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# TAKE THE CHILD AND RUN: HOW ASFA AND THE MENTALITY BEHIND IT HARM CHILDREN

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**Richard Wexler\***

## OVERVIEW

For most of my professional life, I was either a journalist or a professor of journalism. I covered my first child welfare story in 1976, while I was still a journalism student.

I interviewed a woman who was, at the time, 21. By the time she was nine years old, she had been in nine different foster homes. She told me she survived by keeping the rage inside, “unlike my five brothers who’ve been in every jail in New York State.”

This is some of what she said:

*When you spend your life going from place to place and knowing you’re not going to be in any place for very long, you learn not to reach out, not to care, not to feel.*

*My bitterness is not that I went through what I did, my bitterness is that I don’t think it should have had to happen. There was no reason why my family’s life should have been destroyed.*

After speaking to this woman for two-and-a-half hours, I reached a couple of conclusions:

First, I was very glad I chose journalism as a career.

Second, I knew I would keep coming back to the story.

As I did keep coming back to the story, I kept finding that the facts on the ground were not matching what the most widely-quoted so-called “experts” were

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saying. When the dichotomy became too much to bear, I wrote a book on the topic, *Wounded Innocents*.<sup>1</sup> Ultimately, that led me into advocacy.

As I said, that interview with a former foster child was in 1976. Sixteen years later, I was working in that same city, and I took part in a panel discussion of foster care.

Also on the panel was a representative of one of those big, “respected” private agencies with blue-chip boards of directors that lives on *per diem* payments for keeping children in foster care. He was going on about how supposedly children are removed only as a last resort, and never for even a day longer than necessary.

But, he said, maybe *after another generation*, we’ll consider changing the financial incentives under which we operate.

After another generation.

Nothing that had happened to that young woman, that former foster child, and all who came after really mattered to him at all.

Why am I angry?

Because now it’s another 18 years, and if anything, it’s even more likely that children will suffer as that former foster child did.

Here are a few examples:

- In Orange County, California, an impoverished single mother can’t find someone to watch her children while she works at night, tending a ride at a theme park. So she leaves her eight, six, and four-year-old children alone in the motel room that is the only housing they can afford. Someone calls child protective services. Instead of helping her with babysitting or daycare, they take away the children on the spot.<sup>2</sup>

- In Los Angeles, the pipes in a grandmother’s rented house burst, flooding the basement and making the home a health hazard. Instead of helping them find another place to live, child protective workers take away the granddaughter and place her in foster care. She dies there, allegedly killed by her foster mother. The child welfare agency that would spend nothing to move the family offers \$5,000 for the funeral.<sup>3</sup>

- Kimberlee Diedrich and her boyfriend move to Nashville Tenn. to try to find work. But the odd jobs they can find aren’t enough for them to afford permanent housing.

An outreach worker who specializes in helping homeless, pregnant women does her best – but the couple encounter waiting list after waiting list. When the outreach worker comes up with enough money, the couple stays in cheap hotels.

1 RICHARD WEXLER, *WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE* (Prometheus Books 1995) (1990).

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

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

But they're on the streets, one day away from being able to move into an apartment, when their son, Cherokeeewolf William Diedrich, is born.

Rather than help with housing, the child welfare agency confiscates the infant at birth. He's placed with foster parents who want to adopt, and refuse to use the boy's Indian name.

Now the couple has a place to live – but no son. He's dead under mysterious circumstances. The foster parents deny any wrongdoing.<sup>4</sup>

And, thanks to Prof. Matthew Fraidin and some extraordinary students here at UDC, we know that wrongful removal is rampant in Washington.

At a news conference in January 2009, Prof. Fraidin cited some examples:

*An eight-year old boy is taken from his mother because the boy's uncle allegedly beats him. Even though the uncle does not live with the child, the child stays in foster care for two-and-a-half months until the government gets around to admitting they have no evidence that the child is in danger. They drop the case and send him home.*

*A 15-year-old boy is forced into foster care for five weeks after his step-father dies. He lives with strangers even though the boy's grown sister, acknowledged by all to be an appropriate caretaker, is ready, willing, and able to take him in. After five weeks, CFSA sends him home.*

*A seven-year-old boy is taken from his mother because his grandfather - who does not live with the mother - allegedly beats him. The boy lives with strangers for six weeks, even though two loving, capable, professional aunts are available to take him in. He sees his mother only two hours each week. He is finally allowed to live with one aunt, with whom he stays for another six weeks – until the judge determines the boy was not abused. After three months, he goes back home.*

There was nothing unusual about these cases.

In more than 60 percent of the cases handled by Prof. Fraidin's students that semester, the children were returned home within three months. In more than 40 percent, they were sent home within a week – more than enough time to do enormous emotional damage to a child.<sup>5</sup>

If you can send a child back home again within three months, and certainly if you can do it within a week, it's almost certain that you never needed to tear apart that family in the first place.

## I. LEGACY OF FAILURE

These things did *not* happen because workers are jack-booted thugs who relish tearing children from their parents. Mostly, they're well-meaning people; under-

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4 Kate Howard, *Foster Baby's Tragic Beginning, Tragic End*, TENNESSEAN, Feb. 5, 2010.

5 Press Release, Richard Wexler and Matthew Fraidin, Number of D.C. Families Torn Apart Soars 41 Percent in Wake of Fenty's "Foster-Care Panic" Advocates Say (Jan. 7, 2009) (on file with the UDC/DCSL L. REV.), available at <http://www.nccpr.org/reports/dc1709.pdf>.

prepared, undertrained, and terribly overwhelmed, who then are sent out to make life and death decisions.

But I find no comfort to be taken in the fact that most people in the system mean well. The road to foster care hell always has been paved with good intentions.

What so many cases have in common is the single biggest problem in child welfare: The confusion of poverty with neglect. Such cases are far more common than the horror stories of beatings, rape, torture, and murder that regularly – and rightly – make headlines.

For example, three separate studies since 1996 have found that thirty (30) percent of America’s foster children could be safely in their own homes right now, if their birth parents had safe, affordable housing.<sup>6</sup>

A fourth study found that “in terms of reunification, even substance abuse is not as important a factor as income or housing in determining whether children will remain with their families.”<sup>7</sup>

Indeed, the first person to try to run what is now the Child and Family Services Administration back when it was in receivership, estimated that in D.C. between one-third and one-half of D.C.’s foster children could be returned to their parents immediately - if they just had adequate housing.<sup>8</sup>

Why is poverty so easily confused with neglect? In part, it’s because the poor are *defined in* to our neglect laws:

The D.C. Code defines “negligent treatment” as “failure to provide adequate food, clothing, shelter, or medical care.”<sup>9</sup> Yes, the definition goes on to say that this applies when “the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian.”<sup>10</sup> But nobody seems to pay much attention to that part – indeed, D.C.’s official website for training mandated reporters of child abuse *leaves out this part of the code*.<sup>11</sup>

Despite this breathtakingly-broad language, the people who run agencies like CFSA always say: “Foster care is a last resort, - we only take away children when absolutely necessary.”

If that were so, all those children whose parents were represented by Prof. Fraidin’s law students wouldn’t have been able to return home within a week. And if that were so, then similar places should have similar rates of removal.

6 Deborah S. Harburger & Ruth Anne White, *Reunifying Families, Cutting Costs: Housing – Child Welfare Partnerships for Permanent Supportive Housing*, 83 CHILD WELFARE 493, 501 (2004).

7 Ruth Anne White & Debra Rog, *Introduction*, 83 CHILD WELFARE 393 (2004).

8 . Tamar Lewin, *Child Welfare Is Slow to Improve Despite Court Order*, N.Y. TIMES, Dec. 30, 1995, at 6.

9 D.C. CODE, §16-2301 (2001).

10 *Id.*

11 MANDATED REPORTER DC, COMPREHENSIVE DC OFFICIAL CODE (2008), <http://dc.mandatedreporter.org/pages/docs/Comprehensive-DC-Official-Code.pdf>.

They don't.

NCCPR has created a *Rate-of-Removal Index*, in which we compare the number of children removed from their homes over the course of a year both to the total child population, but also, more importantly, to the number of *poor* children in that state. That way, states can't use the excuse: Well, we take away more children because we have so much child poverty.

It turns out that Nebraska, which is among the worst offenders, takes away children at a rate nearly three times higher than Alabama, and more than five times higher than Illinois; both national leaders in using safe, proven programs to keep families together.<sup>12</sup>

Or look at changes over time: In 1992, Illinois had 26,000 children in foster care; by 1997, that figure had soared to 50,000. Now, it's actually under 16,000. There is no evidence that actual child abuse in Illinois rose and fell that fast.<sup>13</sup>

Nor is there anything to indicate that child abuse in the District of Columbia increased by 41 percent during the first nine months of 2008 over the same time the previous year – but that's how fast removals increased as a result of the foster-care panic that followed the discovery of the bodies of the children of Banita Jacks.<sup>14</sup>

These data really tell us that child welfare systems are arbitrary, capricious and cruel. Life or death for a family or a child depends on whim, prejudice, which worker comes to the door and what mood she's in.

## II. THE RESEARCH

Imagine for a moment that you went to a doctor and he told you the following:

- 80 percent of my patients don't get any better.
- A lot of the time, they get worse.
- One-third of the time, I commit malpractice.

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12 2008 Annual Social and Economic (ASEC) Supplement, [http://www.census.gov/hhes/www/cpstable/032009/pov/new46\\_100125\\_03.htm](http://www.census.gov/hhes/www/cpstable/032009/pov/new46_100125_03.htm) (last visited Apr. 4, 2010); 2007 Annual Social and Economic (ASEC) Supplement, [http://pubdb3.census.gov/macro/032008/pov/new46\\_100125\\_03.htm](http://pubdb3.census.gov/macro/032008/pov/new46_100125_03.htm) (last visited Apr. 4, 2010); 2006 Annual Social and Economic (ASEC) Supplement, [http://pubdb3.census.gov/macro/032007/pov/new46\\_100125\\_03.htm](http://pubdb3.census.gov/macro/032007/pov/new46_100125_03.htm) (last visited Apr. 4, 2010) (NCCPR compares the propensity of states to take away children by comparing entries into care to a three-year average of a Census Bureau estimate of the number of impoverished children in each state).

U.S. DEP'T OF HEALTH AND HUMAN SERVS., FOSTER CARE FY 2002-FY 2008 ENTRIES, EXITS, AND NUMBERS OF CHILDREN IN CARE ON THE LAST DAY OF EACH FEDERAL FISCAL YEAR, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/statistics/entryexit2008.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/statistics/entryexit2008.htm).

13 ILL. DEP'T. OF CHILDREN AND FAMILY SERVS., CHILDREN IN SUBSTITUTE CARE: 1985 TO PRESENT, <http://www.state.il.us/dcf/foster/index.shtml>; ILL. DEP'T OF CHILDREN AND FAMILY SERVS., DIV. OF QUALITY ASSURANCE, EXECUTIVE STATISTICAL SUMMARY (2010), <http://www.state.il.us/DCFS/docs/execstat.pdf>.

14 Wexler & Fraidin, *supra* note 5, at 14 (data are from the District of Columbia Child And Family Services Agency FACES system).

But, the doctor continues, if you'll just pay me even more money than I already get and build me a fancy new hospital, I'm sure I can reduce my failure rate to only about sixty (60) percent. Do we have a deal?

Odds are you'd look for another doctor.

But what if all the other doctors told you the same thing? And what if none of them let on that there were, in fact, better treatments with fewer side effects?

Odds are you'd be furious.

Now, consider a study of foster care alumni conducted by Casey Family Programs and Harvard Medical School and released in 2005.<sup>15</sup> When compared to adults of the same age and ethnic background who did *not* endure foster care:

- The foster children have double the rate of Post Traumatic Stress Disorder of Gulf War veterans.
- Only twenty (20) percent of the alumni could be said to be "doing well."
- And nearly one-third of the alumni reported that they had been abused by a foster parent or another adult in a foster home.

The authors went on to design a complex mathematical formula to attempt to figure out how much they could improve these outcomes if every single problem besetting the foster care system were magically fixed. Their answer: 22.2 percentage points.

In other words, if tomorrow, foster care were magically made perfect, it would churn out walking wounded only three times out of five, instead of four.

Other studies have produced even more alarming findings:

In 2007 and 2008 for example, came the largest studies of all. An MIT researcher looked at case records for more than fifteen thousand children. He did not look at the extreme cases, the ones where any caseworker *with time enough to investigate* would know that the child should be removed.

Rather he looked at the typical cases – the in-between cases – where there is a real problem but the decision to remove the child or leave her or him in the home could go either way.

The children left in their own homes did not get extraordinary help, only the typical assistance, if any, provided by child protection agencies. Yet once again, on measure after measure, children left in their own homes typically did better than *comparably-maltreated* children placed in foster care.

In fact, it's not even close.

Children left in their own homes are far *less* likely to become pregnant, far *less* likely to wind up in the juvenile justice system, far less likely to commit crimes as

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15 PETER PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY (2005), available at <http://www.casey.org/Resources/Publications/ImprovingFamilyFosterCare.htm>. See also RICHARD WEXLER, 80 PERCENT FAILURE (2008), <http://nccpr.info/80-percent-failure/> (NCCPR's analysis of this study).

young adults and far *more* likely to hold onto a job than comparably-maltreated children placed in foster care.<sup>16</sup>

All of this new research comes on top of the mountain of data concerning how much better children do when their families actually *do* get intensive help, research that has been accumulating for at least 30 years.<sup>17</sup>

But even if one accepts the research for families where parents have done nothing wrong, what about cases where, for example, the parent has a substance abuse problem? Why bother trying to keep such a family together? After all, aren't these the parents who are said to "choose drugs over their children"?

The answer is, you don't do it for the sake of the parents. You do it for the sake of the children.

In a University of Florida study of children born with cocaine in their systems, one group was placed in foster care, another with birth mothers able to care for them. After six months, the babies were tested using all the usual measures of infant development: rolling over, sitting up, reaching out. Consistently, the children placed with their birth mothers did better. For the foster children, the separation from their mothers was more toxic than the cocaine.<sup>18</sup>

Those infants are trying to tell us something, and we owe it to them to listen: It is extremely difficult to take a swing at "bad mothers" without the blow landing on their children. So if we really believe all the rhetoric about the needs of the children coming first, we must put those needs before anything – even our anger at their parents.

That doesn't mean we can simply leave children with addicted parents. But it does mean that in most cases, drug treatment for the mother is a better option than foster care for the child. And that drug treatment works best when it's inpatient treatment in places where parents and their children can live together.

Want to solve your drug and child welfare problems really fast? Take all the group homes, and shelters, and residential treatment centers – and orphanages like, say, St. Ann's Infant and Maternity Home - almost all of which are utterly useless – and convert them into drug treatment campuses.

None of this means that no child ever should be taken from her or his parents. But foster care is an extremely toxic intervention that must be used sparingly and

16 Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effect of Foster Care*, 97 AMER. ECON. REV. 1583 (2007), available at [http://www.mit.edu/~jjdoyle/fostercare\\_aer.pdf](http://www.mit.edu/~jjdoyle/fostercare_aer.pdf); Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116(4) J. OF POL. ECON. 746 (2008). See also RICHARD WEXLER, *THE EVIDENCE IS IN* (2009), <http://nccpr.info/the-evidence-is-in-foster-care-vs-keeping-families-together-the-definitive-studies/> (NCCPR's analysis of these studies).

17 Issue Papers, <http://nccpr.info/issue-papers/> (last visited Apr. 4, 2010) (these data are summarized, with citations, in the Issue Papers).

18 Kathleen Wobie et al., *To Have and To Hold: A Descriptive Study of Custody Status Following Prenatal Exposure to Cocaine*, Paper Presented Before the American Pediatric Society and the Society for Pediatric Research (May 3, 1998) (on file with author).

in very small doses. Everybody pays lip service to that, of course. But for more than 150 years, at least since the very first “orphan train” left New York City, filled with many children who were never orphans at all, America has prescribed mega-doses of foster care.

### III. THE “EVIDENCE BASE”

The buzzword in child welfare these days is “evidence-based.” So let’s imagine, for a moment, what would happen if tomorrow morning we really woke up in an evidence-based world:

? When it comes to foster care, the evidence is in; so there’d be very little of that.

? Almost all the Residential Treatment Centers would be shut down, since two comprehensive reviews of the scholarly literature found little or no evidence that they do anything<sup>19</sup> except scarf up scarce dollars – and even Shay Bilchik, the former head of their own trade association, the Child Welfare League of America, admitted that they lack “good research” showing residential treatment’s effectiveness and “we find it hard to demonstrate success.”<sup>20</sup>

In an evidence-based world, no 21st Century child welfare system would be shoveling children into a 19th Century form of “care” like an orphanage. It is obscene that CFSA continues to use such an orphanage – that all purpose parking place for young children they don’t know what to do with: St. Ann’s.

One hundred years of research is nearly unanimous: Institutionalization itself – even in so-called good institutions — is inherently harmful. It takes three single-spaced pages just to list some of the study citations.<sup>21</sup> It doesn’t matter how pretty the grounds are at places like St. Ann’s, and it doesn’t matter how nice the nuns are.

Indeed, the harm of “congregate care” is so clear, so obvious that the federal government now rates foster care systems in part on how well they do at keeping children under 12 *out* of institutions. The only thing worse than the *status quo* is relying more on group homes, congregate care facilities, residential treatment centers or any other euphemism for orphanages – including so-called emergency shelters for parking children when they first are taken away.

19 Mental Health: A Report of the Surgeon General, <http://www.surgeongeneral.gov/library/mentalhealth/chapter3/sec7.html#tr> (last visited Apr. 4, 2010); RICHARD BARTH, INSTITUTIONS VS. FOSTER CARE: THE EMPIRICAL BASE FOR A CENTURY OF ACTION (2002), <http://ssw.unc.edu/jif/events/Groupcare.pdf>.

20 Shay Bilchik, *Residential Treatment: Finding the Appropriate Level of Care*, RESIDENTIAL GROUP CARE Q., Summer 2005, at 1 (Child Welfare League of Amer., Arlington, Va.), available at <http://www.cwla.org/programs/groupcare/rgcq.htm>.

21 RICHARD A. WAYMAN, CLINICAL STUDIES, SURVEY REVIEW, AND PEDIATRIC RESEARCH ON RISKS AND HARM TO CHILDREN AND YOUTH SUBJECTED TO LARGE RESIDENTIAL INSTITUTIONS in RICHARD WEXLER, HALF WAY HOME (2008), <http://nccpr.org/reports/virginia02132008.pdf>.

(Indeed, it is just one more stroke of bad luck for the District's children that St. Ann's actually is located in Maryland. Were it in the District, it would be covered by the District's new same sex marriage law – and perhaps St. Ann's would have responded to the law as Catholic Charities of Washington did – by getting out of the foster care business.)

Yes, I know all the excuses from the network of powerful private agencies that wants to keep things as they are – what I have come to call the “foster care – industrial complex.” They claim their shelters provide “stability” to they can “assess” the children and find the right placement.

Decorum dictates that I not use precisely the right word for these claims – I'll have to settle for this one: Nonsense. A comprehensive study of parking place shelters in Connecticut – model state-of-the-art facilities - found that children funneled through them did no better than children who went straight into foster homes; in fact they often did worse. The only thing the institutions succeeded at doing was wasting money.<sup>22</sup>

As for stability – it's the *people* in a child's life who make it stable, not the bricks and mortar. If “house parents” change every year or two, or worse, the child has to deal with shift staff changing every eight hours, that's just as bad or worse than a succession of foster homes.

Yet even as CFSA directors come and go, St. Ann's remains open, apparently immune from serious scrutiny.

But here's the biggest indicator that places like St. Ann's aren't about children at all, they're about adult self-indulgence: Everyone knows that the hardest children to find homes for are teenagers. They're also the ones likely to be damaged least by institutionalization - though make no mistake, it damages all young people.

Yet most parking place shelters, including St. Ann's will take only children age 12 and under.

Why might that be? Because a teenager who's been through removal from his or her home is as likely to spit in your face as to throw his arms around you. So places like St. Ann's only take children while they're still cute and easy to manage.

That means the real purpose of such places is to turn flesh-and-blood human beings into human teddy bears, who exist for the gratification of the adult staff and the adult volunteers.

And then there is the argument of last resort – literally - from the foster care-industrial complex: In this one, they tell us that they really, truly wish institutions didn't have to exist, but they're the last resort. They claim that they take children

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22 Allen D. DeSena et al., *SAFE Homes: Is it worth the cost?*, 29 CHILD ABUSE AND NEGLECT 627-43 (2005). See also Colin Poitras, *Special Homes Trouble State*, HARTFORD COURANT, July 23, 2006.

who are so very, very difficult that they can't handle a family environment. Or to use the agencies' own, unintentionally-revealing slang, the children "blow out of foster homes."

The sheer cynicism of that argument is mind-boggling. Because at least some of the providers have to know that, in almost every case, this happens only because the foster families didn't get the help they needed to care for the children.

When you provide services like Wraparound, children don't fail in foster homes. Wraparound is more effective and less expensive than institutionalization. So why is there so little of it?

Because the very institutions that claim to be the only alternative are swallowing up all the money that could be used to fund Wraparound and other *better* alternatives.

As I said, the evidence for all this is overwhelming. But, unfortunately, what "evidence-based" really means is that if you want to do anything new and innovative that would really help families you'd better be able to dot every i and cross every t on a whole lot of research. If you're just doing the same thing child welfare has been doing for a hundred years, tearing apart families and throwing children into foster homes and institutions, no evidence is required.

But while they don't have evidence, the foster care-industrial complex does have some great applause lines: We're "child focused" they claim. We're standing up for "children's rights." And over and over again they tell us that we have to "err on the side of the child."

I doubt that there is another phrase in the child welfare lexicon that has done more harm to more children than "err on the side of the child."

- It shows no understanding of the harm of removal, when a child who could safely remain in his or her own home is taken from everyone loving and familiar; not just mom and dad but often brothers, sisters, grandparents, aunts, uncles, teachers, friends, and classmates. For a young child, it can be an experience akin to a kidnapping.

And it is even worse when the removal takes place in the context of the latest fad in child removal: tearing apart families because the child "witnessed domestic violence."

In other words, dad beats up mom in front of the kids. An agency like CFSA concludes that mom is a bad mother because she "allowed" herself to be beaten in front of the child.

It took a class-action lawsuit (*Nicholson v. Scoppetta*) to curb this pernicious practice in New York City. My organization's Vice President was co-counsel for the plaintiffs. During the trial one expert after another testified that while witnessing domestic violence may harm a child, taking that child from the non-of-

fending parent is far worse. One expert said that for the child it's like "pouring salt into an open wound."<sup>23</sup>

Sadly, in much of the country child welfare agency policy on this issue can be boiled down to: Please pass the salt.

? All this is true even when the foster home is a good one. The majority are.

But there is far more abuse in foster care than in the general population and far more than generally realized.

The "official" numbers on this are garbage. That's because official numbers involve agencies investigating themselves. That's why academic research consistently produces much higher figures.<sup>24</sup>

And the tragic paradox of foster care is: The more you use it, the worse it gets. Because the more you overload the system, the greater the likelihood that agencies will overcrowd foster homes, lower standards for foster parents and lack the time even to visit the foster children.

If a child is taken from a safe home, only to be beaten, raped or killed in foster care, how is that "erring on the side of the child"? Do we feel better because such children may die with their – children's rights – on?

As I said earlier, orphanages are even worse.

? But even all this isn't the worst of it. Workers' time is not limitless. We all know how overwhelmed they are. While workers are interrogating families over poverty, something else isn't getting done. A visit by a caseworker to check out a hotline call is delayed, or it doesn't happen at all. The extra phone call isn't made. A child in foster care is not seen. *So a child in real danger is missed.*

The take-the-child-and-run approach makes *all* children less safe. That is the real reason for the horror stories that regularly make headlines. And that is, in fact, what we've seen play out in Washington.

Sadly, politicians rarely acquit themselves well in the wake of high-profile child abuse tragedies. But if there ever has been a worse performance than the one turned in by Mayor Adrian Fenty after the bodies of the children of Banita Jacks were discovered in January, 2008, I haven't found it.

At the end of 2007, CFSA was continuing a process of painfully slow improvement. It was too little and it was too slow. But no one doubted that the agency finally was moving in the right direction. Yet the improvement was fragile, rather like a house of cards.

There also were warnings of serious problems unresolved and worse to come. Those warnings were sounded over and over again by the independent monitor overseeing the *LaShawn A. v. Fenty* consent decree.<sup>25</sup>

23 *Nicholson v. Williams*, 203 F. SUPP. 2D 153 (E.D. N.Y. 2002).

24 NCCPR Issue Paper #1, <http://nccpr.info/issue-papers/> (last visited Apr. 4, 2010).

25 See CTR. FOR THE STUDY OF SOCIAL POLICY, AN ASSESSMENT OF THE QUALITY OF CHILD ABUSE AND NEGLECT INVESTIGATIVE PRACTICES IN THE DISTRICT OF COLUMBIA (2007), [http://www.cssp.org/major\\_initiatives/litigation\\_details.html#dc](http://www.cssp.org/major_initiatives/litigation_details.html#dc) (report is fifth publication listed).

Mayor Fenty ignored those warnings. And then, when the Jacks case made headlines, he put grandstanding ahead of the lives and futures of vulnerable children – he knocked down that house of cards – plunging the agency back into chaos.

Now, the mayor has the gall to suggest we all should praise him to the skies for supposedly undoing the damage he did in the first place.

And don't let anyone tell you CFSA is doing a poor job because the money isn't available. The data are imprecise, and they go back to 2006, but CFSA is rolling in dough. Compare child welfare spending to the number of impoverished children in the 50 states and D.C. and D.C. spends more than anyplace else except Vermont.<sup>26</sup>

I'm a tax-and-spend liberal and proud of it. I believe firmly in throwing money at problems. But it is absurd to suggest that DC needs to spend more on child welfare. What DC needs to do is spend *smarter* on child welfare.

#### IV. THE FAILURE OF ASFA

For well over a decade, the foster care-industrial complex has waged a war against safe, proven programs to keep families together.

The entire assault on family preservation is built on a foundation of myth. Unfortunately, there's nothing so powerful as a pernicious myth whose time has come.

The myths about family preservation led to the so-called Adoption and Safe Families Act of 1997.

Proponents of ASFA hijacked the pain and suffering of children like the foster child I described at the beginning of this talk and used it to support legislation that worsens that pain and suffering.

You can't "recruit" your way out of the foster care crisis. Another "recruiting campaign" isn't going to get you nearly enough foster parents if you keep taking away so many children needlessly.

And you can't adopt your way out.

Yes, adoptions are up a lot – in percentage terms. But in raw numbers, the average annual increase has been tiny. And for the most recent seven years, there has been virtually no increase at all. Meanwhile, ASFA reinforces the take-the-child-and-run message, encouraging agencies to tear more and more children from their families. So it's hardly surprising that it wasn't until a decade after

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26 KERRY DEVOOGHT ET AL., FEDERAL, STATE AND LOCAL SPENDING TO ADDRESS CHILD ABUSE AND NEGLECT IN FY 2006 (2008), [http://www.childtrends.org/Files/Child\\_Trends-2009\\_02\\_17\\_FR\\_CWFinancePaper.pdf](http://www.childtrends.org/Files/Child_Trends-2009_02_17_FR_CWFinancePaper.pdf) (NCCPR divided the figures by a census bureau estimate of the number of impoverished children in each jurisdiction).

ASFA that the number of children in foster care on any given day finally showed signs of significant decline.<sup>27</sup>

When ASFA was pending, my organization predicted that terminations of parental rights would increase far faster than adoptions creating a generation of legal orphans, with no ties at all to their birth parents, and little hope of adoption either. Sadly, that's exactly what has happened. Since 1998, the number of children aging out of foster care each year with no permanent home has soared by 41 percent.<sup>28</sup>

What ASFA really has done is encourage the system's worst instincts. It has encouraged agencies to turn their foster care systems into the ultimate middle class entitlement: Step right up and take a poor person's child for your very own.

### V. YOU'RE ONLY DAMNED IF YOU DON'T

As I said at the outset, I don't believe that caseworkers are jack-booted thugs who relish taking away children.

But there are two points at which the comments one often hears from caseworkers – and their bosses – are disingenuous.

The first is when workers claim they are “damned if we do and damned if we don't.”

In more than 30 years of following child welfare, I have never seen a caseworker fired, demoted, suspended, reprimanded or so much as slapped on the wrist for taking away too many children.

All of these things have happened to workers who left even one child in her or his own home and had something go wrong.

When it comes to taking away children workers are *not* damned if they do and damned if they don't – they're *only* damned if they *don't*.

The second disingenuous comment comes when they are caught taking a child who never should have been torn from his or her loving parents but they say: It's not us, we can't take a child unless a judge approves.

In fact, in every jurisdiction, workers can take away a child entirely on their own authority. Either they literally do it themselves or they can call law enforcement to do it for them.

And when a judge does enter the picture a few days later – and that's an eternity for a very young child – then what?

On one side is a lawyer for the government who's had at least 72 hours to review the case and prepare the petition. On the other side is an overwhelmed,

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27 U.S. DEP'T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, [http://www.acf.hhs.gov/programs/cb/stats\\_research/afcars/trends.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm) (last visited Apr. 4, 2010) (data for 2002 through 2008 are available on the website; as newer data are posted, older data are removed; NCCPR has the data for previous years).

28 MADELYN FREUNDLICH, TIME FOR REFORM: AGING OUT AND ON THEIR OWN 1 (2002), <http://www.kidsarewaiting.org/tools/reports/files/0006.pdf>.

impoverished, birth parent who, if she has a lawyer at all, met him in the hallway five minutes before.

Presiding is a judge who knows full well that he can hold hundreds of children needlessly in foster care and while the children may suffer terribly, the judge is safe. Let one child return to a dangerous home and have something go wrong, and the judge's career may well be over.

Case in point: Former D.C. Judge Evelyn Queen, who was effectively driven out of office because she agreed to return Brianna Blackmond to the home where the little girl was killed.

When Queen tried to return to the bench on a part-time basis, *The Washington Post* claimed in an editorial that the Blackmond case wasn't the only reason she was barred from returning. Rather, it was alleged, she had a long, undistinguished record.<sup>29</sup>

I have no idea if that's true or not; I make no judgment on Judge Queen. But if the *Post* is right, that only proves the point. None of those other allegedly bad decisions got the judge in any trouble. It was only the Blackmond decision that ended her career.

So it's no wonder that, when it comes to child abuse cases, judges are far more likely to wield rubber stamps than gavels.

## VI. SOLUTIONS

The only way to fix foster care is to have less of it. That must begin with meaningful due process for families. And due process begins with opening the D.C. Family Court to meaningful public scrutiny.

It's been said that justice must be seen to be done. By that standard, there is no justice in D.C. Family Court or most others.

But since 1980 roughly 15 states have opened their family courts to press and public, two more to reporters only. Even Britain, long known for the restrictions it puts on press coverage of trials, now allows more press access to family court than most U.S. states.<sup>30</sup>

Not one of the states that has opened its family courts has closed them again. That's because the Chicken Littles were wrong: None of the terrible things that supposedly would happen to children if courts were opened actually happened. And over and over again across the country, one-time opponents of open courts became converts. Details are in NCCPR's *Due Process Agenda*. The agenda is available online at [www.nccpr.org/reports/dueprocess.pdf](http://www.nccpr.org/reports/dueprocess.pdf).

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<sup>29</sup> *Stern Judgment on Judge Queen*, WASH. POST, July 25, 2002.

<sup>30</sup> Cassandra Jardine, *Family Courts Prepare to Open Their Doors*, DAILY TELEGRAPH (London), Nov. 17, 2009.

While opening family courts has not transformed them, it has led to modest systemic improvements in some communities and significant improvements in some individual cases.

And that's not surprising. All of us do better when we know someone may be looking over our shoulders, holding us accountable. So while I cannot guarantee that if D.C. Family Court were opened no child ever would be embarrassed; odds are, if the courts were opened, more children would live long enough to blush.

The former chief judge of New York's highest court, the Court of Appeals said it best. Said Judge Judith Kaye: "Sunshine is good for children."

The next vital step is provision of meaningful defense counsel for families. That means lawyers with reasonable caseloads and their own support staff of social work professionals.

They've been doing that for some time now in many counties in the other Washington - Washington State. The program is so successful that even the lawyers who represent the state child welfare agency in these cases support it. They found that when parents were innocent, there was no reason to tear apart their families; and when the reasons for removal were legitimate, competent lawyers with low caseloads could show parents exactly what they needed to do to get their children back - and make sure the parents got the help to do it.<sup>31</sup>

New York City has let contracts to provide similar representation for half of all indigent parents. The city is doing this with the full support of its child welfare agency, the Administration for Children's Services. This is because ACS recognizes that it is not infallible, and recognizes the role lawyers for birth parents can play in fighting for help for families.

It's also probably because, while at the Annie E. Casey Foundation, before becoming ACS Commissioner, John Mattingly co-authored a scathing report on how the city's Family Courts ran roughshod over families. The report quoted judges admitting they routinely rubber-stamped removals even when they thought ACS failed to make its case, because they were afraid of winding up on the front page if they sent a child home and something went wrong.<sup>32</sup>

Other recommendations are in our *Due Process Agenda*.

There also are ways to improve the system through better services. Here is some of what works:

- Hard services work. If the problem is lack of supervision, provide day care. If the problem is lack of housing, provide better housing.

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31 Heath Foster, *Relying on Good Advice Can Reunite Troubled Families*, SEATTLE POST-INTELLIGENCER, Feb. 12, 2003, at B1.

32 SPECIAL CHILD WELFARE ADVISORY PANEL FOR N.Y. CITY, ADVISORY REPORT ON FRONTLINE PRACTICE 48 (2000), <http://aacf.org/child/frontline.pdf>.

- Intensive Family Preservation Services works, provided you don't dilute the service model.<sup>33</sup>

- Family to Family works. This initiative of the Annie E. Casey Foundation, an organization which also has helped to fund NCCPR, has been evaluated by a team from the University of North Carolina. They found that, where Family to Family was implemented, fewer children were taken away, placements were shorter, and there was less bouncing of children from foster home to foster home. Most important: All this positive change was done while making children safer.<sup>34</sup>

Perhaps most instructive are the large-scale, real world changes. I've already mentioned Alabama and Illinois – which I will return to in a moment. Other places well worth looking at are the county-run systems in Allegheny County, Pennsylvania and El Paso County Colorado, and the state-run system in Maine. And Florida, which only a few years ago was the national model for child welfare failure, has made significant improvements in recent years.

But the biggest change you can make for children is not a new program at all: You can change an enormous amount if you adopt the principle that you get what you pay for.

There are two sets of financial incentives. One is the appalling incentives created by the federal government, which rewards states for using foster care and punishes them for using alternatives. The federal government spends more than ten times more on foster care and adoption than on programs to keep families safety together.<sup>35</sup>

But there also is a second set of incentives.

In every community some foster care placements are handled by private agencies – that foster-care industrial complex I keep mentioning. Those agencies are told that their first job is permanence. But the agencies don't get paid for that. Instead, they're paid for each day they allow a child to remain stuck in foster care.

As a result, you wind up with the biggest addiction problem in child welfare. No, I don't mean substance-abusing parents, though that problem is serious and real. I mean mainstream, old-line, child welfare agencies, like the one I cited at the very beginning of this presentation, with their blue-chip boards of directors embedded in the community.

These agencies are *addicted* to their *per diem* payments. And they are putting their addiction ahead of the children.

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33 NCCPR Issue Paper 11, <http://www.nccpr.org/newissues/11.html> (last visited Apr. 4, 2010) (for citations for some of the many studies showing the efficacy of this intervention).

34 C. USHER ET AL., EVALUATION OF FAMILY TO FAMILY (1998), <http://www.unc.edu/~lynnu/f2feval.htm>.

35 See RICHARD WEXLER, YOU GET WHAT YOU PAY FOR, <http://www.nccpr.org/reports/finance.pdf>.

Of course, these agencies piously proclaim that they don't even think about this. That's understandable. We all know that addicts sometimes are – in denial. So they tell us that every placement is essential, and, don't you see, these cases are oh, so complex and the children have to be with us for such a long, long time.

And then came the foster care crisis in Illinois.

Earlier, I mentioned the rise and fall of the Illinois foster care population. Let's take a closer look. In 1993, Illinois experienced a foster care panic like the one in D.C. IN 2008. By 1997, Illinois held the dubious distinction of holding more children in foster care, relative to its child population, than any other state – 50,000 in all.

And that's when the Illinois Branch of the ACLU was able to persuade the state to start paying the private agencies for permanence.

Now, agencies are rewarded for adoptions. They're also rewarded for returning children to birth parents. And far fewer children are taken away in the first place.

When the financial incentives changed, lo' and behold: The intractable became tractable, the dysfunctional became functional, the foster care population plummeted - and again, child safety improved.

Change the financial incentives, and the agencies themselves will find all sorts of ways to do better.

CFSA is supposed to do just that. The *LaShawn* consent decree requires CFSA to institute performance-based contracting. Perhaps someday they'll get around to it.

### CONCLUSION

But things have not always gone so well in Illinois.

Over the years I've often read news stories in which someone says, often gleefully, that, thanks to ASFA, parents have only a certain amount of time to – “clean up their acts.”

Whenever I read that phrase, I think of a man I wrote about in *Wounded Innocents*. His name was James Norman.

Norman was a steelworker in suburban Chicago

He had to give up full time work to care for his wife when she became ill.

After she died he developed a heart condition. Eventually he fell behind on the bills and the electricity to his apartment was cut off. Then, the helping hand of child protective services struck.

A caseworker found a messy home with food spoiling in the refrigerator because there was no electricity. So she took the children the spot – and charged James Norman with “financial neglect.”

The foster home was ten miles and three bus rides away. Norman walked a mile at each end of the trip to visit his children.

The people at the child welfare agency could have provided James Norman with homemaking help, but they did not. They could have provided emergency cash so he could get the power turned back on, but they did not. They could have helped him find a job, but they did not. At least they could have provided transportation to help him visit his children. But they wouldn't do that either.

In effect, the agency told James Norman to drop dead. And 12 days before a hearing at which he might have gotten his children back, he obliged child protective services and did just that.

James Norman died at the age of 38. He had always had a weak heart, but it took child protective services to break it – and to make orphans of the Norman children.

James Norman left a noble legacy. He was the lead plaintiff in a class-action lawsuit that led to a ruling that Illinois routinely broke up families because they were poor.<sup>36</sup> A settlement calls for providing a series of services, including emergency cash, called “Norman money.”

But whenever I read about the supposed need for parents to “clean up their acts” I wonder: What was it, exactly, about James Norman’s “act” that needed to be cleansed?

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<sup>36</sup> Norman v. McDonald, 739 F. Supp. 1182 (N.D. Ill. 1990), *abrogated by* Suter v. Artist M., 503 U.S. 347 (1992); Norman v. McDonald, 930 F. Supp. 1219 (N.D. Ill. 1996).