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## Count the Brown Faces: Where is the "Family" in the Family Law of Child Protective Services

Ana M. Novoa  
*St. Mary's University School of Law*

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# ARTICLES

## COUNT THE BROWN FACES: WHERE IS THE "FAMILY" IN THE FAMILY LAW OF CHILD PROTECTIVE SERVICES

ANA M. NOVOA\*

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\* Associate Professor, Director of the Civil Justice Clinic, and Co-Coordinator of Clinical Programs, St. Mary's University School of Law. B.B.A., University of Texas at San Antonio; J.D., University of Texas.

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*Prelude: The Story of Edwin*

*Edwin is the second child of his mother, Naomi Rodríguez.<sup>1</sup> He was born a year after his parents were married, although by that time, the marriage was unstable.<sup>2</sup> Because of “certain marital difficulties,” Edwin’s mother and father agreed to place him in state custody when he was about one month old.<sup>3</sup> Shortly after that, his mother and father separated, and eventually his mother reestablished a relationship with the father of her oldest child, subsequently having another baby by that union.<sup>4</sup>*

*Everyone in Edwin’s family, except for his siblings, is visually impaired; Edwin’s sight is limited, his mother and step-father are legally blind, and his biological father is visually impaired.<sup>5</sup>*

*After Edwin’s mother and father separated, his mother sought to have Edwin returned to her.<sup>6</sup> Child Protective Services (CPS) resisted Edwin’s return and his mother filed an action in state court to regain custody of her son. However, the trial judge ruled against Edwin’s return home, commenting that: “there would be considerable risk in returning Edwin to his mother because . . . [her] handicap affected her ability to care for an active boy; [she] was overly dependent on her [family] . . .”<sup>7</sup> On appeal, the court found that the trial court’s fears were unfounded, and that the evidence instead “establishes petitioner’s ability to run her household well.”<sup>8</sup> After Edwin had spent over three years in foster care he was finally returned home.<sup>9</sup>*

The right of parents to raise their own children is so fundamental that termination of that right by the courts must be viewed as a drastic remedy to be applied only in extreme cases. . . . The standard of clear and convincing evidence requires a finding of high probability; the evidence must be so clear as to leave no substantial doubt; it

1. See *Rodriguez v. Dumpson*, 383 N.Y.S.2d 883, 884 (N.Y. App. Div. 1976) (holding that evidence was insufficient to support a finding of the mother’s unfitness and awarding custody to the mother).

2. See *id.* at 884.

3. See *id.*

4. See *id.*

5. See *id.* (recounting the visual impairment of the parties involving, specifically that Edwin has sight but suffers from retina blastoma).

6. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 822 n.5 (1977) (discussing Rodríguez’ struggle to regain custody of her child).

7. See *Rodriguez*, 383 N.Y.S.2d at 884 (examining the trial judge’s assessment of the mother’s parental capabilities).

8. See *id.* at 885 (pointing out that Edwin’s mother has a high school diploma from the Institute for the Blind, where she received good grades and studied childcare).

9. See *Smith*, 431 U.S. at 822 n.5 (acknowledging mother for “finally” prevailing in custody battle for her child).

must be sufficiently strong to command the unhesitating assent of every reasonable mind.<sup>10</sup>

### INTRODUCTION

Substantial intrusion by the state in the parent-child relationship occurs when the state provides protective services to a family: when the state removes a child from her home in an emergency, when the state is granted custody of a child, and when the state seeks termination of parental rights. This type of intrusion occurs almost exclusively in the lives of poor people, and rarely in the lives of the middle or upper class.<sup>11</sup> State law, and to some extent federal law, govern all of the above instances of interference in the relationship between a child and one or both of her parents.

The law also governs the definition of the respective roles of the parents, and the determination of child custody or parental visitation. However, in those instances the state itself is not a party and does not intervene to take custody.<sup>12</sup> Parents from all economic groups engage in activity, or lack of action, that is detrimental to their children. Our society views such activity as requiring foster care for the child if the parent is poor, and a private matter if the parent is rich.

The purpose of this Article is to analyze Child Protective Services<sup>13</sup> (public family law), which serves the poor, and to confront the ways in which it deviates from private family law. My belief is that the Child Protective Services (CPS) system has never recovered from its roots in distrust and discrimination against the poor, and that the system is mistakenly defended by asserting a false moral high-ground perceived from the narrow focus on the moment of child-saving, rather than on the legitimate and long term needs of our children. I recognize that society has an obligation to protect children from those who are in a position to exert unreasonable power over them. However, I believe that, because of its structure and culture, our present system is not prepared to provide that protection.

CPS is charged with a dual and contradictory responsibility. On one hand, CPS is to provide "rehabilitative services" to parents to achieve a

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10. *In re Victoria M. v. Carmen S.*, 255 Cal. Rptr. 498, 503 (Cal. App. 3d 1989) (articulating the high standard for termination of parental rights).

11. *See infra* Part I (discussing the disparate treatment between the poor and the middle and upper classes).

12. *See generally* TEX. FAM. CODE ANN. §§ 151-156 (Vernon 1996) (detailing the process dealing with the parent-child relationship).

13. CPS is was created by state law. *See* TEX. FAM. CODE ANN. §§ 264.001, 264.002 (Vernon 1996) (formulating the child welfare services provisions).

safe home environment for the children or to allow the children to be returned after removal.<sup>14</sup> On the other hand, however, CPS is further charged with gathering all of the facts necessary to prosecute and prove a case for the termination of parental rights against those same parents.<sup>15</sup>

The vast majority of children in foster-care continue to be from poor families,<sup>16</sup> with an over representation of children of color.<sup>17</sup> Children of color are more likely than white children to be poor.<sup>18</sup> Of the children who were “under age six, in 1990, fifty percent of African Americans were poor and forty percent of Latinos were poor, [while] only fourteen percent of white children . . . were poor.”<sup>19</sup> Men and women of color are more likely to be perceived by the state as inadequately caring for their children,<sup>20</sup> because they are more likely than the general public to

14. See *id.* at § 264.201 (describing the services offered by the department).

15. Given the impossible conflict in the roles of Child Protective workers, it is surprising that burn-out among them is not higher than it is.

16. During 1983, less than 20% of all children who did not live with their parents were in foster care, but of the children who were in foster care, 60%-80% came from families who received public assistance. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 432 (1983) (discussing the foster care system's use of dual family law); see also Richard Wexler, *There Is No Child Protection Without Family Preservation*, TAMPA TRIB., Oct. 29, 1997, at 15 (describing how “foster care panic” has caused an increase in the number of children in foster care and an increase in child abuse deaths).

17. In 1994, 72% of the children in state custody in Bexar County were either Hispanic or Afro-American. See Telephone Interview with Rose Orsborn, Regional Director for Children's Protective Services, San Antonio Region, Texas Dep't of Protective and Regulatory Services, in San Antonio, Tex. (June 1, 1994); see also Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 39-44 (1993) (advocating for more attention in the adoption of black children). Fenton reported that although most children in foster care are white, the proportion of minority children in foster care is approximately forty-six percent, more than twice the proportion of minority children in the population. *Id.* at 44.

18. See Fenton, *supra* note 17 at 48 (stating that finances are a crucial concern for a family's survival); AMERICAN BAR ASSOCIATION PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK 10 (1993)[hereinafter AMERICA'S CHILDREN AT RISK] (offering statistics on children's poverty levels).

19. AMERICA'S CHILDREN AT RISK, *supra* note 18, at 10 (comparing the percentages of poor African-American and Latino children with the percentage of poor white children).

20. See Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 98-99 (1993) (emphasizing that the definition of “bad mothering” is broad). In discussing the wide discretion of prosecutors, Ashe and Cahn noted that:

[D]ecisions concerning prosecutions [of child abuse cases] will tend to reflect race, class, and gender biases of prosecutors who have tended to be white, middle-class, and male. Mothering is taken out of its context in abuse prosecution and is judged by a judiciary that assumes middle-class, sexist, and racist norms. Mothers-across classes and cultures-are expected to perform in ways that satisfy those norms.

be poor, and as a result they are more likely to become involved with CPS.<sup>21</sup>

## I. CHILD PROTECTIVE SERVICES

### A. *An Historical Perspective*

"From the standpoint of natural parents . . . foster care has been condemned as a class-based intrusion into the family life of the poor."<sup>22</sup> The poor in general, and families of color in particular, are more likely to have child welfare agencies intervene in their family relationships.<sup>23</sup> Also, they are more likely to have their children removed and placed in foster care, and have their parental rights terminated.<sup>24</sup> "The foster care system's lack of concern for natural parents reflects centuries of a dual family law—one for the rich and one for the poor."<sup>25</sup> Family law for the rich and middle-class, or private family law, developed primarily from law

*Id.* at 99 (footnotes omitted).

21. For further discussion on class and ethnic bias in child welfare proceedings see AMERICA'S CHILDREN AT RISK, *supra* note 18, at 45-51 (discussing recommendations to child welfare agencies regarding "vulnerable" families); see also Dorothy E. Roberts, *Punishing Drug Addict Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1422 (1991) (declaring women of color as "targets of government control"). Cf. Ira Chasnoff, et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW. ENG. J. MED. 1202, 1202-06 (1990) (asserting that bias and class affect reporting of drug abuse which can also influence reporting to child protective services); Fenton, *supra* note 17, at 40 (claiming the inclusion of Black children in the adoption system today occurred because "poor, urban Black children" are the children most in need of social services); Garrison, *supra* note 16, at 472-73 (arguing that moving children rapidly out of foster care into adoption melds well with white, middle-class norms, but does not reflect the realities of the poor).

22. *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833-34 (1977) (stating that the poor resort to foster care more often than others because of their lack of resources to purchase temporary private care).

23. See generally Judith Larsen et al., *Medical Evidence in Cases of Intrauterine Drug and Alcohol Exposure*, 18 PEPP. L. REV. 279, 287-88 (1991) (discussing the traits analyzed for drug abuse during pregnancy are similar to those that are required for referral to the welfare system). Larsen also argues these traits might additionally "discriminate against poor, minority women by eliminating from scrutiny women who are economically better off and who have continued their prenatal care while their drug and alcohol remained undetected and unreported." *Id.*

24. See Fenton, *supra* note 17, at 40 (stressing the disadvantages and problems Black children are forced to face); Garrison, *supra* note 16, at 434-36 (noting how the "Colonial American poor laws" serve to disadvantage the poor).

25. Garrison, *supra* note 16, at 432 (tracing the poor treatment toward poor families back centuries). See Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law*, 28 IND. L. REV. 273, 288 (1995) (relating the manner in which custody law has evolved due to the use of a "dual system of family law").

that protected the property interests of the early household.<sup>26</sup> In contrast, family law for the poor<sup>27</sup> developed primarily from the poor laws of the early colonial period which were themselves descendent from the Elizabethan Poor Laws.<sup>28</sup>

From the seventeenth through most of the nineteenth centuries, the basic unit of American colonial society was the household,<sup>29</sup> not the family as we know it.<sup>30</sup> The household was the core unit of society and the center of life and livelihood for every man.<sup>31</sup> It was ruled by a man/owner and included his wife, some or all of his children, possibly the children of friends and relatives, and his servants, apprentices, indentured servants, and slaves.<sup>32</sup> The law absolutely supported the man/owner's rights vis a vis the other members of his household.<sup>33</sup> It was not until the

26. See Ana M. Novoa, *The Diminishing Sphere of the Cooperative Virtues in American Law & Society*, HARV. LAT. L. REV. (forthcoming 1999) (discussing the formation of family law).

27. See Garrison, *supra* note 16, at 433-34 (discussing the influence of the poor upon the formation of family law).

28. See Garrison, *supra* note 16, at 433-34 (tracing back the laws for foster care to Elizabethan poor law); see also Wright S. Walling & Gary A. Debele, *Private Chips Petitions in Minnesota: The Historical Contemporary Treatment of Children in Need of Protection on Services*, 20 WM. MITCHELL L. REV. 781, 786 (1994) (detailing the historical treatment of dependent and neglected children).

29. Within English high society, the importance of the household which supported the nuclear family grew along with the strength of the state, both taking the place of the extended kin networks that were central to English high society before the fifteenth century. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE* 132 (1992) (bemoaning the manner in which poor families have been historically mistreated); LAWRENCE STONE, *THE RISE OF THE NUCLEAR FAMILY IN EARLY MODERN ENGLAND* 25 (noting the changes that accompanied the rise of the nuclear family).

30. Many times the word "family" is used to describe the colonial or post-colonial household unit, but it is a misnomer. The unit included all who lived in the same compound, whether family or servant, or slave.

31. See DAVID Hawke, *THE COLONIAL EXPERIENCE* 60 (1966) (explaining the structure of the family during Colonial times).

32. See John Demos, *Images of the American Family, Then and Now*, in *CHANGING IMAGES OF THE FAMILY* 43, 47 (Virginia Tufte & Barbara Myerhoff eds., 1979) (explaining the composition of a typical household); see also Ralph J. Crandall, *Family Types, Social Structure and Mobility in Early America*, in *CHANGING IMAGES OF THE FAMILY* 61, 66-79 (Virginia Tufte & Barbara Myerhoff eds., 1979) (outlining the different types of family structures); HAWKE, *supra* note 31, at 288 (describing society in early America); Barbara Laslett, *The Significance of Family Membership*, in *CHANGING IMAGES OF THE FAMILY* 231, 236-37 (Virginia Tufte & Barbara Myerhoff eds., 1979) (characterizing the household composition of past times).

33. See HAWKE, *supra* note 31, at 60 (indicating that the "male head of the family ruled absolutely in law"); STONE, *supra* note 29, at 25 (noting the rise of the patriarchy in the sixteenth century).

last half of the nineteenth century that the family, as such, became the specific subject of the law.<sup>34</sup>

The basic unit of American colonial and post-colonial society was the household, however, the poor did not form households.<sup>35</sup> Households were only formed by the rich and middle-class, those who owned land.<sup>36</sup> Instead, the poor were members of the households of others.<sup>37</sup> The children of the poor rarely resided with their parents beyond childhood, and society did not consider the bond between the child and the poverty-ridden parent worth protecting. Law and society protected the relationships that formed the household, but not those that formed the family. Thus, it is not surprising that intervention in the parent-child relationship of poor families was so easily accomplished.<sup>38</sup>

Generally, English and American society from the sixteenth century did not reproach adults who beat children.<sup>39</sup> On the contrary, society and the law accepted the right and responsibility of a man to use force to bend the will of children under his care.<sup>40</sup> Society showed a "fierce determination to break the will of the child, and to enforce his utter subjection to the authority of his elders and superiors, and most noticeably of his parents."<sup>41</sup> The most important virtue among children was obedience which was believed to spring from respect for the power of the dominant.<sup>42</sup> Both Connecticut and Massachusetts, for example, enacted legis-

34. See Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law*, 28 *IND. L. REV.* 273, 275 (1995) (commenting that family law did not become a categorized subject until later in the nineteenth century).

35. See Crandall, *supra* note 32, at 75-79 (pointing out the "indigent-laborer's" societal framework and lack of household structure among the poor).

36. See *id.* (reporting the rich were better able to form households as they were the most stable group in Charlestown).

37. See *id.* (indicating the poor traveled often to find work and were not able to form households).

38. See Garrison, *supra* note 16, at 434 (explaining the harsh consequences the poor faced with regards to custody). "Under the Colonial American poor laws, indigent parents who could not support their children simply lost custody of them; the children were indentured as apprentices. . . ." *Id.* at 434.

39. See Michael Rosenbaum, *To Break the Shell Without Scrambling the Egg: An Empirical Analysis of the Impact of Intervention into Violent Families*, 9 *STAN. L. & POL'Y REV.* 409, 411 (1998) (discussing the waning interest in familial relations during early America).

40. See STONE, *supra* note 29, at 36 (noting the "overwhelming evidence" of the use of force to raise and train children).

41. *Id.* at 36.

42. See Lee E. Teitelbaum, *Family History and Family Law*, 1985 *WIS. L. REV.* 1135, 1148 (1985) (noting a type of educational self-discovery in which a child learns obedience through the use of strict authority).



lation that allowed the death penalty for disobedience to parents.<sup>43</sup> During the eighteenth and nineteenth centuries, much of what we now consider to be child abuse was within the prerogative of the father or male caretaker of children. The virtues of obedience, hard work, and respect for property were learned through discipline.<sup>44</sup> Poor children learned these virtues by being servants in middle or upper-class household, a process thought to be of much greater value than any sentimental feelings between the child and her parents.<sup>45</sup> Consequently, while society saw no reason to prevent parents from beating their children, it did recognize a need to intervene in the parent-child relationship if the parents were inadequate, as a result of being poor, unemployed, uneducated, or of the wrong ethnic or religious background.<sup>46</sup>

The lower classes appeared to be more lenient with their children, at least in the eighteenth century, but this may only be because most poor children left their families around the age of ten.<sup>47</sup> There may have been some parallel leniency among the middle-class, since many middle-class children also spent portions of their youth in the homes of friends and relatives.<sup>48</sup> The state, however, did not intervene in the relationship of middle class families whether the father was lenient or violent.<sup>49</sup>

43. See Stone, *supra* note 29, at 42 (describing the increased subordination of children reflected in state laws). In Connecticut there was further authorization "to commit a child to the House of Correction on complaint from his parents" about rebellion or disobedience. *Id.* at 43.

44. See Teitelbaum, *supra* note 42, at 1147-52 (examining the way children were taught obedience through the use of strict authority).

45. See *id.* at 1147-48 (noting that the "poor laws" provided for children to be sent to "reputable families" to become apprenticeships in order to learn the virtues of obedience).

46. In Massachusetts, children could be removed from their parents if they did not know the alphabet by the time they were six years old. See COONTZ, *supra* note 29, at 126 (stating that the Massachusetts Assembly ordered this removal). See also Garrison, *supra* note 16, at 432-36 (discussing the foster care system's 'dual family law' approach which resulted in poverty stricken parents losing custody of their children); Grossberg, *supra* note 25, at 288 (explaining that social reformers showed little tolerance of cultural, ethnic, or class differences); Walling & Debele, *supra* note 28, at 790-91 (asserting that physical cruelty to children was treated as a private matter). Up to the middle of the 19<sup>th</sup> century, children were removed from their families for poverty, "criminality and drunkenness" but not for cruelty, because physical abuse was "deemed to be a private matter." See *id.*

47. See STONE, *supra* note 29, at 48-49 (indicating that poor children left home at early ages to become apprentices or to work as domestic servants or live-in labor in homes of other families).

48. See Crandall, *supra* note 32, at 68-69 (describing the socialization of children in merchant-planter families); Laslett, *supra* note 32, at 237-38 (recounting the fact that many young adults lived in homes other than the home of their nuclear family).

49. See *State v. Paine*, 23 Tenn. (4 Hum.) 523, 533-34 (1843) (describing the subordinated position of children in relation to the father). See generally ELIZABETH PLECK, DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIO-

Until the middle of the nineteenth century, American society recognized that its intervention in the parent-child relationship was based on societal discontent with the poverty and ethnicity of the parents.<sup>50</sup> Upon removal of the children, no effort was made to maintain the parent-child relationship, it was simply not viewed as sufficiently important. A major change occurred during the nineteenth and twentieth centuries when the rescue of white children from the vices of poverty could not be completely accomplished through indenture.<sup>51</sup> Indentured servitude became illegal and more important; the head of the household had moved from the household to the factory, and was no longer available to properly mold the children.<sup>52</sup> Consequently, schools, poor houses, children's institutions, and reformatories took up the task of caring for poor white children.<sup>53</sup>

The first child "abuse" case on record is that of Mary Ellen, in 1874.<sup>54</sup> Represented by the Society for the Prevention of Cruelty to Animals (SPCA), Mary Ellen was removed from her abusers (who were not her parents or legal guardians), was placed in protective custody; her abusers were tried for assault.<sup>55</sup> Following her case, the Society for the Prevention of Cruelty to Children was founded.<sup>56</sup> But by this time, society already had a long history of intervention in the parent child relationship of poor families, and of removal of poor children to the care of others. Although there was outrage at the abuse of Mary Ellen and other children, there does not appear to have been a true paradigm shift.<sup>57</sup> There

LENCE FROM COLONIAL TIMES TO THE PRESENT (1987) (discussing the prevalent use of violence against children in Colonial times).

50. See Garrison, *supra* note 16, at 435 (stating that although the attitudes towards poverty did not change, the stated reason for intervention became neglect).

51. As slaves, Black children were not considered for rescue as were poor white children. See Fenton, *supra* note 17, at 41-43 (detailing how the traditions for adoption by the Black community were very different from that of the white community).

52. As Professor Teitlebaum points out there were "simply too many such children for private households to absorb." Teitlebaum, *supra* note 42, at 1150.

53. See *id.* at 1152 (describing the roles taken by schools, houses of refuge, and reformatories in the middle of the nineteenth century).

54. See Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711, 715 (1993) (describing the well publicized case that brought about changes in child abuse law).

55. See *id.* at 715 (explaining that the American Society for the Prevention of Cruelty to Animals acted on Mary Ellen's behalf).

56. See Rosenbaum, *supra* note 39, at 411 (discussing the events surrounding Mary Ellen's case); Walling & Debele, *supra* note 28, at 794 (explaining development of Society for the Prevention of Cruelty to Children).

57. See Rosenbaum, *supra* note 39 at 411-12 (discussing the public fury surrounding the case of Mary Ellen Connolly); Walling & Debele, *supra* note 28 at 794 (denoting that public interest in child abuse was high at the end of the nineteenth century). The Walling article comments that the last part of the nineteenth century "witnessed the emergence of a

was no substantial change in the factors that resulted in intervention.<sup>58</sup> Child-savers continued to remove children from homes that were poor and placed them in children's institutions.<sup>59</sup> Additionally, there was little or no intervention in the families of the financially stable, even if the children were being physically abused.<sup>60</sup> Following Mary Ellen's case, and well into the twentieth century, reformers continued to "rescue" children from the ills of improper upbringing—from the culture of poverty.<sup>61</sup> It is true that the rhetoric changed so that the cause of intervention was stated as neglect, which was a euphemism for poverty,<sup>62</sup> or as abuse. Unless it was severe, abuse by the middle and upper-class was shielded by the private nature of the family.

As the mid-nineteenth century slid into the twentieth century, custody in private family law moved from near absolute rights of the father to the best interest standard, with the tender years doctrine helping to define

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wealthy urban elite who . . . [after] [b]laming the immigrants and the poor . . . hoped to rescue the children" from poverty and social disorder. *Id.* Walling and Debele argue in favor of recognizing the authority of private individuals to file petitions for the protection of children. *Id.* at 825. Historically, there is a great deal of support for this contention, since it was not until the 20<sup>th</sup> century that intervention was initiated by governmental bodies rather than lay organizations or individuals. *Id.* at 783, 798. The authors, in drawing on the history of intervention, consistently describe children in alternate care as "neglected or abused." Yet, they ignore that modern standards did not exist then, although they do clearly set out the fact indicating that children were placed in alternate care because of poverty of their parents. *Id.* at 786, 791.

58. See Marjorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 244 nn.6-11 (1982) (noting a failed attempt by a social worker to intervene due to a lack of laws regarding intervention).

59. See COONTZ, *supra* note 29, at 132-33 (detailing child saver's action of sending poor children to work in farms in the Midwest); Walling & Debele, *supra* note 28, at 792 (describing child-saving efforts of the nineteenth century).

60. See COONTZ, *supra* note 29, at 132 (indicating an increase in official intervention in the lives of poor children).

61. Family historian Stephanie Coontz gives a scathing critique of child savers of the late 19<sup>th</sup> century:

Almost invariably, they combined an exaggerated reverence for middle-class family ideals with a contemptuous, punitive attitude toward the real-life families of immigrants and the poor . . . The new privacy that courts accorded middle-class families in the nineteenth century was matched by the new arrogance with which such middle-class reformers intruded into or even tore apart poor families.

*Id.*

62. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race and Class in the Child Protection System*, 48 S.C.L. REV. 577, 605 (1997) (stating that if the state's intervention is based on abuse or neglect, and the intervention revolves around parental failings, the state's involvement will likely be deemed punitive rather than protective).

best interest.<sup>63</sup> Public family law continued to focus on the poor as a societal problem.<sup>64</sup> Poor children were saved either because their living arrangements were inappropriate or because they were engaging in delinquent acts.<sup>65</sup> The policy in private family law changed from a focus on ownership of the services and inheritance of a child, to the rights of the parents to have custody and visitation with the child.<sup>66</sup> Public family law initially saved poor children from the vice of poverty, then from the neglect caused by poverty, and sometimes from physical abuse by poor parents.<sup>67</sup>

Protective services are still imposed primarily on the poor.<sup>68</sup> State intervention in the parent-child relationship is still primarily class/ethnic-based.<sup>69</sup> The focus of protective services has not moved to consider the needs of children from all economic classes. It is still primarily focused on the failings of poor parents; it is still primarily focused on the poverty of the parents.

Middle-class parents now, as in the past, are able to afford caretakers and boarding schools to alleviate the pressures of parenting.<sup>70</sup> The poor, however, are not able to afford caretakers and boarding schools, nor does

63. The 'tender years doctrine' was applied from the last half of the 19<sup>th</sup> century until the middle of this century. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 737 (1988). The doctrine, or preference, applied a maternal preference for custody of young children. See *id.* The doctrine was applied with some variation among the states, either requiring the father to prove that the mother was unfit, or to affirmatively prove that paternal custody was in the child's best interest. See *id.* at 738.

64. See Teitelbaum, *supra* note 42, at 1151-54 (explaining that public agencies were used for the care of pauper children and those children "who had been so poorly raised that they could not be reached by voluntary school programs").

65. See *id.* (asserting that these acts were viewed as resulting from the poverty of the parents).

66. The focus in private family law has always been to protect what is valuable to the head/owner. In prior centuries, the value of children was economic, today it is the emotional or emotional dependence experienced by the adult. See Novoa, *supra* note 26.

67. See Teitelbaum, *supra* note 42, at 1147-57 (analyzing the historical approach of public family law).

68. In B́exar County, when attorneys are appointed to represent the parents in Child Protective Services termination cases, the parents are very rarely screened for indigence. Screening is the exception, not the rule. In criminal cases and in delinquency cases an indigence screening is done routinely. Apparently, one may assume that parents in Child Protective Service cases will be poor.

69. See Marcia Lowry, *Derring-Do in the 1980s: Child Welfare Impact Litigation After the Warren Years*, 20 FAM. L.Q. 255, 255-60 (1986) (referring to state intervention in foster care as being class-based).

70. See *id.* at 258 (quoting a U.S. Supreme Court decision which discusses class and foster care).

society provide respite care for poor parents.<sup>71</sup> The middle-class can afford private therapy that is focused on family interaction. Yet the poor cannot afford therapy to solve intra-family problems. With the emphasis on the poor being personally responsible for their own poverty,<sup>72</sup> there seems to be a parallel requirement that the poor be personally responsible for their financial inability to provide parental support. Additionally, while the dysfunctions of the middle-class are increasingly within the private realm of the individual, the dysfunctions of the poor have for centuries been fodder for public action. In most circumstances, the only parental support services available to the poor are those available through the public child protective service system,<sup>73</sup> a system that takes children away and terminates parental rights.<sup>74</sup>

CPS developed from intrusion into the lives of the poor, not from the protection of children. The protection of children is a relatively new concept to which our legal system and the child protective system is not yet well suited.

### B. *The Poor*

Child abuse and neglect occurs in all ethnic and racial groups, in rural and urban areas, and in all economic classes.<sup>75</sup> However, it is poor fami-

71. See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 833 (1977) (explaining that the poor have few alternatives for child care whereas wealthier citizens have access to more resources); Lowry, *supra* note 69, at 258 (stating that because the poor have few alternatives for care, they have “submit to state-supervised childcare”). But see Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 129-30 (1997) (asserting that there are some programs that provide early intervention, including respite and other support services).

72. See generally Personal Responsibility and Work Opportunity Reconciliation (Welfare Reform) Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.) (describing the purpose of providing assistance to needy families in order to facilitate their independence).

73. See *Smith*, 431 U.S. at 833-34 (explaining that poor are disproportionately represented in foster care and other services); Teitelbaum, *supra* note 42, at 1152 (noting that by the middle of the nineteenth century public services were widely used to serve poor children).

74. The Civil Justice Clinic of St. Mary's University School of Law has represented 4 women (of only about 9 Child Protective Service cases) who, knowing they would be absent for a short period of time, left their child(ren) with an adult, only to come back and find the child in state custody. In each case, the child was old enough to be strongly bonded with the mother, and in each case, the family was managing on a marginal basis prior to intervention.

75. See AMERICA'S CHILDREN AT RISK, *supra* note 18, at 51 (commenting that children of all races, communities, and economic classes are affected by child abuse and neglect); Yara Fernandez-Aldana, *Child Abuse: An Overview*, 158 P.L.I./CRIM 161, 163 (1991) (stating that abuse “comes in all ages, colors, and from all economic levels”).

lies and families of color who "are more likely to be identified and coerced into accepting intervention by the child welfare system, and more likely to have their children removed and placed in foster care."<sup>76</sup> This is, in part, because poor women of color are the primary targets of governmental control.<sup>77</sup>

It is disheartening that the child welfare system is overpopulated to such an extent by people of color, by the poor,<sup>78</sup> the uneducated, and the marginal. What is even more disheartening are the common beliefs about the poor and child protection. First, that the poor overpopulate the system because they are substance abusers and criminals. Second, that they overpopulate the system because they are intellectually and/or physically impaired. And third, using the same false reasoning, that the poor are therefore more likely than the general public to abuse or neglect their children.

In fact, even though the poor overpopulate the CPS system, they are not more likely to be substance abusers. Consider a study conducted by Dr. Ira Chasnoff:<sup>79</sup> he studied the discrepancies in reporting by health care professionals of the use of illegal drugs by pregnant women.<sup>80</sup> Chasnoff and his fellow researchers tested 715 women for drug use in pregnancy.<sup>81</sup> They found no significant difference in positive toxicology between white and Black women; 15% of the white women and 14% of the Black women tested positive for drug use.<sup>82</sup> Of the 715 women stud-

76. AMERICA'S CHILDREN AT RISK, *supra* note 18, at 51 (1993) (discussing the fact that families from different races and color are particularly affected by the child welfare system). In addition "once in foster care, children of color are more likely to remain there for long periods of time, and to experience multiple placements in different homes before they are returned to their parents." *Id.*; see also Fenton, *supra* note 17, at 39 (explaining how Black children are kept in foster care longer than other children).

77. See Roberts, *supra* note 21, at 1422 (stating that governmental intrusion is especially harsh for poor women of color).

78. See *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 833-34 (1977) ("[T]he poor resort to foster care more often than other citizens. For example, over 50% of all children in foster care in New York City are from female-headed families receiving Aid to Families with Dependent Children. . . . 52.3% of the children in foster care in New York City are Black and 25.5% are Puerto Rican.").

79. Ira Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1202-06 (1990).

80. See *id.* (detailing the study conducted). Men's use of illegal drugs is also misrepresented. See Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY 51, Dec. 1988, at 54. Although white men are just as likely to use drugs as African-American men, African-American men are five times as likely to be arrested for a drug offense. *Id.*

81. See Chasnoff, *supra* note 79, at 1202-06 (describing a study of 715 pregnant women in Pinellas County, Florida).

82. See *id.* (noting that there was no significant differences in the positive toxicology between white and Black women).

ied, 133 women were reported to the authorities for drug use during pregnancy; 48 were white, 85 were Black.<sup>83</sup> Although slightly more of the white women abused drugs, twice as many Black women were reported for drug abuse. As one would expect, there was a significant difference in economic status between white and Black women, and almost all of the women who were reported to the authorities were from the lower socioeconomic group.<sup>84</sup>

Clearly, substance abuse cuts across economic lines.<sup>85</sup> For example, several years ago, Courtney Love, the widow of rock idol Kurt Cobain, was arrested on suspicion of heroin possession. The police suspected that she was ingesting both heroin and Xanax, and friends reported that Courtney was “so stoned on Xanax and other drugs, you could hardly understand her.”<sup>86</sup> In the Courtney Love case, there was no indication that the state had intervened in the family at the time of her arrest. Nevertheless, she lost custody of her child for *one month*, after she admitted that she had injected herself with heroin during her pregnancy,<sup>87</sup> an act which has resulted in the termination of parental rights for many a poor mother. The fact remains that it is mostly poor drug abusers who become involved with CPS.<sup>88</sup>

Even though the poor and ethnic groups overpopulate the CPS system, they are not more likely to be engaged in criminal activity.<sup>89</sup> Middle-class men are just as likely to engage in criminal activity as poor men, although

83. See *id.* (recognizing that although a total of 133 women in Pinellas County were reported to health authorities for substance abuse after delivering their babies, Black women were reported 10 times more than white women).

84. See *id.* (emphasizing that poor women were more likely to be reported to health authorities for substance abuse).

85. It is interesting that the rich and the poor tend to favor different drugs, so much so, that we now even speak of “designer drugs.” See Neal K. Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2434 (1997) (proposing a sentencing plan which provides for the fact that drugs cut across different income levels and different crimes, including designer drug crimes).

86. See *Drugs Found in Cobain's Body*, USA TODAY, Apr. 15, 1994, at 20 (describing Love's arrest on suspicion of heroin possession); see also *Passages*, MACLEAN'S, Apr. 25, 1994, at 7 (reporting the arrest of Courtney Love for possession of heroin the day before the discovery of her husband's body).

87. See Stephanie Reader, *Grunger on the Mend in Rome After Binge, Brush with Death*, NEWS TRIB., Mar. 5, 1994, at A1 (detailing a lawsuit that Love filed against her doctor and Cedars-Sinai Medical Center in which she alleges that information was leaked to the press about heroin treatment she received while she was pregnant).

88. See Roberts, *supra* note 21, at 1432 (stating that “[p]oor women . . . are in closer contact with government agencies, and their drug use is therefore more likely to be detected.”).

89. See Eric Schlosser, *The Prison-Industrial Complex*, ATLANTIC MONTHLY, Dec. 1998, at 54 (stating that the use of illegal drugs by Blacks and whites is approximately the same).

poor men are more likely to be arrested and incarcerated.<sup>90</sup> Men of color are more likely than white men to be stopped, questioned and challenged by the authorities.<sup>91</sup> Men of color are more likely to be the targets of security scrutiny in retail establishments, and their presence is more likely to be challenged in middle-class neighborhoods and places of business.<sup>92</sup>

Poor people overpopulate the CPS system and they are, in fact, more likely than the middle-class to live in substandard housing.<sup>93</sup> The poor are also more likely to move from place to place, and are therefore more likely to be perceived as being unstable and being inadequate parents.<sup>94</sup> In general, negative misconceptions of the poor affect them in a number of settings and in their dealings with government and bureaucracies.<sup>95</sup> For example, to identify mothers who are possible drug users, some medical personnel use traits that can be correlated simply to poverty, independent of drug use.<sup>96</sup> Youth and lifestyle, in addition to poverty, can

90. See generally David Cole, *What's Criminology Got to Do With It?*, 48 STAN. L. REV. 1605 (1996) (citing MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 29-30 (1995)) (discussing the manner in which race should be accounted for in criminal law).

91. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 26-27 (1998) (pointing to studies which demonstrate that police officers arrest African American males and present them for prosecution at disproportionately higher rates than their white counterparts); Eric Schlosser, *The Prison-Industrial Complex*, THE ATLANTIC MONTHLY, Dec. 1998, at 51, 54 (noting that over the past twenty years, the proportion of African American men arrested for drug crimes has tripled, despite evidence that illegal drug use is equally prevalent among white men).

92. See Angela J. Davis, *Benign Neglect of Racism in the Criminal Justice System*, 94 MICH. L. REV. 1660, 1660-63 (1996) (arguing race discrimination by retail establishments plays a role in the racism practiced by the criminal justice system); see also John Futtly, *Young Blacks Suffer Unequal Justice, Conference Told*, COLUMBUS DISPATCH (Ohio 1994), at 6C (detailing the focus of a state-wide conference wherein participants noted that "institutional racism serves as a catalyst to crime"); Courtland Milloy, *Unequal Justice in P.G.?*, WASH. POST, Feb. 25, 1996, at B1 (reporting the internal investigation of police officer's preferential treatment of white suspects in Prince George County).

93. See David Cole, *Essay: The Paradox of Race and Crime: A Comment on Randall Kennedy's "Politics of Distinction"*, 83 GEO. L.J. 2547, 2558 (1995) (opining that the stigmatizing effects of criminal law enforcement in African American communities perpetuates the cycle of single parent families, less adult supervision, unemployment, poverty, and drug use).

94. Many students in my family law classes find it acceptable and appropriate to remove children from their homes due to the lack of running water, electricity, or because the family is homeless or moves from place to place.

95. See Austin Sarat, ". . . The Law Is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J. L. & HUMAN. 343, 346 (1990) (describing how the welfare poor are caught in the "power and domination" of bureaucratic officials and social and legal institutions).

96. See Larsen et al., *supra* note 23, at 287 (noting that "lack of neatness and cleanliness" may be a clue to a woman's drug habit).



result in traits that are similar to those associated with drug use.<sup>97</sup> Similarly, the state still intervenes in the parent-child relationship for issues that are purely associated with the poverty of the family.<sup>98</sup> Additionally, physically impaired children are “more likely to be placed in a foster home . . . if they [are] from poor families.”<sup>99</sup> Conversely, if the parents are poor and physically or mentally impaired, the children are more likely to be removed or like Edwin, never returned.

### *The Story of Carmen*

*Carmen was a mildly retarded mother who had been involved with CPS for several years.<sup>100</sup> She had a history of moving frequently and providing insufficient food to her children.<sup>101</sup> The children were taken from her custody when she was about to be evicted from the hotel where she and the children had been living.<sup>102</sup> Stanislaus County Department of Social Services alleged that Carmen “had persistently failed to provide the children with proper care.”<sup>103</sup> Initially, Carmen tested in the range of mildly retarded with an IQ of 58 and subsequently of 72.<sup>104</sup> Her life skills counselor concluded that “[h]er low level of functioning makes it difficult for her to learn the necessary skills she needs to adequately parent her children . . . .”<sup>105</sup> After a judge terminated her parental rights on the basis of development disability, the court, on appeal found that the plan of service contained nothing specifically tailored to Carmen’s limitations,<sup>106</sup> and sent the case back to the trial court for exploration of possible alternatives to termination.<sup>107</sup>*

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97. See *id.* at 287-88 (noting that prostitution during adolescence is an example of poverty of the family).

98. See, e.g., *E.L.B. v. Texas Dep’t of Human Servs.*, 732 S.W.2d 785, 786 (Tex. App.—Christi 1987, n.w.h.).

99. Cathy S. Widom, *The Role of Placement Experiences in Mediating the Criminal Consequences of Early Childhood Victimization*, 61 AM. J. ORTHOPSYCHIATRY 195, 196 (1991).

100. See *In re Victoria M. v. Carmen S.*, 255 Cal. Rptr. 498, 506 (Cal. App. 3d 1989) (ordering lower court to explore possible additional alternative services, because, in light of Carmen’s limitations, services offered before termination were insufficient).

101. See *id.* at 500.

102. See *id.*

103. *Id.*

104. See *id.*

105. *Id.* at 501.

106. See *In re Victoria M.*, 255 Cal. Rptr. at 504.

107. See *id.* at 506.

## II. FOSTER CARE

In colonial and post colonial America, when children were removed from poor families, there was no expectation of their return.<sup>108</sup> Instead, the focus was on removing the children from the risk without consideration of what would happen to the children thereafter.<sup>109</sup> It was not until this century that foster care was viewed as a temporary placement in a system whose stated goal was the reunification of the family.<sup>110</sup> However, once children were taken into state custody, even though foster care was conceived as temporary, the children often remained in state care for years.<sup>111</sup> Historically, state care has never been short-term in practice, although the foster-care placements were contractually and philosophically temporary.<sup>112</sup> In part as a result of the inconsistency, children were moved from place to place as the years went by.<sup>113</sup> Evidently, the focus of the system was never on the authentic needs of the child, instead the focus has been on the middle-class adult celebration of victory experienced at the moment of child-saving.<sup>114</sup>

The state makes a bad parent. Although there are many wonderful foster parents, child welfare workers, supervisors, and administrators will

108. In the colonial northwest, children from poor families were indentured or bound-out to wealthier families where they remained. See Garrison, *supra* note 16, at 434.

109. Some poor children were shipped off to the West and Midwest presumably to work as free or cheap labor in farms. The homes to which the children were sent to were not screened with regards to safety. The safety of the children was not the focus. See COONTZ, *supra* note 29 at 132, 133.

110. The preference or default policy in Texas is to return children to their homes. See generally TEX. FAM. CODE ANN. §§ 261, 262, 263, 264 (Vernon 1996).

111. See TEXAS SUPREME COURT TASK FORCE ON FOSTER CARE, EXECUTIVE SUMMARY 10, 11, 19 (1996) [hereinafter EXECUTIVE SUMMARY] (citing the Task Force's report that found the average waiting period, between 1991 and 1995, for long term substitute care was 13.2 months, while the wait for adoption placement was over 30.5 months). The Task Force also reported that it took an average of 40 months to complete an adoption from start to finish. See *id.* See also Fenton, *supra* note 17, at 44 (stating that Black children will remain in foster care longer than white children; AMERICA'S CHILDREN AT RISK, *supra* note 18, at 51 (stating that children of color are more likely to experience multiple placement and institutional placements than white children).

112. See Garrison, *supra* note 16, at 428, 437 (distinguishing that the purpose behind foster placement was to create a temporary intervention period in which both parent and child would receive assistance in order to address family problems).

113. See Lowry, *supra* note 69, at 259 (citing commentators who concluded that the lack of overall structure in the foster care program has led to the displacement of children who face multiple transfers). A recent study in New York found that nearly 60 percent of the children in foster care experienced more than one placement and another 28 percent were transferred three or more times. See *id.*

114. See *infra* Part I.A.

readily concede that the foster-care system is harmful for children.<sup>115</sup> Judges are not surprised when they see children run away while in state custody and return to the same parents from whom the courts were so ready to save them. Courts are not surprised when children who were in state custody, reappear as the “abusive parents” of another generation of children. For some children the potential for harm is greater in the custody of the state than the harm for which they were removed from their homes. Why is foster care so detrimental?

There are at least three difficulties with foster care. First, when children are removed from homes where there is a risk of harm, the child-savers assume that state custody is ‘safe’ and ‘neutral.’ They fail to weigh the potential for harm if the child is left in the home against the emotional harm if placed in foster care. There is a risk of sexual and physical abuse while in state custody,<sup>116</sup> but that risk is not considered. Another risk that is not considered is the harm caused by the breaking of emotional parental bonds.<sup>117</sup> The system presumes state custody to be “safe.”

Second, once in state custody, many children remain there for years.<sup>118</sup> They usually experience a series of temporary placements over an extended period of time. Children who are in “temporary care” for years are frequently moved from place to place.<sup>119</sup> The instability of placement and the lack of continuing relationships with adult care-givers is severely detrimental to children. The tragedy is that for those cases where long term non-parental care is necessary, it is possible to successfully recruit and develop stable long-term foster care that would allow the children to

115. See *G.M. v. Texas Dep’t of Human Resources*, 717 S.W.2d 185, 188 (Tex. App. Austin 1986, n.v.h.) (detailing the evidence put on by the state showing the detrimental effects of foster care). The state argued that the act of a parent allowing a child to be sent to foster care is so injurious to the child that it should be sufficient grounds for termination of parental rights. See *id.* The Court rejected the idea that foster care placement was a voluntary act by the parent and found the argument both untenable and ironic. See *id.*

116. See, e.g., Sally Kestin, *Series of Child Deaths Puts Focus on Agency*, TAMPA TRIB., Sept. 14, 1997, at 1, available in 1997 WL 13832680. The child was removed from her parents at the age of four. See *id.* She was never returned to them and while in state care experienced 24 placements, and was abused in at least 2 of those placements. See *id.*

117. See Wendy Glockner Kates et al., *Whose Child is This?: Assessment and Treatment of Children in Foster Care*, 61 AM. J. ORTHOPSYCHIATRY 584, 584-85 (1991) (arguing that mental health professionals are faced with a unique dilemma, attempting to place abused and neglected children in foster care while knowing that such traumatic separation causes psychological injuries to the child).

118. See EXECUTIVE SUMMARY, *supra* note 111, at 10-19 (explaining that in Texas, it can take two years before the child leaves substitute care).

119. See *id.* at 38 (noting that over 30% of the young people in foster care who were surveyed in 1996 had been in four or more placements, and over 40% had had four or more caseworkers).

remain in stable and continuing placement for years.<sup>120</sup> And third, because of the large number of children in care, social workers are seriously overworked and unable to provide sufficient services to accomplish family reunification. When CPS takes custody of children in marginal cases, unmanageably large caseloads develop, resulting in the caseworkers' inability to respond adequately to severe or real emergencies.<sup>121</sup> A high instance of state intervention consequently cripples the efforts to protect children.

Several years ago, the Texas Department of Protective and Regulatory Services adopted the informal goal of limiting state custody to one year.<sup>122</sup> But the goal was difficult to reach. If the children were removed from a family where the home was poor, or dysfunctional, rather than severely abusive, termination was difficult. The state could not prove termination was appropriate because being dysfunctional is not grounds for termination.<sup>123</sup> The state set up difficult standards for these parents, who often lost heart and interest.<sup>124</sup> Many of these parents might not have been lost, however, if the state had worked with the family without removing the child. Many of these cases might have been resolved more appropriately if the state had not institutionalized removal and termina-

120. In October 1998, I was in court with one of my pro bono cases, and the court asked the state about the possibility of a long term (permanent) agreement with the foster care mother. The child had been with the same foster mother for approximately nine years, since he was a toddler. Parental rights had been terminated years ago, and the child was not appropriate for adoption. The CPS supervisor informed us that the department was unconvinced that long term placement was an option and was still assessing the policy on long term placement agreements.

121. See Douglas J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J. L. & PUB. POL'Y 539, 540 (1985) (proposing that a "high level of unwarranted intervention does not prevent many obviously endangered children from being killed and injured, even after their plight becomes known to the authorities.").

122. See Telephone Interview with Rose Orsborn, *supra* note 17 (stating that a goal in B  xar County is to limit foster placement to one year); see also EXECUTIVE SUMMARY, *supra* note 111, at 43 (recommending a statutory limit on the time that a child can spend under the Temporary Conservatory of the State). The state has now codified that goal, in compliance with the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended scattered sections of 42 U.S.C.).

123. See TEX. FAM. CODE ANN.   161.001, (1)(D) (Vernon Supp. 1999) (requiring the court to order termination if by clear and convincing evidence, it is shown that the child is placed "in conditions or surroundings which endanger the physical or emotional well being of the child"). *Id.* at   161.001, (1)(E) (placing children with "persons who engage in conduct which endangers the physical or emotional wellbeing of the child").

124. See Kates et al., *supra* note 117, at 588 (describing parents' response of becoming intimidated or alienated by social service system, and suggesting that parents who are unable to maintain meaningful contact with their child respond to their emotional devastation through detachment).

tion as the standard response in dealing with poor and dysfunctional families.

Still, Texas has made substantial changes in its law over the past several years in an effort to prevent foster care drift. Texas now requires the state to file a permanency plan with the court no later than ten days before the mandatory six month hearing.<sup>125</sup> By that time the state must be sure whether it will be recommending termination or reunification.<sup>126</sup> Further, the state is to request a final order or move to dismiss the suit at the expiration of one year from the date the child enters custody.<sup>127</sup> Additionally, Texas amended the section of the Family Code dealing with involuntary termination to add several new provisions, thus making it easier to terminate the parental rights of a child who is in state custody.<sup>128</sup> The changes might be beneficial, if coupled with early prevention programs and strong family reunification programs. However, the state cannot simply continue to intervene where the primary problem is poverty without addressing the root causes of the family problems. The requirement to resolve CPS cases coupled with the easy termination process will simply result in a wholesale loss of children by the poor, and especially by people of color.

### *The Story of Kathaleen*

*Kathaleen was born when her mother, Marie, was only sixteen years old.<sup>129</sup> Kathaleen was placed in foster care, with strangers, when she was a little over a year old.<sup>130</sup> Her mother's plan of service<sup>131</sup> required that*

125. See TEX. FAM. CODE ANN. § 263.303(a) (Vernon Supp. 1999) (requiring that a plan of action be included in a status report filed with the court no later than 10 days before the hearing).

126. See TEX. FAM. CODE ANN. § 263.303(b) (Vernon Supp. 1999) (detailing that the status report must evaluate parents' compliance with prior service plans and recommend a course of action from a list of possible options). The list includes returning the child to her home, or for children with "special needs or circumstances," deviating from the prescribed list. See *id.* at TEX. FAM. CODE ANN. § 263.303(b)(2)(D) (Vernon Supp. 1999).

127. See TEX. FAM. CODE ANN. § 263.401(b) (Vernon Supp. 1999) (stating the court may enter an extension but for no longer than 180 days).

128. See TEX. FAM. CODE ANN. § 161.001 (Vernon Supp. 1999) (stating reasons why the court may terminate parental rights).

129. See *In re Kathaleen*, 460 A.2d 12, 15 (R.I. 1983) (holding that the child protective agency met its burden, by clear and convincing evidence).

130. See *id.* at 13. The mother had voluntarily placed the child in the temporary care of the child welfare service. See *id.* Later, the agency refused to return the child to her mother and proceeded an action to terminate her parental rights. See *id.*

131. A plan of service states the goals and objectives that must be met before the child can be returned home. The plan sets out who is responsible for each item. It is sometimes drafted by CPS, and given to the parent. In some areas it is developed jointly by the worker and the parent. Today, generally the parent must sign the plan, file it with the

*Marie find employment and an apartment, visit with Kathaleen, and participate in counseling.*<sup>132</sup> *Marie did not receive counseling, but she did follow through with all of the other requirements of the plan of service.*<sup>133</sup> *Nevertheless, Kathaleen was not allowed to return home to her mother.*<sup>134</sup> *A psychiatric evaluation conducted by court order concluded that Marie was unable to provide consistent parenting for Kathaleen.*<sup>135</sup> *The evaluator concluded that "Marie had difficulty with interpersonal relationships, difficulty following through with commitments, and an inability to recognize her problems or appreciate her situation."*<sup>136</sup> *In the meantime, Marie had another child who the state allowed to remain in her custody. Apparently, the state believed that Marie was able to care for the new baby but not for Kathaleen.*<sup>137</sup> *Once Kathaleen's parent-child relationship with her mother was terminated, she lost her relationship with her mother and her sibling.*<sup>138</sup> *On appeal, the termination was upheld.*<sup>139</sup>

### III. PERMANENCY, EXCLUSIVENESS, AND JOINT CUSTODY

In Texas, as in many other states, private family law has encouraged the continual participation of both parents in the lives of their children. Over the past several years, there has been an increase in visitation rights of non-custodial parents.<sup>140</sup> The minimum visitation schedule, presumed to

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court, and it can be the basis of termination of parental rights if the parent fails to comply. See TEX. FAM. CODE ANN. §§ 263.102, 263.103 (Vernon 1996) (detailing the required contents of the service plans).

132. See *In re Kathaleen*, 460 A.2d 12, at 13.

133. See *id.*

134. See *id.*

135. See *id.*

136. *Id.*

137. See *id.* (acknowledging that Marie had a second child but only had her parental rights with respect to Kathaleen terminated).

138. See *In re Kathaleen*, 460 A.2d at 13 (R.I. 1983).

139. See *id.* at 15 (indicating the family court's decision of terminating Marie's parental rights is affirmed).

140. In 1989, the Texas Legislature provided the courts with guidelines which presumed possessory rights of a parent named as a "possessory conservator." See Act of Sept. 1, 1989, 71st Leg., R.S., ch. 617, § 4, 1989 Tex. Gen. Laws 2030, 2030-35, *repealed by* Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 151-52. In 1993, that presumption was amplified by legislative amendment. See Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 766, § 4, 1993 Tex. Gen. Laws 2989, 2991-92, *repealed by* Act of Apr. 20, 1995, 74th Leg., R.S., ch. 20, § 1, 1995 Tex. Gen. Laws 113, 151-52 (codified at TEX. FAM. CODE ANN. §§ 153.251-153.253 (Vernon 1996)) (adding to the statute circumstances when the standard possession order would be inappropriate or unworkable).

be in the best interest of the child, has been expanded.<sup>141</sup> Grandparents<sup>142</sup> and step-parents<sup>143</sup> have been given the right to obtain access to the child. A preference for joint custody, and a policy of encouraging fuller participation by the non-custodial parent, have been adopted in many states. In some states, violence by one of the parties will not affect visitation rights unless the child was the victim of the violence.<sup>144</sup> Even if the child was victimized, the court is required to enter a visitation schedule. The court is required to use the least-restrictive plan consistent with the safety and welfare of the child.<sup>145</sup> The termination of an absent parent's rights is usually not deemed to be in the child's best interest unless there is a third-party or step-parent adoption looming.<sup>146</sup>

By contrast, in child protective cases, the state will rarely seek a permanency plan<sup>147</sup> that includes continued contact with the parent. Most cases where the child is not returned home result in the termination of all parental rights. Some of those cases end with the appointment of the state or a third-party as custodian, with some parental visitation. The focus is

141. See TEX. FAM. CODE ANN. § 153.251(b) (Vernon 1996) ("It is the policy of this state to encourage frequent contact between a child and each parent for periods of possession that optimize the development of a close and continuing relationship between each parent and child.").

142. See *id.* at § 153.433 (Vernon 1996) (detailing circumstances when a grandparent's request for access to a grandchild will be granted).

143. See *id.* at § 102.003(9) (Vernon Supp. 1999) (allowing persons who had actual care, control, and possession of a child for six months prior to the action to bring a suit affecting the parent-child relationship).

144. See *id.* at § 153.131(b) (Vernon Supp. 1999) (stating that a parent will be appointed sole or joint managing conservator unless it would significantly affect the child's physical health or emotional development); *id.* at § 153.004 (indicating that the court will take into account a history of domestic violence before appointing a party as a sole or joint managing conservator); DRAFT COMMITTEE ON GENDER BASIS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN & MEN IN THE COURTS 47 (1990) (stating that violence will not affect visitation); see also *In re Michael G.*, 74 Ca. Rptr. 2d. 642, 644, 652 (1998) (allowing the parents to maintain visitation rights even though three of their other children were taken away because of emotional and physical abuse); *Barkloff v. Woodward* 55 Cal. Rptr. 2d. 167, 170-71 (1996) (reversing lower court decision granting visitation rights to former boyfriend who was suspected of sexual abuse and was not the child's biological father). *But see Baker v. Baker*, 494 N.W.2d 282, 284 (1992) (holding that in a protection order, a "finding of immediate danger to the [child]" was not needed before temporary custody could be determined).

145. See TEX. FAM. CODE ANN. § 153.193 (Vernon 1996) (providing that terms of an order denying possession of a child or imposing restrictions on parent's possession "may not exceed those that are required to protect the best interest of the child.").

146. This seems to be the practice in Bexar county. Several judges have articulated such a preference in the absence of extreme circumstances. The policy is based on a desire to preserve the child's right to financial support.

147. A permanency plan is a document compiled by the caseworker which sets out the goal for the case, and the time frame for accomplishment.

so firmly placed on punishing the parent for the inability to parent, that the child's need to maintain some contact with the birth parent is lost. When I have suggested that the state retain managing conservatorship over a child, while still allowing contact with her parent to preserve the parental relationship, the state would most commonly respond that this recommendation deprives the child of closure and permanency.

Closure and permanency are key concepts in the book *Beyond the Best Interest of the Child*, by Goldstein, Freud, and Solnit.<sup>148</sup> The authors argue that the law must consider the needs of the child as paramount<sup>149</sup> and that one of the most important needs of the child is continuity.<sup>150</sup> According to Goldstein, Freud, and Solnit, "[c]hildren have difficulty in relating positively to, profiting from, and maintaining the contact with two psychological parents who are not in positive contact with each other."<sup>151</sup> The authors identify the parental relationship as developed through nurturing contact, not through biological ties.<sup>152</sup> They believe that a child needs a continuing, unambiguous, authoritative parental figure and that other relationships should be sacrificed in order to achieve it.<sup>153</sup> The state has adopted portions of this theory in the child welfare arena. The state assumes that it provides a stable, nurturing, unambiguous and authoritative parental figure for a child, which should supersede the relationship between a poor and marginal parent and her child. Like our counterparts in the colonial period, we presume that middle-class intervention will provide a positive change for the children of the poor.

If the theories of Goldstein, Freud, and Solnit were applied in the divorce setting, one parent would be granted full custody and control of the child. The custodial parent, not the court, would "decide under what con-

148. See generally JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 47 (1973) [hereinafter *BEST INTEREST*] (declaring that the law's first priority should be the psychological health as well as the physical well-being of the child).

149. See *id.* at 7 (describing the author's first value preference); see also TEX. FAM. CODE ANN. § 153.002 (Vernon 1996) ("The best interest of the child shall always be the primary consideration of the court in determining the issues of conservatorship and possession of and access to the child.").

150. See *BEST INTEREST*, *supra* note 148, at 7 (identifying the author's second value preference, as the parent's right of privacy "[t]o safeguard the rights of the parents to raise their children as they see fit, free of government intrusion.").

151. *Id.* at 38.

152. See *id.* at 17 (professing that emotional bonds are created when a parent provides day-to-day care and needs, whereas a biological parent who fails to provide a child's needs becomes a stranger).

153. See, e.g., *id.* at 38 (describing the loyalty conflicts endured by children who have to keep contact with two parents who are not in contact with each other). But see Garrison, *supra* note 16, at 449, 474 (denouncing Goldstein, Freud, and Solnit's philosophy that a child should not have conflicting loyalties, including parental ones).



ditions to raise the child.”<sup>154</sup> The non-custodial parent would “have no legally enforceable right to visit the child.”<sup>155</sup> The custodial parent would have exclusive control over the frequency and duration of visits with the other parent.<sup>156</sup> That, however, is not the rule in private family law.

### *The Story of Bianca, Natalie and Jeremy*

*Bianca, Natalie and Jeremy*<sup>157</sup> were placed in the temporary custody of the state when Bianca was a newborn, Natalie was 15 months old, and Jeremy was nine years old.<sup>158</sup> In reviewing the trial court's termination of parental rights, the court of appeals found that the evidence indicated that the two-bedroom house where the children and their mother lived was “adequately furnished, well organized, clean and neat.”<sup>159</sup> Even the family's caseworker testified that there were no problems with the physical conditions the children were living in. Although Natalie had been tested as developmentally delayed, she was tested in English, which she did not speak very well; and, although Jeremy had extensive absences from school, the evidence showed that many of the absences were excused.<sup>160</sup> The state claimed the children's mother was an addict and dealt in prostitution, yet it did not prove those allegations, nor did it show that the children were endangered.<sup>161</sup> The state alleged two grounds for termination:<sup>162</sup> (1) that the parent “knowingly placed or knowingly allowed the child to remain in conditions or surroundings which endanger the physical or emotional well-being of the child,”<sup>163</sup> and (2) that the parent “engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangers the physical

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154. BEST INTEREST, *supra* note 148, at 38.

155. *Id.*

156. *See id.*

157. *See* Rodríguez v. Texas Dep't of Human Servs., 737 S.W.2d 25, 26 (Tex. App.—El Paso 1987, no writ) (holding that the evidence did not support order of termination).

158. *See id.* The Texas Department of Human Services intervened and obtained custody of the three children after Bianca tested positive for opiates at birth. *Id.* at 26.

159. *Id.* at 27.

160. *See id.*

161. *See id.*

162. *See id.* (stating that Virginia Rodriguez knowingly placed her children in dangerous situations and engaged in conduct that placed them there).

163. Act of Jan. 1, 1973, 63d Leg., R.S., ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1427 (amended 1997) (current version at TEX. FAM. CODE ANN. § 161.001(1)(D) (Vernon Supp. 1999)) (allowing termination of parental rights if the parent engaged in one of a specified list of activities, and if termination were in the best interest of the child); Rodríguez, 737 S.W.2d at 27 (terminating parental rights in compliance with the statute).

*or emotional well being of the child.*"<sup>164</sup> *The court of appeals reversed the trial court's termination of parental rights of all three children.*<sup>165</sup>

#### IV. BEST INTEREST

##### A. *We Don't Know Why We Love Them But We Do*

Children, particularly children in need, arouse in us the desire to protect and nurture. Who is not moved by the sight of starving, disease-ridden children of the third world? Who can keep from smiling at the picture of a healthy, clean, happy, bouncing baby? Children are show-stoppers. They draw our attention. They appeal to our emotions and create in us a very strong emotional response.

The images of children that draw somewhat idealized emotional responses from us are very different from the reality of raising a child. A child cries and is dirty more often than she is clean, and her demands increase in complexity as she advances in age. If it were not for the emotional pull of babies and young children, most of us would give up parenting. The extremely strong emotional response to a child, balanced against the reality of parenting, keeps parents sane and somewhat focused.<sup>166</sup>

When confronted with the image of an abused or neglected child, we also experience a strong emotional response. We want to rescue the child, to remove her from harm and put her in a place that will be safe and nurturing. A place where she will be properly fed, clothed, and happy. However, while we want to rescue the child, we want to do it without taking on the personal responsibility of the child.<sup>167</sup>

##### B. *The Needs of the Child*

Generally, a child needs to be fed, clothed, housed, educated, nurtured, kept safe and clean, provided with medical care, and appropriately disciplined. But what are the specific and special needs of a child who is from a substantially dysfunctional family? "While professionals and society cannot condone any form of mistreatment of children, the belief that they need to be "rescued" from their families may be counterproductive. The

164. Act of Jan. 1, 1973, 63d Leg., R.S., ch. 543, § 1, 1973 Tex. Gen. Laws 1411, 1427 (amended 1997) (current version at TEX. FAM. CODE ANN. § 161.001(1)(E) (Vernon Supp. 1999)); *Rodriguez*, 737 S.W.2d at 27 (discussing termination of parental rights in compliance with the statute).

165. See *Rodriguez*, 737 S.W.2d at 29.

166. This paper will not discuss when, why, and how parents lose that balance and focus, yet it is clear that it is not an occurrence limited to the poor.

167. See generally Garrison, *supra* note 16 (denoting the number of children involved in the foster care system). The author uses these numbers to draw the inference that individuals are not willing to take on the personal burden of rearing the child. See *id. passim*.

rescue myth . . . deprives the children of their natural place in their families . . . .”<sup>168</sup> However, the “rescue myth” is deeply rooted in our history,<sup>169</sup> and responds to our need to provide instant protection from socially constructed harm.<sup>170</sup> The “rescue myth” allows us to feel good about ourselves, but does not necessarily respond to the continuing needs of the child. The myth “underestimates the children’s separation trauma, [and] ignores the risks of foster care itself . . . .”<sup>171</sup>

It is better for a child to grow up in a dysfunctional family that is hers<sup>172</sup> than to be removed<sup>173</sup> to a balanced family that is not hers.<sup>174</sup> Children who are removed from their home suffer and mourn the loss of their parent(s) as much as they do when a parent dies.<sup>175</sup> The trauma of separation frequently manifests itself in “intense generalized hostility.”<sup>176</sup> This unresolved mourning may result in tantrums, aggression, crying, difficulty in school, and other symptoms of depression and anxiety.<sup>177</sup>

Children perceive their placement in foster care not as a relief from victimization, but as a threat to their very survival.<sup>178</sup> Consequently, chil-

168. Kates et al., *supra* note 117, at 588 (arguing that placing children in foster care is frequently counter-productive to the desired goal).

169. *See infra* Part I.A.

170. A child’s attorney recently told my Civil Justice Clinic students that she was not going to recommend returning our client’s children home. Our client was not the alleged perpetrator; she had completely separated herself from the perpetrator. Although she had fully complied with the plan of service, the attorney had some concern that the children might be at risk, and, as she said, at least now they were in a safe place.

171. Kates et al., *supra* note 117, at 588.

172. *See* Garrison, *supra* note 16, at 467-69 (stating it is better for the child to deal with their flawed biological parents, than to be removed, thus devising fantasy parents, which ultimately effects the child’s long term development); Kates et al., *supra* note 117, at 584-85, 588 (bemoaning the separation of a child from a parent because it leaves the child wondering, “[w]hose child am I”). *See generally* BEST INTEREST, *supra* note 148 (separating child from parent deleteriously affects a child’s sense of continuity).

173. *See* Kates et al., *supra* note 117, at 588 (placing a child in foster care embarks us on a course of emotional abuse of the child, which rarely, if ever, factors into the process of decision-making the child’s trauma).

174. “[S]eparating children from their parents is itself devastating to children of any age. . . . Public policy must refocus its efforts to support families so that children can be safe with the parents they know and love . . . .” AMERICA’S CHILDREN AT RISK, *supra* note 18, at 45.

175. *See* Kates et al., *supra* note 117, at 584 (asserting that separating the child from his/her parent causes the child to mourn).

176. *Id.* at 585.

177. *See id.*

178. *See id.* at 584 (describing that children who enter foster care are threatened by issues of separation which are not limited to mourning of losses, but extend to fear for their own survival). “[C]hildren in foster care experience *placement* as a threat to survival, and child welfare workers, foster care-givers and clinicians . . . view the abusive or chaotic conditions that precipitated placement as the primary threat to the child’s survival.” *Id.*

dren are generally not relieved when taken from a situation that we may view as risk-ridden. Children are not comforted by being placed in what we consider a "safe"<sup>179</sup> environment. They do not feel safe, they feel at risk. When a child feels at risk, she is at risk.

Children who are removed from marginal families, and even from truly abusive relationships, may still want to be at home, because they want to be with their parents.<sup>180</sup> What the child feels is central to her health and safety. It is therefore inappropriate to dismiss her feelings when assessing what course of action is in her best interest. If we place a child in an environment where her bones are safe, but where she perceives that her very survival is at risk, then from her perspective she has not been saved from harm,<sup>181</sup> instead, her injury has been compounded.

Placement of the child in foster care implies to the child that either the child herself or her biological parents are failures, and therefore "bad."<sup>182</sup> When the child is moved from one placement to another, the child's view of herself as bad is reinforced.<sup>183</sup> The harm inherent in foster care<sup>184</sup> outweighs the benefit of removal<sup>185</sup> only if the child is actually at risk of substantial harm.<sup>186</sup> A child who is removed from a dysfunctional family

179. We, the judges, lawyers, and social workers, define safe from the perspective of how *we* feel. A placement is safe if there is no physical abuse, no obvious emotional abuse, and if the place is clean, and sufficiently large for the number of people in residence.

180. Professors Ashe & Cahn clearly articulate the frustration experienced by many attorneys who are involved with CPS cases: "I was often pained by the apparent failure of social workers and prosecutors to appreciate the violence perpetrated by the legal process upon a child when he or she is abruptly and forcibly wrenched away from parents who, however inadequate, are nonetheless familiar." Ashe & Cahn, *supra* note 20, at 79.

181. See EXECUTIVE SUMMARY, *supra* note 111, at 11 (reporting that children in foster care do not develop a sense of security due to the lack of stability of placements).

182. See Kates et al., *supra* note 117, at 587 (explaining the dichotomy between the child's view of themselves and their biological parents as failures and their glorified view of their foster parents).

183. See *id.* (detailing the sense of rejection felt by children removed from the foster home).

184. See AMERICA'S CHILDREN AT RISK, *supra* note 18, at 50 (stating that foster care children may experience abuse from their foster parents).

185. See Kates et al., *supra* note 117, at 588 (arguing that foster parents can create a welcoming environment for the child if they see their role as that of an extended family). "[T]he well-intentioned efforts of professionals in the welfare system are sometimes misdirected in that professionals work to save the child at the child's expense." *Id.*

186. See Widom, *supra* note 99, at 195-96 (discussing out-of-home placement's critics view that foster care may be more detrimental to the children than maintaining the biological family together). See generally Kates et al., *supra* note 117 (arguing the need to formulate new model of foster care that acknowledges child's need to remain with biological parent). "[C]oercive intervention should not occur in situations involving child neglect, unless necessary to protect a child from demonstrable physical harm." AMERICA'S CHILDREN AT RISK, *supra* note 18, at 50.

will require healing from the trauma of the separation and from the effects of the parental relationship. The scars or effects of the improper parenting are multiplied by, not resolved through, foster placement.

As it happens, sometimes our need to save the child coincides with the child's immediate needs, and a child truly at risk is separated from the perpetrator of severe harm, or a child who has been hurt beyond her ability to heal within the family is removed from that family. For example, a perpetrator of sexual abuse must be separated from the child whom he is victimizing, preferably without disrupting other relationships of the child.<sup>187</sup> A child must be removed from any parent whose reliance on alcohol or drugs is so extreme that the parent cannot care for herself or others.<sup>188</sup> That is not to say, however, that termination of the parental relationship with such parents is necessarily in the child's best interest. Nor is it reasonable to expect that the child protective system will be able to accurately distinguish future perpetrators from other dysfunctional adults and thus prevent injury to all children who are truly at risk. To believe that the state can effectively prevent injury to children by removing them from a future perpetrator is analogous to the belief that crime can be eliminated through the incarceration of future felons.<sup>189</sup>

### C. *Best Interest of the Adult*

While evaluating the best interest of the neglected child, we focus on our own satisfaction of having rescued a poor needy child and on the horrible irresponsibility of the parents,<sup>190</sup> instead of the experiences and authentic needs of the child, regardless of whether an alternate placement is going to meet those needs. In determining whether and when to return a child to the parent, judges, the state, and attorneys focus on whether the parent has met a list of middle-class standards.<sup>191</sup> The trauma exper-

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187. In the past, when a child was the victim of sexual abuse there was an assumption the child would not be protected; thus, the child was taken from the home instead of the perpetrator. Today, however, Texas provides for the removal of the perpetrator from the home. See TEX. FAM. CODE ANN. § 262.1015 (Vernon Supp. 1999) (mandating that it is preferable for the state to remove the alleged perpetrator of the abuse rather than removing the child).

188. See TEX. FAM. CODE ANN. § 161.001(1)(P) (Vernon Supp. 1999) (ordering courts to consider a parent's use of a controlled substance when determining whether it is proper to terminate the parent-child relationship).

189. For an interesting assessment of the American overuse of prisons, see Schlosser, *supra* note 80, at 51.

190. See *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 834 (1977) (explaining studies suggesting that middle-class social workers treat natural parents' poverty as prejudicial to best interests of child).

191. See generally *Ashe & Cahn*, *supra* note 20 (describing the hurdles parents must overcome to meet their own needs before meeting needs of their children).

ienced by the displaced child is rarely, if ever, balanced against the risks associated with returning the child home. Many times an acceptable home, a job for three months, completion of parenting classes, and counseling are required before the child is returned. Once initiated, couldn't these goals for the parent be completed while the child is at home?<sup>192</sup> The parent-child relationship could then be monitored, and the parent would be more motivated.<sup>193</sup> With the child at home, the parenting classes and therapy would be more effective.

Analysis, critical thinking, and creativity of social workers, attorneys, and judges are essential if we are truly interested in what is best for the child. Our habit of using two or three alternative solutions for managing a child abuse case is inadequate. We allow ourselves to fall into the rut of treating every case as substantially the same. Court orders and CPS plans of service are similar from one case to the next: the child is put in a "safe place" and gets medical and psychological care, the parent is given parenting classes, a psychological evaluation, drug/alcohol treatment, and maybe counseling. We follow the same pattern, even though we should have learned from our experience that in many cases if "generic reunification services are offered to a parent . . . failure is inevitable, as is termination of parental rights."<sup>194</sup>

### *The Story of E.L.B.*

*These children were . . . "unwashed, dressed in filthy, soiled clothes, and infested with lice. . . . The house was full of old newspapers and garbage and had heaps of dirty clothes lying about. There was no running water or electricity nor edible food in the refrigerator."<sup>195</sup> The mother was "mildly retarded with an IQ of sixty, [and] a developmental age of eight years, eleven months."<sup>196</sup> She was "not able to properly care for herself or her children."<sup>197</sup> She did not function as an independent adult, but was heavily dependent . . ."<sup>198</sup> The court was horrified that the*

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192. B exar County has a program called the "Home Centered Program," where the parents meet their plan of service while the child is in the home. See *infra* V.A. (discussing programs around the nation designed to preserve families).

193. Presently, parent-child visits are more likely to be evidence-gathering sessions rather than therapeutic sessions.

194. Cf. *In re Victoria M. v. Carmen S.*, 255 Cal. Rptr. 498, 507 (Cal. App. 3d 1989) (explaining how developmentally challenged parents are hindered by generic reunification services).

195. *E.L.B. v. Texas Dep't of Human Servs.*, 732 S.W.2d 785, 786 (Tex. App.—Corpus Christi 1987, n.w.h.).

196. *Id.*

197. *Id.*

198. *Id.*

*children were living under such conditions, and acknowledged the fact that the mother was also living in the same substandard conditions, but failed to conclude that perhaps the family would be healthier and happier if services were provided to the whole family.<sup>199</sup> The children were removed by CPS and eventually the children's relationship with their mother was terminated.<sup>200</sup> The court found that the mother subjected the children to "deplorable and neglectful conditions."<sup>201</sup> The appellate court agreed that there was clear and convincing evidence sufficient to terminate her parental rights.<sup>202</sup> The state presumably found someone to care for the children. Another arm of the state probably found someone to care for the mother. I wonder if the state could have found someone to care for them all—together.*

## V. WHAT ARE WE DOING, WHAT CAN WE DO?

A solution to the problem of foster care for the poor must include basic changes in perspective. We must realize that we cannot eliminate violent crimes, but we can strengthen families and minimize both neglect and abuse.<sup>203</sup> However, if we want to nurture and protect families, we must begin with a realization of and willingness to change prejudicial attitudes towards families that are poor or that are culturally different from "middle America."<sup>204</sup> No program will be effective until the basic systemic

199. *See id.* (noting appellant and her children constantly changed residences and lived with a whole host of appellant's relatives).

200. *See E.L.B.*, 732 S.W.2d at 787 (finding it was in the best interests of the child to terminate parental rights and that such a finding was supported by clear and convincing evidence).

201. *Id.* at 786.

202. *See id.* at 787 (agreeing with the trial court that there was sufficient evidence to terminate parental rights).

203. There is a tension in the CPS arena between acting as a child saver by removing the child from families who pose a potential risk to the child and providing services intended to preserve the family unit for the benefit of the child. In 1980, Congress passed the Adoption Assistance & Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500, 503 (1980) (codified in scattered sections of 42 U.S.C. § 671(a)(15) (1988)). This provision, among others, required the states to make reasonable efforts to keep families together. For an assessment of its effectiveness, see Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 227 (1989-90) (explaining problems in defining reasonable efforts). Later, the Family Preservation and Family Support Program encouraged states to plan for and fund family preservation programs. However, in 1997, Congress passed the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115, 2116 (1997) (codified in scattered sections of 42 U.S.C.) in response to a concern that family preservation programs and reasonable efforts requirements were endangering the safety of children.

204. *See generally* Angela Mae Kupenda, *Two Parents are Better than None: Whether Two Single, African American Adults-Who are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other-Should be Allowed to Jointly Adopt and Co-Parent*

prejudice against poor families and families of color is resolved. Further, the state will have to broaden its vision from the moment of "child saving" and seriously consider the authentic and continuing needs of the child. In practice, the change will have to occur in three ways.

First, we must change the way in which we manage the state's intrusion into family life. We must make it our business to use our resources to prevent the breakup of families. Several of the programs described below are intended to make that change. Second, in situations where the child must be removed from one or both parents, we must reconstitute the structure of the substitute care system so that it reflects the support system available to successful families. Third, if the child must be removed and if the parent is not able to rehabilitate sufficiently for the return of the child, then we must be consistent with the policies of private family law. The child should be allowed to maintain contact with the parent to the greatest extent consistent with her safety. Our focus, as the alternative to returning the child, should be to maintain the maximum amount of contact possible between the child and the parent. This change in focus will help alter the basic attitude towards parents, and allow us to make decisions actually based on the child's needs. Below, I will discuss each of these propositions in detail.

#### A. *Family Preservation*

The public policy of most, if not all, states acknowledge that it is desirable for the child to remain with or be reunited<sup>205</sup> with her family. Nonetheless, current federal funding priorities still favor out-of-home care over preventative efforts.<sup>206</sup> Funding priorities should be

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*African American Children*, 35 U. LOUISVILLE J. FAM. L. 703, 703-06 (1997) (discussing adoption options developed from African American experiences).

205. See Jennifer A. Hand, *Preventing Value Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1277-78 (1996) (submitting that most states are required by statute to make reasonable efforts to preserve the biological unit as a prerequisite to termination).

206. See AMERICA'S CHILDREN AT RISK, *supra* note 18, at 46 (stating the "current funding priorities, which favor out-of-home care over preventive efforts, must be reversed."). The Federal Family Preservation and Family Support program was intended to address the funding imbalance between out-of-home preventive efforts and family-support programs. See *id.* Louise A. Leduc, Note, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195, 1199 (1996) (describing that the family preservation movement enjoyed widespread support from both political parties because of its "focus on helping hold together families in need"). Subsequently, the Adoption and Safe Families Act of 1997, reversed some of the gains in policy by adding time-limited services, and expanding termination of parental rights. See *id.*; Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1443-44 (1998) (observing that the government's reduction of the termination timeline in con-



changed to favor preventative and reunification services over foster care.<sup>207</sup>

For the most part, public policy recognizes that children are better off and happier with their own families, even if the family is dysfunctional. There are a few programs that intervene to provide services to families before any abuse or neglect has been identified.<sup>208</sup> Early intervention is usually extraordinarily successful.<sup>209</sup> Of course, it is impossible to know which families would have become involved with the state had there been no services provided. Nonetheless, if our goal is to strengthen families, to provide children with nurturing parents, and to minimize the instances of abuse and neglect, then we should increase the number and variety of early prevention programs.

Texas, like several other states, has social workers who provide “in-home” or “ongoing” services to families at risk.<sup>210</sup> All child abuse referrals are investigated and then either closed, sent to the “in-home” workers,<sup>211</sup> or, if the child is removed, sent to the legal units.<sup>212</sup> The caseloads

junction with its refusal to increase services will result in an increase of destroyed families which could have otherwise remained intact).

207. See, e.g., Victoria Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 668-72 (1994) (describing The Shoulder, Inc., a Houston, Texas, model drug treatment center). The center has 35 beds for women, including pregnant women and women with newborn babies. *Id.* at 668-69. The residents go through a detoxification program and a residential program where they receive counseling, parenting and other skills training, and pediatric care. *Id.* at 669. The staff works with the mothers on issues such as locating housing, developing skills, and obtaining services in the community. *Id.* at 670. The estimated cost for treating one woman for the recommended 60 days residence is approximately \$3,500. *Id.* The taxpayers save approximately \$1,000,000 during a child's first 18 years of life for every drug-free child born in the United States. *Id.*

208. For example, “Healthy Families America” exists in a number of states including Hawaii and California, and works with families at risk of future involvement with CPS. See Shari Roan, *Parents Get an Ounce of Prevention: Home Visitors Act as Extended Families for Stressed Out Mothers and Fathers in a Bid to Curb Child Abuse*, L.A. TIMES, Aug. 17, 1993, at A1 (outlining the program as it started in Hawaii).

209. See Wexler, *supra* note 16, at 15 (alleging family preservation programs make it easier, not harder, to pursue adoption where that is best for a child). Michigan, the state with the largest family preservation program in America, also has the nation's best record for getting foster children adopted. *Id.*

210. These services include mother's helpers, foster grandparents, parenting information, and skills programs. The services are provided to families where some risks have been identified but where legal intervention and removal is not requested by CPS.

211. If the risks associated with the family are deemed by the worker not to be serious, the referral is sent to an “in home” worker, or closed.

212. The units of child protective workers responsible for children under the temporary custody of the state are called legal units. Legal workers might have as many as forty open cases at one time.

in these "in-home" units are high,<sup>213</sup> and the services available to the family are very limited.

In contrast, a few states have instituted regional or statewide programs that attempt to prevent placement through the infusion of extensive but short-term social services to the family. Hawaii,<sup>214</sup> and Washington,<sup>215</sup> for example, have plans that are generically labeled "family preservation," and are characterized by small caseloads and intensive work with the families. Although a few years ago intensive family preservation was in favor,<sup>216</sup> there has been considerable retrenchment. Family preservation programs are at risk, partially due to their own expense, but largely because they have been unjustly blamed for not foreseeing the murders of children.<sup>217</sup> It is a sad error in judgment to attack early prevention and family preservation programs when a child is murdered.<sup>218</sup> It would be a

213. In B  xar County, the average caseload for a family preservation worker is twenty cases.

214. See Faye T. Kimura, *Paradise in the Making: Hawaii Strengthens Its Child Protective Services System*, 80 A.B.A.J. 79, 79 (1994) (stating that until 1989, the Hawaiian foster care lacked a unified system). However, the state has now reduced foster home placement by providing in-home services to those families with children at risk. *Id.*

215. See Paul Knepper & Shannon M. Barton, *Statewide Cross Training As a Means of Court Reform In Child Protection Proceedings*, 36 BRANDEIS J. FAM. L. 511, 544-45 (1997-98) (discussing a Washington program "based on extending services to troubled families" before removal). *But see* Marva Hammons, *Legal and Community Services Advocates Working Together to Preserve Families*, COLOMBIA UNIVERSITY SCHOOL OF LAW, Dec. 1-2, 1994, 3 J.L. & Pol'y 469, 469-70 (1995) (questioning the concept of "family preservation model").

216. Funding through the Federal Family Preservation and Family Support Program requires that the states plan implementation of integrated statewide family preservation and/or family support services. See AMERICA'S CHILDREN AT RISK, *supra* note 18, at 45-47 (discussing different funding procedures of programs). The states have been given a great deal of flexibility in the types of programs they may implement. See *id.* *But see* Pat McElroy & Cynthia Goodsoe, *Family Group Decision Making Offers Alternative Approach to Child Welfare*, YOUTH LAW NEWS, May-June 1998, at 8 (outlining the criticism and the defunding of family preservation). Recently, the federal government has cut the funding available to the states for social service programs, thus resulting in cut-backs in the programs. See, e.g., Gil Lawson, *Elderly, Children Hit Hardest by Budget Cuts*, THE COURIER-J. (Louisville), Nov. 26, 1996, at 1B, available in 1996 WL 6371075.

217. See Joseph Gerth, *1995 Toll: 8 Children Under State Supervision Died of Abuse or Neglect*, THE COURIER-J., (Louisville), July 21, 1996, at 14A, available in 1996 WL 6355087 (describing how Kentucky is cutting back on the state's Family Preservation Program in order to recruit more foster care parents because of his fear of abused children); Richard J. Gelles, *First We Must Preserve the Abused Children*, TAMPA TRIB., Oct. 13, 1997 at 9 (describing several instances of abuse under state supervision programs). *But see* Kestin, *supra* note 116, at 1 (arguing that "distinguishing between the families who can be helped and those who will likely harm again" is unreasonably difficult).

218. See Jill S. Levenson, *Scapegoating Social Workers Won't Help Kids*, SUN-SENTINEL, (Ft. Lauderdale, Fla.), Nov. 24, 1997 at 15A (stating that the "finger pointing" needs to stop and the community as a whole needs to take responsibility for "creating proactive

blessing if through some consistent premonition social workers could un-  
 failingly identify those adults who are likely to engage in extreme vio-  
 lence. But they cannot; no one can. Could a caseworker be expected to  
 identify the risk of murder based on one home visit or even two? Per-  
 haps if the worker had been to the home weekly, had spoken to the fam-  
 ily daily. But that would have required a caseload of only three or four  
 cases.<sup>219</sup>

Family preservation programs attempt to reduce the instance of foster  
 care through the use of comprehensive social services over a short period  
 of time.<sup>220</sup> Family preservation workers have a small caseload, two to  
 four families, with whom they work intensely.<sup>221</sup> The workers provide a  
 variety of services, strengthening the family that is at risk of having a  
 child removed to foster care.<sup>222</sup> The combination of a small caseload and  
 the availability of intense and varied services sets these programs apart  
 from the standard “in-home” programs currently available throughout  
 the country.

An apparent flaw is the “family preservation” program’s presupposi-  
 tion that the workers will be able to accurately identify those families  
 who are at risk of having a child removed. The workers may spend time  
 providing family preservation services to families whose children would  
 never have been removed. And many families who *are* at risk might  
 never be referred to or accepted into such a program, resulting in an  
 equal number of children being placed in foster care. As mentioned  
 above, another criticism that has arisen recently is the failure of the sys-  
 tem to identify children who will be murdered, and preventing the mur-  
 der through removal of the child from the home.<sup>223</sup>

A different approach that has drawn attention recently is “Family  
 Group Decision Making,” which has been instituted under various names  
 in Oregon, California, Canada and New Zealand.<sup>224</sup> The program aug-

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changes that make sense”); Wexler, *supra* note 16, at 3 (noting that family preservation  
 programs will not keep children safe).

219. See Wexler, *supra* note 16, at 3 (reporting that Illinois changed its family preser-  
 vation program after the death of a young child). As a result of these changes, the number  
 of children in foster care increased by 30% over the next year, thereafter the number of  
 children’s deaths due to abuse increased. See *id.* Connecticut had a similar experience  
 with an increase in children in foster care and a corresponding increase in the death rate  
 for children. See *id.*

220. See Telephone Interview with Rose Orsborn, *supra* note 17.

221. See *id.*

222. Services might include stress management, maintaining self-control, classes on  
 discipline, housekeeper services, help with transportation, and other services that help the  
 family deal with daily struggles.

223. See Telephone Interview with Rose Orsborn, *supra* note 17.

224. See McElroy & Goodsoe, *supra* note 216 at 1.

ments the family preservation programs by relying on or including the extended family in assessing the needs of the children and in determining how those needs can be met and what services are required. In some areas, the program is founded on mediation between the state and the family of the child.<sup>225</sup>

With some success, Texas has experimented with several service-intensive programs.<sup>226</sup> A program, called the Home Centered Program, is presently in place in B  xar County.<sup>227</sup> The Home Centered unit becomes involved with families immediately after the adversarial hearing, the point at which the state is initially granted temporary custody of a child.<sup>228</sup> Families are referred to the Home Centered unit by the investigating caseworker, the judge, or one of the attorneys.<sup>229</sup> The worker and supervisor of the unit meet with the family, assess their level of commitment, and decide whether or not to accept the case.<sup>230</sup> Once a case is accepted, even though the state continues to have legal custody of the child, the child is placed back in the home.<sup>231</sup> The workers in the Home Centered unit each have two to four cases and work intensely with the families assigned to them. They attempt to build on the family's strengths and help the family overcome its weaknesses.<sup>232</sup> If the family is successful in overcoming the stated risks, and the success rate is very high, the worker recommends that the legal case be dismissed.<sup>233</sup> Unfortunately, the Home Centered unit is small.<sup>234</sup> The low caseload and intensity of services allows participation of only a small percentage of families whose children are in state custody. The unit accepts cases only at the initial hearing stage and will not accept cases that involve sexual, drug, or alcohol abuse.

If, as a nation, we wish to save families, we must begin by adopting a comprehensive plan, which includes one or more models of intense services focused on family preservation or reunification, in addition to ongoing protective services for those families needing an occasional helping

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225. *See id.* (explaining that the parties can reach resolution through mediation without the Child Welfare Agency becoming involved); *see also* EXECUTIVE SUMMARY, *supra* note 111 at 42-47 (stating that the Texas Supreme Court Task Force on Foster Care also recommended increased use of mediation in CPS cases).

226. *See* Telephone Interview with Rose Orsborn, *supra* note 17.

227. *See id.* (noting there are other programs available on limited county-wide basis in Texas).

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.*

232. *See* Telephone Interview with Rose Orsborn, *supra* note 17.

233. *See id.*

234. *See id.*

hand.<sup>235</sup> We must fund enough of the intense services units to provide services to all of the families who are at risk. In addition, for the intense services programs to be effective, the workers must be willing to provide in-home services to families who, today, would have their child removed. Programs like the Home Centered Program will have to be expanded, and the criteria and time for admission be liberalized. That means children will remain in families where a risk already exists. Children will stay with substance-abusing parents,<sup>236</sup> and with homeless parents. The worker, foster grandparent, case aide, or homemaker will have to be present in the home three or four times a week. They will have to help clean, help transport, help apply for benefits, and do whatever else it takes to help the family rehabilitate.

### B. *Temporary Foster Care*

Research suggests that children are better off if they are able to maintain some level of contact with their parents,<sup>237</sup> and that collaboration between the parents and the foster parents is best for the child.<sup>238</sup> Others envision a system where services are provided to the whole family, not

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235. See Knepper & Barton, *supra* note 215, at 526 (describing cross-training and multidisciplinary training as “an effective tool for reducing role ambiguity among decision makers in the child protection process”). Knepper and Barton discuss nine criteria that should be met in cross-training. The nine criteria are:

- (a) Trainers should agree upon each professional’s decision-making role.
- (b) Training sessions should occur prior to entry into service.
- (c) Training should follow guidelines formulated for each role.
- (d) Training should be locally based.
- (e) Training should include GALS, CASA, and all who appear on behalf of the children, parents, and social service agencies.
- (f) Training should explain the rationale for public law governing child protection agency.
- (g) Training should include discussions of successful categories; should describe expectations.
- (h) Professionals should share knowledge of gaps during training sessions.
- (i) Training should focus on interpersonal and organizational communication, team building, and intersystem problem solving.

*Id.*

236. See Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 329 (1996) (supporting substance abusing parents to maintain the needs of the children with help of an interagency approach for family preservation).

237. See Kates et al., *supra* note 117, at 588 (suggesting the necessity to involve parents in child’s daily life).

238. See *id.* (stating that collaboration between biological and foster parents is helpful for the child).

just the child.<sup>239</sup> The foster parents, whom I prefer to call substitute care-givers, should be considered as extended family members helping the parents.<sup>240</sup> They should be viewed by the children, parents, state and court as foster grandparents, or as a foster aunt and uncle. Then the child would not confuse<sup>241</sup> the role or identity of the care-givers and the parents. The substitute care-givers would work directly with the parents so that both are involved in the daily decisions about the care of the child.<sup>242</sup> And all could work together to return the child home.

Currently, in child protective cases in B exar County, Texas, parents visit their children only twice a month for one hour each visit.<sup>243</sup> In the vast majority of cases, the foster parents have no contact with the natural parents.<sup>244</sup> Once the decision is made not to return the child to the custody of the parent, the case is assessed for termination. Most of those cases end with the termination of parental rights and termination of all contact between the parent and the child.

### C. *Why Terminate?*<sup>245</sup>

Some parents are unable to care for their children. Some parents with low IQs who love their children are nonetheless incapable of caring for them. Some parents who have substance abuse problems<sup>246</sup> too severe for lasting rehabilitation might never be able to care adequately for their

239. See generally Nancy S. Erickson, *Preventing Foster Care Placement: Supportive Services in the Home*, 19 J. FAM. L. 569 (1981) (arguing that placement of child in foster care should be last resort).

240. See Kupenda, *supra* note 204, at 711-13 (focusing on the African American extended family members using the traditional model).

241. See *id.* at 712 (explaining that the children refer to the co-parents by relationship titles, even if there is no blood relationship). Adults who were raised by family members will frequently say: "I call her mom because she raised me, but she is really my aunt." In this situation, there is no confusion of identities and there is recognition of the psychological parent as well.

242. See Erickson, *supra* note 239, at 574 (presenting techniques the foster parents could use to keep the biological parents informed about their child).

243. This is the standard visitation schedule proposed by the department and ordered in the majority of cases in B exar County. When the child is in the children's shelter, the parent is allowed to visit several times a week. Once the child is placed in a foster home, the visits are limited for the convenience of the family preservation worker and the foster family.

244. Many times the names of the foster parents are kept confidential.

245. See Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Won't Go Away*, 25 ST. MARY'S L.J. 623, 672 (1994) (concluding that prenatal drug use should not result in punishment of the mother through termination of parental rights; "[i]nstead, legislatures should seek to enact laws that encourage and foster a positive maternal-child relationship.").

246. See generally *Vanessa W. v. Texas Dep't of Human Servs.*, 810 S.W.2d 744 (Tex. App.—Dallas 1991), *writ granted*, 817 S.W.2d 62 (Tex. 1991) (*per curiam*) (suggesting Va-

child. Parents with certain psychotic or neurotic disorders might become too unstable to continue to provide daily care for their child. Today, we deal primarily with these cases through termination of parental rights,<sup>247</sup> and the hope of adoption. The child, whether adopted or not, has no continued contact with the parent and may never be given the opportunity to assess or internalize the reality of the parent's disability.<sup>248</sup>

A plan for long-term care with continued contact with the parent and other relatives is better for the child. If the child cannot be returned home, then the child should be placed with a long-term, permanent, substitute care-giver<sup>249</sup> or, if more appropriate, in a residential treatment home. Even if contact must be highly structured, the child must be in a setting where communication with the parent and other significant adults is still possible. This type of a plan is particularly necessary in the many cases where at least one of the children is old enough to know and have bonded with the parent. A positive side effect to the plan is that the social worker has a single, constant goal, and does not have to make the emotional switch between reunification and termination. The worker can focus on preserving, to the fullest extent possible, the relationship between the child and the parent. Parents will respond to the positive attitude of the worker and more likely maintain interest in keeping and caring for their children.

Further, the plan is consistent with what would have been done in private family law setting. This proposal is consistent with the many private adoptions where the birth mother is allowed to continue to have contact with the adoptive parents. It is consistent with the many intra-family placements that occur formally or informally,<sup>250</sup> and many times is culturally more appropriate. The plan is also consistent with what happens in cases where the parent has enough money and is concerned enough to provide substitute care for the child. Over the years, we have found

nessa might have been rehabilitated if she had been with her child while services were being provided).

247. See TEX. FAM. CODE ANN. § 161.001(1)(F) (Vernon Supp. 1999) (requiring termination if it is found by clear and convincing evidence that the parent "failed to support the child in accordance with his ability during a period . . .").

248. At the Civil Justice Clinic we currently represent one mother whose children are in long term (permanent) foster care. The oldest child is angry at her mother and does not want to visit with her, although the younger children see her regularly. Although we consider the situation with the oldest child a problem, at least she knows her mother and has begun to deal with her anger towards her mother.

249. The foster care-giver should still not try to replace the parent. As time goes on, the care-giver and child will develop appropriate language to reflect their relationship and to reflect the child's relationship with the absent parent.

250. See Kupenda, *supra* note 204 at 711-13 (discussing possible alternative placements).

adoptive parents for children with severe emotional and physical disabilities; similarly, we could,<sup>251</sup> if we tried, find substitute care families willing to enter into long term care programs.<sup>252</sup>

#### CONCLUSION

In 1980, Nancy S. Erickson wrote,

[W]hat is demanded is an acceptance of the basic notion that a child's own family, even if poor, ill-housed, and marginally functioning, is the least detrimental alternative for that child. Visions of saving the child by transporting her to a middle-class foster home must be rejected. Intellectually these ideas may not be hard to grasp; emotionally they are extremely difficult to accept.<sup>253</sup>

In B exar County, Texas, like in most other counties in the country, we are well entrenched in "saving" children from families who are poor, ill-housed, and only marginally functional. Most of the children we are "saving" are children of color.

A disparity between the application of the law in the private family law cases and the child welfare cases is clear. Frequently, respondents in child welfare cases have their children taken away for far fewer deficiencies than would be required in a case filed by a private individual. Termination of parental rights of respondents in child welfare cases occurs far more frequently than with respondents in private cases, even with cases containing similar facts. In child welfare cases, the courts gloss over laws that purportedly require strict construction.

Child welfare agencies have enormous power over their adverse parties, most of whom are poor, most of whom are women, most of whom are women of color. The question is whether a system that developed from intrusion into the lives of the poor can be reconstituted to provide services that will nurture the quality of the lives of all children. If it cannot, then we should scrap the system and start over.

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251. See Melanie McFarland, *With Open Arms: Seattle Foster Mother's Nurturing Is Focus of PBS Documentary*, SEATTLE TIMES, Jan. 8, 1998, at E1 (describing the Casey Family Program, which operates in 13 states, offers long-term care for children and has been able to develop families willing to enter into such an arrangement).

252. Currently Child Protective Services does not seek nor train long-term foster families because there is no public funding for such a program. See Telephone Interview with Rose Orsborn, *supra* note 17.

253. See Erickson, *supra* note 239, at 608 (arguing that children should be placed in foster care only when no other options are available).