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WHAT WENT WRONG? WHY FAMILY PRESERVATION PROGRAMS FAILED TO ACHIEVE THEIR POTENTIAL

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*Far more common than a child who comes into [foster] care because he was beaten are children who come into foster care because the foodstamps ran out or because an illness went untreated after parents were kicked off Medicaid or because a single mother trying to stay off welfare could not provide adequate supervision while she worked.*¹

INTRODUCTION

Foster care is the centerpiece of the child welfare system in the United States. Foster care serves nearly 750,000 children each year² and, along with adoption services, accounts for ninety-percent of the federal budget for child welfare.³ Yet, despite decades of reform efforts, the foster care system remains overburdened,⁴

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¹ Richard Wexler, Executive Director of the National Coalition of Child Protection Reform National Coalition for Child Protection Reform, *Issue Paper 5: Who is in "The System" – And Why?* (2008) [hereinafter *Who is in "The System"*], available at <http://www.nccpr.org/reports/05SYSTEM.pdf>.

² Trends in Foster Care and Adoption, 2002-2008, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm (taking into account the total number of children who are in the foster care for at least some period in a given year).

³ MADELYN FREUNDLICH, THE PEW CHARITABLE TRUSTS, TIME FOR REFORM: INVESTING IN PREVENTION: KEEPING CHILDREN SAFE AT HOME 1 (2007), [hereinafter TIME FOR REFORM], available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/time_for_reform.pdf ("Ninety-percent" takes into account the federal funding provided for both foster care and adoption services. Federal funding for adoption is only provided for children that are adopted from a foster care placement. The remaining ten-percent is considered "flexible" funding that the states can use in accordance with their needs).

⁴ See Cindy Rodriguez, *Report Finds Thousands of Kids Stuck in Overburdened Foster Care System*, WNYC, Nov. 10, 2009, available at <http://www.wnyc.org/news/articles/144139> (reporting that the improper training and supervision of caseworkers, in addition to the high caseloads and the high turnover rate of caseworkers, has left many children to languish in New York's foster care system for years); *California's Foster Care System Way Overburdened*, ASSOCIATED PRESS, Aug. 15, 2008, available at <http://cbs5.com/local/california.foster.care.2.796688.html> (reporting that high caseloads for California lawyers and judges means that they have little to no time to spend on addressing specific needs of either the children who are placed in foster care or their families); Errin Haynes, *Report Says*

does not significantly better the outcomes for many children⁵ and, perhaps most importantly, fails to address the needs of a vast majority of the children it serves.⁶

These charges are not new. A look at Congressional hearings on child welfare⁷ and related news articles⁸ from the 1970s reveal similar complaints about the condition and effectiveness of the foster care system. In response, Congress initiated the first major federal reform of the child welfare system in 1980, passing the Adoption Assistance and Child Welfare Act (“CWA”).⁹ The crowning achievement of the CWA was its supposed emphasis on “family preservation” as an alternative to foster care, which specifically required that states take “reasonable efforts” to prevent the removal of children from their homes or to ensure their return as soon as possible.¹⁰

Problems Persist with GA Foster Care, ASSOCIATED PRESS, Jan. 22, 2010, available at http://www.examiner.com/a-2436064-Report_says_problems_persist_with_Ga_foster_care.html (reporting that “relaxed” state monitoring of private agencies contracted to provide foster homes and overcrowded foster care conditions has led to an increase in foster care abuse and neglect in Georgia).

⁵ Joseph J. Doyle, *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, THE AM. ECON. REV., at 1584 (2007), available at http://www.mit.edu/~jjdoyle/fostercare_aer.pdf (finding that children on the “margin” of placement – cases in which investigators disagree on whether the child should be placed in foster care or should remain at home – have better outcomes with regard to teen motherhood, juvenile delinquency, employment, and earnings when the child is allowed to remain at home, as compared to those cases in which the children are placed in foster care); Joseph J. Doyle, *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, J. OF POL. ECON., 116 NO. 4, at 748 (2008), available at http://www.mit.edu/~jjdoyle/doyle_jpe_aug08.pdf (finding that children on the “margin” of placement have three times the arrest, conviction, and imprisonment rate when placed in foster care as compared to those children that are allowed to remain at home).

⁶ See Report Reveals Human Cost of Foster Care (2004), available at http://www.pewtrusts.org/news_room_detail.aspx?id=17412 (“Sadly, [the] spotlight [on foster care] rarely illuminates the underlying reasons for child welfare system shortcomings, including . . . an inflexible, “one-size-fits-all” approach in treating all abused and neglected children, no matter how different their situations.”) (emphasis added).

⁷ See TIME FOR REFORM, *supra* note 3, at 20 (explaining that the rationale behind passing the Child Welfare Act of 1980 was to reduce “foster care drift,” a situation in which some children began to languish in foster homes with no plans for reunification or permanency). See also S. REP. NO. 96-336, at 1 (1979) (In discussing the purpose of the proposed Child Welfare Act, the Senate Report indicates that the Act makes an overt shift in the emphasis of child welfare legislation by decreasing “the emphasis on foster care placement and . . . encourag[ing] greater efforts to find permanent homes for children.”); S. REP. NO. 96-336, at 12 (1979) (“The committee believes that it would be appropriate and desirable at this time to modify the law in a way which will de-emphasize the use of foster care and encourage greater efforts to place children in permanent homes.”).

⁸ See J.C. Barden, *System of Foster Care for Children Assailed as Flawed and Costly; Total Doubled since 1960*, N.Y. TIMES, Apr. 24, 1979, at A17 (stating that children who could be returned to their homes or found other permanent placement are becoming lost in the overburdened foster care system); Celeste Durant, *Foster Homes: A Huge System with Major Problems*, L.A. TIMES, Dec. 4, 1977, at D1 (stating that the quality of foster care is too variable, the case loads are too heavy and the social workers are “overburdened” and don’t have the resources to work with the number of children they are assigned); Lynne McTaggart, *Children Have Friend in Court*, THE SPOKESMAN REVIEW: PARADE MAGAZINE, Nov. 18, 1979, at 30 (stating that many children have been “lost” in foster care because of poor court and agency record keeping and are under the supervision of an “overburdened” social worker with “minimal training or experience”).

⁹ Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500 (1980).

¹⁰ *Id.* at § 471(a)(15) (“reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”).

While family preservation was not a novel concept, the CWA represented the first time the federal government required that it be considered prior to the placement of a child into foster care.¹¹ The concept of family preservation is premised on the notion that many children are removed from their homes in situations where they and their families would be better served by receiving targeted and intensive support services such as emergency shelters, financial assistance, caretakers and various counseling services.¹² Such services would enable families to improve their living conditions and remain together, thereby avoiding the trauma and lasting effects of foster care.¹³

That was thirty years ago. Since then, members of Congress and critics of family preservation have attacked the idea as a failed and dangerous attempt at reform from a bygone era.¹⁴ Federal efforts have focused almost exclusively on supporting foster care and adoption by providing states with virtually open-ended financial support for both services, while providing insufficient funding and guidance for family preservation programs.

¹¹ LINDSEY DUNCAN, *THE WELFARE OF CHILDREN* 21-22 (2d. ed., Oxford University Press 2004) (1994). At the beginning of the 20th century, the concept of supporting impoverished families began to emerge as the placement of children into foster care increased. In response, the federal government provided funding for “mothers’ pension programs,” which were designed to target poor families with dependent children. Despite this funding, it was not until the CWA that Congress explicitly required that “reasonable efforts” be made prior to the removal of a child. See Kasia O’Neill Murray and Sarah Gesirich, *A Brief Legislative History of the Child Welfare System*, 4 [hereinafter *A Brief Legislative History*], available at <http://pewfostercare.org/research/docs/Legislative.pdf>.

¹² For sources explaining the rationale behind family preservation programs, see Child Welfare Information Gateway: Family Preservation Services, available at <http://www.childwelfare.gov/supporting/preservation/>, and National Coalition for Child Protection Reform, *Issue Paper 10: What is “Family Preservation”?* (2008) [hereinafter *What is “Family Preservation”?*], available at <http://www.nccpr.org/reports/10Whats.pdf>; for a list of services, see Department of Health and Human Services, 48 C.F.R. § 1357.15 (1983).

¹³ See Child Welfare Information Gateway: Family Preservation Services, *supra* note 12; National Coalition for Child Protection Reform, *supra* note 12 (explaining the rationale behind family preservation programs).

¹⁴ For members of Congress, see comments by Senator Lott and Senator Craig during hearings on the adoption of the ASFA in 1997, 143 CONG. REC. S. 12668 (1997) (Senator Lott stated, “[reasonable efforts] has come to mean efforts to reunite families which are families in name only. I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children.” Senator Craig stated “[the reasonable efforts] requirement has resulted in states using extraordinary efforts to keep children in what may actually be abusive or unsafe situations. Tragically, it’s the children who ultimately pay for mistakes when this happens-sometimes with their very lives.”). See also comments by Senator DeWine during hearings on foster care in 1996, 142 CONG. REC. S. 5710 (1996) (“We send these children back to the custody of people who have already abused and tortured them. We send these children back to be abused, beaten, and, many times, killed.”). The Senator then proceeded to graphically recount five “horror stories” of children whose parents abused them in ways which included being plunged into scalding water, being hanged to death, being forced to consume feces and being subject to severe beatings that resulted in internal lacerations. For other critics, see The National Coalition for Child Protection Reform, *Issue Paper 9: The Unreasonable Assault on “Reasonable Efforts”*, available at <http://www.nccpr.org/reports/9Efforts.pdf> (explaining the rejection of family preservation). See also Patrick Murphy, *Family Preservation and its Victims*, THE NEW YORK TIMES, June 19, 1993, available at <http://www.nytimes.com/1993/06/19/opinion/family-preservation-and-its-victims.html?pagewanted=1> (arguing that family preservation services are used in order to keep children with their abusive parents).

Nevertheless, states have made some progress in using family preservation programs to combat the overreliance on foster care.¹⁵ Two-thirds of the states, however, have reported that they lack appropriate services necessary to provide support to families.¹⁶ States interested in providing family preservation programs are constrained by their dependence on federal funding to operate their child welfare services.¹⁷ Moreover, given that ninety-percent of this funding is dedicated to foster care and adoption services,¹⁸ it is not surprising that federal child welfare reform efforts have left states “straightjacket[ed]” into an “over-reliance” on foster care.¹⁹

In this Note, I attempt to describe how federal efforts to reform the child welfare system have failed to support families. Put simply, my analysis will demonstrate that family preservation did not fail child welfare reform. Rather, the federal government failed family preservation.

I argue that family preservation has not been perceived as a viable goal for child welfare reform since the beginning of reform efforts in 1980 because Congress failed to provide adequate guidance, funding and monitoring of family preservation programs. As a result, states became even more dependent on foster care, for which they received open-ended matching funds. Moving into the 1990s, the overreliance and overpopulation of foster care continued, and Congress moved toward a second round of reform efforts. This time, Congress failed to fully appreciate the shortcomings of their initial reforms, and consequently labeled family preservation as the source of the problem. Compounding this faulty perception was the fact that Congress also failed to adequately understand the main causes of children being removed from their homes. Instead of relying on studies which demonstrated that a vast majority of children in foster care were placed because of “neglect”—which can include poverty and homelessness—Congress focused on horrific stories of sexual and physical abuse suffered by children that

¹⁵ See U.S. General Accounting Office, *Child Welfare: States' Progress in Implementing Family Preservation and Support Services*, 28 (1997) [hereinafter *States' Progress*], available at <http://www.eric.ed.gov/PDFS/ED406058.pdf> (showing that when provided funding, most states were able to use such funding to implement new family preservation programs, expand services and provide services to more families than would have been possible absent funding).

¹⁶ U.S. General Accounting Office, *Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children but Long-Standing Barriers Remain*. GAO Report No. 02-585 (2002), available at <http://www.gao.gov/new.items/d02585.pdf>.

¹⁷ The Cost of Protecting Vulnerable Children V: *Understanding State Variation in Child Welfare Funding*, 10 fig.3, available at http://www.urban.org/UploadedPDF/311314_vulnerable_children.pdf (2006) (showing that federal funding accounts for over thirty percent of child welfare expenditures in forty-nine states and over fifty-percent of child welfare expenditures in twenty-five states).

¹⁸ See TIME FOR REFORM, *supra* note 3.

¹⁹ *Id.* at 5. See also, MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context, Children, Families, and Foster Care*, 14: 1 Children Families, and Foster Care, 49, 63 (2004) [hereinafter *Safety and Stability*], available at http://www.princeton.edu/futureofchildren/publications/docs/14_01_03.pdf (explaining that since the federal government provides very limited funding for family preservation programs while providing “open-ended” funding for foster care, the latter is often the “easiest option” when “few other resources” exist).

had been sensationalized by the media. In response, Congress passed new reform legislation that targeted children of sexual and physical abuse, leaving the vast majority of children in the foster care system—those subject to “neglect”—without needed services.

I begin my analysis in Part I by explaining that effective family preservation programs decrease the placement of children into foster care. Part II provides a brief overview of how the federal government became involved in child welfare starting in the 1960s, and how the system overemphasized foster care. The resulting increase in foster care placements throughout the 1970s led to the first major calls for reform. Part III focuses on the peak of the family preservation movement that began in the late 1970s and culminated with the passage of the CWA in 1980. I explain how the CWA did not adequately allow for the development, expansion and use of family preservation programs, while paradoxically causing an increase in foster care placement. As a result, Part IV explains how family preservation was effectively abandoned as an alternative to foster care and erroneously labeled a scapegoat for the shortcomings of the CWA. Finally, Part V provides a brief look at ways in which the current child welfare system can be reformed to accommodate and support family preservation programs. With the proper reforms, states would be able to expand their family preservation programs to alleviate some of the burdens on the foster care system and provide better services to all children and families in need.

I. FAMILY PRESERVATION PROGRAMS: AN OVERVIEW

A. What are Family Preservation Programs?

Family preservation programs provide a range of services that target families at risk of having their children removed, with the goal of allowing those children to remain safely at home. Families that are best served by family preservation programs are those experiencing temporary crisis as a result of unexpected poverty, homelessness and in some cases substance abuse.

To illustrate these scenarios, take a single father who developed a heart condition and could no longer work full time.²⁰ He fell behind on his bills, had his electricity shut off and the food in his refrigerator spoiled.²¹ Instead of assisting with the utility bills, Child Protective Services (“CPS”) found the conditions and placed the children into foster care.²² Or, take the single mother of three who could only afford to live in a motel room.²³ She worked the night shift at a theme park

²⁰ *Who is in “The System”*, *supra* note 1.

²¹ *Id.*

²² *Id.*

²³ Laura Saari, *Checking Up on the Children*, ORANGE COUNTY REG., Jan. 17, 1999, at E1.

but could not afford to have someone watch her children at night.²⁴ Instead of assisting with babysitting services, CPS placed the children into foster care.²⁵ Finally, take the grandmother who raised her granddaughter in a rented house.²⁶ Pipes burst in the basement, causing a health hazard in the home.²⁷ Instead of helping the family find another place to live, CPS took the child and placed her into foster care.²⁸ In a horrific twist of irony, after the foster mother killed the granddaughter, the same CPS that would not pay for repairs or new housing offered to pay the grandmother \$5,000 for the funeral expenses.²⁹

In order to address these types of situations, family preservation programs apply a clearly delineated set of policies and procedures to ensure that the crisis is remedied and that the children are able to remain safely at home. As Richard Wexler—Executive Director of the National Coalition of Child Protection Reform—explains, “[t]he term ‘family preservation’ has a very specific meaning. It refers to a *systematic determination* of those families in which children *could remain in their homes* or be returned home safely, and *provision of the services* needed to *ensure that safety*.”³⁰

Studies have shown that the family preservation model first adopted by Homebuilders—a foster care placement prevention program—in the 1970s, and which has since been replicated in about forty states, is the most effective approach to decrease the placement of children into foster care.³¹ Here, a caseworker meets with the family no more than twenty-four hours after the initial referral and works with the family to address the crisis and to determine the appropriate remedy.³² For the next four to six weeks, that caseworker assists the family in securing public assistance, adequate housing, food and clothing, therapy and counseling, employment and training and other related services that can put a family back on its feet.³³

On average, caseworkers handle two families at a time, which enables them to visit the families for eight to ten hours each week instead of having the families report to offices for short and often impersonal meetings.³⁴ Caseworkers are also

²⁴ *Id.*

²⁵ *Id.*

²⁶ Nicholas Riccardi, *Grandmother Blames County in Latest Death of Foster Child*, L.A. TIMES, June 15, 1999, at B1.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *What is “Family Preservation”?*, *supra* note 12 (emphasis added).

³¹ Washington State Institute for Public Policy, *Intensive Family Preservation Programs: Program Fidelity Influences Effectiveness—Revised* (2006) [hereinafter *Intensive Family Preservation Programs*], available at <http://www.wsipp.wa.gov/rptfiles/06-02-3901.pdf>.

³² Shelley Leavitt, *The Homebuilders Model: What We have Learned over the Last Thirty Years*, [hereinafter *The Homebuilders Model*], available at <http://www.uiowa.edu/~nrcfcp/about/documents/LeavittHomebuildersModel.ppt>.

³³ *Id.*

³⁴ *Id.*

on-call to handle emergencies twenty-four hours a day.³⁵ At the end of the four to six week intervention period, the counselor helps to link the family to less intensive support to ensure that the crisis does not reappear and that the children continue to remain safe.³⁶ Finally, in order to ensure quality services, each case is evaluated using several assessment criteria to promote accountability and fidelity in the program.³⁷

Contrary to assertions by critics of family preservation programs,³⁸ such services are not designed to allow children who have been subjected to physical or sexual abuse to remain home with their abusers. Contributing to such assertions is the fact that critics fail to draw a distinction between various family preservation programs.³⁹ In short, the mere labeling of a program as “family preservation” is not enough to ensure its success. The U.S. Department of Health and Human Services sheds light on this frequent mischaracterization as they explain:

[s]ince the term “family preservation services” was coined in the 1980s, there has been *considerable confusion about the essential elements of these services* and which types of programs fall into this category. Although family preservation programs share many common characteristics, *they vary considerably* with respect to auspices (public or private agencies), theoretical orientation, target population, identified problem, and primary location of service. Programs also *vary dramatically in terms of intensity, duration, caseloads, and teaming with other professionals or paraprofessionals.*⁴⁰

To illustrate this point, Patrick Murphy wrote an article in the New York Times entitled “Family Preservation and its Victims,” which outlines several situations where children were allowed to remain home with their abusive caretakers under what Murphy refers to as “family preservation.”⁴¹ A closer reading of the article reveals that these families merely received welfare checks to assist with rent or housekeeping services.⁴² While such services are certainly part of family preservation programs, absent the appointment of an individualized caseworker, constant in-person communication and a specific assessment of the nature of the crisis and the proposed solution, the program can hardly be termed “family preservation.” Indeed, critics have a tendency to lump any program that

³⁵ *Id.*

³⁶ *What is “Family Preservation”?*, *supra* note 12.

³⁷ *The Homebuilders Model*, *supra* note 32.

³⁸ *See supra* text accompanying note 14.

³⁹ National Coalition for Child Protection Reform, *Issue Paper 11: Does Family Preservation Work?*, (2006) [hereinafter *Does Family Preservation Work?*], available at <http://www.nccpr.org/reports/11Work.pdf>.

⁴⁰ Child Welfare Information Gateway, Program Approaches, available at <http://www.childwelfare.gov/supporting/preservation/approaches.cfm> (emphasis added).

⁴¹ Patrick Murphy, *Family Preservation and its Victims*, N.Y. TIMES, June 19, 1993, available at <http://www.nytimes.com/1993/06/19/opinion/family-preservation-and-its-victims.html?pagewanted=1>.

⁴² *Id.*

allows children to remain at home as “family preservation.”⁴³ Doing so only reinforces the misconceptions about family preservation, and these misconceptions come at the expense of programs that have proven successful in decreasing the placement of children into foster care by allowing them to remain safely at home.

B. Family Preservation Programs Can Better Meet the Needs of “Neglected” Children than Foster Care

Critics of family preservation often point to horrific stories of sexual and physical abuse suffered by children⁴⁴ that have been highlighted by the media and have exaggerated the prevalence of such incidents.⁴⁵ In reality, seventy-percent of children placed into foster care each year are removed from their homes due to “neglect.”⁴⁶ Moreover, over half of the children who are placed into foster care each year return home in less than a year.⁴⁷ Given that the system has been overburdened for over three decades, it is perplexing as to why so many children that have not been subjected to sexual or physical abuse are being removed from their homes for such a limited period of time. The services provided by family preservation programs would better serve “neglected” children than would foster care.

Understanding child “neglect” can be challenging because despite being the most prevalent type of child maltreatment—outnumbering incidents of physical abuse by three-to-one and incidents of sexual abuse by six-to-one⁴⁸—it remains the least studied and least understood type of maltreatment.⁴⁹ A major reason for this lack of research has been the difficulty in defining “neglect,” especially when compared to sexual and physical “abuse.”⁵⁰

The federal government set minimum standards for the definition of child abuse and neglect in the 1970s in order for states to meet requirements and receive

⁴³ *Does Family Preservation Work?*, *supra* note 39.

⁴⁴ See *supra* text accompanying note 14.

⁴⁵ Kathleen A. Bailie, *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, 2288 (1998) (arguing that ASFA resulted from societal outrage over news reports on extreme acts of child abuse by parents whose children are in the child welfare system).

⁴⁶ U.S. Department of Health & Human Services, *Child Maltreatment 2007*, Chapter 6, Services, available at <http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm>.

⁴⁷ TIME FOR REFORM, *supra* note 3, at 4.

⁴⁸ *Child Neglect: A Guide for Prevention, Assessment and Intervention*. Children’s Bureau, Office on Child Abuse and Neglect, Ex. 2-1, *Victimization Rates by Maltreatment Type, 2000-2004* (2006), available at <http://www.childwelfare.gov/pubs/usermanuals/neglect/chaptertwo.cfm>.

⁴⁹ Bruce D. Perry, Keven Colwell & Stephanie Schick, *Child Neglect*, *Encyclopedia of Crime and Punishment* 1 (D. Levinson ed., Sage Publications 2002), available at http://www.childtrauma.org/ctamaterials/neglect_in_childhood.asp.

⁵⁰ See Child Welfare Information Gateway, *Definitions of Child Abuse and Neglect: Summary of State Laws* (2007), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/defineall.pdf (demonstrating that states are relatively consistent in defining physical and sexual “abuse,” but have no consistent definition for “neglect”).

certain child welfare funding.⁵¹ While the statute provides a succinct definition of “sexual abuse,”⁵² it fails to draw a distinction between “physical abuse” and “neglect.”⁵³ In defining the latter two, the statute explicitly refers to “an act or failure to act” that causes or presents an imminent risk of harm.⁵⁴ The problem with grouping “action” and “inaction” under the same category is that it equates parents who cannot afford to provide a winter jacket for their child with parents who beat their child.

States, on the other hand, have generally avoided this categorization problem by separating “abuse” and “neglect” into very distinct and dissimilar categories. Under most state definitions, “abuse” involves physical injury or harm or the threat of physical injury or harm to the child as a result of actions, while “neglect” is frequently defined in terms of *inaction*, such as a failure to provide food, clothing, shelter, medical care, supervision and education.⁵⁵ Nevertheless, despite these distinctions, states have few alternatives beyond placing children into foster care.

As indicated in the opening quotation, child “neglect” is more often than not the result of poverty, and not “bad” parenting.⁵⁶ The same cannot be said for children that are victims of sexual and physical abuse. Indeed, “[a]buse is 14 times more common in poor families” while “[n]eglect is 44 times more common in poor families.”⁵⁷ Therefore, it is perplexing that the child welfare system currently lumps all these groups of children together into a “one-size-fits-all”⁵⁸ foster care system, when in reality, providing families with needed services would better serve the needs of neglected children and produce more stable outcomes.

⁵¹ *Id.*

⁵² Child Abuse and Protection Treatment Act, 42 U.S.C. § 5106(g)(4) (1974). “Sexual abuse” is defined as,

(A) [t]he employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or (B) the rape, and in cases of caretaker or interfamilial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

⁵³ *Id.* at § 5106(g)(2) (“abuse and neglect” is defined as “[a]ny recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse, or exploitation, or an act or failure to act which presents an imminent risk of serious harm”).

⁵⁴ *Id.*

⁵⁵ See *Definitions of Child Abuse and Neglect*, *supra* note 50. See also Acts of Omission – An Overview of Child Neglect (2001), available at <http://www.childwelfare.gov/pubs/focus/acts/acts.pdf> (explaining that generally, state reporting laws define neglect as “deprivation of adequate food, clothing, shelter or medical care”).

⁵⁶ See *Who is in “The System”*, *supra* note 1. See also National Coalition for Child Protection Reform, *Issue Paper 6: Child Abuse and Poverty* (2008) [hereinafter *Child Abuse and Poverty*], available at <http://www.nccpr.org/reports/6Poverty.pdf> (illustrating several situations where children were placed into foster care because of a lack of basic services such as housekeeping or babysitting, lack of basic needs such as warm clothing or medicine, or for homelessness).

⁵⁷ See *Child Abuse and Poverty*, *supra* note 56 (emphasis added).

⁵⁸ Report Reveals Human Cost of Foster Care, *supra* note 6.

Family preservation programs are the needed alternative to foster care because they provide services that address poverty, the root cause of neglect. As a result, neglected children and their families can remain together while receiving needed services. Studies have shown that family preservation programs decrease the placement of these children into foster care.

A Michigan study compared children and families who participated in the Families First family preservation program with children that were placed into foster care.⁵⁹ After a twelve-month follow-up, ninety-three percent of families that participated in the Families First program remained together while only forty-three percent of children placed into foster care had been returned home.⁶⁰

The study provided some insight into the disparate result. In the Families First program, caseworkers made initial contact with the families less than twenty-four hours after the referral.⁶¹ The caseworkers for the children placed into foster care took, on average, twenty-two days to contact the family.⁶² In looking at in-person time spent with the families, caseworkers with Families First spent an average of forty-one hours over twenty-eight days with each family, as compared to just four hours over a span of six weeks with caseworkers from foster care.⁶³ Finally, seventy-eight percent of Family First caseworkers used flexible funds to assist families and spent an average of \$345 on services such as utilities and rent, while only four percent of foster care caseworkers used funds and spent no more than \$60 per family.⁶⁴

Two additional studies provided similar findings. A three-year California study that targeted “high risk” families found that the Emergency Family Care Program was able to avoid placement in eighty-six percent of their cases.⁶⁵ The study pointed to both the high-degree of in-home contact and the provision of “concrete services,” such as “teaching family care, supplemental parenting, securing medical care and food, and providing training on financial management,” as the main contributors to the success of the program.⁶⁶

Finally, the Washington Institute for Public Policy found that family preservation programs that “adhere closely to the Homebuilders model” significantly reduce out-of-home placements as well as subsequent abuse and neglect.⁶⁷ The study demonstrated that the effectiveness of each program was

⁵⁹ Betty Blythe, Michigan Families First Effectiveness Study, available at http://www.michigan.gov/dhs/0,1607,7-124-5458_7695_8366-21887--,00.html.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Marianne Berry, *Children of Poverty: Studies of the Effects of Single Parenthood, the Feminization of Poverty, and Homelessness*, in KEEPING FAMILIES TOGETHER. (S. Bruchey ed., Garland Publ'g.1994).

⁶⁶ *Id.*

⁶⁷ *Intensive Family Preservation Programs*, *supra* note 31.

directly related to the degree of fidelity to the Homebuilders model with which the program was administered.⁶⁸

These studies reveal that low caseloads, substantive in-person contact and concrete services targeted to remedy identified crises, contribute to the effectiveness of family preservation programs and decrease the likelihood of placement.

Critics of family preservation programs point to studies that fail to distinguish between programs modeled on Homebuilders, and thus cite results that either dilute the benefits of such programs or even flatly contradict them.⁶⁹ One example was illustrated in the aforementioned Murphy article.⁷⁰ Another example is demonstrated in a Mississippi study that found little evidence to show that family preservation services resulted in lower placement rates.⁷¹ The problem with that study is that the services provided varied in their implementation and were not modeled on the Homebuilders approach.⁷²

There is no question that the mere act of labeling a program as “family preservation” does not guarantee its effectiveness, but the data is clear on the types of programs that do work. Along these lines, Robert Wexler has suggested that the wholesale acceptance of foster care by the child welfare system represents a double standard, considering foster care has not been held to account for its own failures.⁷³ More troubling for critics of family preservation programs are the results of two recent studies that measured arrest rates, imprisonment, teen motherhood, employment, and earnings for children who were placed into foster care. These studies found that similarly situated children who are on the margin of being placed in foster care and who remain at home, even without receiving services, have better long-term outcomes than children who are placed in foster care.⁷⁴ Such data supports the premise that having a family is the best indicator of a more positive future-outcome than foster care, and that removal should only occur when viable alternatives do not exist. Therefore, a child welfare system that incorporates the use of family preservation programs would better serve many of the neglected children that comprise a vast majority of foster care placements each year. But, as the following sections establish, family preservation programs have never been given the chance to achieve their potential.

⁶⁸ *Id.*

⁶⁹ *Does Family Preservation Work?*, *supra* note 39.

⁷⁰ *See supra* Part I.A.

⁷¹ C.A. Ford & Felix A. Okojie, *A Multi-Dimensional Approach to Evaluating Family Preservation Programs*, *FAM. PRES. J.* (1999).

⁷² *Id.*

⁷³ *Does Family Preservation Work?*, *supra* note 39.

⁷⁴ *See supra* text accompanying note 5.

II. HOW IT ALL BEGAN: THE BEGININGS OF FEDERAL ACTION ON CHILD WELFARE

Federal funding for child welfare services began in 1935, when Congress first authorized small grants to states to encourage them to initiate their own child welfare agencies and programs.⁷⁵ Despite this early initiative, it was not until the 1960s that the federal government would become the entrenched and dominant force in the national child welfare system that it is today.

In 1961, Congress provided matching federal funds for children in foster care for the first time.⁷⁶ In doing so, Congress linked federal funding to the placement of a child into foster care—a link that remains today—thus providing states with a financial incentive to use foster care services.⁷⁷ In 1962, Congress required state agencies to provide reports to the court system on families whose children had been identified as candidates for removal.⁷⁸ Together, these two provisions incentivized states to use foster care services because funding and regulations targeted the removal of children. Not surprisingly, the result was an increase in the removal of children from their homes and the growth of foster care system.⁷⁹ Two points about this phase of federal involvement should be emphasized. First, the federal focus was solely on foster care. There were no federal funds or emphasis on either family preservation or adoption. Second, it was this emphasis on foster care that would send the system into overdrive by the 1970s, heralding in the first call for reform.⁸⁰

In 1974, Congress enacted the first major federal legislation addressing child abuse and neglect. In exchange for federal funding for child abuse prevention and treatment, the Child Abuse Prevention and Treatment Act (“CAPTA”), required states to establish child abuse reporting procedures and investigation systems.⁸¹ Along with the expansion of the foster care program from the 1960s, the implementation of mandatory reporting laws under CAPTA resulted in the rapid growth of the number of children who were removed from their homes and placed in foster care.⁸²

By the end of the 1970s, it became clear that the growing number of children being placed was beginning to burden the foster care system. The quality of care decreased and the typical length of stay in foster care increased.⁸³ As a result, the

⁷⁵ *A Brief Legislative History*, *supra* note 11, at 1.

⁷⁶ Act of May 8, 1961, P.L. 87-30, 75 Stat. 75 (1961).

⁷⁷ *A Brief Legislative History*, *supra* note 11, at 2.

⁷⁸ The Public Welfare Amendments Act of 1962, P.L. 87-543, 76 Stat. 172 (1962).

⁷⁹ *A Brief Legislative History*, *supra* note 11, at 2.

⁸⁰ See TIME FOR REFORM, *supra* note 3, at 20.

⁸¹ *A Brief Legislative History*, *supra* note 11, at 3.

⁸² *Id.*

⁸³ *Id.* (discussing the increase in the length of stay in foster care). See also *supra* text accompanying note 8 (discussing the decrease in the quality of care and the overburdened foster care system).

new phenomenon of “foster care drift” developed. Children began to languish in foster homes with no plans for reunification or permanency.⁸⁴

It was at this point, in the late 1970s, that Congress had its first chance to reform the system. Federal legislation from the previous two decades had led to a rapid increase in the population of children being placed into foster care with few opportunities to avoid such placements and few opportunities to leave. For a brief moment, it appeared that Congress had effectively taken these concerns into account with the Adoption Assistance and Child Welfare Act of 1980 (“CWA”). On the surface, the CWA appeared to place family preservation as its paramount goal and sought to deemphasize the use of foster care placement.⁸⁵ Nevertheless, as discussed in the next section, the discontinuity between the intentions and the effects of the CWA soon became apparent. Foster care placements only continued to grow throughout the 1980s and ‘90s, while family preservation efforts remained stalled in the dust.

III. GRASPING FOR AN ILLUSION: THE FIRST ATTEMPT AT CHILD WELFARE REFORM MISSES THE MARK

With the passage of the CWA in 1980, it appeared that Congress had sought to reverse the child welfare system’s reliance on foster care—which pervaded the system for nearly two decades—with a shift toward family preservation.⁸⁶ To achieve this goal, the CWA provided that before a child could be removed from his or her home the state had to make “reasonable efforts” to “prevent or eliminate the need for removal.”⁸⁷ The CWA also provided that the states develop a “plan” to meet this objective that required the approval of the Secretary of Health and Human Services.⁸⁸ Finally, the CWA established certain procedures in order to facilitate a “case review system” to ensure that states were planning for the eventual departure of children from foster care.⁸⁹

Together, these provisions were designed to decrease the flow of children into foster care, ensure that children within the system did not languish in care and provide more targeted services to all children in the child welfare system.⁹⁰ But Congressional intent never materialized, and the CWA neither incentivized the use of family preservation alternatives, nor decreased the flow of children into foster

⁸⁴ Intensive Foster Care Reunification Programs, *available at* <http://aspe.hhs.gov/hsp/cyp/xsfcprog.htm>.

⁸⁵ Adoption Assistance and Child Welfare Act of 1980 §471(a)(15) P.L. 96-272, 94 Stat. 500 (1980) (“reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”). *See also supra* note 7.

⁸⁶ *See supra* text accompanying note 7.

⁸⁷ Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500 (1980).

⁸⁸ *Id.* at § 471(a).

⁸⁹ *Id.* at § 475(5).

⁹⁰ *See supra* text accompanying note 7.

care.⁹¹ There were four reasons for this: 1) Congress provided no substantive guidance as to how the states or the courts were to interpret and implement family preservation;⁹² 2) Congress provided insufficient funding for states to create such programs, while providing open-ended federal matching funds for foster care placements;⁹³ 3) there was a lack of effective monitoring mechanisms in order to assist the states in complying with federal requirements;⁹⁴ and 4) no private right of action existed under the CWA that would have permitted parents or child advocates to sue state or federal officials for failing to properly use family preservation alternatives.⁹⁵

Taken together, instead of decreasing state reliance on foster care, these factors actually led to the explosion of the foster care population during the mid-1980s and into the '90s.⁹⁶ Further, the vast majority of children in foster care were still being placed due to neglect, and few services were provided to better their condition and that of their families.

A. Insufficient Federal Guidance to the States and to the Courts

The CWA provides that states must make “reasonable efforts” to prevent removal of children and to reunite families of children placed into foster care in order to receive matching federal funding for foster care.⁹⁷ Each state must also submit a “plan” that outlines its proposed implementation of the “reasonable efforts” provision. The Department of Health and Human Services (“DHHS”)

⁹¹ *A Brief Legislative History*, *supra* note 11, at 4.

⁹² The CWA only provides that “reasonable efforts” be taken to “prevent or eliminate the need for removal” and that the states develop a “plan” to facilitate such efforts, but provides no explanation as to the definition, extent or implementation of “reasonable efforts.”

⁹³ *Safety and Stability*, *supra* note 19 (explaining that the federal government provides “open-ended funding” for children in foster care, but “very limited funding” for the development of alternative service).

⁹⁴ Department of Health and Human Services: Office of Inspector General: Oversight of State Child Welfare Programs, 17-18 (1994) [hereinafter Oversight], available at <http://oig.hhs.gov/oei/reports/oei-01-92-00770.pdf> (finding that states view the state “plan” as “largely a paper exercise” and then providing a list of shortcomings of the review process).

⁹⁵ *Suter v. Artist M.*, 503 U.S. 347, 363 (1992) (holding that neither the CWA, nor § 1983 confer a private right of action for individuals to sue the state for failure to comply with the “reasonable effort” provision of the CWA).

⁹⁶ The population of foster care rose from 280,000 in 1986 to 400,000 in 1990 and peaked in 1999 at 567,000. See *A Brief Legislative History*, *supra* note 11, at 4; Child Trends Data Bank, The Number and Rate of Children in Foster Care Ages 17 and Under, 1990-2006, available at http://www.childtrendsdatbank.org/sites/default/files/12_fig01.jpg. It has been suggested that the economic slowdown, the crack and AIDS epidemics and the higher incarceration rates of women in the 1980s led to explosion of the foster care population in the mid-1980s. See *A Brief Legislative History*, *supra* note 11, at 4. While these conditions may have created the necessary environment for an explosion of the foster care population, the remainder of this Part explains how the CWA constrained states to rely primarily on foster care to deal with these issues, when family preservation programs may have been able to mitigate the crises.

⁹⁷ Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500 (1980).

must approve each “plan” before a state can qualify for federal foster care funding.⁹⁸

The problem with the “reasonable efforts” standard is that the statute provides no definition or guidelines concerning what “efforts” are sufficient to satisfy it; leaving the states and the courts to make that determination.⁹⁹ Unfortunately, it became clear that the “[s]tate plan was seen as largely a paper exercise,” and that “[s]tate officials and [federal] officials agreed that it is rarely, if ever, looked at by [federal inspectors].”¹⁰⁰ As a result, few states have enacted a statutory definition of the “reasonable efforts” standard.¹⁰¹

The lack of federal guidance to the states is further compounded by a lack of guidance to the courts. Annual caseloads for child welfare proceedings can average around 1,000¹⁰² per judge and sometimes reach upward to 5,000.¹⁰³ Further, just forty-nine percent of judges receive any specialized training before hearing child protective matters.¹⁰⁴ Perhaps then, it is not surprising that audits of judicial determinations have found many child welfare proceedings do not meet “reasonable efforts,” despite judicial determinations indicating the contrary.¹⁰⁵ In some states the “reasonable efforts” determination consists of a box on a pre-printed form that merely requires a judge to check the box indicating that he or she had made the appropriate judicial determination.¹⁰⁶ No rationale or written reasoning is required.¹⁰⁷ As a result, in many cases, it has been reported that the written evidence in case files simply does not support the conclusions on the pre-printed forms.¹⁰⁸ Given that the DHHS does not adequately assess state “plans,” that few states have enacted a statutory definition of “reasonable efforts,” and that state courts are not making effective determinations of “reasonable efforts,” the

⁹⁸ *Id.*

⁹⁹ See *supra* text accompanying note 92. See also Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W.L. REV. 223, 223-24 (1989) (suggesting that the lack of clarity in the “reasonable efforts” provision contributed to the difficulties in implementation).

¹⁰⁰ Oversight, *supra* note 94, at 18.

¹⁰¹ Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws (2006), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf (explaining that while some states require the provision of services to assist families, most states use a “broad definition of what constitutes reasonable efforts”).

¹⁰² Carlos R. Moreno, *Taking Action for our Foster Children*, SAN FRANCISCO CHRONICLE, Aug. 15, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=c/a/2008/08/14/ED3E12B9KH.DTL>.

¹⁰³ The Daily Record Editorial Advisory Board, *Bring Juvenile Courts Back from the Breaking Point*, THE DAILY RECORD, May 9, 2005 [hereinafter *Breaking Point*], available at http://findarticles.com/p/articles/mi_qn4183/is_20050509/ai_n14620185/.

¹⁰⁴ Overcrowded Court Dockets, Lack of Family Services Keeping Children in Foster Care, Says New Survey of Family Court Judges, available at http://www.pewtrusts.org/news_room_detail.aspx?id=22808.

¹⁰⁵ Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State’s Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 285 (2003).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

needs of children who go through a child welfare proceeding are not being served appropriately by child welfare agencies.

It should be noted that in 1983, three years after the passage of the CWA, the DHHS promulgated a regulation outlining services that states could provide and courts could require to fulfill the "reasonable efforts" requirement.¹⁰⁹ Not surprisingly, many of the recommendations, such as emergency shelters, financial assistance, caretakers and various counseling services, are precisely the types of services provided by family preservation programs.¹¹⁰ Nevertheless, absent funding for such alternatives, states continued to rely on foster care.

B. Inadequate Funding

Despite requiring "reasonable efforts" to prevent placement, the CWA did not authorize federal funding to support family preservation programs. As touched upon above, state compliance with the "reasonable efforts" provision is tied to funding for *foster care* and not to funding for family preservation.¹¹¹ This seems to be a perplexing condition, because "reasonable efforts" are required *before* a child is removed from his or her home. States were further constrained by the federal funding scheme because the CWA linked the receipt of funding to the placement of a child in foster care.¹¹² Moreover, matching federal funds for foster care are "inflexible" and *have* to be used by the states for foster care services.¹¹³ Therefore, a state received matching federal funds if it placed a child in foster care, but no funding if it determined the child could remain at home as part of a family preservation program.

Under these conditions, it is clear that the CWA did not shift the focus of the child welfare system toward family preservation. Instead, the CWA tacitly supported foster care as the default option for children. While the number of children in foster care did decrease slightly following the passage of the CWA, between 1986 and 1990, the foster population grew from 280,000 to 400,000, and peaked in 1999 at 567,000.¹¹⁴ At the same time, state incentives to develop, expand and use family preservation services were hindered because of a lack of funding.

Critics of the CWA exposed the gaps in the federal funding scheme by arguing that states only received funding for children in need of support when they

¹⁰⁹ Department of Health and Human Services, 48 C.F.R. § 1357.15 (1983) (providing a list of services).

¹¹⁰ *Id.*

¹¹¹ In order for the state to be eligible for matching foster care funding, the CWA provides, among other requirements, that "reasonable efforts" be made to prevent the removal of children from their homes. See Adoption Assistance and Child Welfare Act of 1980, P.L. 96-272, 94 Stat. 500 (1980).

¹¹² Allen & Bissell, *supra* note 19, at 51.

¹¹³ TIME FOR REFORM, *supra* note 3, at 23.

¹¹⁴ See *supra* text accompanying note 96.

entered foster care.¹¹⁵ The CWA neither provided for funding for at-risk children before they came in contact with the child welfare system, nor provided alternatives to placement for families in crisis.¹¹⁶

In 1993, thirteen years after the CWA, Congress finally addressed the gap between funding for foster care and a lack of funding for family preservation programs by passing a series of small-scale reform efforts. To provide federal funds for family preservation programs and for court improvements, Congress passed the Family Preservation and Support Services Program (“FPSSP”).¹¹⁷ Congress continued reform efforts in 1994 and 1996 with the passage of the Child Welfare Waiver Demonstration Program (“Waiver”) and Temporary Assistance to Needy Families (“TANF”), respectively.¹¹⁸ The Waiver program gave up to ten states the flexibility to use existing federal funding sources for family preservation services.¹¹⁹ Similarly, TANF provided all states with a limited amount of discretionary funding that could be used for a variety of child welfare purposes, including family preservation, but was not restricted for use toward foster care and adoption.¹²⁰

States began to report the expansion and increased use of family preservation programs in the years that followed these funding initiatives.¹²¹ For example, forty-one states introduced new programs, thirty-two states expanded existing programs and forty-nine states indicated that the funding allowed them to serve families that could not be served without it.¹²² This data clearly demonstrates that states were able use the funding to implement and expand family preservation programs, and that those services were able to reach families that would otherwise not be served.

Unfortunately, these reform efforts were insufficient to generate the impetus necessary to restructure the child welfare system. A closer look reveals their shortcomings. First, the amount of funding provided by all three programs was very small, especially when compared to the funding states were receiving for foster care services. For example, the FPSSP allocated \$930 million over a period of five years.¹²³ When compared to the \$4.5 billion that is allocated for foster care

¹¹⁵ Allen & Bissell, *supra* note 19, at 51-52.

¹¹⁶ *Id.*

¹¹⁷ Omnibus Reconciliation Act of 1993, 42 U.S.C. § 629 (2010) (Entitlement Funding for Services Designed to Strengthen and Preserve Families).

¹¹⁸ Social Security Act Amendments of 1994, 42 U.S.C. § 1320a-9(b) (2010) (“Waiver Authority”); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 110 Stat. 2105 at Title I (“Block Grants for Temporary Assistance for Needy Families”).

¹¹⁹ Allen & Bissell, *supra* note 19, at 58.

¹²⁰ *Id.*

¹²¹ *States’ Progress*, *supra* note 15, at 28.

¹²² *Id.*

¹²³ National Resource Center for Respite and Crisis Care Services, *Fact Sheet Number 37: Family Preservation and Family Support Services*, (1994), available at <http://www.archresp.org/archfs37.htm>

each year,¹²⁴ family preservation programs were still greatly underfunded. Further, the states generally did not opt for the Waiver program because of the complex evaluation requirements and the condition that the initiatives used under the program be cost-neutral.¹²⁵ Finally, none of the reform efforts broke the link between the receipt of open-ended federal matching funds and foster care. Therefore, even though states were finally receiving limited federal funding for family preservation programs, the funding was capped and the financial incentives for foster care placement remained.

C. Ineffective Monitoring of State Compliance

In addition to a lack of guidance and insufficient funding, federal monitoring of state compliance with the “reasonable efforts” standard further hindered state efforts to use family preservation programs. Under the CWA, states are required to pass periodic “reviews” of their child welfare systems.¹²⁶ But, these reviews failed to provide states with useful guidance, policy recommendations or even an accurate assessment of their compliance with federal reform efforts.¹²⁷

Soon after the passage of the CWA in 1980, it became clear to the states, the courts and even the federal government that states were floundering when it came to meeting the requirements of the statute. By 1984, the Office of the Inspector General of the DHHS identified twenty-eight states that were having difficulties in satisfying the requirements of the CWA.¹²⁸ In 1988, at a hearing on the subject of child welfare reform, the Associate Commissioner for the Children’s Bureau admitted that federal inspectors simply looked at the review documents from the state to see if they indicated whether “reasonable efforts” had been taken.¹²⁹ No effort was made to determine whether the efforts had been legitimate.¹³⁰ In 1990, George Miller, Chairman of the Select Committee on Children, Youth, and Families stated, “we don’t know whether or not the law works because the Department of Health and Human Services, throughout the 1980s, failed to enforce compliance.”¹³¹ Indeed, a report by the Office of Inspector General of the DHHS affirmed this lack of oversight, stating, “the [] review process is often focused on whether certain forms are filled out appropriately rather than whether, in fact, the

¹²⁴ TIME FOR REFORM, *supra* note 3, at 1.

¹²⁵ Allen & Bissell, *supra* note 19, at 63.

¹²⁶ Adoption Assistance and Child Welfare Act of 1980, § 427, P.L. 96-272, 94 Stat. 500 (1980).

¹²⁷ Oversight, *supra* note 94, at 8.

¹²⁸ U.S. Department of Health and Human Services, Office of Inspector General, Opportunities for Improved Foster Care Eligibility Determinations, 1 (1994) [hereinafter DHHS Report], available at <http://oig.hhs.gov/oas/reports/acf/1993/d9300022.pdf>.

¹²⁹ *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 16, 59 (1996), available at http://www.eric.ed.gov:80/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/25/87/15.pdf.

¹³⁰ *Id.*

¹³¹ Lifting the Veil – Reasonable Efforts, available at <http://liftingtheveil.org/reason01.htm>.

purpose of the law in preventing unnecessary placements is being met.”¹³² That same report also found that federal oversight was not spurring advancements in State programs, and in some cases, had detrimental effects.¹³³ Further, a GAO survey in the early 1990s, found that over half of the family preservation programs surveyed were not able to serve all families who needed such services due to lack of funding and staff.¹³⁴

Such failures were also readily apparent to the states and to the courts, as some state departments admitted to not making “reasonable efforts” in some cases¹³⁵ and certain judicial determinations were found to be insufficient.¹³⁶ For example, in a survey of the Baltimore Juvenile Court System, the courts determined that “reasonable efforts” were made in ninety-nine percent of cases, yet the Department of Human Resources candidly admitted to not making “reasonable efforts” in twenty percent of the cases.¹³⁷ Court appointed attorneys in Baltimore also expressed the belief that the “reasonable efforts” finding by the court is a “virtual rubber stamp.”¹³⁸

Some states expressed a concern that the reviews not only detracted from their ability to apply the federal requirements, but also did not provide the guidance and oversight necessary to encourage state initiative. For example, some states believed that constant alterations to the review process redirected state attention and resources.¹³⁹ Other states expressed concern that the reviews were focused on assessing timeframes as opposed to whether the state provided services that actually produced improvements.¹⁴⁰ Further, federal review reports were not issued to the states in a timely manner, which slowed state capacity to improve child welfare programs.¹⁴¹ Finally, some states were left with the impression that they could pass reviews regardless of the quality of their child welfare programs.¹⁴²

¹³² DHHS Report, *supra* note 128, at 22.

¹³³ *Id.* at 8.

¹³⁴ *States' Progress*, *supra* note 15, at 3.

¹³⁵ *Breaking Point*, *supra* note 103 (In a 2005 study of Maryland Courts, it was found that “reasonable efforts” were found in ninety-nine percent of cases, even though the Department of Human Resources candidly admitted that its local departments do not make reasonable efforts in twenty percent of the cases).

¹³⁶ Department of Health and Human Services, Departmental Appeals Board, Welfare Docket No. A-93-195 (1995), available at <http://www.hhs.gov/dab/decisions/dab1508.txt> (finding that of 100 sampled payments for which the state of Pennsylvania had filed for federal reimbursement, twenty-five were found to be ineligible, primarily for lack of proper judicial determinations with respect to reasonable efforts having been rendered to prevent removal, or determinations that remaining in the home would be contrary to the best interests of the child).

¹³⁷ *Breaking Point*, *supra* note 103.

¹³⁸ *Id.*

¹³⁹ DHHS Report, *supra* note 128, at 8.

¹⁴⁰ *Id.* at 10.

¹⁴¹ *Id.* at 14 (On average, it was found that states received reports two and a half years after the reviews, with some taking as long as five years).

¹⁴² *Id.* at 10.

As a result, states became more concerned with passing reviews as opposed to following the intent of the law.¹⁴³

The issues were also no secret to judges within the system. One judge went as far as stating, “[i]t is possible, through review of decisions throughout the country, to make a case for the total inadequacy of the child welfare system and the legal system to deal adequately with the reasonable efforts requirement.”¹⁴⁴ Other judges have expressed that reform in the judiciary is of dire need because “[t]he cost of inaction far outweighs the cost of hiring the additional personnel needed to ensure that Juvenile Court proceedings meet national standards.”¹⁴⁵

D. No Private Right of Action

Beyond the states, the courts and the federal government, the people impacted most by the CWA—the families—also took notice of its shortcomings. By 1992, a case had made its way to the Supreme Court that, if successful, would have provided a private right of action either under the CWA itself or through an action under 42 U.S.C. § 1983¹⁴⁶ to hold child welfare agencies responsible for failing to adequately implement the “reasonable efforts” provision.¹⁴⁷ In *Suter v. Artist M.*, petitioners, Artist M., et. al.—“wards of the Juvenile Court”¹⁴⁸—brought a class action lawsuit against Respondents, Sue Suter and Gary T. Morgan, the Director and the Guardianship Administrator, respectively, of the Illinois Department of Children and Family Services.¹⁴⁹

Artist M. argued that Respondents failed to make “reasonable efforts,” as provided by the CWA, “to prevent removal of children from their homes and to facilitate reunification of families where removal had occurred.”¹⁵⁰ In short, the Court reversed the Seventh-Circuit and rejected both arguments of the Petitioners. It reasoned that neither the CWA, nor § 1983 created a private right of action on the ground that the CWA “impose[d] only a rather *generalized duty* on the State, to be

¹⁴³ *Id.*

¹⁴⁴ Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 U. PITT. L. REV. 211, 222-23 (1992).

¹⁴⁵ *Breaking Point*, *supra* note 103, at page 3.

¹⁴⁶ Civil Action for Deprivation of Rights, 42 U.S.C. § 1983 (1979) (providing

[e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress)

(emphasis added).

¹⁴⁷ See generally *Suter v. Artist M.*, 503 U.S. 347 (1992).

¹⁴⁸ *Artist M. v. Johnson*, 917 F.2d 980, 983 (7th Cir. 1990).

¹⁴⁹ *Suter*, 503 U.S. at 351 (the “[Department of Children and Family Services] is the state agency [in Illinois] responsible for, among other things, investigating charges of child abuse and neglect and providing services to abused and neglected children and their families.”).

¹⁵⁰ *Id.* at 352.

enforced not by private individuals, but by the Secretary”¹⁵¹ In reaching this conclusion, the Court highlighted some of the flaws addressed above, making clear that the vagueness with which the “reasonable efforts” provision was written seems to foreclose any Congressional intent to create a private right of action.

The Court noted that “[w]hat is significant is that *the regulations are not specific*,”¹⁵² and that beyond using “reasonable efforts” to keep children with their families, “[n]o further statutory guidance is found as to how ‘reasonable efforts’ are to be measured.”¹⁵³ The Court went on to explain that the state “plan” is the only real requirement for the states to be compliant with the statutory regulation, stating, “[t]he regulations promulgated by the Secretary to enforce the Adoption Act *do not evidence a view that [the statute] places any requirement* for state receipt of federal funds *other than the requirement* that the State submit a plan to be approved by the Secretary.”¹⁵⁴ Finally, the Court compared the “reasonable efforts” provision to other provisions in the CWA and concluded that “[t]he language of other sections of the Act . . . shows that Congress knew how to impose precise requirements on the States aside from the submission of a plan to be approved by the Secretary when it intended to.”¹⁵⁵ But, with regard to “reasonable efforts,” Congress simply did not impose any such requirements.¹⁵⁶ On the basis of these factors, the Court concluded that the duty imposed upon the states was “generalized” and not to be enforced by private individuals.¹⁵⁷

Therefore, in the instant case, given that Illinois had submitted a “plan” that had been approved by the DHHS,¹⁵⁸ Petitioners were simply out of luck as far as being able to seek remedies from the courts. While it is difficult to assess what may have changed had *Artist M.* been affirmed, the result is that once a state “plan” has been approved by the DHHS, families and children will have no recourse through the courts, and state agencies will have no deterrence against administering insufficient child welfare services.

Without proper guidance, funding, monitoring or a private right of action, states were in a position where it made more financial sense to place children in foster care than to support underfunded and ill-defined family preservation alternatives. The explosion of foster care placements throughout the 1990s helps to illustrate this result.¹⁵⁹ The shortcomings of the CWA proved to be too strong to allow the states to develop functioning and supportive family preservation services

¹⁵¹ *Id.* at 363 (emphasis added).

¹⁵² *Id.* at 361-62 (emphasis added).

¹⁵³ *Id.* at 360.

¹⁵⁴ *Suter*, 503 U.S. at 361 (emphasis added).

¹⁵⁵ *Id.* at 361, n.12.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 363.

¹⁵⁸ *Id.* at 358.

¹⁵⁹ *See supra* text accompanying note 96.

that may have been able to stem the overflow of the foster care system. Unfortunately, when Congress initiated the second major overhaul of the child welfare system in the late 1990s, it erroneously viewed family preservation as a failed alternative, and unjustly blamed “reasonable efforts” for the ills of the system.

IV. THE MARGINALIZATION OF FAMILY PRESERVATION: THE SECOND ATTEMPT AT CHILD WELFARE REFORM

The CWA had a more harmful, long-term consequence for family preservation that emerged during the mid-1990s and culminated with the Adoption and Safe Families Act (“ASFA”), passed in 1997.¹⁶⁰ Since the CWA was viewed as being premised on family preservation, but did not result in a decreased reliance on foster care, family preservation was seen as a failed initiative. In reality, as addressed above, it was the CWA that failed family preservation, and not vice versa. But instead of taking the time to assess either the underlying shortcomings of the CWA or the fact that a vast majority of children were not placed because of sexual or physical abuse, Congress chose to scapegoat family preservation.¹⁶¹ As a result, the ASFA exacerbated the trend in the child welfare system of failing to address the needs of a vast majority of children being placed in foster care, and made no efforts to rectify the shortcomings of the CWA.

Unlike Congressional hearings leading up to the CWA, which discussed the importance of family preservation, the Congressional hearings that preceded the ASFA were markedly different. Congressmen told “horror stories” that were popularized by the media about children who were allowed to remain with their parents and were ultimately tortured and killed.¹⁶² In response, Congress used the ASFA to shift focus toward adoption. As explained below, the two main tenets of the new legislation were to rebrand the “reasonable efforts” standard to make it easier for the courts to terminate parental rights and place children up for adoption and to provide increased financial incentives to states for adoption.¹⁶³

The ASFA specifically targeted children who had been subject to egregious sexual or physical abuse. It provided that in such cases, “reasonable efforts” would not be required before a court could terminate parental rights and place the children up for adoption.¹⁶⁴ Further, the ASFA provided open-ended financial incentives

¹⁶⁰ Adoption and Safe Families Act of 1997, P.L. 105-89, 111 Stat. 2115 (1997).

¹⁶¹ See *supra* text accompanying note 14.

¹⁶² *Id.* See also Kathleen A. Bailie, *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, 2288 (1998) (arguing that ASFA resulted from societal outrage over news reports on extreme acts of child abuse by parents whose children are in the child welfare system).

¹⁶³ See discussion *infra*.

¹⁶⁴ Adoption and Safe Families Act of 1997, § 101(a)(D)(i-ii), P.L. 105-89, 111 Stat. 2115 (1997) (“Reasonable efforts” need not be attempted under the following conditions: 1) If the parent has subjected the child to aggravated circumstances [a]s defined in State law, . . . 2) If the parent has committed or attempted murder or voluntary manslaughter of another child of that parent, 3) If the

for adoption by providing each state \$4,000 for each adopted child and \$6,000 for each adopted child with special needs.¹⁶⁵

Together, both of these provisions resulted in a near doubling of adoptions, from just over 27,000 in 1996 to just over 50,000 a year between 2000 and 2006.¹⁶⁶ For the children that have suffered egregious abuse, this increase in adoption is a positive sign that more children are being placed into permanent homes. Nevertheless, the data from 1996 shows that victims of sexual and physical abuse represented about one-third of all children who entered foster care each year.¹⁶⁷ For the remaining two-thirds of children placed as a result of neglect,¹⁶⁸ the ASFA provided no new relief.

In fact, in the decade since the passage of the ASFA, the gap between children placed as a result of neglect, compared to sexual and physical abuse, has only widened. In 2007, nearly seventy percent of children who entered foster care were placed as a result of neglect, compared to only twenty-six percent of children who were placed as a result of sexual or physical abuse.¹⁶⁹ This trend demonstrates that a growing number of children who are not receiving effective assistance by either the ASFA or the CWA are being placed into foster care.

Indeed, communities felt as though the ASFA had undercut the earlier emphasis on family support and prevention.¹⁷⁰ Further, a GAO Report in 2002 found,

Without appropriate services and treatment, children are more likely to be placed in foster care and to stay there for longer periods. The *lack of services and treatment* stalls permanency decisions in those cases when judges are reluctant to pursue termination of parental rights without such help being offered first. For example, in one recent study, *two-thirds of the states reported that the lack of appropriate services* provided to the parent soon after the child entered care, particularly substance abuse treatment, was a significant barrier to prompt permanency decisions. In some situations, children are returned home without the proper identification of substance abuse, mental health, or domestic violence problems. When these problems reoccur, children are often returned to foster care.¹⁷¹

parent "committed a felony assault that results in serious bodily injury to the child or another child of the parent, or . . ." 4) If the parental rights of the parent to a sibling have been terminated involuntarily).

¹⁶⁵ Adoption and Safe Families Act of 1997, § 437A, P.L. 105-89, 111 Stat. 2115 (1997).

¹⁶⁶ Adoptions of Children with Public Child Welfare Agency Involvement By State (1995-2006), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/adoptchild06.htm

¹⁶⁷ Figure 2-4 Types of Maltreatment, 1990-1996, <http://www.acf.hhs.gov/programs/cb/pubs/ncands96/figure24.htm>.

¹⁶⁸ *Id.*

¹⁶⁹ Child Maltreatment 2007, Chapter 6, Services, <http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm>.

¹⁷⁰ Allen & Bissell, *supra* note 19, at 4.

¹⁷¹ U.S. General Accounting Office, *Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children but Long-Standing Barriers Remain*. GAO Report No. 02-585 (2002), available at <http://www.gao.gov/new.items/d02585.pdf> (emphasis added).

Family preservation programs could encompass such “appropriate services.” In their absence, as the GAO report identifies, children are kept in limbo between their parents and foster care. As a result, neglected children and their families are not being provided with services to address their issues.

In the end, while the ASFA did provide a remedy for children who suffered from egregious sexual and physical abuse,¹⁷² such cases fortunately represent a minority of children as compared to children placed as a result of neglect.¹⁷³ Yet, it is the latter group of children that has increased in number since the passage of the ASFA, resulting in a greater number of children who are not being assisted adequately under either the ASFA or the CWA.¹⁷⁴ While the CWA failed family preservation from the basis of funding, incentivizing and providing guidance,¹⁷⁵ the ASFA undercut family preservation alternatives by rejecting them.¹⁷⁶ In the wake of the ASFA, foster care continues to be the main focus of the child welfare system, with adoption being the secondary option. While this focus may work well for children of sexual and physical abuse, the remaining vast majority of children are still being placed into foster care with no real opportunity to receive the services that they require.

Since the passage of the ASFA in 1997, little has changed on the federal level regarding the state of family preservation. Congress has continued to pass small-scale reform efforts. But, unlike the small-scale reform efforts from the mid-1990s that focused on supporting family preservation,¹⁷⁷ efforts since the ASFA have largely focused on bettering results for foster care children following their departure from foster care.¹⁷⁸ Aside from the renewal of the FPSSP, now called the Promoting Safe and Stable Families Act,¹⁷⁹ none of these efforts substantively addressed family preservation.

Looking back over the brief history of child welfare reform, beginning with the CWA in 1980, it is clear that foster care has been the central tenet of the child welfare system, with adoption services a close second. Indeed, foster care placements and adoptions increased subsequent to the passage of the CWA and of the ASFA, respectively. Both efforts receive open-ended federal funding and

¹⁷² By allowing courts to terminate parental rights and place such children up for adoption, *see supra* text accompanying note 164.

¹⁷³ Figure 2-4 Types of Maltreatment, *supra* note 167.

¹⁷⁴ *Id.*

¹⁷⁵ *See supra* Part III.

¹⁷⁶ Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 277-78 (2003).

¹⁷⁷ *See supra* notes 117, 118.

¹⁷⁸ *See* Foster Care Independence Act of 1999, P.L. 106-169, 113 Stat. 1822 (1999), (providing services for adolescents making the transition from foster care to self-sufficiency and for former foster youth up to 21 years old) and Fostering Connections to Success and Increasing Adoptions Act of 2008, P.L. 110-351, 122 Stat. 3949 (2008) (providing federal funding for kinship adoptions).

¹⁷⁹ Promoting Safe and Stable Families Amendments of 2001, P.L. 107-133, 115 Stat. 2413 (2002).

substantive guidance as to how states should utilize and structure such programs. The same cannot be said for family preservation, especially since Congress has intentionally moved away from the initiative, beginning in 1997 with the ASFA. As the aforementioned research clearly highlights, current federal efforts are not sufficient to address the needs of a vast majority of children that enter the already overburdened child welfare system each year. Regrettably, there is no indication that Congress is ready to embrace the idea of family preservation anytime soon.

V. THE THIRD TIME'S A CHARM: A FRAMEWORK FOR REFORMING THE CHILD WELFARE SYSTEM

In this final part, I pinpoint some key elements of reform that ought to be considered as a means of effectively incentivizing family preservation alternatives to refocus the child welfare system. Two key benefits can be achieved by using family preservation programs to reduce the placement of children facing various forms of neglect. First, the stream of children flowing into the foster care system can be reduced, thereby decreasing the burdens on the system and allowing the children that truly require foster care to receive better services.¹⁸⁰ Second, child welfare services will no longer take a “one-size-fits-all” approach and will have the necessary resources and programs to address the diverse needs of many more children. An important aspect of the elements I address below is that none require either a massive overhaul of the system or a drastic increase in funding. Therefore, I would argue that when compared to the current system, the potential benefits that can be achieved through the reform suggested below far outweigh the costs of maintaining the status quo.

As addressed, states have initiated small-scale family preservation programs and have demonstrated the willingness and capability of expanding such programs when provided with the necessary funding.¹⁸¹ The DHHS has also outlined a clear set of services, such as emergency shelters, financial assistance, caretakers and various counseling services that would meet the “reasonable efforts” requirements and that are the types of services provided by family preservation programs.¹⁸² Therefore, it would appear that the necessary foundation has been laid on both the state and federal level in order for reform efforts to take place.

The four prongs of reform are as follows: 1) adjust financial incentives to encourage states to use, develop and expand their current family preservation programs; 2) provide guidance to state courts and child welfare agencies by outlining the optimal circumstances in which “reasonable efforts” ought to be used; 3) adopt a consistent and functional definition for “neglect;” and 4) set standards for family preservation services.

¹⁸⁰ See *supra* text accompanying notes 4-5.

¹⁸¹ *States' Progress*, *supra* note 15.

¹⁸² Department of Health and Human Services, 48 C.F.R. § 1357.15 (1983) (providing a list of services).

A. Adjust Financial Incentives

Under the current federal funding scheme, receipt of matching federal funding for foster care is linked to the placement of a child.¹⁸³ Such funding is open-ended but “inflexible” because it must be used by the states for foster care services.¹⁸⁴ Conversely, funding that can be used for family preservation services, which only accounts for ten-percent of all federal funding, can be used for a variety of services—including foster care—and is fixed so that it does not change as states increase or decrease the use of family preservation programs.¹⁸⁵

This incentive scheme can be altered by linking funding to *children* instead of to the use of foster care.¹⁸⁶ Therefore, regardless of whether a child enters foster care or receives family preservation services, the federal matching funds would come from the same pool. As a result, states would no longer be “straight-jacketed”¹⁸⁷ into placing children into foster care because, provided a child is receiving child welfare services, the state would receive the matching funds.

B. Specify Optimal Circumstances for Using “Reasonable Efforts”

One of the main criticisms about the CWA was that Congress did not provide states and courts with guidance on applying the “reasonable efforts” standard.¹⁸⁸ The Supreme Court in the *Artist M.* decision echoed this sentiment when they found that the standard is “not specific” and that it only imposed a “generalized duty” on the states.¹⁸⁹ Nevertheless, Congress has demonstrated its ability and willingness to provide more specific standards regarding child welfare legislation. For example, in the same way that the ASFA enumerated the specific and extreme circumstances in which “reasonable efforts” need *not* be made,¹⁹⁰ Congress can specify the optimal circumstances in which “reasonable efforts” *can* be made prior to removal.

Chief among these situations, as discussed in Part I, are incidents of neglect caused by poverty and homelessness. Lack of housekeeping services, babysitting, medicine, shelter and appropriate clothing for cold weather are deemed neglect in most states and can result in the removal of children from their homes and families.¹⁹¹ There is simply no reason why families and children in such impoverished situations should be torn apart when family preservation programs designed to address their poverty could be more effective. Indeed, the DHHS has

¹⁸³ Allen & Bissell, *supra* note 19.

¹⁸⁴ TIME FOR REFORM, *supra* note 3, at 23.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* at 27.

¹⁸⁷ *Id.*

¹⁸⁸ See *supra* Part III.A.

¹⁸⁹ Suter v. Artist M., 503 U.S. 347, 362-63 (1992).

¹⁹⁰ Adoption and Safe Families Act of 1997, § 101(a)(D)(i-iii), P.L. 105-89, 111 Stat. 2115 (1997) (for a list of situations in which “reasonable efforts” need not be made).

¹⁹¹ See *supra* Part I.B.

even recognized that services designed to address these issues would meet the “reasonable efforts” requirement.¹⁹² Specific guidance to the states and the courts as to when “reasonable efforts” are most appropriate would help to distinguish between children best served by family preservation programs and those best served by foster care.

C. Adopt a Consistent and Functional Definition for “Neglect”

Along the lines of providing more guidance to the states and to the courts regarding the use of “reasonable efforts,” Congress can also adopt a consistent and functional definition for “neglect.” As addressed, CAPTA set minimum requirements for state definitions of “abuse” and “neglect,” but failed to distinguish between the two.¹⁹³ Most states have gone a step further and generally define “abuse” in terms of harmful *acts* and “neglect” in terms of *inaction*.¹⁹⁴ But, state definitions are not consistent. At least one-fifth of states have mirrored the CAPTA approach and do not distinguish between “abuse” and “neglect.”¹⁹⁵ Indeed, the DHHS has found that the “variation” among state definitions has contributed to a “lack of clarity on a national level.”¹⁹⁶

In order to address the “lack of clarity,” Congress should revisit the CAPTA definitions and permit the states and the courts to take a family’s situation into consideration when applying the “reasonable efforts” standard. This will allow states and courts to distinguish between neglect caused by poverty from neglect caused by “bad” parenting. A more flexible definition will allow states and courts to better meet the needs of various children and their families, instead of simply lumping all children into foster care.

D. Set Standards for Family Preservation Programs

While the data has shown that the mere labeling of a service as “family preservation” is not sufficient to ensure its efficacy,¹⁹⁷ the model adopted by Homebuilders has been shown to decrease the placement of children into foster care.¹⁹⁸ In the same manner that Congress has required licensure of foster care personnel and has set standard minimum requirements for foster care and adoption services, Congress can set minimum standards for family preservation programs. By demanding that family preservation programs meet the intensive criteria established by Homebuilders in order to receive federal funding, Congress can help

¹⁹² Department of Health and Human Services, 48 C.F.R. § 1357.15 (1983) (providing a list of services).

¹⁹³ See *supra* Part I.B.

¹⁹⁴ *Id.*

¹⁹⁵ Child Welfare Info. Gateway, *Acts of Omission: An Overview of Child Neglect* (2001), <http://www.childwelfare.gov/pubs/focus/acts/actsa.cfm>.

¹⁹⁶ *Id.*

¹⁹⁷ See *supra* Part I.B.

¹⁹⁸ *Id.*

to ensure that any organization or effort cannot simply label itself as “family preservation.” This would also help to allay the concerns expressed by critics because by providing specific requirements, Congress will enable family preservation programs to be assessed and evaluated based on the standards shown to be effective.

CONCLUSION

Foster care and adoption services provide a necessary relief for children who are victims of various types of maltreatment. Nevertheless, such services fail to provide support to families and children who are combating homelessness, poverty and other social ills that can lead to neglect. As a result, each year, tens of thousands of children fall into a wide gap in the child welfare system where they are needlessly removed from their homes and do not receive services that could assist their families. Family preservation programs can help close this gap and provide meaningful services to children whose needs are not being met by the current system.

Critics of family preservation programs are only doing a disservice to maltreated children by failing to credit models that have proven successful; especially when compared to foster care. Ignoring the ills of the current child welfare system and its dependence on foster care has a direct impact on the children and their families whose needs are not being met.

Only with a better understanding of the children that are in the system, the ways in which family preservation programs can provide much needed assistance, and the causes of three decades of insufficient alternatives to foster care, can future reform be based on empirical data and not sensationalized rhetoric. If steps are not taken soon to provide for family preservation programs as a means of addressing the ills and shortcomings of the current child welfare system, the biggest perpetrator of neglect in this country will be the very system that was designed to provide relief.