

COMMENTARY

THE FOSTER CARE DILEMMA AND WHAT TO DO ABOUT IT: IS THE PROBLEM THAT TOO MANY CHILDREN ARE NOT BEING ADOPTED OUT OF FOSTER CARE OR THAT TOO MANY CHILDREN ARE ENTERING FOSTER CARE?

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For the past twenty-five years there has been on-going concern about foster care policy and practice in the United States. In the 1970s a number of important critics, including Robert Mnookin¹ and Michael Wald,² harshly criticized the ease with which children were able to enter foster care. These critics suggested that constitutional principles and sound public policy justified laws and practice that restrained coercive interference with the way families raise their children. They argued that the State should demonstrate a high threshold of harm to children before intervening coercively to protect them. Finally, they argued that once intervention was shown to be justified, the legal principle of the least restrictive alternative should apply to foster care placements. Under this principle, children would be separated from their families and placed in foster care with non-relatives only if consistent with their safety and well-being and when no other alternative remained.

Beginning in 1977, Congress started paying serious attention to these criticisms. Led by Representative George Miller, Congress introduced several pieces of legislation³ followed by

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¹ See, e.g., Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226; Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973).

² See, e.g., Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985 (1975); 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).

³ See, e.g., Public Assistance Amendments of 1977, H.R. 7200, 95th Cong. (1977); Adoption Assistance and Child Welfare Act of 1980, H.R. 3434, 96th Cong. (1979).

lengthy hearings.⁴ Most startling, Congress revealed that federal policy, as well as federal laws in effect through the 1970s, created financial incentives for state officials to rely on foster care as a first, rather than a last, alternative. For example, federal money was available to States exclusively through the Aid to Families with Dependant Children—Foster Care (“AFDC-FC”)⁵ funding stream, which required child protection officials to remove children from their families in order to qualify for precious federal funding. In addition, the federal foster care program⁶ provided unlimited federal reimbursement only for out-of-home placements, while offering limited funds for preventing such placements or reuniting families. As a result, the most common state response was to remove children from their homes and place them in foster care. Congress responded by passing the most important federal foster care legislation this century—the Adoption Assistance and Child Welfare Act of 1980.⁷

Congress meant for that legislation to address several prominent deficiencies in foster care practice through the end of the 1970s. Perhaps the two most prominent were: (1) states resorting too frequently to foster care as a means of intervention in the family-child relationship; and (2) government viewing the placement of children in foster care as the “solution” to the problems at hand. According to the drafters, the Act sought “to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.”⁸ In other words, beginning in 1980, Congress intended that States use preventive and other services, when-

⁴ The public hearings conducted by Congress provide an overview of the critical opinions about common practices in the 1970's and why Congress was moved to drastically overhaul the foster care system. See *Public Assistance Amendments of 1977: Hearings on H.R. 7200 Before the Subcomm. on Pub. Assistance of the Senate Comm. on Fin.*, 95th Cong. (1977); *Public Assistance Legislative Recommendations: Hearings Before the Subcomm. on Pub. Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 95th Cong. (1977); *Proposals Related to Social and Child Welfare Services, Adoption Assistance, and Foster Care: Hearing on H.R. 3434 Before the Subcomm. on Pub. Assistance of the Senate Comm. on Fin.*, 96th Cong. (1979); *Welfare Reform Legislation: Hearings Before the Subcomm. on Pub. Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 96th Cong. (1979); H.R. REP. NO. 96-900 (1980).

⁵ AFDC-FC, Title IV-A of the Social Security Act, 42 U.S.C. § 603 (1999).

⁶ *Id.*

⁷ 42 U.S.C. § 602 (1982 & Supp. II 1996). For some insight into the legislative history of the Act, see also Pub. L. No. 96-272, 94 Stat. 500 (1980).

⁸ S. REP. NO. 96-336, at 1 (1979), reprinted in 1980 U.S.C.C.A.N. (94 Stat. 500) 1448, 1450.

ever possible, to keep children safely in their homes. In addition, focusing on children already in foster care, Congress expected child protection officials to facilitate, through so-called reunification services, returning children safely to their homes in a reasonably short time. With these twin objectives in place, Congress had every reason to conclude that the few remaining children who entered foster care must be there for very good reasons (else preventive services would have obviated the placement) and that those even fewer children who remained in foster care for more than a short stay would very likely need to remain out of their homes for extremely long periods of time, perhaps permanently (else reunification services would have effected their return home). For the few children remaining in long-term foster care—those for whom state prevention and reunification efforts failed—Congress wanted States to terminate parental rights and free children for adoption into safe homes.⁹

Congress believed that these changes would correct the problems of foster care in the 1970s. Any study of foster care in the United States over the past twenty-five years, however, must unavoidably grapple with a paradox: the national foster care population increased by several hundred thousand children in the same decade that Congress passed sweeping legislation explicitly designed to reduce states' use of out-of-home care for children from troubled families. "According to figures reported by the American Public Welfare Association, the number of children in foster care increased from 280,000 in 1987 to more than 460,000 in 1992."¹⁰ This unintended

⁹ The Act requires that States take specific steps to prevent unnecessary separation of children from their parents, to assure a careful monitoring of children who are separated, and to provide an infusion of services into the family in order to speed the ultimate return of children to their parents. First, the Act sets strict conditions for removal of children from their homes. Once children enter foster care, the Act requires States to develop a statewide information system containing each child's status, demographic characteristics, location and goals for placement and to maintain a case review system for each child receiving state supervised foster care. The Act also demands the development of a services program designed to either help children return to families from which they have been removed or, when appropriate, to place them for permanent adoption or legal guardianship. In addition to administrative case reviews, the Act requires periodic court reviews to determine a plan for the child, including whether to continue foster care or seek to terminate parental rights so that the child may be adopted.

¹⁰ 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, 138 (1995) (citation omitted); see also Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, *THE FUTURE OF CHILDREN*, Spring 1998, at 72, 72 ("The substitute care population increased from 276,000 children in 1985 to approximately 494,000 children a decade later.").

This paradox suggests the limitations of a federal policy that focuses on indi-

increase sparked discussion about the proper way to address the needs of these children.

Beginning in the late 1980s and accelerating in the 1990s, the national debate has reemerged and refocused on the role of government in helping persons and families in need. While public assistance and benefits programs were the first to be directly impacted by this debate, public policy underlying foster care has also been affected. As a result, many of the ideas and values that predominated public policy twenty years ago have been challenged and, to an unprecedented degree, repudiated. For example, Congress abandoned the guarantee of basic economic support for families with the passage of federal welfare reform in 1996.¹¹ The very next year, Congress passed the Adoption and Safe Families Act of 1997 ("ASFA").¹² Through this new legislation, Congress now wants federal and local officials responsible for oversight of the nation's foster care population to concentrate primarily on reducing the time children spend in foster care. This focus will divert attention from both the prevention of foster care and the devotion of money and services to reunification efforts. Instead, new federal policy will encourage adoptions once children have been in foster care for a certain length of time, even in cases where there was no compelling need for foster care placement or where no efforts were undertaken to reunify children with their birth families.

These changes are especially significant because of the specific population of children affected by them. The disproportionate impact on children of color is astonishing. In New York City, for example, of the 42,000 children in foster care in December 1997, New York City officials categorized only 3.1% as "white".¹³ These figures, however disturbing, should not be

vidual families in need. When too many families are in need, and when their needs are largely the same, preventive services cannot suffice. More broad-based reforms are needed in such circumstances.

¹¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (merging Aid to Families with Dependent Children (AFDC) Emergency Assistance and the Jobs Opportunities and Basic Skills (JOBS) training program into the Temporary Assistance for Needy Families (TANF) block grant).

¹² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

¹³ See NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, SELECTED CHILD WELFARE TRENDS 81 (1998). This means that New York City, with a population in excess of 7,300,000 people, more than 52% of whom are "white," has no more than 1,300 "white" children in foster care. In other words, a city of nearly 4,000,000 "whites" has a foster care population of only 1,300. See NEW YORK CITY ADMINISTRATION FOR CHILDREN'S SERVICES, COMMUNITY DATA PROFILES 24 (1998). This strongly suggests that, at least with respect to white families in New York City, foster

too surprising given two shared facts about poverty, race and child welfare in the United States. First, the link between child protection and poverty is staggering. Studies show that families earning incomes below \$15,000 per year are twenty-two times more likely to be involved in the child protective system than families with incomes above \$30,000.¹⁴ Second, there is a well-known, direct nexus between poverty and race.¹⁵

What does this inform us about child welfare? At a minimum, the startling number of poor children in the child welfare system proves what public policy officials have long known: that children raised in severe poverty plainly need the beneficence of state aid. Unfortunately, the United States appears to be on a deliberate course to reduce financial support systems for poor families. Severe cuts in early intervention programs and preventive services are forcing poor families to look to the coercive process of child protection as their primary source of much needed assistance. The almost certain trend for the future is an increased use of foster care because it continues as the only remaining source of government largesse—a “benefits” program imposed through a coercive, adversarial system that threatens a family’s integrity and a child’s opportunity to be raised by his or her birth family.

This should begin to sound frighteningly familiar to those conversant with the history of foster care in the early 1970s. Foster care will almost certainly again become an overused method of assisting the very poorest of families. The subject of why a political consensus against the provision of need-based financial support to families with needy children was so easy to achieve in the 1990s is beyond the scope of these comments. But well within their scope is the simple truth that politicians in the 1990s rejected the idea that, except in emergencies, government should be used to temporarily bolster the capacity of poor families to raise children in a safe

care is truly considered a last resort and an extreme remedy.

¹⁴ See Mark E. Courtney, *The Costs of Child Protection in the Context of Welfare Reform*, THE FUTURE OF CHILDREN, Spring 1998, at 88, 95 (“[T]he incidence of abuse and neglect is approximately 22 times higher among families with incomes below \$15,000 per year than among families with incomes of more than \$30,000 per year.”).

¹⁵ See Leroy H. Pelton, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989) (stating that the child welfare population began to grow faster as the system included black children and arguing that this inclusion coincided with a time when black families began to compose a larger portion of the impoverished population).

and healthy environment. In this same era, despite some promise at the beginning of the decade, federal and state political entities similarly rejected the principle that all children are entitled to health care treatment or childcare programs. Indeed, the 1990s can be characterized as a period when Congress arrived at the consensus that government had been doing too much to assist poor families and that better public policy called for very modest and time-limited government assistant programs, leaving these families to fend largely for themselves.

It is against this backdrop that we can measure the Adoption and Safe Families Act and begin to appreciate Congress' concern that child protection officials have been too assiduous in working to rehabilitate "broken" families. Federal officials who previously rejected the concept that poor, but "good," families should be eligible for the public dole were quite likely to be troubled by federal policy that mandated the expenditure of substantial federal money in an effort to rehabilitate poor, but "bad," families.

All of this leads to a set of crucial, empirical questions that seem to sharply divide Professors Richard Gelles and Ira Schwartz¹⁶ on the one hand and Professor Dorothy Roberts¹⁷ on the other.¹⁸ If the vast majority of children are in foster care because it is the least restrictive alternative consistent with their safety, that would have significant impact on public child welfare policy. If, in contrast, only a small percentage of children in foster care actually need to be there in order to ensure their safety, then a very different agenda deserves our prompt attention.

Are most children in foster care today as the absolute-last-resort, despite assiduous efforts by state officials to keep them at home? Are children who remain in foster care for more than a very short stay really there despite significant efforts by child protection officials to identify and redress the obstacles to their safe return home? Are they actually in

¹⁶ See Richard Gelles & Ira Schwartz, *Exploring the Rights of Children in The Child Welfare System*, 2 U. PA. J. CONST. L. 71, 71-83 (1999).

¹⁷ See Dorothy Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 84, 84-105 (1999).

¹⁸ Empirical data is needed to determine whether families are receiving the amount of preventive services Congress contemplated or whether too many children continue to enter foster care despite the availability of less restrictive means of protecting them and their families. Empirical inquiry should also focus on the use of reunification services and examine whether agencies have been appropriately retrofitted to meaningfully help families with children in foster care so as to minimize placement time.

foster care, in other words, because no other alternative exists? If they are, then much of what Professors Gelles and Schwartz propose begins to come into clear focus as a necessary solution.

On the other hand, what if child protection officials have insufficiently embraced preventive services programs? What if reunification services designed to overcome barriers to returning foster care children to their families have not been adequately used? In these circumstances, Professor Roberts is surely right to worry that the Adoption and Safe Families Act will ultimately result in penalizing children through the destruction of their worthy families.

The disagreement between these positions is, I believe, over these empirical questions. Gelles and Schwartz write as if the children in care not only need to be there, but that their parents are dangerous people who are almost certainly incapable of changing their dangerous ways. If these premises are correct, then ASFA makes eminent sense. No one can doubt that some children deserve the opportunity to be liberated from failed homes. On the other hand, Roberts posits that most children are in foster care for reasons having virtually nothing to do with safety and, even more significantly, not because their parents are dangerous.

Remarkably, we do not have precise answers to these questions dividing Professors Gelles and Schwartz and Professor Roberts. Professors Gelles and Schwartz's remarks imply that States are overanxious to place children at risk of serious harm by their families back in their homes, even when the evidence is plain that the family is unworthy. This sentiment, however, is unsupported by facts, indicating that ASFA was passed prematurely. Before inviting the draconian measure of permanent banishment of birth parents from the lives of poor children, Congress should have insisted upon formal studies that analyze the true reasons so many children have entered foster care in the past twenty years.

The little evidence available suggests that no more than ten percent of the children in foster care are there because of serious abuse.¹⁹ If this is right, then ASFA (and Professors

¹⁹ See, e.g., Kathleen A. Baillie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents In Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2317 (1998).

Of all the substantiated cases of abuse and neglect addressed by [New York City's child welfare agency], fewer than 10 percent involve any kind of physical or severe emotional abuse. The remaining 90 percent involve charges of neglect against parents who have allegedly failed to care properly for their children.

Gelles and Schwartz) appear to be concentrating on the smaller of many problems in the field. All of us can agree that we need to ensure that children at risk of serious parental harm are not held hostage to a fantasy that we have the tools (or are willing to search for them) to remedy their parents' deficiencies. ASFA addresses this concern and insists that after a reasonable period in foster care (during which, it is presumed, agencies have been working tirelessly, but unsuccessfully, to overcome the barriers to a child's safe return), parental rights should be destroyed and children freed for adoption. However, if the remaining ninety percent of children in foster care are there for reasons other than serious abuse, we now appear to have lost sight of our first principles. Children deserve to be brought up by their loving families. It is Professor Roberts's thesis that ASFA will make it less likely that children in foster care will be allowed this fundamental human right.

This leaves very significant public policy questions. Assuming all of us are really interested in doing best for children, should we concentrate our efforts on developing public policy that obviates the need for foster care placement, or on eliminating obligations to assist parents of children who enter foster care? The Adoption and Safe Families Act should, in my opinion, be criticized on many grounds. But the most significant criticism is that it wrongly assumes that there are no anterior problems surrounding the administration of foster care policy.

For many of us struggling to do justice for poor children, whether or not they happen to end up in foster care, our deepest concerns are the dangers that ASFA creates. One can accept without argument that the correct public policy response to families that inflict violence on their children of the kind referred to by Professors Gelles and Schwartz is to stop making efforts of any kind to rehabilitate their parents and to accelerate their adoption into new, loving families. Having done so, the question remaining is how many of the nearly 500,000 children in foster care have we addressed, and what about the rest?

What can and should a humane society do on behalf of poor children when state officials learn that children are being raised in unsatisfactory conditions that can be ameliorated by options other than placement into foster care? That was one of the most prominent questions raised by the

Id. (quoting *Myths and Facts: The Big Picture*, CHILD WELFARE WATCH, Winter 1997, at 7).

ninety-sixth Congress as it debated the passage of the Child Welfare Adoption and Assistance Act of 1980.²⁰ Its answer was that States can be doing much more than they were to eliminate the need for foster care placement.²¹ As a consequence, States were obligated—for the first time in American history—to make reasonable efforts to avoid placement into foster care, in an effort to limit the foster care population to those cases in which reliance on out-of-home care was required.

A lot has happened between 1980 and 1997, in the child welfare field, in national politics, and in Congress's desire to assist poor families and poor children by providing them aid. If it is the case that the 1980 legislation has been under-enforced when it comes to preventing placement, it is deeply disconcerting to find the one-hundred-and-fifth Congress troubled that States are working too hard to reunify families. In the absence of empirical support for this proposition, I believe that Congress deeply erred by stressing that the leading problem confronting America's foster care dilemma is that we have done too much to try to keep children with their families. I suggest we have not done nearly enough.

²⁰ See *supra* note 7 and accompanying text.

²¹ See *id.*