed system-wide reform at the federal, state and local levels, emphasizing flexibility in spending services intended to increase support for families and children before, during, and after placement. Multiple interrelated changes in the fiscal structure of programs, in the termination of parental rights at the state level, and in awareness and involvement in these programs at the local community level were advocated.²⁶ As suggested by the National Commission, reform of child protection policy and practice requires broad-based interdisciplinary changes—drawing on the interrelated efforts of social services agencies, courts, and state legislatures and administrative agencies.²⁷ Reform efforts must encompass considerations of family preservation measures, reasonable efforts requirements, flexible funding mechanisms, timely court processes and well-trained child welfare professionals. A national policy strategy should take into account the role that poverty plays in child maltreatment, and development of such a strategy should encompass consideration of the structure and impact of federal welfare reform.

Constitutional doctrine supports this change in perspective. State intervention in the family implicates fundamental rights of privacy. Intervention in the form of removal is a serious intrusion on family privacy. Such intervention is constitutionally permissible only if the state demonstrates a compelling interest, and uses narrowly tailored means to accomplish its purpose.²⁸ The lack of emphasis on prevention in child protection policy as it is currently executed with respect to poor children and their families often results in an undermining of family privacy. Though the state's purpose in child protection is compelling, the manner by which it typically seeks to achieve its objective is unnecessarily intrusive on the privacy rights of poor families. Child protection policy reform that provides all families in contact with the child protection system (including birth, foster or adoptive families) access to services early on that can help them handle or eliminate everyday problems and thus avoid disrupting the family by removing the child would

25. NAT'L COMM. ON CHILD., BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES (1991).

26. *Id.* at 310-41 (noting the failure of disconnected, narrowly focused service systems to facilitate functioning families).

27. *Id.* at 312-13.

28. *See, e.g., Moore v. East Cleveland*, 431 U.S. 494, 499 (1972) (holding that piracy with respect to family life is protected by due process).

increase the long-term well-being of the child and minimize the intrusion on family privacy. Thus, the reform of child protection policy requires a new perspective on the interrelation of child protection policy and welfare policy.

As Congress considers the reauthorization of PRWORA, the challenge for policy makers and service providers at all levels of government is to view the problems of welfare reform and those of child welfare and protection as interdependent. Alleviating the harm that poverty causes for children of the working poor and the unemployed is beyond the scope of the child protection system alone. Similarly, achieving the goal of promoting work and reducing families' dependence on government benefits cannot alone produce positive outcomes for child well-being. Change must occur at multiple levels in order for reform to succeed. A shift in the child protection paradigm, accompanied by a renewed commitment by government to help meet the needs of economically struggling families, could have a positive impact on efforts to enhance child welfare, to prevent child maltreatment and to reduce the strain on an already overburdened child protection system. While the primary goal of welfare reform, to increase adult economic self-sufficiency, and the goal of the child protection system, to ensure safe and nurturing lives for children, may be appreciably different, they need not be irreconcilable. The challenge is to move past the rhetoric and politics of the welfare reform debate and genuinely focus on the day-to-day needs of working poor and unemployed families with children, placing particular emphasis on eliminating, or at least significantly reducing, child poverty and its effects. Viewing the welfare and child protection systems as complementary could provide the foundation for much needed changes in child protection practice and create a stronger social welfare system. Part I of this article examines aspects of child poverty in the United States. It looks at the effectiveness of pre-1996 social welfare programs designed to alleviate the effects of child poverty and the extent to which those programs have been modified or eliminated by welfare reform. It then discusses the development of child protection policy and practice in the United States. It considers the impact of poverty in the operation of the foster-care system and the ability of the existing foster-care system to respond to the increase in the number of poor children likely to enter the system as a result of changes in welfare law and the economic downturn. Part II examines existing family rights doctrine, and the juxtaposition of the constitutional limitations imposed on state intervention in family affairs with the public duty to children arising under

common law. In Part III, I consider the relationship between constitutional law and child abuse and neglect, and suggest that existing constitutional doctrine supports a change in child protection policy and practice in light of changes in social welfare law and the existing state of the economy. Finally, Part III suggests issues for consideration in the welfare reauthorization discussions and recommends ways to restructure income support programs and family support services to better protect at-risk children while lessening the intrusion on family privacy.

PART I. CHILD POVERTY, WELFARE REFORM AND CHILD PROTECTION: HISTORICAL BACKGROUND AND SOCIAL CONTEXT

A. *Child Poverty in the United States*

The composition of the ranks of the poor has changed considerably over the past twenty-five to thirty years. While child poverty rates have remained high since the middle of the 1970s, the poverty rate of the elderly, once considered the poorest group, has dropped significantly. Due in large part to successful government economic security measures, such as social security and Medicare, the elderly poverty rate has decreased from 35% in 1960 to 11% in 1995.²⁹ Since 1969, the economic situation of children has steadily deteriorated. "From 1969 to 1979, the percentage of white children living below the poverty line increased more than 25 percent (from 10.5 percent to 13.4 percent), while the percentage of nonwhite children living in poverty increased from 41.5 percent to 42.1 percent."³⁰ By the 1970's indigent children had replaced the indigent elderly as the largest group.³¹ The poverty rate for children under eighteen

29. With the enactment of the Social Security Act in 1935 the federal government implemented a mandatory social savings program to ensure people income in their later years. The Social Security system successfully redistributed a large amount of income from younger to older people, making the spending power of the elderly (relative to their needs) equal to or greater than that of most other groups in society including families with children. With the passage of Supplemental Security Income (SSI) legislation in 1972 the economic situation of the elderly underwent additional, significant positive change. In 1966, 40% of people aged sixty-five or older lived below the poverty line; by 1979 this number had been reduced to 16%—a 60% decline in poverty among the elderly. From 1979 to 1989 the number had dropped to 9%. Significantly, this decline occurred during the last two decades as the elderly population increased by 50%. See POVERTY IN THE U.S., *supra* note 4. See generally DUNCAN LINDSEY, THE WELFARE OF CHILDREN 211-12 (1994) (analyzing the changing composition of the poor between the turn of the nineteenth century and the mid 1990s).

30. Lindsey, *supra* note 29, at 215.

31. *Id.* at 215. See also Daniel Patrick Moynihan, *Towards a Post-Industrial Social Policy*, 71 FAM. IN SOC'Y 51, 56 (1990).

increased from roughly 14% in 1973 to roughly 21% in 1995, as compared to an adult poverty rate of just over 11% for 1995. The poverty rate for children under six increased from 16% to 24% during the same period.³² After a period of steady economic growth nationally, the child poverty rate began to recover somewhat, falling from its 1993 peak of 22.5% in 1993 to 18.7% in 1998.³³ "The number of children in poverty increased from 10.3 million in 1979 to 13.3 million in 1998."³⁴

The general concept of poverty is one that is familiar and easily understood by most people—a child living in poverty lacks sufficient resources to meet basic needs (food, shelter, and clothing) considered essential to human well-being. However, the federal government uses an official definition of poverty, based on data gathered by the U.S. Census Bureau. To assess the number of persons living in poverty, the government uses a poverty index by which it sets thresholds that take into account total family income and family size; the thresholds are adjusted annually for inflation.³⁵ According to this measure, "for example, the 1995 poverty threshold for a single individual was \$7,929, while for a family of four (two adults, two children), the threshold was \$15,455, and for a family of six (two adults, four children) the threshold was \$20,364."³⁶ "In 1998, the official poverty threshold for a family of four was \$16,660."³⁷

According to the official poverty measure "more than 20% of the nation's 67 million children are poor."³⁸ Thirty-seven percent of

32. According to the official poverty measure, in 1995, 20.8% of all children in the United States were poor (more than 14 million children, including more than 5 million preschoolers under the age of six) compared with an adult poverty rate of 11.3% in that same year. POVERTY IN THE U.S., *supra* note 4, at vii, tbl. A.

33. *Id.*

34. Neil G. Bennett & Hsien-Hen Lu, *Child Poverty Research Brief 2, Child Poverty in the States: Levels and Trends from 1979 to 1998*, Nat'l Center for Child. in Poverty, at <http://www.nccp.org/cprb2txt.html> (last visited Apr. 10, 2003).

35. The measure of resources used is annual before-tax family money income. Income, as defined in the official measure, includes cash earnings, unemployment benefits, other cash payments from government transfer programs such as AFDC, SSI and other assistance programs, but does not include the cash value of in-kind benefits such as food stamps, medical assistance, subsidized housing and childcare. See ARLOC SHERMAN, WASTING AMERICA'S FUTURE: THE CHILDREN'S DEFENSE FUND REPORT ON THE COSTS OF CHILD POVERTY 3, 4 (1994); David M. Betson & Robert T. Michael, *Why So Many Children Are Poor*, 7 FUTURE OF CHILDREN: CHILDREN AND POVERTY 25, 26-28 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no2ART2.pdf.

36. *Id.* at 26.

37. Bennett & Lu, *supra* note 34.

38. See Betson & Michael, *supra* note 35, at 27. The actual number of poor families, and hence poor children, likely exceeds official estimates since the official poverty definition does not account for geographic variations in costs of living. Particularly with the great variation

American children live in low-income families, i.e., families with incomes below 200% of the poverty line (which is \$27,722 for a family of three).³⁹ Six percent of the children in the United States live in extreme poverty, in families with incomes below half the poverty line. In 2000, the extreme poverty line was \$6,930 for a family of three.⁴⁰ But why are so many children poor? The reasons for poverty, in general, and for child poverty in particular, are complex and varied and there is no single, simple answer to this difficult question. This article does not attempt to present comprehensive examination of existing social science research on the forces, both economic and demographic, that have contributed to this phenomenon; to do so would require an article in itself, perhaps several. Yet, in order to discuss the broader law and policy implications of child poverty it is necessary to review generally some current findings on poverty and the factors giving rise to it, and to relate those findings to trends in children's poverty rates.

1) Socioeconomic Forces Giving Rise to Child Poverty

Understanding child poverty requires viewing it within the broader socioeconomic context. From 1979 to the present the proportion of Americans living at or below the poverty level has increased.⁴¹ "Children live with and rely on adults for their economic well-being."⁴² No group has fared worse as a whole than families with children. Consequently, to understand child poverty, one must necessarily consider the underlying causes of adult

in housing costs across different regions of the country, this is a major limitation. During the past ten years, funding for public housing across the country has decreased by 80%. Thus, housing has become the major financial expense for the poor. In several states and metropolitan areas the fair market rent was several times the maximum grant provided by AFDC. "In 1987, research showed that half of all renter households in poverty were spending more than 70% of their income in housing." Lindsey, *supra* note 29, at 210. Further the official poverty measure does not take into account the impact of federal taxes, or lost income due to high medical costs, childcare or other expenses. *Id.*

39. U.S. CENSUS BUREAU, MARCH CURRENT POPULATION SURVEYS, 1976-2001. Many of the problems of "near poor" low-income families overlap with those of poor families, including the need for well-paying jobs and access to affordable quality childcare and health care. See also CHILD POVERTY FACT SHEET, NAT'L CENTER FOR CHILD. IN POVERTY, LOW-INCOME CHILDREN IN THE UNITED STATES: A BRIEF DEMOGRAPHIC PROFILE (Mar. 2002), available at <http://www.nccp.org/ycpf.html>.

40. *Id.*

41. Sheldon Danziger, at al., *The American Paradox: High Income and High Child Poverty*, in CHILD POVERTY AND DEPRIVATION IN THE INDUSTRIALIZED COUNTRIES, 1945-1995 (Giovanni Andrea Cornia & Sheldon Danziger eds., 1997).

42. Betson & Michael, *supra* note 35, at 27.

poverty.⁴³ The research of economists and public policy theorists considering the ability of adults to be economically self-sustaining divide adults into three categories: (1) those who are “family self-sufficient,” i.e., adults whose personal resources (their income and their receipts from social service programs not dependent on the presence of children) are enough to keep their entire family out of poverty; (2) those who are “adult self-sufficient,” i.e., adults who would have enough resources to maintain themselves above the poverty level if their children were not present, but do not have enough to meet the additional needs of their children; and, (3) those who do not even attain “adult sufficiency.”⁴⁴ In 1992, according to census data, based on only the economic resources brought to the family by the adults, a total of 15.7% of all adults with children did not meet the needs of their families and would have been counted as below the poverty level in the absence of government welfare benefits designed for children, in other words, as failing to achieve family-sufficiency.⁴⁵

Generally, adult poverty has been found to result from either economic and demographic factors that affect overall income distribution or from factors that affect individual earning capacity, such as education, age, and race. The past three or so decades have witnessed a “dramatic (increase) in the proportion of women in the (work) force and the entry [into the work force] of those born during the baby boom [which, when taken together, have created] a younger and more female-intensive labor force.”⁴⁶ Children are now more likely to live with a single parent (typically, the mother) and to have fewer siblings. Parental education continues to rise, but the economy is harsher for the less educated. Unemployment rates have decreased overall, but unemployment rates have risen and wages have declined for workers with low levels of education and experience, making it especially difficult for parents, particularly young parents, to earn enough to support their families above the poverty level.⁴⁷ Since the 1970’s, the number of immigrants entering the United States has increased significantly; the two

43. *Id.*

44. *Id.* at 27-30. This difference is reflected in the poverty thresholds for families of varying sizes. For example, in 1995 the poverty threshold for two (non-elderly) adults without children was \$10,205; for a family of two adults and two children it was \$15,455. Thus, an adult couple with income of \$12,000 would be considered “adult self-sufficient, but not family self-sufficient.” *Id.* at 28.

45. *Id.* at 29-30.

46. *Id.* at 29.

47. *Id.* at 29.

fastest growing groups of U.S. children are Latino and immigrant children. Both Latino children and children born to immigrants tend to be "disproportionately poor."⁴⁸ Each of these changes in the family, the economy and society has had a direct impact on child poverty rates.

The percentage of all children who were living in mother-only families increased from 8% to 20% in the period between 1960 and 1990.⁴⁹ Roughly 50% of the decline in two-parent families during this period was the result of "increases in the families headed by never-married mothers, and roughly 50% was due to increases in the number of families headed by divorced and separated mothers."⁵⁰ Mother-only families tend to be poorer than two parent families both because there is only one potential wage earner and because women generally earn less than men do.⁵¹ Consequently, the increase in the numbers of mother-only families has led increasingly to the "feminization" of child poverty.⁵² The decline in family size and the increase in parental education levels over the past thirty years had a positive impact on childhood poverty. From the 1960s to the mid-1990s, "the average number of children per family dropped by more than one and the proportion of children whose mothers had [less] than 12 years of schooling dropped by [half]."⁵³ Changes in both factors "increased children's access to economic resources."⁵⁴ But family size and parental education tell only part of the story.

From 1979 to the present the proportion of the population in poverty fluctuated up significantly or down modestly with corresponding periods of economic recession or growth. Child poverty rates, however, have remained high. While the economy has grown slowly during the past two decades, the average level of real earnings (i.e., earnings adjusted for inflation) has not grown much, and the inequality of earnings among workers has increased, resulting in a larger proportion of the population in poverty. Although unemployment levels have dropped by nearly one-third

48. Mary E. Corcoran & Ajay Chaudry, *The Dynamics of Childhood Poverty*, 7 THE FUTURE OF CHILDREN: CHILDREN AND POVERTY, 40, 42 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no2ART3.pdf (this is particularly true for those under 25 years of age).

49. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 351 (1985).

50. *Id.* at 42.

51. WEITZMAN, *supra* note 49 at 206.

52. *Id.* at 350.

53. *Id.* at 43.

54. Corcoran & Chaudry, *supra* note 48, at 43-44.

since 1983, "the low and declining wages of less-educated workers have lead to greater poverty."⁵⁵

In addition, one must consider the interaction of education, race and age, the "personal factors that can most significantly affect earnings and income."⁵⁶ Education level is indicative of market skills that result in higher wages; "age proxies for job skills attained through experience; and, because of discrimination, race can affect both job opportunities and level of earnings."⁵⁷ These parental attributes, when taken separately or in combination, have an impact upon child poverty.

What is the overall effect of these demographic and economic trends on child poverty? The education level of the adults in a family is a significant determinant of family income. The proportion of unemployed adults and the proportion of those who experience at least one period of unemployment during a given year both decline dramatically as education levels increase. Studies show that the distribution of adults and children by the education level of the primary adult in the family are nearly identical. But "children [tend to] live with relatively young adults who have not reached their peak earning capacity and are . . . less likely to be

55. Betson & Michael, *supra* note 35, at 29.

56. *Id.*

57. *Id.* Research data comparing white, African-American, and Latino men, between the ages of 25 to 54 years, who were deemed earnings-poor (i.e., as having annual earnings below the poverty line for a family of four; because annual earnings are the product of both hourly wages and annual hours worked, one can be earnings-poor either because of low wages or low work hours) in 1969, 1979, and 1989 revealed three consistent patterns. First, as earnings are linked to educational level, in each year the more schooling men had, the less likely they were to be poor. Second, African-American and Latino men were more likely to be earnings-poor than were white men with the same level of completed schooling. For example, in 1989, among high school dropouts, 60% of African-American men and 51% of Latino men were earnings-poor, as opposed to 38% of white men. Third, the percentage of men who were earnings-poor increased substantially between 1969 and 1989. In 1969, roughly 12% of white men, 32% of African-American men, and 26% of Latino men were earnings poor. By 1989, these percentages had risen to 20% for whites, 42% for African-Americans, and 38% for Latinos. While the increase was most pronounced for the least educated men, even highly educated men were not exempt, as 11% of white male college graduates and 18% of African-American and Latino male college graduates were earnings-poor in 1989. In 1969, a high school diploma permitted the majority of men between the ages of 25 and 54 to earn a sufficient income to keep a family of four out of poverty. But by 1989, significant minorities of men, (22% of whites, 43% of African-Americans, and 35% of Latinos), with a high school education did not earn enough to support a family above the poverty level. Data on the decline of women's earnings in recent decades is more mixed. For example, during the 1980's, African-American and Mexican women, women with less than a college education, and single mothers experienced declining wages and decreased employment. However, "employment increased sharply for married women and for white and Puerto Rican women at every level of schooling." Corcoran & Chaudry, *supra* note 48, at 43-44.

adult-self sufficient."⁵⁸ "This is [particularly] true for those under 25 years of age."⁵⁹ Further, the nexus between race and poverty is strong. As compared with whites, African-American and Latino adults are more likely to have incomes that are too low to meet the family's needs, even when they have the same level of education as whites.⁶⁰

When taken together, analysts have determined that these economic and demographic changes had large, offsetting effects on child poverty rates. "If the increase in single-parent, [female-headed families] were the only change in children's lives [over the past twenty years,] the poverty rate would have increased by about 13 percent for African-American children and about 3 percent for white children."⁶¹ But actual increases were lower due to "increased parental [education,] decreased family size, and increased numbers of two-income families,"⁶² all of which tended to decrease child poverty. However, these poverty-reducing effects were counteracted by a combination of increased single-parent families, slow economic growth and "increasing income inequality which caused child poverty rates to rise."⁶³

2) *The Effects of Child Poverty*

As noted earlier, in recent years nearly one in five children in the United States has lived in families whose cash income is below the poverty level.⁶⁴ Another one-fifth lived in families whose incomes were no more than twice the poverty level.⁶⁵ For a small proportion of those children, 4.8% of all children and 15% of children who were ever poor, childhood poverty lasted ten years or more.⁶⁶ Several recent studies have used national longitudinal data

58. *Id.*

59. *Id.*

60. *See supra* note 57.

61. Cocoran & Chaundry, *supra* note 48, at 44.

62. *Id.*

63. *Id.* The rise in the rate of child poverty has out paced that of adult poverty because children are not distributed equally between all adults with children. Studies show that poor families have more children per adult than the population as a whole because poor families with children have more children on average (2.24 per family) than non-poor families with children (1.79 per family), and poor families with children have fewer adults than non-poor families due to increased incidents of divorce and non-marital births. *See also* Betson & Michael, *supra* note 35, at 31-32.

64. *Id.* *See also supra* notes 27-33, 41-45, and accompanying text.

65. DONALD J. HERNANDEZ, *AMERICA'S CHILDREN: RESOURCES FROM FAMILY, GOVERNMENT AND THE ECONOMY* (1993).

66. Jeanne Brooks-Gunn & Greg J. Duncan, *The Effects of Poverty on Children*, 7 *THE*

to examine the effects of family income (controlling for factors other than income that may be associated with living in poverty) on specific aspects of children's well-being, as measured by: "(1) physical health (low birth weight, growth stunting, and lead poisoning), (2) cognitive ability (intelligence, verbal ability, and achievement tests scores), (3) school achievement (years of schooling, high school completion), (4) emotional and behavioral outcomes, and (5) teenage out-of-wedlock childbearing."⁶⁷

Poor children in America suffer diminished physical health when compared to non-poor children as measured by several key indicators of child health—low birth weight and infant mortality, growth stunting, and lead poisoning. "Low birth weight is associated with an increased the likelihood of subsequent physical health and emotional and cognitive problems that can continue throughout childhood and adolescence, including physical and learning disabilities Low birth weight is also the key risk factor for infant mortality."⁶⁸ A study examining the relationship of family income to low birth weight found that "white women with family income below the poverty level in the year of birth were 80 percent more likely to have a low birth weight baby as compared to women with family income above the poverty level . . . (when controlled for mother's age, education, marital status, and smoking status)."⁶⁹ The study also showed that

duration of poverty had a significant effect. If the woman was poor at both the time she entered . . . the sample and at the time of her pregnancy (within 5 to 10 years later), she was more than three times as likely to deliver a low birth weight baby as was a woman who was not poor at both times.⁷⁰

Growth stunting and lead poisoning are also key measures of child health. Deficits in children's nutritional status are associated with poverty; growth "stunting (low height for age) [is] a measure of nutritional status."⁷¹ Growth stunting "is more prevalent among poor children than non-poor children,"⁷² with greater "differentials

FUTURE OF CHILDREN: CHILDREN AND POVERTY 55 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no2ART4.pdf.

67. *Id.* at 57.

68. *Id.* at 60.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

in height for age between poor and non-poor children [when] long-term rather than single year poverty measures are used.”⁷³ Exposure to lead at even low levels can have harmful consequences for children. “Health problems vary with length of exposure, intensity of lead in the environment, and the developmental age of the child.”⁷⁴ Health problems attributable to lead poisoning, especially in young children, include “stunted growth, hearing loss, vitamin D metabolism damage, impaired blood production,”⁷⁵ and kidney damage. Deteriorating lead-based paint is the primary source of lead poisoning in young children. Four to five million children live in homes with lead levels above the safety thresholds, “and more than 1.5 million children under six years of age have elevated blood lead levels.”⁷⁶ Research data from 1988-1991 showed that “children’s blood lead levels declined as family income [rose]. All other things being equal, mean blood lead levels were 9 percent lower [for children under five years of age] in families with incomes levels at twice the poverty level than for those who were poor.”⁷⁷

“[C]hildren living below the poverty [level] are 1.3 times as likely as non-poor children to experience learning disabilities and developmental delays. Recent stud[ies] comparing children in families whose incomes were less than half the poverty threshold with children in families with incomes between one and half to two times the poverty threshold [found that] the poorer children scored between 6 and 13 points lower on various standardized tests of IQ, verbal ability, and achievement. These differences are very large from an educational perspective and were present even after controlling for maternal age, marital status, education, and ethnicity The smallest differences appeared for the earliest (age two) measure of cognitive ability, suggest[ing] that effects of poverty on cognitive development occur early Duration of poverty [also had an impact. Children who lived in poverty for over four years] had scores on the various assessments at six to nine points lower than children who were never poor.”⁷⁸

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 61.

Educational attainment is a significant predictor of experiences in later life.⁷⁹ A 1994 study that examined the relationship of parental income and a child's school attainment concluded that, while the effect of income on the number of school years completed was small ("a 10 percent increase in family income is associated with a 0.2 to 2 percent increase in the number of school years completed"⁸⁰), poverty does limit school achievement. Additional studies have "also found that poverty status has a small negative impact on high school graduation."⁸¹ It has been suggested that the "apparently strong effects of parental income on cognitive abilities and on school achievement in the early childhood years"⁸² does not appear to have a strong effect on completed years of schooling due in part to the fact that

extra-familial environmental factors (*e.g.*, schools and neighborhoods) begin to matter as much or more for children than family conditions once children reach school age. [S]chool related behavior depends on both ability and behavior—children's behavioral problems measured either before or after the transition into school are not very sensitive to differences in parental income.⁸³

Finally, and perhaps most importantly, few studies measure income over the period of time from childhood to adolescence, so it is not clear how the timing of economic deprivation affects outcome, *i.e.*, whether poverty in early childhood has a critical effect on later outcomes such as school completion.⁸⁴ One recent study that sought to measure the effect of time of income on completed schooling found that family income averaged from birth to 5 years had a more significant effect on the number of school years a child completes than does family income measured between ages 5 and 10 years, or between ages 11 and 15 years. For low-income children, a \$10,000 increase in mean family income between birth and age 5 was identified with nearly a full year in completed schooling, where similar increase in family income later in childhood had no significant effect.⁸⁵

79. *Id.*

80. *Id.* at 61-62

81. *Id.* at 62

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

Several studies have indicated that "[p]oor children suffer from emotional and behavioral problems [such as] aggression, fighting, acting out, . . . anxiety, social withdrawal, and depression . . . more frequently than do non-poor children."⁸⁶ This was particularly true for persistently poor children (defined as a specific percentage of years of life during which the child lived below the poverty level, usually more than four years), even when the studies controlled for maternal age, education and marital status. "[T]he effects of poverty on emotional outcomes are not as large as those found in cognitive outcomes,"⁸⁷ but further research on the link between income and a child's emotional outcomes is needed.⁸⁸

Finally, research on the link between family income and teenage out-of-wedlock births is similarly inconclusive. Although the rate of out-of-wedlock births among poor teens is three times that of non-poor teens, the nexus between family income and teen births is not understood. Studies have shown, however, while "variations in income around the poverty threshold were not predictive of a teenage birth . . . the probability of a teenager's having an out-of-wedlock birth declined significantly at family incomes levels above twice the poverty [line]."⁸⁹

While the social science data leave unanswered a number of questions concerning exactly how and to what extent poverty affects child development, it is clear that children who live in conditions of poverty suffer diminished physical, emotional, and psychological development. A nation's collective economic and social future depend on the productivity of its children. The failure to address the large numbers of impoverished children will have long-term consequences for society.

B. Welfare Reform and Child Welfare

The welfare debate of the 1990s, as presented in the media, focused primarily on the AFDC program.⁹⁰ In reality welfare policy

86. *Id.* at 9.

87. *Id.* at 83.

88. *Id.*

89. *Id.* at 64.

90. MARY ELLEN HOMBS, *WELFARE REFORM: A REFERENCE HANDBOOK* 1 (1996). The Aid to Families with Dependent Children program ("AFDC") was the successor program the Aid to Dependent Children program ("ADC"), a program of public aid to widowed mothers, created as one of four primary components of the nation's welfare system that grew out of the New Deal policies of the 1930's. The New Deal programs included, in addition to ADC, social security, workmen's compensation, and unemployment insurance. Interestingly, the Social Security program was the controversial aspect of Roosevelt's New Deal initiatives.

reform addressed a range of low-income programs beyond AFDC. As of 1994, AFDC actually represented only 1% of federal expenditures and roughly 3.2% of state expenditures.⁹¹ The spectrum of programs addressed during the welfare debate included such income assistance programs as AFDC, General Assistance, (the general label applied to cash-assistance programs at the state and county level), and Social Security); medical care (Medicaid); food and nutrition assistance (food stamps, Women, Infants and Children WIC nutrition program, school breakfasts and lunches); housing assistance (public housing and other housing help); education and training (the Job Training Partnership Act and Head Start); and other minor programs for low-income people, such as legal services and assistance.⁹² In 1995, "federal spending on AFDC, Supplemental Security Income for the disabled, and food stamps together constituted less than [4%] of the federal budget,"⁹³ as had been the case for most of the preceding thirty years.⁹⁴ However, since AFDC was the centerpiece of the 1996 welfare reform legislation, and was the most visible assistance program for the poor, as well as the program that has received the most public scrutiny and engenders the most visceral public reaction, the discussion in this article will center on AFDC.

AFDC, as a federally mandated program, was designed to be a federal-state partnership, intended to provide cash assistance to needy children.⁹⁵ The federal law required states to provide cash assistance to all eligible families.⁹⁶ Each state administered the program and established the income eligibility level and the benefit level available to families within the state, in keeping with federal limitations.⁹⁷ The federal government monitored the states' administration of the program and matched the state funds provided.⁹⁸

AFDC replaced ADC when the decision was made to include the needs of the custodial parent in the calculation of benefits. *Id.* at 2-3.

91. *Id.* at 8.

92. *Id.* at 9.

93. *Id.*

94. Stephen B. Page & Mary B. Lerner, *Introduction to the AFDC Program*, 7 FUTURE OF CHILDREN: WELFARE TO WORK 1, 9 (1997) available at http://www.futureofchildren.org/usr_doc/vol7no1ART2.pdf (last visited Apr. 10, 2003).

95. *Id.* at 3.

96. *Id.*

97. *Id.*

98. *Id.*

Typically, only very poor families composed of single mothers and their children qualified for AFDC To be eligible for AFDC, a family had to include a dependent child under 18, was a citizen or permanent legal resident, and who could be considered deprived of parental support—usually because no father was in the home.⁹⁹

To control costs and limit the appeal of government assistance, many states set income eligibility levels at which a family could receive cash assistance at levels lower than the federal poverty level. Consequently, a family could be below the poverty level and, nonetheless, not qualify for AFDC.¹⁰⁰ In 1992, only 63% of children living in poor families received AFDC benefits. As a family's income rose from work, its AFDC benefits were decreased or discontinued.¹⁰¹

According to the Census Bureau, about 14 million people were receiving of AFDC in 1995. This included 3.8 million mothers ages of 15 to 44 years; 500,000 mothers age 45 and over; 300,000 fathers living with dependent children; and 9.7 million children. Nearly half of women on AFDC have never been married. The average mother on AFDC gave birth at age 20, compared to age 23 for women not on AFDC. The average AFDC family has 2.6 children, compared to 2.1 children for families not on AFDC More white women of childbearing age receive AFDC than black or Hispanic women, but black and Hispanic women received AFDC in disproportionate numbers. About 63.5 percent of AFDC recipients lived in private-market housing, only about 9 percent lived in public housing.¹⁰²

Thirty-four percent of AFDC recipients received benefits for less than one year, while 32% of AFDC recipients received benefits

99. *Id.*

100. *Id.* at 4.

101. See H. REP., WAYS AND MEANS COMM., OVERVIEW OF ENTITLEMENT PROGRAMS: 1994 GREEN BOOK 325 (1994) [hereinafter, *Ways and Means Comm.*]. See also KATHRYN A. LARIN & KATHRYN H. PORTER, CENTER ON BUDGET AND POLICY PRIORITIES, ENOUGH TO LIVE ON: SETTING AN APPROPRIATE AFDC NEED STANDARD (1992).

102. Hombs, *supra* note 90, at 11. The characteristics of "the typical welfare family" differ in many respects from the popular image of a welfare family. In 1992, some 39% of the parents who received AFDC were white, 37% were black, and 18% were Hispanic. Most AFDC families were small: 43% included only one child. Despite the public concern for teenage child bearing, only 8% of the mothers were under the age of 20, although another 25% were between 20 and twenty-five years of age, and many welfare recipients first bore children in their teen years. See Page & Lerner, *supra* note 94, at 22-23.

for one to three years.¹⁰³ Nearly 14% of AFDC recipients received aid under the program for more than three years.¹⁰⁴ In 1995, the AFDC caseload represented nearly 5% of the total United States population and approximately 14% of all children.¹⁰⁵

Although the financial assistance AFDC provided to families was reliable, it was not generous. AFDC grant levels, like the standards governing eligibility, varied widely from state to state. In 1994, the average monthly payment in most states for a single mother with two children and no earnings was about \$366.00. Despite state-by-state differences, no state's grant level kept pace with inflation, and the median state AFDC grant declined in value by 47% between 1970 and 1994.¹⁰⁶ Most welfare families (roughly 87%) received assistance through food stamps and Medicaid coverage, but the combined value of AFDC and food stamps left families in the average state well below the federal poverty level. A case study undertaken by Congress of the household budgets of AFDC recipients in several cities demonstrated that after paying for food and housing, the average AFDC mother had only \$90.00 left each month from her benefits (AFDC, food stamps, and any support for the disabled) to pay all other expenses, including utility and clothing costs, and bus fare or other transportation costs.¹⁰⁷

The welfare reform debate of the 1990's was shaped by changes in public attitudes toward welfare as well as by the recent history of AFDC. In 1993, single women who had never married headed nearly 48% of the families receiving welfare.¹⁰⁸ The public view of unwed mothers is quite different from its view of widows, the primary recipients of public aid at the creation of the welfare program in 1935.¹⁰⁹ Further, mothers of all income levels have joined the work force, with approximately 67% of women with children employed outside the home as of 1993.¹¹⁰ This change in overall demographics has altered the general public assumptions

103. Hombs, *supra* note 90, at 11.

104. *Id.*

105. *Id.* at 10-11.

106. P. Lindsay Chase-Lansdale & Maris A. Vinovskis, *Whose responsibility? An Historical Analysis of the Changing Roles of Mothers, Fathers and Society*, in *ESCAPE FROM POVERTY: WHAT MAKES A DIFFERENCE FOR CHILDREN?* 11-37 (P. Lindsay Chase-Lansdale & J. Brooks-Gunn eds., 1995).

107. WAYS AND MEANS COMM., *supra* note 101, at 367, 399.

108. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, BUREAU OF THE CENSUS, *MOTHERS WHO RECEIVE AFDC PAYMENTS—FERTILITY AND SOCIO-ECONOMIC CHARACTERISTICS* 95-2 (1995).

109. Hombs, *supra* note 90, at 11.

110. WAYS AND MEANS COMM., *supra* note 101, at 533.

about women's work, childcare, and the merits of helping poor mothers to stay at home with their children. It seems reasonable to many people then that poor single women be expected to work outside the home.¹¹¹

Motivated by the demographic and attitudinal changes, government, over the past twenty years, has made various attempts to move adults in welfare families into the workforce and to economic self-sufficiency, with limited success due in large measure to inadequate funding. In 1967, the federal government developed the Work Incentive Program (WIN), which required states to establish employment and training programs for welfare recipients. It emphasized a mixture of job training, education, and structured job searches to improve employment opportunities of welfare recipients.¹¹² The Work Incentive Program began as a voluntary program, but in 1971, the federal government required the participation of welfare recipients who had no special responsibilities at home and no preschool age children.¹¹³ As a result of limited resources, the federal mandate could be only partially put into practice. "Operating the WIN employment and training programs cost [state] welfare agencies more than issuing monthly benefit grants."¹¹⁴ Administratively, at both the federal and state levels, "authority over WIN was divided between employment services departments that focused on work-related services for welfare recipients, and social service agencies that brokered support services such as childcare to the same individuals. The [bifurcated] arrangements made WIN difficult to administer and awkward for families,"¹¹⁵ so the WIN program became essentially little more than a registration requirement for many welfare recipients. Federal funding for WIN [decreased] by 41% between 1979 and 1986.¹¹⁶

111. See generally, Mary B. Lerner et al., *Welfare to Work: Analysis and Recommendations*, 7 THE FUTURE OF CHILDREN: WELFARE TO WORK 4, 5-6 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no1ART1.pdf. AFDC was designed to maintain family incomes, not to encourage employment. Therefore, despite changes in demographics and public attitudes, imposing work expectations requires a significant shift in welfare policies and programs.

112. Susan W. Blank & Barbara B. Blum, *A Brief History of Work Expectations for Welfare Mothers*, 7 THE FUTURE OF CHILDREN: CHILDREN AND POVERTY 28, 31 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no1ART3.pdf.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

The early 1980's saw a number of state welfare-to-work demonstration programs, and although there was increased interest in welfare-to-work programs, welfare reform was not central to the national policy agenda.¹¹⁷ But in 1986, in his State of the Union address, President Reagan called for a study of the welfare system. President Reagan's endorsement of a general reform of welfare led to the creation of welfare reform task forces at the American Public Welfare Association (APWA) and the National Governors' Association.¹¹⁸ The APWA published a report called *One Child in Four*, in which it outlined its recommendations.¹¹⁹ The report emphasized that children's well-being should be central to any welfare reform efforts.¹²⁰ Welfare reform discussions in the 1970's and early 1980's had focused primarily on parents' work efforts.¹²¹ By linking welfare-to-work policies with concerns about children's welfare, the APWA made a significant shift in the way the national debate was framed at the time.¹²² It has proved to be a continuing challenge to keep the needs of children at the center of discussions on welfare reform.¹²³

Congress entered the debate on welfare reform in 1987. The first significant development in the reform effort was the 1998 passage of the Family Support Act (FSA).¹²⁴ Central to the FSA was the relation of work to welfare that has so dominated the reform debates of the 1990's. The FSA "required states to establish statewide Job Opportunities and Basic Skills Training Programs (JOBS)—[successor programs to WIN]—by 1992, . . . to provide arrangement of education, and training" services and at least two of four additional services—job search, on-the-job training, work supplementation and community work experience.¹²⁵ JOBS increased the number of families who were required to be in work programs and mandated that states provide transportation, supportive services and childcare for participants.¹²⁶ If services (including childcare) could be made available to them, all AFDC recipients who were not specifically exempted were required to

117. *Id.* at 32.

118. *Id.*

119. *Id.*

120. *Id.*

121. Hombs, *supra* note 90, at 5.

122. *Id.*

123. See Blank & Blum, *supra* note 112, at 32.

124. *Id.*

125. *Id.*

126. *Id.*

participate in welfare-to-work activities or be subject to financial sanctions. In reality, however, as was the case with WIN, states have lacked the financial resources to offer JOBS services to all persons eligible for them.¹²⁷ When it was enacted, the FSA was viewed as landmark legislation for its emphasis on involving mothers of preschoolers in JOBS, its targeting of teen parents, its mandate that states provide a mix of education and training services, and its provision of transitional childcare and Medicaid benefits. While FSA did change the structure of welfare-to-work programs, it left AFDC eligibility rules and benefit levels intact.

By the early 1990's, JOBS implementation was overshadowed in a number of states by new initiatives designed to increase participation of welfare mothers in the work force and to decrease the rate of out-of-wedlock births in response to changes in the federal waiver process for AFDC set in motion by the Bush administration.¹²⁸ Under President Bush the federal waiver process was changed to make the federal government more receptive to states' waiver requests. States began to request waivers from the federal government; for example, to deny increased AFDC benefits to recipients who bore additional children or to increase work incentives by permitting employed recipients to keep more of their earnings and benefits.¹²⁹ "No waiver requests were rejected by the Bush administration after this new policy."¹³⁰ By implementation in mid-1996, 37 states had waiver projects in effect. These proposals bypassed the JOBS strategy for increasing work force participation by welfare recipients, focusing instead on the rules of the mainstream AFDC system.¹³¹

127. *Id.* at 30.

128. The waiver process allowed states to request the waiving of federal rules for the AFDC program so that a state could undertake an experimental or demonstration program that would otherwise have been impermissible under or inconsistent with federal requirements. In order for a state's waiver request to have been granted, its proposal must have been cost neutral to the federal government, and the project must have been carefully evaluated by the state. See Hombs, *supra* note 90, at 5-6.

129. Other common state demonstration projects for which waiver requests were made included: the removal of restrictions "so that two-parent families were eligible to receive AFDC;" the implementation of childcare changes that "extend[ed] or expand[ed] the availability of childcare assistance for AFDC recipients;" the increase in "penalties for violations of AFDC rules for those not in compliance with JOBS requirements;" the "increase in program asset limits particularly affecting [indigent] individuals who tried to own a car;" the modification of "time limits or work requirements; the expansion of requirements to participate in JOBS;" the extension or expansion of "Medicaid coverage for AFDC families in transition to work;" and the imposition of school attendance requirements. *Id.* at 6-7.

130. *Id.* at 6.

131. *Id.* at 6. See also Blank & Blum, *supra* note 112, at 35-36.

Close evaluation of many of the welfare-to-work projects demonstrated that the programs had small positive effects on rates of employment and annual earnings,¹³² but none significantly reduced welfare caseloads, nor were able to move individuals, or children and families, out of poverty or permanently away from dependence on public assistance.¹³³

Evaluations of welfare-to-work programs designed to increase employment rates of welfare recipients showed limited success. As discussed earlier, the lack of success was partly attributable to insufficient funding of the programs, but other factors played a role as well. The majority of welfare recipients are young women who have poor job skills and limited education to offer employers, which limits their ability to find or maintain work in the regular market.¹³⁴ For example, 44% of the mothers who began receiving welfare in 1992 had not completed high school.¹³⁵ The low educational attainment and limited skills of benefit recipients restricted the types of jobs they could hold; recipients who found employment thus often were in jobs that paid very meager wages.¹³⁶ Welfare-to-work programs that attempted to increase employment at good wages through use of remedial education, vocational training or post secondary education to improve recipients' job qualifications did not fare much better.¹³⁷ Welfare recipients with strong basic skills could take advantage of educational opportunities to secure stable, better paying jobs, but many recipients had only eighth grade reading and math skills.¹³⁸ Limited educational credentials limited job choices to entry-level, unskilled positions, which tend to

132. See generally DANIEL FRIEDLANDER & GARY T. BURTLESS, *FIVE YEARS AFTER: THE LONG TERM EFFECTS OF WELFARE-TO-WORK PROGRAMS*, (1995); SHARON K. LONG ET AL., *THE EVALUATION OF THE WASHINGTON STATE FAMILY INDEPENDENCE PROGRAM* (1994); DEMETRA SMITH NIGHTINGALE, ET. AL., *EVALUATION OF THE MASSACHUSETTS EMPLOYMENT AND TRAINING (ET) CHOICES PROGRAM*, (1994); JAMES RICCIO ET AL., *GAIN: BENEFITS, COSTS, AND THREE-YEAR IMPACTS OF A WELFARE-TO-WORK PROGRAM* (1994).

133. See generally David Greenberg & Mark Wiseman, *What Did the OBRA Demonstrations Do?*, in *EVALUATING WELFARE AND TRAINING PROGRAMS* 25-75 (Charles F. Manski & Irwin Garfinkel eds., 1992); JUDITH M. GUERON & EDWARD PAULY, *FROM WELFARE TO WORK* (1991).

134. *Id.*

135. WAYS AND MEANS COMM., *supra* note 101, at 401-02.

136. Studies show that from 1979-1990, the median real wage of women who moved from AFDC rose from \$6.07 to \$6.72 an hour—an annual wage gain of six cents per hour, or less than 1 percent per year. However, the majority of young women who were working former recipients of AFDC in the period of 1979 to 1981 earned wages of \$4.26. *Id.*

137. Alan M. Hershey & LaDonna A. Pavorti, *Turning Job Finders into Job Keepers*, 7 *THE FUTURE OF CHILDREN: WELFARE TO WORK* 76 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no1ART7.pdf.

138. WAYS AND MEANS COMM., *supra* note 101, at 401-02.

be poorly paid.¹³⁹ Achieving economic self-sufficiency requires sustained employment. Studies have shown that from half to two-thirds of the welfare recipients who left welfare for work lost their jobs within the first year.¹⁴⁰ In 40% of the cases, the employer's actions (layoffs and firings) were the cause of the job loss; the other 60% of job losses were initiated by employees in response to problems on the job or at home.¹⁴¹

As support for cash welfare programs (known as "transfers") declined over the two decades in favor of welfare-to-work initiatives, programs to provide for basic needs of the poor through in-kind rather than cash benefits, such as the Food Stamp Program, the Special Supplemental Food Program for Women, Infants and Children (WIC), Head Start, subsidized housing programs, and Medicaid, also evolved.¹⁴²

Between 1975 and 1995, total expenditures on these in-kind programs (excluding Medicaid for elderly and disabled) increased by 135%, in real terms, from \$40 billion to \$95 billion (in 1995 dollars). By contrast, real expenditures on AFDC cash assistance to families decreased by 8% over the same period despite a 19% increase in the number of children receiving AFDC.¹⁴³

Evidence suggests that some cash and in-kind programs did, in the aggregate, have some positive impact on child poverty.

In 1995, more than 17 million children (24.2% of all children under 18 years of age) would have been classified as poor based on the cash incomes of their families alone before taking account of the effects of any government programs on family income. . . . Government cash transfer programs [primarily] AFDC raised cash family income above the poverty level for 2.4 million of these pretransfer poor children. After also adding . . . the cash value of . . . food stamps, Medicare/Medicaid, school lunch, housing benefits, [and the Earned Income Tax Credit to cash

139. *Id.*

140. Hershey & Pavotti, *supra* note 137, at 76.

141. "Welfare recipients who lose jobs attribute job loss to both job-related and personal factors, . . . such as being laid off or fired, receiving low wages or inadequate fringe benefits They also cite to personal factors, such as health or family problems, difficulties with transportation or childcare arrangements, or termination of Medicaid." *Id.*

142. *Id.* at 77.

143. See Eugene M. Lewit et al., *Children and Poverty: Analysis and Recommendations*, 7 THE FUTURE OF CHILDREN: CHILDREN AND POVERTY 4, 10 (1997), available at http://www.futureofchildren.org/usr_doc/vol7no2ART1.pdf.

family income], only 10 million children (14.2%) lived in families whose combined cash income and noncash benefits were below the poverty level in 1995.¹⁴⁴

Nevertheless, political discourse, particularly at the national level, and public opinion moved beyond the welfare reform efforts of the 1980s and early 1990s. Those efforts had emphasized, first, provision of adequate income and alleviation of poverty, and second, increased employability. The 1990s welfare reform debate centered squarely on work—the argument became that work, not public assistance, should be the main source of family income, even in single parent families. It emphasized the reduction of out-of-wedlock births and increased employment of single mothers. The 1996 welfare law, PRWORA,¹⁴⁵ ended the federal guarantee of assistance to all eligible families and shifted administrative authority to the states, giving states unprecedented discretion in deciding which families to assist, what services to provide, what requirements to impose, and how to respond to families who cannot find work adequate to support their families within allotted time limits. PRWORA provided that federal welfare funds (TANF) would be allocated through a lump-sum block grant to each state. The TANF program replaced AFDC. The block grant amount was not scheduled to increase in size in future years regardless of changes in the economy. In addition, a five-year lifetime limit was placed on the amount of time a family can receive federal assistance.¹⁴⁶ Further, states would receive full federal funding only if, by the year 2002, half of the adults receiving federal assistance worked at least 30 hours per week. PRWORA also reduced funding of both food stamps and income support for the disabled (Supplemental Security Income) and limited aid to legal immigrants to those who arrived in the United States before the effective date of the legislation.¹⁴⁷

144. *Id.* at 11.

145. *See supra* note 1.

146. The law provides that a household which includes an adult who has received assistance through TANF funds for more than 60 months cannot receive additional federally funded benefits. Children who qualify for assistance and live in households in which the adults have exhausted their assistance eligibility (for example, children in foster homes) remain eligible for assistance without a time limit. *See Temporary Assistance for Needy Families*, 42 U.S.C. §§ 601-679 (2000).

147. *See generally* MARK GREENBERG & STEVE SAVNER, CENTER FOR LAW AND SOCIAL POLICY, A DETAILED SUMMARY OF KEY PROVISIONS OF THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES BLOCK GRANT OF H. R. 3734: THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (1996). *See also* Larner et al., *supra* note 111.

The needs of children received some consideration under the new law. Federal spending on childcare subsidies increased, though the number of poor mothers with young children entering the work force would increase even more dramatically. While childcare assistance under the former law was guaranteed to welfare recipients who worked, attended training or participated in job search activities,¹⁴⁸ and federal funds matched state fund expenditures for childcare, under TANF federal funds for childcare are capped.¹⁴⁹ However, eligibility for Medicaid coverage depends on family income under the new law rather than welfare status, so Medicaid will continue to be available to families who meet income guidelines. Under AFDC, families receiving welfare were automatically enrolled in Medicaid, but now welfare and Medicaid are less closely linked and children's access to Medicaid is not as well protected.¹⁵⁰

It is not clear yet what impact the new welfare policies will have on the well-being of children. Past research on the effects of various government assistance programs indicate that even those families in which the parent(s) succeed in finding work are likely to remain poor.¹⁵¹ The conditions associated with poverty have damaging effects on children's success in school and later in life, whether the children's parents relied on public assistance or employment as a source of income.¹⁵² As a nation, our economic and

148. WAYS AND MEANS COMM., *supra* note 101.

149. *Id.*

150. See S. ROSENBAUM & J. DARNELL, GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER FOR HEALTH POLICY RESEARCH, AN ANALYSIS OF MEDICAID AND HEALTH-RELATED PROVISIONS OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996 (1997).

151. Research on the post-1996 reform efforts bear out this assumption. For example, recent studies conducted by the Manpower Demonstration Research Corporation, a noted research group that conducted a number of studies on the effectiveness of several benefit programs prior to the 1996 reform, examined the impact of welfare reform to date in Los Angeles, California. Los Angeles is home to more welfare recipients than 48 of the 50 states. It found that "43 percent of poor families who were required to participate in the city's welfare reform program got jobs, while only 32 percent of families randomly selected to remain in the traditional welfare program did. This represents an increase of one-third over the old welfare program. [But most] recipients were still receiving welfare because their earnings were so low. The typical recipient who was working was earning \$6.54 an hour, [an expert] said [they] need[ed] to earn \$7.82 an hour before they [would] make enough to stop receiving welfare." The study also showed that welfare recipients in this major urban area were far more successful at getting jobs and made significantly more money than their counterparts in rural and suburban areas, though the largest decline in welfare rolls has occurred in rural and suburban areas. Judith Havemann, *Welfare Reform Success Cited in L.A.*, WASH. POST, Aug. 20, 1998, at A1.

152. See *supra* discussion in Part I(A)(2).

social future will be determined in large measure by the way we provide for our children. Public concern with the welfare of children has been expressed through development of the child protection system. The child protection system can also play a vital role in promoting economic security for children.

C. The History and Development of Child Protection in the United States

Society's responses to problems of child neglect and abuse are, today, largely a function of government. State and local child welfare departments, operating under the authority of state law, but supported in large part by federal funding, carry out the various responsibilities of child protection. This was not always the case. Historically, there is abundant evidence of incidents of cruelty, maltreatment, and exploitation directed toward children. In the past, child labor, confinement, deprivation of food, and flogging were among accepted methods of child discipline and training. Only in the nineteenth century was any organized form of intervention undertaken on behalf of children at risk from the actions or inactions of their parents.¹⁵³

The current child protection system evolved out of the almshouses, orphanages, and anti-cruelty societies of the past. The legal underpinnings for public efforts to protect needy children can be found in the English Poor Law of 1601, which placed responsibility for the poor in the hands of the local community.¹⁵⁴ The doctrine of *parens patriae* allowed government intervention into the family to enforce parental duty, supply substitute care for the child or protect the child from harm.¹⁵⁵ Attention focused primarily on the children

153. See generally, Samuel X. Radbill, *A History of Child Abuse and Infanticide*, in THE BATTERED CHILD 3-21 (Mary Edna Helfer et al. eds., 1997).

154. The English Poor Law, also called the Elizabeth Poor Law, was comprehensive legislation designed to provide relief to the poor. It became a model for the next three centuries for America as well as England. State intervention in poor families was not only permitted but encouraged as a means to realize other public policy goals ranging from provision of welfare relief at minimal public cost to the prevention of crime. See generally Brenda G. McGowan, *Historical Evolution of Child Welfare Services: An Examination of the Sources of Current Problems and Dilemmas*, in CHILD WELFARE: CURRENT DILEMMAS, FUTURE DIRECTIONS 46-90 (Brenda G. McGowan & William Meezan eds., 1983). See also Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894-99 (1975).

155. The doctrine of *parens patriae* was viewed as a part of equity jurisdiction in seventeenth century England. It derived from the right of the Crown to protect those of its subjects who were unable to protect themselves. It was used reportedly for the first time in

of the poorest families and on those who were orphaned or abandoned. Until the mid-nineteenth century, most "destitute children were sent to institutions operated by private charit[ies] [such as] foundling hospitals to care for unwanted babies" or almshouses (poor houses that served the poor of all ages, along side the aged, infirm and insane).¹⁵⁶ When children reached the age of 9 or 10 years, "they were [typically] indentured to families as servants or apprenticed out to learn a skill and pay for their care by their free labor."¹⁵⁷ In the later half of the nineteenth century, investigations of the almshouses and increasing criticism of the affects of their unsanitary conditions on children, lead private charities and religious groups to create orphanages and children's asylums to separate indigent children from adults.¹⁵⁸ "A number of states passed laws requiring that children be moved from almshouses and [placed in these] children's institutions."¹⁵⁹ By the end of the century, they housed more than 100,000 children.¹⁶⁰ Many children entered the orphanages as infants and left as young adults.¹⁶¹

Foster care offered a better alternative. In 1853, in response to the large numbers of hungry and homeless children in New York City, Charles Loring Brace founded the Children's Aid Society and developed the "placing-out system" (foster care) as an alternative to institutional custodial care.¹⁶² For "75 years the Children's Aid Society sent more than 150,000 orphaned children by train" from the streets of New York to farm homes in the Midwest "where their labor was valued by farm families."¹⁶³ Placing children out was seen as providing more than just care and provision for orphaned and abandoned children. It was viewed as providing an avenue for upward mobility and an escape from poverty for children, including those removed from families too poor to properly care for them. Over the years, the number of orphans declined and out-placing would come to serve primarily those children whose families were

1696 in *Falkland v. Bertie*, 23 Eng. Rep. 814 (1696). See Lawrence B. Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

156. Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 23, 25 (1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART2.pdf.

157. *Id.* at 24-25.

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

unable to properly provide for them. These homes were precursors of the foster care system.¹⁶⁴

"The forerunners of today's child protective services (CPS) agencies that today investigate and respond to child abuse and neglect were private associations called 'anti-cruelty societies.'"¹⁶⁵ The New York Society for the Prevention of Cruelty to Children (SPCC) formed in 1877 after an infamous child abuse case. That same year, New York State passed a law to protect children and impose punishment for harms done to them, giving anti-cruelty societies a legal basis for identification and action taken on behalf of children mistreated by their families.¹⁶⁶ "By the early twentieth century, more than 300 Societies for the Prevention of Cruelty to Children operated in cities throughout the Northeast and the Midwest under the umbrella of the American Humane Associations. These were private agencies, supported by public and private funds, investigated reports of child abuse and neglect, filed complaints against perpetrators in court, and aided in the prosecution of those complaints."¹⁶⁷ The philosophies of the SPCC's varied from state to state as to whether the focus was placed on saving children from neglectful or abusive families or harmful environmental conditions, or on helping families better provide and care for their children.¹⁶⁸ The tension between these two missions has continued to this day in child protection services.¹⁶⁹

By the early twentieth century the focus of child welfare and protection efforts shifted from the mere provision of institutional care to a broader definition of child welfare that adopted a progres-

164. *Id.* It should be noted that, from the beginning the problem of poor or orphaned children was viewed from what is called a "residual perspective." Without families or resources, these children were seen as "social leftovers," (a phrase coined by Duncan Lindsey), or residual children who have fallen through the economic and social cracks of society. "The residual perspective view[ed] state intervention as a measure of last resort, only after the resources of family, [extended] kin, and neighbors have been exhausted." According to this view, "when government does help, [that help] should be minimal, time-limited, and confined to highly selective forms of [aid] directed to specific categories of need." *Id.* Therefore, if residual children were to be provided for, it should be done as inexpensively and conveniently as possible. Within this view, there was debate as to which type of care, institutional or foster care, was the best method. But the underlying premise that needy children were a social problem to be dealt with in a residual fashion prevailed. See Lindsey, *supra* note 29, at 16 n.4. Remnants of that view are reflected in today's child protection policy.

165. Schene, *supra* note 156, at 24-25.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 25-26 (discussing that the evolution of child services is marked by this tension).

sive idea of social reform which included, among others, support for the idea of providing assistance to parents in caring for their children.¹⁷⁰ The Children's Bureau was established in 1910 to focus on the development of health and safety standards for children.¹⁷¹ It promoted labor standards to eliminate exploitation of children as a cheap source of labor, and the creation of mothers' pension programs to provide income protection to female-headed families.¹⁷² In 1920, the Child Welfare League of America, together with the American Humane Society and other agencies, promoted the idea of a private, national child welfare program. It was intended to provide temporary out-of-home care for dependent children and family preservation whenever that option was possible.¹⁷³

By the middle of the twentieth century, the focus of child protection shifted from an emphasis on law enforcement to one of rehabilitation through social services.¹⁷⁴ Child protection efforts became part of a broader array of social services provided through government.¹⁷⁵ By the 1930s and 1940s, the child protection functions previously performed by private humane societies were taken over by various public entities and voluntary organizations, including juvenile courts, child protective agencies, family welfare societies and newly formed state and local governmental bodies.¹⁷⁶ The federal government's participation in child welfare began with the passage of the Social Security Act of 1935 and the creation of the Aid to Dependent Children program.¹⁷⁷ That legislation also included the Child Welfare Services Act that provided limited federal funding to states for the creation of preventive and protective services for children.¹⁷⁸ In reality, most states used those federal monies to fund foster care programs rather than to provide support services to families whose children remained in the

170. For example, "in 1909, the first White House Conference on Children issued the following policy statement: 'No child should be removed from the home unless it is impossible so to construct family conditions or to build and supplement family resources as to make the home safe for the child . . .'" *Id.* at 26 (quoting WILLIAM JOHN SCHULZ, *THE HUMANE MOVEMENT IN THE UNITED STATES, 1910-1922* 209 (1924)). However, foster care remained the major expenditure for child welfare agencies. See Lindsey, *supra* note 29, at 20 n.7.

171. Lindsey, *supra* note 29, at 19.

172. *Id.*

173. *Id.*

174. Schene, *supra* note 156, at 26.

175. *Id.*

176. *Id.* at 26-27.

177. *Id.* at 27.

178. *Id.*

home.¹⁷⁹ "The modern child [protection] system emerged as a major public institution during the 1950s when child welfare agencies became professional state agencies providing foster care and an assortment of other services such as adoption."¹⁸⁰

In the 1960s, the problem of child neglect and abuse gained national attention in the wake of increased documentation by the medical community of what would come to be called the "battered child syndrome," and the role government could play in identifying and responding to the problem.¹⁸¹ In 1974, the federal Child Abuse Prevention and Treatment Act (CAPTA) became law.¹⁸² CAPTA:

encouraged states to pass laws requiring that medical professionals and others identify children who needed protection, and that public social service agencies investigate reports of maltreatment and keep track of substantiated cases. CAPTA also established the National Center on Child Abuse and Neglect, which developed standards for receiving and responding to reports of maltreatment.¹⁸³

As a result, a nationwide child protection system developed, consisting of state laws mandating the reporting of abuse and neglect, child protection service agencies to investigate reports, and state-level registries of perpetrators and victims.¹⁸⁴ Still, even with increased federal funding, the majority of child welfare funds were used for foster care rather than family supportive services.¹⁸⁵

From the mid-1970s to the mid-1990s, "the number of children officially reported as abused or neglected rose by 347 percent."¹⁸⁶ Public concern for mistreated children, codified in mandatory reporting laws, led to a significant increase in the numbers of children identified as abused or neglected.¹⁸⁷ The increased volume of cases has strained the capacity of state and local governments to respond.¹⁸⁸ Cases considered serious are investigated, but few

179. *Id.*

180. Lindsey, *supra* note 29, at 19.

181. Schene, *supra* note 156, at 27.

182. Pub. L. No. 93-247; 88 Stat. 3 (codified as amended at 42 U.S.C. § 5101 et. seq. (2001)).

183. Schene, *supra* note 156, at 27.

184. *Id.*

185. *Id.*

186. *Id.*

187. For the definition of "child neglect" and its distinction from "child abuse," see *infra* note 179 and accompanying text.

188. "Currently, it is estimated that between forty and sixty percent of cases in which maltreatment is substantiated receive no subsequent services." Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 THE FUTURE OF CHILDREN: PROTECTING

resources are available to provide continued social services to families even when evidence of maltreatment is found.¹⁸⁹ The numbers of children placed in foster care has grown in part due to limited availability of resources for other forms of familial support and in part due to state laws and regulations that created a process for removing a child from the home but were less clear on how to help the families or to decide whether to return a child home.¹⁹⁰ Stays in foster care turned out to be long for many children, often with multiple moves from place to place.¹⁹¹

Concern about the large numbers of children in foster care, the length of time they remained, and the number who moved from one foster home to another without being returned to their families or released for adoption led to passage of the Adoption Assistance and Child Welfare Act of 1980,¹⁹² federal law which required states to make "reasonable efforts" to prevent out-of-home placement and to promote family reunification or permanency placement (adoptive homes) for vulnerable children. Permanency planning and family reunification became matters of national policy with the adoption of this legislation.¹⁹³ As a result of this Act, Congress, in essence, federalized the rules by which children enter foster care, the obligations of the states to families with children in foster care, and the expected conditions and time-lines under which children are to remain in foster care. The intent was to prevent unnecessary foster care placements, to reunify families when possible, to encourage adoption when reunification was not possible, and to minimize foster care drift.¹⁹⁴ To accomplish its goals, the Act limited the conditions under which federal dollars could be used by states for foster-care related services. To be eligible for federal reimbursement, states were required to provide preventive and reunification

CHILDREN FROM ABUSE AND NEGLECT 39, 49 (1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART3.pdf.

189. *Id.*

190. For a general discussion of abuse and neglect procedures see Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 625 (1976) [hereinafter Wald, *Standards*].

191. See generally FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES, PATHWAYS AND PLACEMENTS (Richard Barth & David Brodzinsky eds., 1994).

192. 42 U.S.C. § 1305 note (2003).

193. Dana Beaveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 452 (1997).

194. "When the law was enacted, the median length of stay in foster care was two and one-half years. Thirty-eight percent of all children [remained] in foster care more than two years. *Id.*

services to families before and after state removal of children from the home.¹⁹⁵ The Act specifically required that, in each case, "reasonable efforts [shall be made] prior to the placement of the child in foster care, to prevent or eliminate the need for removal of the child from his home, and [once removed,] to make it possible for the child to return to his home."¹⁹⁶ Many states codified these requirements into their own law.¹⁹⁷ The Family Preservation and Family Support program, part of the 1993 amendment of the Social Security Act, provided some additional federal funds for family support and preservation. Still, limited budgets and increasing caseloads prevented any broad or substantial reform of child protective practices or the foster care system.

Although the Act sought to correct what were perceived as financial incentives to over use foster care, that hope has not been realized; out-of-home placements continue to increase.¹⁹⁸ Congressional hearings on the effectiveness of the Act eight years after its passage identified the lack of available resources as a major problem.¹⁹⁹ The combination of limited funds and modest enforcement efforts have limited the Act's impact. Success of the other principle goal of the Act, increased permanency for children who could not be reunited with their natural families, has been equally limited.²⁰⁰ The number of children in foster care has increased two-thirds in the last ten years.²⁰¹ Indeed, there are few indications that the condition of the foster care, as a whole, has improved. Litigation to drive systemic reform of foster care is in its second

195. S. Rep No. 96-336 at 10 (1979), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1459.

196. 42 U.S.C. § 671(a)(15).

197. *See, e.g.*, VA. CODE § 16.1-252(E)(2) (Michie 1994); 29A N.Y. Fam. Ct. Act. § 1027(b), 1028, 1055(C) (McKinney, 1992).

198. *Id.*

199. One witness testified that judicial findings of reasonable efforts were typically made, but not based on evidence. When evidence was presented, judges found that because services were unavailable, the reasonable efforts requirement was simply satisfied. The Chair of the Select Committee on Youth and Families, the honorable George Miller, concluded, "services are not really available. They could be created in the community, but that choice has not been made . . . we are just shuffling kids around hoping they don't die in the process" Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children From the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 456 (1997) (quoting from Foster Care, Child Welfare, and Adoption Reforms, 1988: Joint Hearings Before the Subcomm. On Pub. Assistance and Unemployment Compensation of the House of Representatives Comm. On Ways and Means and the Select Comm. On Youth, and Families, 100th Cong., 2d Sess. 231, 252 (1988)).

200. *See* discussion *infra* and text accompanying notes 184-93.

201. CHILDREN'S DEFENSE FUND, THE STATE OF AMERICA'S CHILDREN YEARBOOK: 1996, 68 (1996) [hereinafter CHILDREN'S DEFENSE FUND 1996]. There has also been an increase in the number of abuse and neglect cases. *Id.*

decade.²⁰² Twenty-one states have been sued because of inadequate child protection programs, and a number of state foster care systems are under federal court supervision because of multiple failures to meet state and federal requirements.²⁰³

As the numbers of children in foster care has continued to climb, the emphasis on permanency planning for foster children has resurfaced, as reflected in passage of the Adoption and Safe Families Act in 1997 (ASFA).²⁰⁴ While the ASFA provides some increased funding for family support and family preservation programs, it also shortens the time parents have to regain custody of their children before the state initiates proceedings to terminate their parental rights. Adoption is now promoted as a solution for children at risk at home. Today, the child protection system provides limited support care, such as in-home counseling, to help parents better fulfill their parental responsibilities, but primarily provides substitute care, i.e., foster care when parents are unable to do so.

D. Poverty, Child Protection, and Welfare Reform

In 1994, "child protective services agencies investigated reports of maltreatment involving nearly 3 million children."²⁰⁵ "Roughly

202. In 1992 the Supreme Court held that foster care children have no private right of action to sue under the Civil Rights Act, 42 U.S.C. 1983, to enforce the federal statutory requirement and compel agencies to administer federally mandated services under the "reasonable efforts" requirement of the Adoption Assistance and Child Welfare Act of 1980. *Suter v. Artist M.*, 503 U.S. 347 (1992).

203. See, e.g., *LaShawn A. v. Barry*, 69 F.3d 556 (D.C. Cir. 1995) (examining the District of Columbia's foster care system, which subsequently was placed in receivership); *Jeanine B. V. Thompson*, 877 F. Supp. 1268 (E.D. Wis. 1995) (examining Wisconsin's foster care system); *Norman v. McDonald*, 930 F. Supp. 1219 (N.D. Ill. 1996) (extending period of consent order following class action suit against Illinois Department of Children and Family Services).

In Los Angeles, where roughly 41 percent of all California's children in foster care receive services, an audit revealed that the county failed to protect children in foster care from substandard conditions and physical and sexual abuse. It also showed that approximately 3,000 case files on foster homes that had experienced serious problems were never referred to the state for administrative action, and that the county did not even know how many children were actually in the foster care system at the time of the audit. Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative*, 4 STAN. L. & POL'Y REV. 183, 184 (1994).

204. 42 U.S.C. § 1305 note (2003).

205. Mary B. Lerner et al., *Protecting Children From Abuse and Neglect: Analysis and Recommendations*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 4, 10 (1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART1.pdf [hereinafter *Protecting Children*].

one-third of all investigated reports are substantiated, [i.e.,] found to involve evidence of abuse or neglect in violation of state laws.²⁰⁶ At "this rate of substantiation, . . . a total of 994,586 children were identified nationally as child victims in 1995."²⁰⁷ Child maltreatment occurs in families at all income levels, but poverty has long been identified as an environmental factor that contributes to child maltreatment, particularly neglect.²⁰⁸ "National data indicate that abuse or neglect are twenty-two times [more] likely to occur in families with . . . [annual earnings of] less than \$15,000 . . . as they are [to occur] in families earning \$30,000."²⁰⁹ The higher frequency of substantiated maltreatment in poor families may be attributed in part to definitional standards for neglect, which encompass many circumstances associated with poverty.²¹⁰ Further, "aspects of a family's economic and social situation (such as unemployment, [homelessness,] or social isolation) [can] affect . . . [the occurrence of child] maltreatment . . . through their [psychological] effects on the parents' . . . well-being."²¹¹

Child protection authorities become involved with a family in one of two ways.²¹² Either the family itself comes to the agency and requests assistance or the child protection agency receives a report of suspected abuse or neglect.²¹³ After investigation, the agency decides whether and how to intervene on behalf of the child. In all states, the child protection agencies have broad discretionary authority to decide how to respond.²¹⁴ They can bring abuse or neglect charges against the parents, which usually leads to a judicial hearing, and frequently results in the removal of the child; they can offer placement, removing the child from the home without judicial approval; they can offer other aid to enhance the child's

206. *Id.*

207. *Id.*

208. Child neglect is the most common form of maltreatment. Data from the U.S. Department of Health and Human Services Third National Incidence Study of Child Abuse and Neglect, published in 1996, indicate that approximately 474,800 children in 1986 and 879,000 children in 1993 were victims of reported cases of child neglect. Studies suggest that poverty is especially related to serious neglect and physical violence toward children, but that sexual and emotional abuse are not closely related to socio-economic status. English, *supra* note 115, at 44-47.

209. *Protecting Children*, *supra* note 205, at 16.

210. For discussion of statutory grounds for neglect, see *infra* note 277.

211. See generally, English, *supra* note 188, at 45-46. See also NATIONAL RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT (1993).

212. Lindsey, *supra* note 29, at 164.

213. *Id.*

214. *Id.*

safety and well-being within the home environment.²¹⁵ How an agency responds may be influenced as much by factors beyond the nature or immediacy of the harm to the child, such as the availability of alternatives to out-of-home placement and the tendency of child welfare personnel to treat income inadequacy as a proxy for neglect or abuse, as by the facts of the particular case.²¹⁶

Although administration of the child protection system is the responsibility of the states, much of the funding for child protection comes from the federal government.²¹⁷ Consequently, federal financial support has been central in shaping child protection policy and practice. Some federal funds are earmarked for family support and preservation services, but "more substantial federal funding goes to pay for the care and supervision of children in out-of-home [placements]."²¹⁸ For example, as a point of comparison, in 1995, federal foster care spending exceeded \$3 billion dollars, while federal spending on family preservation and support and other child protective services programs was \$442 million.²¹⁹ In addition,

215. During the last decade or so the discretionary power of child protection agencies has grown, "as has court involvement in child welfare cases." *Id.* Child protection caseworkers, with the authority of the courts behind them, have "considerable authority to remove children" from their homes. *Id.* The removal can happen in one of two ways, as indicated above. "The parent may voluntarily release the child to the care of the child protection system" or, if the "parent refuses to cooperate," the caseworker can petition the court for removal and placement. *Id.* "When a court becomes involved, it makes a . . . jurisdictional . . . judgment" based on such "descriptive criteria as observed parental behavior, apparent neglect or abuse to the child," or other indicators. *Id.* Once jurisdiction is established and investigation of the specific harm to the child is completed, the court renders a dispositional judgment based on the "the best interest of the child" standard. *Id.* at 164-65. *See also* Wald, Standards, *supra* note 190, at 628-31.

216. Some commentators have suggested that broad and inconsistent standards in abuse and neglect statutes allow for class-biased decisions by case workers. *See generally*, Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683 (2001). While class bias may influence some out-of-home placement decisions, the labeling of income inadequacy as abuse or neglect may also be attributed to the conceptual blurring of child abuse and child neglect, which limits the perception of available responses.

217. "A 1990 survey of public child welfare agencies indicated that state and local governments provided 57 percent of child welfare funding, with the remainder covered by the federal government." Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 88, 90 (1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART6.pdf.

218. *Id.* For a description of the continuum of family and child service alternatives, see Jacquelyn McCroskey & William Meezan, *Family Center Services: Approaches and Effectiveness*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 54 (1998), available http://www.futureofchildren.org/usr_doc/vol8no1ART4.pdf.

219. *See* WAYS AND MEANS COMM., *supra* note 101. For a description of the primary federal programs that support child protection and level of support provided through each program in 1995, see Courtney, *supra* note 217, at 90-93.

the foster care payment and the adoption assistance program (financial assistance for those who adopt children with special needs) currently provide the only uncapped entitlement funding to [the child protection system] in which reimbursements to states [increase or decrease based] on the number of children . . . in out-of-home care and the costs of that care. . . . The other major sources of federal dollars for child welfare have fixed funding, which only changes with the agreement of Congress and the President.²²⁰

Social policy analysts have suggested that the “combination of fixed funding” sources for prevention and support services to needy children and their families, but “open-ended” funding for “out-of-home care, creates an incentive for public agencies” to use foster care placement as their most frequent means of response rather than offer other services that could keep the family intact.²²¹

The federal government spends more per capita on foster care than either in-home child protection or direct cash assistance to poor families.²²² For example, “in 1993, the median monthly AFDC payment for one child (\$212) was more than \$100 per month less than the median foster care maintenance payment.”²²³ Costs for care of children in institutional rather than foster family care averaged \$3,000 per month.²²⁴ “Furthermore, foster care rates are proportional to the number of children placed (two children generate twice the payment rate of one child).”²²⁵ By contrast, the per capita payment rates of AFDC decrease as family size increases.²²⁶ In light of the spending differences between foster care and welfare, the total net federal per child costs of foster care in 1995 was \$11,698, but only \$1,012 for AFDC.²²⁷ When state contributions are factored in, the average government cost of welfare support per person was \$2,499, while the per-child costs of foster care was \$21,902.²²⁸

The costs for investigating child maltreatment reports and for provision of prevention efforts and in-home services to families are

220. Courtney, *supra* note 217, at 92.

221. *Id.*

222. *Id.* at 93

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 93-94.

borne largely by the states; therefore, per-case costs vary widely.²²⁹ However, the estimated average per case costs in 1993 dollars was \$813 per investigation and \$2,702 per case for in-home services such as family counseling.²³⁰ "Although foster care spending has grown with the foster care case load, funding for . . . [child protective] investigations and [preventive] services to families has not risen significantly" despite a 63% increase in the number of reported cases from 1985 to 1995.²³¹ The contrast between government expenditure for foster care relative to that spent for prevention efforts or in-home assistance suggest that the child protection system has fewer resources to provide services to a growing number of at risk children and that, at least in part, explains the emphasis on foster care placement as a response.

Although, under welfare reform, federal funding to the major programs supporting child protection services, foster care and adoption assistance are retained, the changes in the cash assistance program (TANF) are likely to increase the pressure on the child protection system. Most of the children involved with the child protection system come from families living in poverty or in marginal economic circumstances. Therefore, any substantial change in the economic circumstances of such families is likely to increase the need for child protective services.²³² The primary objective of welfare reform is to make families self sufficient by emphasizing participation in work and work-related services.²³³ But recipients of welfare benefit who succeed in finding work typically earn low wages; consequently, the financial benefits of work will likely be marginal for most families.²³⁴ Families can receive assistance only for a lifetime maximum of five years, and some states have set shorter time limits. Under TANF, "states can deny families cash or in-kind assistance for failing to comply with work requirements or for exceeding the time limit[s], jeopardizing [a] family's ability to [meet] basic needs."²³⁵ "The Congressional Budget Office has estimated that between 2.5 and 3.5 million children could be affected by the five-year federal time limit . . . when the law is fully implemented"²³⁶

229. *Id.* at 94.

230. *Id.*

231. *Id.* at 94-95.

232. *Id.* at 95.

233. *See supra*, text accompanying notes 19-20.

234. *Id.*

235. *Id.*

236. *Id.* *See also id.* at 95-99; David A. Super et al., Center on Budget Policy and

In addition, if work requirements are met, children of working parents may be left unsupervised or in unsafe childcare settings. Although the welfare reform law increases federal childcare funding, "the Congressional Budget Office projects a shortfall of \$1.8 billion in childcare funds for low-income working families by the 2002."²³⁷ Further, benefit recipients are "not guaranteed childcare subsidies under the new law, and families with children over six years old can be penalized for failure to [participate] in work activities."²³⁸ As a result, "many parents may be faced with the choice of either losing benefits if they disregard work requirements . . . , or leaving their children unsupervised or in unsafe childcare. The latter choice [may] be grounds for child protective services intervention."²³⁹

Growth in child poverty for any of the reasons discussed above is likely to lead to increases in child maltreatment, particularly child neglect, and a corresponding increase in the demand for child protective services. At the same time as the demand for child protective services increases, "fewer federal funds will be available to support child protective services" other than foster care.²⁴⁰ Despite the fact that foster care is expensive, welfare reform may indirectly reduce the availability of alternative services, thereby increasing the use of out-of-home placement in response to the needs of at-risk children. Viewing child protection and welfare as complementary measures, and developing policy accordingly, could result in a more efficient use of public funds and provide a more effective means of protection for needy children.²⁴¹

Priorities, The New Welfare Law (Aug. 1996), at <http://www.cbpp.org/WCNSUM.HTM> (last visited Apr. 10, 2003).

In addition to changes . . . in the cash assistance system, the welfare reform law also narrows the definition of child disability under the [Supplemental Security Income] program that provides income support to disabled [persons]. It is estimated that by the year 2002 these changes may eliminate more than 22 percent (or 315,000) of those children of low-income families . . . who previously qualified for assistance.

Courtney, *supra* note 142, at 98.

237. *Id.* See also U.S. Dep't of Health and Human Services, National Center on Child Abuse and Neglect, Child Maltreatment 1994: Reports from the States to the National Center on Child Abuse and Neglect (1996).

238. *Id.*

239. *Id.*

240. *Id.* Under welfare reform, Emergency Assistance program funds, which many states previously used to defray some costs associated with child protection, ". . . is collapsed into the TANF block grant" and states are no longer required to use a portion of those funds for child services. *Id.* 98-99.

241. See generally *id.* at 100-01.

PART II. FAMILY RIGHTS DOCTRINE AND THE PUBLIC DUTY TO CHILDREN

The legal foundation for the child protection system's intervention into family affairs derives from state laws that prohibit parents and care givers from harming or threatening a child's health or welfare by "physical or mental injury, sexual abuse, . . . neglected treatment, or maltreatment."²⁴² But fulfillment of the duties of the child protection system place it squarely at the intersection of two core values of American society—protection of children and respect for the privacy of the family. The balance between these often-competing interests is a delicate one. Nowhere is the tension between the values of family privacy and child protection more evident than in the case of coercive intervention and removal of a child from the home for reasons of neglect arising from conditions of poverty. Nor does any circumstance so clearly demonstrate how closely linked, yet incompatible in effect, are current child protection policy and welfare reform.

A. *The Family Rights Limitation on State Intervention*

In the United States, high value is placed upon privacy, independence, and parental rights. Our legal system has long recognized the Fourteenth Amendment's protection against the deprivation of life, liberty or property without due process of law as creating a domain of personal and familial privacy, which government is bound to respect.²⁴³ It is firmly established that this sphere of family privacy affords freedom of personal choice in a wide range of family matters,²⁴⁴ including decisions with respect to marriage,²⁴⁵ procreation,²⁴⁶ the bearing of children,²⁴⁷ the choice of family living arrangements,²⁴⁸ and the rearing and educating of children.²⁴⁹ Our legal tradition has generally accepted as fundamental the relation-

242. Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5106(g)(4) (2003).

243. U.S. CONST. amend. XIV, §1.

244. *Roe v. Wade*, 410 U.S. 113, 169 (1973) (Stewart, J., concurring).

245. *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967).

246. *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

247. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Roe v. Wade*, 410 U.S. 113 (1973).

248. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977).

249. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts* 321 U.S. 158 (1944); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

ship between parent and child, as well as the integrity of the family unit itself; included in that tradition is the proposition that parents have a paramount claim to the care and custody of their minor children in all but exceptional circumstances.²⁵⁰ As the Supreme Court has plainly stated, "the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."²⁵¹ Respect for parental authority and family autonomy reflects a long-standing social consensus that the family, rather than the state or other institutions, is best equipped to educate and socialize children, and inculcate moral and cultural values.²⁵² Deference to parental authority is consistent with society's interests in the promotion of social diversity and cultural pluralism.²⁵³ And, regard for family relations and protection of the parent-child relationship is considered essential to a child's normal, healthy development.²⁵⁴

While the relationship of parent and child is deemed fundamental, it is not absolute. The state can intervene in that relationship if it first demonstrates some compelling reason to do so.²⁵⁵ The

250. *Yoder*, 406 U.S. at 232 ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring tradition"); *Dickinson v. Lascaris*, 423 N.E.2d 361, 363-64 (N.Y. 1981) (only extraordinary circumstances justify removal of a child from parent's custody).

251. *Prince*, 321 U.S. at 166. The Court recently reaffirmed the proposition that "[c]hoices about marriage, family life, and the upbringing of children are among the associational rights this Court has ranked as >of basic importance in our society,' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M. L. B. v. S. L. J.*, 519 U.S. 102, 111 (1996) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)).

252. *Bellotti*, 443 U.S. at 638 (the parent's role in training children for the responsibilities of adulthood "in large part, is beyond the competence of impersonal political institutions."); *Moore*, 431 U.S. at 503-04 (family has role in protecting its members from personal and economic hardship).

253. *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."). See also Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992 (1975) [hereinafter, Wald, *Neglected Children*]; Areen, *supra* note 154, at 893.

254. See *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."). See also 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 147 (1897) (the law has historically recognized the natural bonds of affection between parent and child lead parents to act in the best interest of their children). See generally, JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996).

255. Meeting this test requires a clear showing of harm to the physical or mental health of the child or to the public peace, safety or general welfare; ambiguous justifications and vague assertions of benefit to the child or the public will not suffice. *Yoder*, 406 U.S. at 213-

protection of a child from harm is such a reason, and the state has long intervened in families to protect the welfare of children under the *parens patriae* doctrine and the state's police powers.²⁵⁶ But the means undertaken by the state must be narrowly tailored to achieve its avowed purpose. In the context of child protection this suggests that the nature of the state's intervention in the family on behalf of the child's welfare must be by the method least intrusive on the rights of the parent and child that will accomplish the state's objective.²⁵⁷

All states have abuse and neglect laws that provide a basis for state intervention. Statutory definitions vary widely from state to state. The language of some statutes define with precision the kinds of conduct that constitutes abuse or neglect, while others use far more general language.²⁵⁸ The types of permissible intervention also vary widely, from minimally intrusive approaches such as in-home counseling and parental skills training while leaving the child in the parents' custody to emergency removal and out-of-home placement, with intent to terminate parental rights.²⁵⁹ Law and

15 (state interest in compulsory education not sufficient to overcome parents' rights absent showing of harm to child or 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); *Pierce*, 268 U.S. at 535-36 (statute requiring all students to attend public schools interferes with rights of parents to direct education and upbringing of child); *Meyer*, 262 U.S. at 401 (state interest in encouraging American ideals by prohibiting teaching of foreign languages insufficient to permit infringement of parents' rights to raise children as they see fit).

256. *Quilloin v. Walcott*, 434 U.S. 246 (1978). See Areen, *supra* note 154; Custer, *supra* note 155.

257. *Roe v. Conn.*, 417 F. Supp. 769, 779 (M.D. Ala. 1976) (a state must consider alternatives such as parenting seminars, counseling, and in-home supervision before severing the parent-child relationship). See generally, *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1231-42 (1980) (state's compelling interests for family intervention must be narrowly tailored and least intrusive).

258. See, e.g., VA CODE ANN. § 63.2-150548.2 (Michie, 1995) (defines an "abused child" as one whose "parent creates or inflicts upon child physical or mental injury by other than accidental means . . ."); GA CODE ANN. 19-14-2(4) (1994) ("Neglect" means harm to a child's health or welfare by a person responsible for the child's health or welfare which occurs through negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care."); COLO. REV. STAT. § 19-1-103III (1995) (Neglect means any case in which "the child's parents, legal guardian, or custodian fails . . . to provide adequate food, clothing, shelter, medical care" etc.); OHIO REV. CODE ANN. § 2151.03 (A)(2) (Banks-Baldwin 1995) (A neglected child includes "any child . . . [w]ho lacks proper parental care because of the faults or habits of his parents, guardian, or custodian.").

259. The Adoption Assistance and Child Welfare Act of 1980 requires that states make "reasonable efforts" prior to removing a child from its home. 42 U.S.C. § 671(15) (2003). Although the statute does not define "reasonable efforts," that it includes this pre-condition on removal suggests nonetheless that state interventions on behalf of children should, to the extent possible, take the form of alternatives other than removal. The 1997 Adoption and

policy experts have long debated the extent of the harm posed to children by family intervention in general, and by out-placement in particular.²⁶⁰ However, few would argue with the postulate that the state should not intervene without good reason. The question is, what is “good reason?” When is intervention necessary, and what type of intervention is justified?

The dilemma of child protection policy and practice lies in finding interventions that actually help endangered children, while not causing unnecessary harm and disruption.²⁶¹ In its role as *parens patriae* the state has assumed the responsibility to intervene when a child is maltreated. But not all interventions are equally effective or helpful, at least in part because of the limitations in the

Safe Families Act (ASFA) amended the requirements of the AACWA to provide that the state may place the child in foster care without making reasonable efforts to retain in the home under certain limited circumstances, such as: in cases involving “aggravated circumstances” (abandonment, chronic abuse, sexual abuse); in cases in which the parent committed murder or voluntary manslaughter of another child; or, in cases involving felony assault resulting in serious bodily injury to any child. It does not alter the “reasonable efforts” directive as it relates to what one might call the “typical neglect” case—those involving deficiencies in parental care that do not cause grave risks of death or physical harm. The new statute does, however, direct states to initiate termination of parental rights for children who have been in foster care for 15 of the preceding 22 months. For further discussion of the AACWA and ASFA. See *supra* discussion in Part I(C).

260. See GOLDSTEIN, ET AL., *supra* note 254 (stressing the importance of minimizing intrusion by the state in parent-child relationship and maintaining family integrity. Emphasizing harm caused a child by separation, the authors theorize that as far as the child's emotions are concerned, interference with parental ties to a parent, whether that parent be “psychologically fit or unfit” can be painful to the child. The authors apply a psychoanalytic analysis of child placement and conclude that decisions should seek to maximize continuity of care and rest upon a determination of what would be “the least detrimental alternative.”) For a critique of “the least detrimental alternative” approach to child placement decisions, see Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Detrimental Alternative*, 75 GEO. L.J. 1745 (1987).

261. As noted earlier, the debate between interventionists and non-interventionists is longstanding. At one end of the spectrum are the interventionists who reflect the psychological (or more generally, the behavioral sciences) rationale incorporated in the early residual perspective of child protection. That is, that society offers opportunities for all families to provide for the physical, emotional, and social needs of their children and thus, the failure of some families to do so is due to the moral, psychological or physiological shortcomings of the parents. The answer to the child's need for protection from these failings is removal from the family. At the other end of the spectrum are the non-interventionists who argue that all state intervention, even intervention without removal, poses great risks to the child's developmental progress and is invariably detrimental. They advocate that state intervention by child protection services be limited to cases of serious bodily injury inflicted, or attempted to be inflicted, by parents upon their child, or sexual abuse or abandonment. They argue against intervention for other less serious physical harms or for emotional or intellectual harm, even when serious. For a discussion of the non-interventionists view, see GOLDSTEIN, ET AL., *supra* note 260; for critique of the non-interventionists see Garrison, *supra* note 260; for a strongly interventionists view see SANFORD KATZ, *WHEN PARENTS FAIL* (1971).

resources of the child protection system, as well as because of disruption to the family and its potential to exacerbate the harm to the child.²⁶² Removal and placement in foster care is intrusive and disruptive of the family relationship.²⁶³ It is also one of the most frequently used forms of intervention.²⁶⁴ Child abuse and neglect occurs in families at all income levels and, indeed, most poor people do not mistreat their children. But poverty is a common characteristic of families charged with maltreatment, particularly neglect, and removal is a common response of child protective agencies.²⁶⁵ Without question, not every family can or should be preserved. And, without peradventure, the state's child protection authority serves to justify state action. But can we ever justify coercive removal of a child from his or her home for reasons of neglect arising from conditions of poverty?

262. Jeanine L. English & Michael R. Tritz, *In Support of the Family: Family Preservation as an Alternative to Foster Care*, 4 STAN. L. & POL'Y REV. 183, 187 (1992/1993) (quoting Charles P. Gershenson, former Chief of Research and Evaluation of the Children's Bureau of U.S. Department of Health and Human Services):

Some [experts] estimate that between 35 and 70 percent of children placed in foster care should not be there and can be severely damaged by the experience. According to a former chief of research and evaluation of the Children's Bureau of the U.S. Department of Health and Human Services '[r]esearch over the past 40 years says that if you remove the child from the home, you traumatize the child more than he is already hurt. You inflict a subsequent injury, especially on a young child who can't understand why he's been removed from his family. They feel they did something bad, and that it is their fault, or they view it as a kidnapping.'

263. This article focuses on coercive removal and outplacement of children by the state. However, many children receive out-of-home placement care at the request of their parents who, when faced with unemployment, sudden homelessness, or other economic emergency, and lacking any meaningful alternative, surrender their children for foster care placement. Although the coercive undertones of some so-called voluntary placements resemble more "a plea bargain of sorts in which the parent agrees to placement rather than contest an imminent neglect or abuse action." See Garrison, *supra* note 260, at 1807; Laura Oren, *DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990). But whether by involuntary or voluntary placement, once a child enters foster care, the parent relinquishes custody of the child and the right to play a role in decisions about the child. *Smith v. Org. of Foster Families for Equal. and Reform* (O.F.F.E.R.), 431 U.S. 816 (1977).

264. See *supra* discussion Part I(C).

265. Since many poor families receive some form of public assistance benefits, they are subject to social work supervision. Consequently, complaints concerning their children are more likely to be made than complaints against families not receiving public assistance due to increased exposure to persons obligated to report instances of perceived childcare deficiencies and who may disapprove of the parents' childcare methods. Neglect laws appear to be applied "more stringently" against poor parents than against middle class parents, and particularly against racial and ethnic minorities. Wald, *Standards*, *supra* note 190, at 623, 640-41. See also English, *supra* note 188, at 44-47.

Existing constitutional doctrine would support this intrusion on family integrity only if this method of intervention is the least intrusive, most narrowly tailored means by which the state can accomplish its goal of protecting the welfare of the child. Legal commentators have suggested that whether removal of a child for reasons of parental poverty can ever be justified as the "least intrusive" means depends on the availability of money and other services to support poor families. If money and services to support their families were available, many children who have been removed from their homes because of neglect, might have remained at home. If money and services are not available, however, the children may be at risk unless they are removed and provided support by the state in another setting, such as foster care."²⁶⁶ I agree that whether removal of a child for neglect arising out of conditions of poverty is ever justifiable as the least intrusive means depends, in part, on the availability of alternatives.²⁶⁷ I submit, however, that whether removal in such cases can ever be justified as the least drastic alternative turns not merely on the *availability* of economic support and other services. It is also a function of the likelihood that removal and placement in foster care will accomplish the state's objective of protecting the child. The intrusion on family privacy by removal of the child might be constitutionally permissible, even if financial support and services were available as alternative forms of intervention, if removal and subsequent placement in foster care was a demonstrably more effective means of advancing the state's compelling interests in protecting the child. I would argue, however, that in cases of removal on grounds of neglect, generally, it is not.

There is substantial support for the proposition that, except in cases involving seriously harmed or abandoned children, a child's situation is not improved through removal. In fact, removal frequently results in placing a child in a more detrimental situation, thus compounding the harm.²⁶⁸ Therefore, whether removal for neglect arising from conditions of poverty can be justified as the least intrusive form of intervention must turn on a weighing of the actual harm or likelihood of harm to the child by remaining in the home, against the likelihood of harm caused by removal and placement in foster care. If the harm caused by removal is likely to

266. See Braveman & Ramsey, *supra* note 199, at 451-52. See generally Garrison, *supra* note 260.

267. Braveman & Ramsey, *supra* note 199, at 451.

268. See *infra* discussion accompanying notes 183-200.

be as great as or greater than the harm of remaining in the home, the degree of intrusion into the family posed by removal is neither constitutionally justified, nor in the best interests of the child.²⁶⁹ Assuming that the state will continue to undertake responsibility for protecting poor children from neglect,²⁷⁰ one must ask, then, how family privacy doctrine limits the method by which the state fulfills that responsibility and what implications those limitations have for child protection practice, particularly in light of welfare reform.

B. Foster Care: The Least Drastic Alternative?

"Historically, [the child protection system] ha[s] operated from the principle that no child should be removed [from home] for reasons of poverty."²⁷¹ Current statutory safeguards also technically excuse parents who are unable to provide for their children.²⁷² However, child protective agencies rely routinely on neglect statutes to place poor children in out-of-home care. Evidence indicates that poor children are more likely to end up in foster care than children

269. Once a court finds a child neglected following a petition by child protective services, the court renders a disposition, i.e., it decides what to do with the child. Since most neglect "statutes [offer] no specific guidelines for dispositional decisions", the court renders the disposition it determines to be in the child's "best interests." Wald, Standards, *supra* note 190, at 631; Robert H. Mnookin, *Child Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 29 LAW & CONTEMP. PROBS. 226 (1976).

270. The Supreme Court has held that a constitutional obligation to protect an individual's safety and well-being arises only when that individual is in the custody of the state. Thus, the state has no affirmative duty to protect the safety and well being of poor children. See *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189 (1989). Nevertheless, this Article assumes that society will continue to value its children and thus presumes that the state will not abandon its child protection role and will, therefore, continue to intervene on behalf of neglected children.

271. Lindsey, *supra* note 29, at 168. "Since 1909 there has been an historic principle that children should not be removed from their home for 'reasons of poverty' To remove a child from his or her parent(s) for reasons of poverty would be 'cruel and unusual punishment', or severely harsh punishment for conditions which the parent(s) may be unable, at least temporarily, to change. Instead, the child welfare social worker has been mandated to provide services and resources to the family so that removal of the child for reasons of poverty would not be necessary" *Id.* at 168 n.75 (citations in original omitted).

272. See, e.g., N.Y. Fam. Ct. Act § 1012 (f)(I)(A) (1998):

'Neglected child' means a child . . . whose physical, mental or emotional condition has been . . . or is in danger of becoming impaired as a result of failure of his parent . . . to exercise a minimum degree of care . . . in supplying the child with adequate food, clothing, shelter or education . . . *though financially able to do so or offered financial or other reasonable means to do so.*

Id. (emphasis added). See also Areen, *supra* note 154, at 925-26; Wald, Standards, *supra* note 190, at app. 700-01.

of other classes.²⁷³ One reason for the higher frequency in poor families is that definitional standards for what constitutes substantiated incidences of neglect encompass many circumstances and behaviors arising from or directly attributable to poverty.²⁷⁴ Most state neglect statutes define neglect broadly in language that permits wide discretion in determining when state intervention is appropriate.²⁷⁵ Generally, child neglect is defined as the improper care of a child or the inability to provide adequately for the basic needs of a child.²⁷⁶ Circumstances meeting the statutory grounds for neglect may include, for example, lack of adequate food, failure to provide necessary health care or immunizations for a child, unsafe childcare or lack of supervision.²⁷⁷ In other words, "neglect"

273. See *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 833-34 (1977) ("[F]oster care has been condemned as a class-based intrusion in the family life of the poor [The] disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families.") As noted earlier, a total of 994,586 children were identified nationally as victims of child maltreatment in 1995. Fifty-two percent of those cases involved neglect. Children from families with annual incomes of less than \$15,000 are five times more likely to be reported to child protective services as maltreated than any other children. See also Amy Sinden, *In Search of Affirmative Duties Toward Children Under a Post-DeShaney Constitution*, 139 U. PA. L. REV. 227, 228 n.7 (1990).

274. *Id.*

275. *Id.*

276. There is no single definition of "neglect" or "abuse" used consistently from state to state. Although state laws defining child abuse and neglect existed as early as the mid-twentieth century, it was not until enactment of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974 that a national definition emerged. CAPTA created a broad definition of child maltreatment as: "[T]he physical or mental injury, sexual abuse . . . , neglected treatment, or maltreatment of a child [under age 18] by a person who is responsible for the child's welfare, under circumstances which indicate that the child's health or welfare is harmed or threatened thereby," 42 U.S.C. § 5106(g) (2003). CAPTA imposed its minimal definitional standard on states receiving federal funds, but left the details of defining abuse and neglect to the states, thus permitting considerable variation state-to-state. Discussions of the issues surrounding abuse and neglect are frequently merged, blending the two conceptually into one category. However, they are in fact qualitatively different. Child neglect is generally defined as an act of omission by a parent or care giver that involves refusal or delay in providing health care; failure to provide basic needs such as food, clothing, shelter, and attention; inadequate supervision; or abandonment. Thus, improper care is often a result of the parent's inability to provide properly for the child. Child abuse, on the other hand, involves intentional harm a parent inflicts upon a child—acts of commission by a parent or care giver that results in physical harm, including death, or sexual acts of various forms in which children are used for the sexual gratification of the perpetrator (including sexual exploitation and child pornography), or intentional emotional abuse (such as confinement, withholding food, shelter, etc., exposure to domestic violence, other sustained and repetitive emotional or psychological harm). See English, *supra* note 188, at 40-42. See generally, Lindsey, *supra* note 29, at 147-48.

277. For example of some states neglect statutes, see *supra* note 164. See also, CHILDREN'S DEFENSE FUND 1996, *supra* note 201, at 87; Wald, *Neglected Children*, *supra* note 257, at 1000-03.

is usually defined in terms of deficiencies in parental conduct or inadequacy in home conditions, rather than in terms of the specific harm to the child.²⁷⁸ "Poverty is linked with poor nutrition, a lack of medical care, inadequate day care, poor educational facilities, and psychological feelings of hopelessness and stress."²⁷⁹ It appears that there is also a nexus between poverty and other risk factors for maltreatment such as depression, isolation, and substance abuse.²⁸⁰ Any one of those conditions could suffice to show "harm" as defined in the statute and support a finding of neglect. A child who is maltreated can be removed from home. Thus, the state can, in effect, remove a child from home for reasons of poverty.²⁸¹ The risk to the child justifies state intervention, but it justifies removal to foster care only if that method of intervention would most effectively protect the child.²⁸² If removal and subsequent placement in foster care is no more effective at protecting the child than a less intrusive method of intervention, or if, in fact, it increases the risk of harm to the child, it does not further the state's interest and would not survive strict scrutiny.²⁸³ If the state continues to assume its child protection role, then, it would be required to correct the deficiencies of the foster care system or to use alternative, less intrusive methods of intervention.²⁸⁴ Therefore, it is necessary to examine the effectiveness of foster care as a means of child protection.

Foster care is intended to provide temporary, safe care for children whose parents are unable to care for them.²⁸⁵ But separation of these already vulnerable children from their parents and homes often does not protect the children from further harm or provide them the stable, nurturing care they need. Unfortunately, there is no conclusive data available comparing neglected children, who remain in the home with supportive services, with a similar group who were placed in foster care, so there is no way of being fully certain of the relative positive and negative consequences of

278. See generally, Wald, *Neglected Children*, *supra* note 257, at 1000-01. For a discussion of the positives and negatives of broad definitions of neglect versus more precise definitions see also, Garrison, *supra* note 260, at 1795-1800.

279. Braveman & Ramsey, *supra* note 199, at 461.

280. See discussion *infra* Part I(C).

281. Braveman & Ramsey, *supra* note 199, at 461-62.

282. *Id.* at 463-64.

283. *Id.*

284. *Id.*

285. Foster care includes "any type of care that substitutes others for the natural parent in the parental role, including group homes . . . and institutions, as well as foster family homes." O.F.F.E.R., 431 U.S. at 823-24 n.8.

either alternative.²⁸⁶ However, there is evidence of the potential negative consequences of foster care. Evidence shows that children in foster care are at high risk of further abuse and neglect while in out-of-home care.²⁸⁷ In fact, it has been shown that children in foster care are at a much greater risk of maltreatment than are children in the population at large.²⁸⁸ In addition to the risk of foster family maltreatment, foster children suffer from the effects of so-called "program abuse," which occurs when the failure of the foster care system itself fails to provide children with a stable and secure home setting, or when it does not provide for the child's medical . . . needs.²⁸⁹

Foster care placements are often unstable. Many children experience "foster care drift" in which they "are shuffled from home to home without any opportunity to form an attachment with an adult caretaker. Stays in four or more foster homes are common."²⁹⁰ In addition to the trauma caused by foster care drift, "the likelihood that the child will be abused at some time during his stay increases

286. See McCroskey & Meezan, *supra* note 218, at 60-64.

287. Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children From Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 204-12 (1988). The author points out that children in foster care have suffered further neglect, severe physical abuse and even death. *Id.* at 206. The continues by arguing that "[they] seem peculiarly vulnerable to sexual abuse . . . [attributable to the lack of] permanent kinship bond[s] in foster care . . . combined with the cultural and class gaps that often exist between foster families and foster children. . . ." *Id.* at 205.

288. "A national survey of foster family abuse and neglect, completed in 1986 by the National Foster Care Education Project, revealed rates of abuse that, at their highest, were over ten times greater for foster children than for children in the general population." *Id.* at 206. The actual amount of maltreatment cannot be accurately determined as:

a much higher level of abuse and neglect actually occurs than [is] officially reported. One study attempted to account for unreported or uninvestigated abuse and neglect in assessing the risk of abuse or neglect in foster boarding home care. The study concluded that forty-three percent of the children studied had been placed in an unsuitable foster home, and that fifty-seven percent of the children in the foster care system who were examined were at serious risk of harm while in foster care.

Id. at 206-07.

289. *Id.* at 207.

290. *Id.* at 208. See also Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 225-55 (1990); Rorie Sherman, *Children Adrift: Suits Seek to Reform Foster Care*, NAT'L L. J., June 27, 1994, at A1, A25. Studies have shown that the denial of parental love and compassion can diminish the capacity for the development of those qualities in children raised in foster care. Much research has been conducted on the need for continuity of care to the normal emotional and psychological development. Experts have attributed the development of status anxiety in children to the lack of permanence associated with conditional and impermanent foster care placements. See generally GOLDSTEIN ET AL., *supra* note 260; but for discussion of research contradicting many of these findings, see Garrison, *supra* not 260.

with each move.”²⁹¹ Due to the shortage of suitable foster homes, some children must spend significant periods in group homes, shelters or other impersonal institutional settings, which may cause emotional harm even if their physical needs are provided for adequately.²⁹² Further, the medical care system for foster children has been shown to be inadequate to address the health care needs of foster children, many of whom suffer from acute health problems.²⁹³ “For example, a comprehensive study of the medical status of foster children found that many . . . pre-school age foster children . . . had not received vaccinations for . . . prevention of childhood diseases. Fourteen percent had received no medical examinations upon admission to foster care . . . forty-seven percent of the children had visual problems that had not been evaluated by an optometrist. Over forty percent needed dental care but had not been to a dentist. Only one-fourth of the children who had identifiable emotional or developmental problems had received treatment. When children had received medical attention, it often was incomplete or inadequate.”²⁹⁴

Not only has foster care failed to meet its objective of providing safe temporary care to the children it serves, it has also failed in achieving permanent placement for those children. A few studies have been undertaken in recent years to assess the results of permanency planning efforts after the 1980 Child Welfare Act. Their findings are instructive both in providing information on the current state of the foster care system and in predicting the likely future impact of the 1997 Adoption and Safe Families Act on the foster care system.

Studies in New York and in Michigan examined the foster care populations of those states over a seven-year period.²⁹⁵

291. Mushlin, *supra* note 287, at 208.

292. “One study found that the number of available foster homes decreased from 147,000 nationwide in 1987 to approximately 100,000 three years later.” Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 72, 74 (1998), available at http://www.futureofchildren.org/usr_doc/vol8no1ART5.pdf.

293. “The need [for health care] is acute for foster children who are less healthy than any other identifiable group of youngsters in the United States” Mushlin, *supra* note 287, at 208 (citing research findings of an extensive independent evaluation of the physical condition of 668 children in foster care in New York City, published in F. KAVALER & M. SWIRE, *Foster-Child Health Care* 1 (1983)). Given that foster children come primarily from poor families where lack of adequate food and health care is endemic, it is easy to understand why foster children would be disproportionately unhealthy. See discussion *infra* Part I(C).

294. Mushlin, *supra* note 287, at 208-09.

295. Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 Fam.

The Michigan data were accumulated from 1986 to 1992. Michigan tracks the children who enter the foster care system by placing them into two categories. The first, 'temporary foster care', lists children in foster care who remain legally related to their parents. Some of these children will be returned to their parents' custody; others will be freed for adoption after parental rights are terminated. The second category, is 'state wards;' these are children whose parents' rights have been terminated and who are in foster care awaiting adoption. Some, but not all, of these children will eventually be adopted. In addition, Michigan keeps records of all children who are adopted and, of this number, how many came from foster care.²⁹⁶

A clear trend emerged by comparing statistics on these groups over the seven-year period.

The number of children becoming state wards is increasing. However, the number of state wards being adopted though also increasing, is not keeping up with the increase in the number of children entering the state ward population. As a result, Michigan is experiencing a dramatic increase in the number of children who are freed for adoption but are not adopted.²⁹⁷

Michigan's state ward population has grown steadily from 1986 (the first year of [the] study) through 1992. . . . Moreover it has been accelerating in recent years. . . . From 1986 to 1988, the number of state wards hovered around 1,700. In 1989, the population of freed children in foster care jumped to 2,040. . . . In 1990, the growth in state ward population began a dramatic ascent. In just three years, the state ward population increased nearly 50 percent above its 1989 record level. By the end of 1992, it had skyrocketed to 3,030, a 73 percent increase from 1986.²⁹⁸

At an adoption rate for state wards of 1,200 adoptions per year in 1995, and "[p]rojecting an incremental increase of 400 children annually who are not adopted, there will be 5,000 children awaiting adoptive families [in Michigan] in the year 2000."²⁹⁹ This is only

L. Q. 121 (1995). "These states were chosen because they each have significant foster care population and maintain statewide statistics and a tracking system for foster children." *Id.* 195 *Id.* at 127.

296. *Id.*

297. *Id.*

298. *Id.*

299. *Id.* at 129.

part of the story. The study also indicates that "[o]f the 3,030 legally orphaned children in foster care awaiting adoption at the end of 1992 [when the study was completed], some will wait in vain. Between 1986 and 1992, 325 legally orphaned children were apparently discharged from foster care—many to their own custody as they 'aged out' of the system."³⁰⁰ These children were never adopted and thus never benefited from termination of their parents' rights.³⁰¹ They remained in the limbo of the foster care system, sometimes for several years.³⁰²

The New York study produced similar results. From the first year of the study in 1987 to the last year in 1992, the number of parental rights that were terminated increased annually.³⁰³

1,119 children were freed for adoption in 1987. By 1991, the number had increased to 2,082 children—an increase of 86 percent. Although the number of adoptions also increased each year, from 648 in 1987 to 1,269 in 1991 (an increase of 96 percent), the number of children freed for adoption who were not adopted went from 648 in 1987 to 2,383 in 1991, an increase of 225 percent.³⁰⁴

By mid-1992, New York officially reported that there were 2,495 children freed and available for adoption but not adopted.³⁰⁵ "Many children in this category have been there for many years and have virtually no prospect for adoption."³⁰⁶ Between 1987 and 1991, a clear pattern emerged: "The number of children freed for adoption goes up every year; the number of children adopted fails to keep pace with the number of adoption-eligible children; and the total number of orphaned children not adopted continues to increase fastest of all."³⁰⁷

"The findings of this study are consistent with an analysis of national data conducted in 1986"³⁰⁸ The study found that "the population of foster care children freed for adoption but not adopted

300. *Id.*

301. *Id.* at 130.

302. *Id.* at 129-31.

303. *Id.*

304. This number does not account for all legally orphaned children in New York "because the population of freed children in foster care grows cumulatively over the years." *Id.* at 130.

305. *Id.* at 130.

306. *Id.*

307. *Id.* at 132.

308. *Id.* at 133.

increased 50 percent between 1977 and 1982.”³⁰⁹ In light of the shortened period for termination of parental rights provided in the 1997 Adoption and Safe Families Act, if projections of the continuation of this trend are accurate, “the family ties of a . . . continually increasing . . . number of children [will be severed] with no a concomitant benefit to [the] children.”³¹⁰ As a result, more children will be left adrift in the foster care system.

Further, a large scale study by the federal government’s National Institute of Justice in 1992, found that there is little difference in later incidence of delinquency or criminal activity between children placed in foster care because of abuse and neglect and those children who remain at home. However, among those children taken from their homes, there is a strong correlation between frequent placement changes and high arrest rates. In addition, a 1992 study by Urban Systems Research and Engineering in Washington, D.C. found that more than half of the inmates in Ohio’s prisons were once in the foster care system.³¹¹ This suggests that the detrimental effects of foster care placement may be long term.

The problem with these studies is that they do not provide any information on how these children would have fared had they remained at home and their parents been provided with alternative services. “[F]ederal law require[es] better statewide record keeping.”³¹¹ Unfortunately, it is easier to determine what happens to children after entering foster care than [t]o evaluat[e] the effectiveness of preventive services before children enter the foster care.”³¹² Further study is needed to determine the extent to which families are receiving preventive services and support and to document the extent to which too many children continue to enter foster care when less restrictive means of protecting them and helping their families could have been used.

The fact that significantly more federal funding continues to be directed to foster care services means that there continue to be fewer resources available for prevention and family support. Even

309. *Id.* at 133. The data also revealed that while minority children were more likely to be freed for adoption, they were less likely to be adopted. *Id.* For discussion of the disproportionate impact the frequent use of termination statutes may have on poor children and children of color. See generally John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child’s Right to Permanence*, 54 S. Cal. L. Rev. 633, 738-48 (1981).

310. Guggenheim, *supra* note 295, 134.

311. See *supra* note 10.

311. Guggenheim, *supra* note 295, at 125.

312. *Id.*

when funds are not specifically earmarked for foster care, the limit of federal funds has a significant impact on the availability of alternatives. When child welfare departments allocate resources, preventive services receive a lower priority than mandated foster care for severe abuse cases.³¹³ This is not intended to suggest that under existing doctrine, the expense of foster care constitutionally obligates the state to undertake alternative means of intervention.³¹⁴ On the contrary, the Supreme Court has held that the government may allot public resources in any way that is minimally rational, even when such allocation impinges in some way on family integrity and protected parental rights.³¹⁵ For example, the Court held, in *Dandridge v. Williams*,³¹⁶ that a state could prescribe a maximum grant for welfare benefits regardless of family size, despite the fact that to do so would affect recipients' right of family integrity.³¹⁷ Nonetheless, considering that the annual per child cost of foster care is more than 11 times the cost of providing basic income maintenance, to unnecessarily resort to foster care is a significant waste of public resources.³¹⁸ If removal is also ineffective in protecting the child, arguably, as a matter of policy, it fails even the "reasonable basis" test.³¹⁹ However, how a state chooses to spend its resources for child protection services would likely meet the rational basis standard.³²⁰

When one considers the potential harm to children from foster care placement, it can no longer be presumed that removal of a poor child from a home necessarily serves the state's avowed interests in

313. *Id.*

314. See *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (holding that a state can determine eligibility requirements for benefits; "neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support."). In an earlier article, I considered whether the state, by assuming responsibility to protect neglected children, created a limited, but affirmative, obligation to provide public assistance. See Kay P. Kindred, *God Bless the Child: Poor Children, Parens Patriae, and a State Obligation to Provide Assistance*, 57 Ohio St. L.J. 519 (1995) discussing that while plausible arguments might be made, particularly under some state constitutions, for some degree of entitlement, under current constitutional authority the state has no obligation to assistance to poor children).

315. See generally, Kindred, *supra* note 314, 534-40.

316. 397 U.S. 471 (1970).

317. *Id.* at 485-487.

318. See *supra* text accompanying notes 113-18. See also, David J. Herring, *Exploring the Political Roles of the Family: Justifications for Permanency Planning for Children*, 26 LOY. U. CHI. L.J. 183,195 (1995).

319. *Dandridge*, 397 U.S. at 487 (holding that if the classification made by the state has "some 'reasonable basis,'" courts must defer to legislative and administrative judgments in the allocation of public assistance).

320. See *Lavine v. Milne*, 424 U.S. 577 (1976).

child protection. Thus, even though as a matter of policy, removal may survive rational basis review, it is not clear that it survives strict scrutiny analysis.³²¹ The state does not have an affirmative duty to intervene to protect poor children from the consequences of the economic inadequacies of their parents.³²² Indeed, the state could choose not to provide any child protection services at all.³²³ As the Court concluded in *DeShaney*, “nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. “The Clause ... is not [] a guarantee of certain minimal levels of safety and security.”³²⁴ If the state decides however, by virtue of its *parens patriae* power to intervene, its intervention must be by the least intrusive method by which it can satisfy its avowed purpose.³²⁵ If poverty is the reason a family is unable to adequately care for a child, intervention into the family may be constitutionally permissible, but destruction of the family unit by removal may not be the least intrusive means of protecting the child.³²⁶ If the state could more effectively satisfy its legitimate and compelling interests in protecting the child’s welfare through alternative means of intervention, such as in-home assistance,³²⁷ it may be constitutionally obliged to do so. The lack of conclusive findings as to whether children, in neglect cases are more likely to be better protected from further harm by remaining in the home with supportive services, than by removal, makes a definitive determination difficult. On balance, however, existing evidence supports the conclusion that foster care, at least as it currently exists and operates, often is quite harmful to children and, gener-

321. Braveman & Ramsey, *supra* note 199, at 463.

322. *Id.*

323. *Id.* at 464.

324. *DeShaney*, 489 U.S. at 195.

325. Braveman & Ramsey, *supra* note 199, at 451.

326. *Id.* at 463.

327. In-home assistance can take a variety of forms. Federal regulation delineates a list of suggestive services that states may make available to families to satisfy the “reasonable efforts” requirement of the Adoption Assistance and Child Welfare Act, to include: twenty-four hour emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary childcare to provide a brief respite to the family as part of plan to prevent removal of the child; and other services that the agency identifies as necessary and appropriate such as home-based family services, self-help groups, services to unmarried parents, provision of or arrangements for mental health counseling, drug and alcohol abuse counseling, and vocational counseling or vocational rehabilitation. See 45 C.F.R. § 1357.15(e)(2)(2003). See also, McCroskey & Meezan, *supra* note 218.

ally, may have more harmful consequences for children than leaving the child in the home. Thus, if the state chooses to intervene to aid poor children, it may have a constitutional obligation to do so by providing in-home assistance rather than removal to foster care.

Considerations of when the state must provide in-home services and support as the least intrusive means of intervention requires a child protection policy that distinguishes "between families in which the child requires protection from his parent, and those in which the child requires protection from inadequate resources."³²⁸ Under current laws, where neglect is defined in terms of inadequacies in parental conduct or home environment, the distinction is not always clear. Coercive removal of children cannot be viewed as the least drastic alternative when an at-risk child would likely receive greater protection by provision of alternative support and services in the home. Given the existing state of foster care in this country, current child protection practice cannot withstand strict scrutiny analysis. Thus, existing constitutional authority requires reform of child protection practice.³²⁹

III. RECONCILING CHILD PROTECTION AND WELFARE REFORM

The 1996 welfare reform law converted AFDC, Emergency Assistance, and the Job Opportunities and Basic Skills (JOBS) program into the Temporary Assistance to Needy Families (TANF) block grant to states.³³⁰ The TANF block grant will give the states set annual allocations of about \$16.4 billion per year from 1996 through 2003.³³¹ Under the reform law, adults who receive any form of aid funded by TANF must participate in work or work-related activities and are eligible for assistance only for a maximum of five years.³³² The law also changed eligibility for food stamps and Supplemental Security Income (SSI) for disabled persons.³³³ Given the interconnection between poverty, child maltreatment, and the

328. Garrison, *supra* note 260, at 1812.

329. This is not an attempt to impose an affirmative support obligation on the state. I do not suggest that the doctrine of family integrity entitles poor families to public assistance. Rather, I contend that existing authority supports restriction on the method of child protection practice. On the question of an "indirect affirmative obligation," see generally, Braveman & Ramsey, *supra* note 199.

330. See discussion *infra* Part I(B).

331. Courtney, *supra* note 217, at 95.

332. *Id.*

333. See discussion *infra* Part I(B).

placement of children in foster care, the new welfare law, and the slowing down of the economy taken together have the potential to have a significant impact on the demand for child protection services.³³⁴ Unless policy makers reconcile the objectives of child protection policy and those of welfare policy, welfare reform may indirectly alter the availability of alternative responses to child maltreatment and increase the pressure on an already overburdened child protection and foster care system. The "reasonable efforts" requirement of the Child Welfare Act already rings hollow, as "reasonable" too often is defined as "available."³³⁵ As more children in foster care are freed for adoption, in keeping with the directives of the Adoption and Safe Families Act, but never adopted, an overburdened system will become all the more strained, increasing the likelihood of harm to the children it was designed to protect.

Review of the employment rate of welfare recipients since the enactment of PRWORA suggests an increase in employment of welfare recipients.³³⁶ These recipients can typically earn roughly \$6 to \$7 an hour in the private sector.³³⁷ Even if they earn this wage steadily in full-time jobs, a sizable minority of recipients have gross incomes at or below the poverty level.³³⁸ Once childcare costs and transportation costs are subtracted, a majority of the recipients fall below the poverty line. Reform measures that force a large number of welfare recipients into the labor market will likely accelerate the decline in wages among unskilled workers over time.³³⁹ In a robust economy, as additional unskilled workers enter the job market, employers may be expected eventually to create enough jobs to employ them, if the wage for unskilled workers drops.³⁴⁰ Simply stated, many families who received welfare benefits will not earn enough money post-welfare to escape poverty, even if they work full-time on a year-round basis.³⁴¹ Unless private sector earnings are supplemented with a publicly funded wage subsidy most new workers will remain poor, and many may be worse off than they were under the former system.³⁴² Further, as the economy weakens

334. *Id.* See also Courtney, *supra* note 217, at 95.

335. See *supra* text accompanying notes 192-96.

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

342. *Id.*

many jobs, particularly unskilled jobs, will be lost. But the existing five-year lifetime cap on receipt of benefits will make many former recipients ineligible to receive assistance.

The goal of the welfare reform law focused on adult self-sufficiency, while the goal of the child protection system has long been one of ensuring a safe environment and nurturing care for children; in many ways, the practical effect of the goals of the child protection system and the welfare system conflict. The political rhetoric of the welfare reform debate presumed that poor children would benefit from welfare reform, but failed fully to consider the interdependence of the child protection system and the welfare system. For example, despite the shortcomings of the former AFDC program, it served to complement child welfare and protection services. The AFDC program provided a foundation of economic support to poor families. Such support was available whether parents worked. That support can often be critical in keeping families together. Child protection service workers could offer needy families targeted assistance to help pay for rent, utilities, childcare or other services. In many instances, the welfare reform law inadvertently created greater need for such services while creating some barriers to this kind of assistance by child protection services. For example, curtailment of food stamp program eligibility and benefits represented about half the spending reductions under PRWORA.³⁴³ Most food stamp recipients are children, and nearly 80% of food stamp benefits go to households with children.³⁴⁴ Child protection services funding has not increased to make up the difference. Although the 1996 welfare law provided increased funding for childcare, the demand for childcare assistance has grown significantly and many states, constrained by limited resources, have waiting lists for subsidies.³⁴⁵ Child protection services typically have not been able to meet the increased need. A family's Medicaid coverage declines when the family leaves TANF.³⁴⁶ There is no child protection system substitute for that medical coverage. Thus, children's well-being may be threatened by poverty and uncertainty as their parents try to survive in the low-wage labor market. Additionally, if the parents cannot work or lose benefits due to a failure to properly navigate through the system of

343. USDA, CHARACTERISTICS OF FOOD STAMP HOUSEHOLDS: FISCAL YEAR 2000 (2001).

344. *Id.*

345. Courtney, *supra* note 217, at 98.

346. *Id.*

TANF requirements, their well-being is also threatened. The state must develop strategies to protect these children.

The Personal Responsibility and Work Opportunity Reconciliation Act gives a state unprecedented discretion in choosing how to structure its assistance program. The result has been 51 separate welfare programs that differ not only in eligibility requirements and benefit levels, but also in goals and strategies.³⁴⁷ Much of welfare reform's continued impact on the child protection system will depend on how states balance the competing demands of moving parents into the work force and protecting children, in other words, on how they restructure their priorities.³⁴⁸ The enforcement of financial sanctions to enforce the work requirement may put more children at-risk. States may then be inclined to rely even more frequently on coercive removal to protect those children.³⁴⁹ States that reform their welfare systems to include family support and a guarantee of both work and childcare, may however, reduce the need for child protection services and make the supports they do provide more meaningful.³⁵⁰

[S]tates can offer a range of supportive services such as job training, parent support groups, and substance-abuse treatment to improve the prospects that parents will succeed in making the transition to work. They can impose financial sanctions incrementally, rather than abruptly terminating benefits, to lessen the likelihood that children will be placed in desperate situations.³⁵¹

To promote self-sufficiency, without sacrificing children's well-being, states need more than "one size fits all" programs.³⁵² Welfare recipients who make the transition to work face the risks of the labor market including low wages, business cycles, and layoffs. Some will need only supplemental assistance, such as help paying childcare costs. Others may be unable to support their children with their earnings and will need more intensive assistance to keep their families together.³⁵³ While implementing welfare reform, states may need to develop various options in order to protect

347. See Larner et al., *supra* note 111, at 6-10.

348. Courtney, *supra* note 217, at 100.

349. *Id.*

350. *Id.*

351. *Id.*

352. Larner, et al., *supra* note 111, at 13.

353. *Id.*

children. For example, if a state's TANF block grant is insufficient to meet the demand, many needy families may be left without assistance.³⁵⁴ States may need to use more state and local funds to supplement TANF.³⁵⁵ Benefits provided through TANF block grants can be provided for no more than a lifetime limit of five years, (or a shorter state-imposed period).³⁵⁶ Many families who have been unable to find or maintain employment within the time limit may be left without benefits or sufficient income and end up homeless.³⁵⁷ As a result, the children of such families may be placed in foster care.³⁵⁸ Alternatively, states could provide vouchers or child-only grants to families who reach time limits, or could temporarily exempt families facing removal and foster care placement from the requirement.³⁵⁹

The new welfare law merged the former Emergency Assistance funds, formerly used for temporary crises, into the TANF block grant.³⁶⁰ If TANF funds are used for crisis intervention, the TANF rules apply and the aid counts toward the family's lifetime limit.³⁶¹ With careful restructuring, states could use state funds for crisis intervention or states could set aside some TANF funds to use for crisis intervention and provide emergency noncash vouchers.³⁶² To help families meet the work requirements, increased quality childcare must be made available and more states must provide child-only grants or state aid to assist with childcare costs.³⁶³ In the absence of state aid for childcare, mothers of infants temporarily could be exempted from work requirements.³⁶⁴

For the long term, social policy analysts have concluded that welfare and poverty policies that protect and provide for children must re-establish the safety net for low-income children.³⁶⁵ Efforts of such restructuring might include:

- (1) Work-related family supports for those who can work.
Welfare recipients that make the transition to work will

354. Courtney, *supra* note 217, at 96.

355. *Id.*

356. *Id.* at 95.

357. *Id.* at 96.

358. *Id.*

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.*

365. Larner, et al., *supra* note 74, at 13.

face the same pressures of managing child rearing and wage earning that confront the general population of working poor. Ideally, to equitably support poor working families, research suggests that universal, income-linked policies be developed to provide affordable health insurance, to guarantee childcare subsidies, to supplement low wages with tax credits, and give all workers access to unemployment insurance. It is recommended these supports be independent of the welfare system, and available to all families with children who meet income eligibility requirements. Co-payment or sliding fee mechanisms would ensure that parents share the costs of benefits and would be adjusted as their incomes rise;³⁶⁶

- (2) Improved childcare for poor working families. Parents of young children cannot work if they cannot arrange safe childcare for their children during their working hours. In addition to childcare subsidies, other steps must be taken to compensate for the fact that parents in poor neighborhoods often work odd hours, lack transportation and have children of varied ages which increase the difficulty in finding adequate childcare. Childcare alternatives must be created to meet their particular needs;³⁶⁷
- (3) Transitional assistance for families entering the labor force. Whether due to divorce, abandonment, or choice many parents must care for children without a spouse. They may need particular assistance, such as job training, job search aid, childcare information, and temporary cash assistance to enter or re-enter the work force;³⁶⁸
- (4) Welfare programs should be able to accommodate the needs of single mothers to adapt part-time work schedules around childcare needs to allow single mothers to continue their schooling beyond high school, or to participate in training programs to develop skills that will enhance their employment options;³⁶⁹
- (5) Coordinate and integrate child protection system services and welfare programs to provide more preventive services to address family problems such as substance abuse,

366. *Id.*

367. *Id.* at 15.

368. *Id.*

369. *Id.*

domestic violence, literacy issues, and other such barriers to employment and positive parenting,³⁷⁰ and,

- (6) Modify and coordinate the fiscal structure of the child protection system and the welfare system to increase services to intact families and for family reunification that might reduce the need for some out-of-home placements or that might better support kinship-care placements.³⁷¹

Providing employment-related family supports, without regard to welfare status, may make such programs politically more acceptable, but clearly, it will add to their costs. Even significant changes in welfare, that are designed to save money, will have only a relatively modest impact on overall government budgets, because the AFDC program actually accounted for only a small portion of federal and state budgets.³⁷² To meet the objective of welfare reform policy and protect the welfare and future of children, policies must focus more on long-term success in helping families escape poverty and dependency, and less on program costs.

In developing poverty and welfare policies, policy makers can no longer ignore the impact of those policies and programs on the children and the child protection system. They must develop a new paradigm in which the policies of the child protection system and the welfare system are viewed as component parts of a larger whole. In reauthorizing PRWORA, the goals of the welfare programs should be expanded to include reducing poverty, increasing the economic stability of families, and enhancing the development and well-being of children. This partnership model of sorts may enable states to identify families that require welfare intervention before the children have been seriously harmed. Provision of family support may reduce the need for removal of children in many cases, thereby reducing the burden on the existing foster care system, and, perhaps making it a more workable system for those seriously endangered children who must be removed from their homes.

370. *Id.* at 14-15.

371. *Id.*

372. *See* discussion *infra* Part I(B).

IV. CONCLUSION

It is ironic that the United States, with one of the largest and most expensive child protection systems in the industrialized world, also has one of the highest rates of child poverty. "[A] recent comparison of the child poverty rate of the United States with rates in 16 other industrialized nations found the U.S. rate to be the highest."³⁷³ Such high poverty rates are not an inevitable result of modern industrialized society. Other industrialized nations with fewer resources and similar economic and social problems than the United States have lower child poverty rates.³⁷⁴

The report found that, while on a pre-transfer basis the United States level of child poverty was comparable to rates in a number of other countries, on average more generous transfer and tax policies in other nations reduced child poverty rates more. Ten of the 17 countries eliminated more than 50% of child poverty generated by their market economies through their cash transfer policies alone; many also provided generous in-kind benefits such as free or subsidized health and childcare.³⁷⁵

If a country fails to provide income protection for its children, there will inevitably be large numbers of children harmed by the consequences of poverty. Too frequently the response of the existing child protection system, acting in "the best interests of the child," has been to remove the child from the impoverished home and place that child in foster care, sometimes for years. Meanwhile, as a society, we have failed to address the causes of poverty or neglect that lead to the placement.³⁷⁶ While much of the recent debate about welfare reform underscored issues related to personal responsibility and family values, the public policy conundrum is far more complex. Issues of welfare reform cannot be resolved independently of questions of child welfare and child protection.

Existing legal doctrine, as manifested in current child protection policy, justifies state intervention in families only in confirmed cases of child maltreatment, not simply because a parent does not

373. See Lewit, et al., *supra* note 143, at 11. See also, Lindsey, *supra* note 29, at 189-228.

374. American children are three times as likely to be poor as British children, four times more likely to be poor than French children and seven to thirteen times more likely to be poor than German, Dutch, or Swedish children. See CHILDREN'S DEFENSE FUND 1996, *supra* note 126, at xx.

375. Lewit, et al., *supra* note 143, at 11.

376. See generally Lindsey, *supra* note 29, at 224-28.

work. But under the welfare-to-work policies of welfare reform in light of the slowing economy, states imposing stringent requirements and limits on financial assistance will likely find the circumstances of many children will worsen. It will be difficult to ignore the condition of children whose families have been denied economic support. The result may be increased state intervention to protect such children. For lack of other alternatives, current child protection policy and practice suggests that intervention is apt to take the form of removal and placement in foster care. The situation of large numbers of children need not deteriorate. Policy makers, working from the perspective that child protection and welfare policies must function in conjunction, can reform the operation of welfare in their states to include family support and to guarantee both work and childcare for those who try to become economically self-sufficient.