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Clare Huntington

Fordham University School of Law, chuntington@law.fordham.edu

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THE CHILD-WELFARE SYSTEM AND THE LIMITS OF DETERMINACY

CLARE HUNTINGTON*

I

INTRODUCTION

To read Robert Mnookin's seminal 1975 article, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*,¹ is to see a blueprint for legislative action. To a remarkable degree, the reforms Mnookin proposed to the child-welfare system are what Congress and the states adopted in the following two decades. And yet reading Mnookin's article is also a *Groundhog Day* experience. The problems he described with the child-welfare system nearly forty years ago sound all too familiar today.²

Mnookin famously argued that the best-interests standard was indeterminate in the context of the child-welfare system.³ According to Mnookin, this open-ended standard created several notable failings: It could not identify families truly in need of intervention, it took little account of the dangers inherent in foster-care placement, and it did not move children through the system expeditiously.⁴ As a result, too many children were removed from their homes unnecessarily and then left to languish in the limbo of foster care.⁵ To address these problems, Mnookin proposed a more determinate standard to replace the best-interests test. To limit removals to cases where foster-care placement was truly needed, he proposed that states remove a child only where her physical health was in immediate danger and there were no reasonable means available for protecting the child within the family.⁶ And, to move children more quickly through the system, he proposed a time limit on efforts to reunify the family.⁷

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This article is also available at <http://lcp.law.duke.edu/>.

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1. 39 LAW & CONTEMP. PROBS. 226 (Summer 1975).

2. GROUNDHOG DAY (Columbia Pictures 1993).

3. Mnookin, *supra* note 1, at 229.

4. *See id.* at 268–77.

5. Throughout this article, I use the term “removal” in its general sense to mean the decision to take a child from her home and place her in an alternative setting. I do not differentiate among the various procedural postures for removing a child. For a description of such various procedural postures, see Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 457–58 (2003). Chill notes, however, that most children are removed on an emergency basis. *Id.* at 458.

6. *See infra* text accompanying note 32.

7. *See infra* Part II.A.

In the 1980s and 1990s, Congress undertook serious and sustained reforms to the legal standards governing the child-welfare system, largely moving in the direction Mnookin advocated. In one reform, Congress tried to stem the tide of foster-care placement by requiring states to provide family-preservation services, intended to keep children in their original homes.⁸ Although this requirement fell short of Mnookin's determinate standard for removals, it was in the same spirit of preventing foster-care placement by treating families with children still at home. In a later reform, Congress more fully embraced an aspect of Mnookin's determinate standard, requiring states to adopt a time limit on family-reunification efforts.⁹

Despite these considerable changes to the standards governing child welfare, the reforms have had mixed success in changing actual practice on the ground. Determinacy on the front end—accurately identifying which children should be removed from their homes—remains challenging, and efforts to focus on family preservation have had a very modest impact on keeping children at home. We have not fully invested in these programs and doing so is difficult in the face of continued resistance to family-preservation efforts. But even with additional funding, it is not clear these programs can effectively prevent foster-care placement.

By contrast, determinacy on the back end—moving more children out of foster care—is easier to achieve. The time limit on reunification efforts has had the intended effect of shortening stays in foster care. This determinacy, however, has come at a real cost. Fewer children are returning home, and one reason children are moving more quickly out of foster care is because they are going to adoptive homes and guardianships.¹⁰ Whether this trade-off is an improvement over the old system, where children spent more time in foster care but were also more likely to return home, is a matter of considerable controversy. But it is clear that a more expeditious timeline puts considerable pressure on parents to make the required changes in time to regain custody. Mnookin predicted this problem but believed that a determinate standard would, ultimately, create a fairer system that benefitted children.¹¹ The darker side of time limits is that more children are now emancipated from foster care, neither returning home nor finding a permanent home with an adoptive family or a guardian.

With the evidence on the results of determinacy now in hand, it is time to reflect on the possibilities and limits of the child-welfare system.¹² Well-intentioned reforms of the legal standards that govern the child-welfare system have done little to address the larger problems that underlie child abuse and neglect—particularly poverty, social isolation, substance abuse, and parental

8. See *infra* text accompanying note 50.

9. See *infra* text accompanying notes 60–63.

10. See *infra* Part III.B.2.

11. Mnookin, *supra* note 1, at 293.

12. See *infra* Part IV.

stress. By the time a family is ensnared in the system, it is often too late for even the most carefully calibrated legal standard to address the crisis that led the state to intervene. The emphasis on family preservation has not created a system that effectively addresses underlying problems, and indeed any efforts that come this late face considerable hurdles. The time limits help move children to permanency, but at a substantial cost.

What the child-welfare system needs is a fundamental reorientation toward prevention. Broad-based “family support” programs funded through the child-welfare system offer a promising model, and it is here that we should place our real efforts. And for those children who are removed from their homes—there will always be some—the child-welfare system should develop more realistic goals for them and their families. In short, rather than tinkering with the machinery of the child-welfare system,¹³ we should work to build a different machine.

II

A SEA CHANGE IN DETERMINACY

A. Mnookin’s Critique

In *Child-Custody Adjudication*, Mnookin compared litigation in two contexts: the child-welfare system and private disputes between parents. He argued that in both situations the best-interests standard was indeterminate because decisionmakers cannot make accurate predictions about what is best for any particular child,¹⁴ and, even if they could, there is no societal consensus about what *is* best for children.¹⁵ In the child-welfare system, Mnookin contended that this indeterminacy had two significant ramifications.

First, the indeterminate best-interests standard did not consistently identify which cases required foster-care placement. As Mnookin explained, in cases where the court found that a child has been subject to, or is at risk for, maltreatment, the question for the court was whether to remove the child or keep her at home.¹⁶ At the time Mnookin was writing, most states used the best-interests standard to make this decision or, in an even more profoundly indeterminate manner, simply left the issue to the discretion of the judge.¹⁷

Mnookin argued that rather than enforcing minimum standards of acceptable parenting, the best-interests standard invited state actors to look

13. *Cf.* *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) (“From this day forward, I no longer shall tinker with the machinery of death.”).

14. Mnookin, *supra* note 1, at 249–60.

15. *Id.* at 260–61. As Mnookin stated, “Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself.” *Id.* at 260.

16. *See id.* at 243 & n.80 (describing how the “jurisdictional” phase of a child-welfare case, when the court determined maltreatment, posed no real hurdle to state involvement, and that the main issue was in the “dispositional” phase, when the court decided what to do with the family).

17. *See id.* at 243 n.81 (citing each state’s standard at the time).

broadly into a family's life,¹⁸ allowing a judge to use her personal values when reviewing a case and opening the door to class bias.¹⁹ Further, Mnookin believed the indeterminate standard was biased in favor of removal because a court weighed the known dangers of the family against the unknown and arguably unappreciated dangers of foster care.²⁰ Finally, the best-interests standard did not require a decisionmaker to determine whether the child could be protected through preventive services to the family rather than removal to foster care.²¹ In all these ways, Mnookin contended that the standard did not accurately identify those children truly in need of foster-care placement.

Second, Mnookin argued that by consigning children to foster care, which has numerous risks, the standard did not speed children toward a permanent home, either back with their families or in a new adoptive family.²² Instead, children moved from one foster-care placement to another, remaining in foster care for years.²³ Mnookin believed that the indeterminate standard was part of the problem because the standard did not require state actors to evaluate whether a foster-care placement was serving an individual child's interests.²⁴ Decisionmakers could simply cite broad reasons for their decisions, which often were not grounded in a particularized determination of a child's situation.²⁵

As part of his research, Mnookin sent observers to the annual reviews required under California state law.²⁶ Two-thirds of the hearings lasted for two minutes or less, and only six percent lasted longer than ten minutes.²⁷ Additionally, written reports submitted by social workers were simply a recital of what had happened since the last review and did not include a detailed action plan for the child.²⁸ Mnookin was most struck by the failure of the reviews to push the case in a particular direction, either returning the child home or moving toward adoption. In most cases, the court simply decided to continue

18. *Id.* at 268–69.

19. *Id.* at 269–70. Mnookin reviewed cases where this had occurred. *Id.* at 269 n.194.

20. *Id.* at 270. Mnookin identified three ways foster care could psychologically damage a child: the removal itself, the placement in a home where the child's status was uncertain and unfamiliar, and the high turnover of social workers and judges in the case. *Id.* at 270–71. Mnookin also noted that there were methodological difficulties with gauging whether foster care harms or benefits children in general, and also that there was no reliable way for a judge to make this determination with respect to any given child. *Id.* at 271–72.

21. *See id.* at 272. As Mnookin described, many families could be well served with targeted support that addressed the problems in the family, but the state is not required to provide these services, and in many instances there is no attempt by the state to help keep families together. *Id.*

22. *Id.* at 273.

23. *Id.*

24. *Id.*

25. *Id.* at 273–74.

26. *Id.* at 274 (describing the annual reviews for each child in foster care, which were intended to look back at what had happened to the child during the year and look forward to the plans that were being made for the future). The study involved an observation of every annual review in one county during a one-month period, a total of 177 cases. *Id.*

27. *Id.*

28. *See id.* Few parents and even fewer foster parents attended the proceedings. *Id.*

care.²⁹

Unlike private-custody disputes, where Mnookin concluded that there was no opportunity for meaningful reform,³⁰ it was possible to address some of the problems in the child-welfare system, Mnookin believed, by reforming the best-interests standard. His two-part reform was intended to limit the number of children entering foster care and to move those children who did enter the system more quickly, either back to their biological families or into adoptive homes.³¹

To limit the number of children entering foster care and ensure greater consistency, Mnookin proposed to cabin judicial discretion by making the standard both more objective and more determinate. He argued for a clearer formulation of the removal standard:

A state may remove a child from parental custody without parental consent only if the state first proves: (a) there is an immediate and substantial danger to the child's health; and (b) there are no reasonable means acceptable to the parents by which the state can protect the child's health without removing the child from parental custody.³²

Mnookin believed that this reform would lead to far fewer removals because differences in values, for example those that might be based on parents' unusual sexual practices, would not enter the decisional framework,³³ and the provision of services, such as housecleaning for the dirty-home cases,³⁴ would enable children to remain in their homes.³⁵ The focus on threats to health would also narrow the scope of removal cases to those where intervention was most likely

29. *Id.* at 275. Mnookin also described the problems with the adoption system. He studied the adoption process in California and concluded that social workers were reluctant to push for adoption and, instead, pursued adoption only where biological parents were largely out of the picture and thus would not contest the adoption. *Id.* at 275–76. Additionally, when adoption was pursued, it was usually not the product of a push by social workers; rather, it was usually the result of external pressure, such as the request by a foster family to adopt the child. *Id.* at 276. Mnookin concluded that the reticence to pursue adoptions was due largely to social workers' preference for the status quo. *Id.*

More broadly, Mnookin argued that protecting children raises a series of difficult public-policy questions, such as determining when the state should try to encourage the formation of new psychological ties for a child rather than seek to return the child home, when the state should consider termination of parental rights and adoption, and who should make these decisions and using what criteria. *Id.* at 280. Mnookin believed that a flexible, discretionary, and indeterminate standard, such as the best-interests test, did not force courts or the child-welfare bureaucracy to answer these questions systematically. *Id.*

30. *See id.* at 282.

31. *See id.* at 277–81.

32. *Id.* at 278.

33. *See id.*

34. JANE WALDFOGEL, *THE FUTURE OF CHILD PROTECTION* 125 (1998) (describing the different kinds of cases in the child-welfare system and noting that approximately fifty percent of cases involve poverty-related neglect, such as inadequate child care or dirty homes).

35. Mnookin, *supra* note 1, at 278. Mnookin acknowledged that his standard did not clarify how far a state must go to try to keep a child in her home. By asking the state to deploy "reasonable" means to keep the child at home, for example, the standard necessarily allows the court to consider the cost of the efforts required. *Id.* at 279. Mnookin was clear, however, that one goal of the standard was to encourage states to invest more money in efforts to keep children safe in their own homes. *Id.* at 279 n.224.

to protect the child.³⁶ He acknowledged that trial judges would still have considerable discretion to determine when a danger was “immediate and substantial,” but at least the standard would lead to fewer cases of removal.³⁷

To move children more quickly through the foster-care system after removal, Mnookin sought a standard that would maximize continuity and stability for the child. He thus proposed a fixed period of time for returning a child home from foster care.³⁸ During this time, the state would make “reasonable efforts” to work with the parents and create a safe environment for the return of the child.³⁹ If, at the end of that period, the child could not safely return home, the presumption would shift from reuniting a child with her biological family to finding an adoptive home or another long-term, stable placement.⁴⁰ The length of time might depend on the kinds of issues facing the family, but the period would be determined at the outset, when the child was removed from the home, and would be set using criteria that could be consistently and fairly employed in other cases.⁴¹ Further, at the time of removal, the state would need to detail for the court the kinds of services it would offer to the parents to address the problems that led to the removal.⁴² Periodic reviews would ensure the state was doing what it could to help parents, and, importantly, place the burden on the state to show why the child could not safely return home.⁴³ Mnookin acknowledged the problems with a fixed period—it might end too soon from the perspective of some parents, or too late from the perspective of some children—but argued it would be preferable to the indeterminate best-interests standard, which permitted repeated extensions even when a child was unlikely ever to return home.⁴⁴

B. Congressional Responses to Indeterminacy

These criticisms by Mnookin and others were highly influential, contributing to an overhaul of the child-welfare system in 1980.⁴⁵ In the Adoption Assistance

36. *Id.* at 278. Mnookin distinguished physical dangers to a child—which, he argued, would likely be addressed by placement in foster care—from emotional dangers. It is more difficult to predict when a child is emotionally endangered and there is no evidence that foster care would be an improvement over a home situation. For this reason, he thought dangers to a child’s “health” should be limited to physical dangers. *Id.* at 279–80.

37. *Id.* at 278.

38. *Id.* at 280.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 280–81.

44. *Id.* at 280, 292–93.

45. For a summary of this history, see MARTIN GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS 187–88 (2005) [hereinafter GUGGENHEIM, WHAT’S WRONG WITH CHILDREN’S RIGHTS] (describing the widespread discontent with the foster-care system and particularly the perception that too many children were removed from their homes and were staying in foster care too long). See also Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem that Too Many Children Are Not Being Adopted Out of Foster Care or that Too Many*

and Child Welfare Act of 1980 (AACWA),⁴⁶ Congress took several steps, many of which reflected Mnookin's critique of the system. In a sea change from prior policy, which emphasized removal and extended foster-care stays, two stated goals of AACWA were avoiding removal by keeping children safe in their homes⁴⁷ and returning children to their families from foster care.⁴⁸

AACWA did not adopt Mnookin's more determinate standard that no child should be removed if there are reasonable means to keep the child safely at home, but Congress did take a step in that direction. AACWA required states, as a condition of receiving federal child-welfare funds, to allow the removal of children only where "the removal from the home was the result of a judicial determination . . . that continuation therein would be contrary to the welfare of such child and . . . that reasonable efforts" to keep the child in the home had been made.⁴⁹ AACWA's standard thus only required the provision of services, and indeterminate language—"contrary to the welfare of the child"—remained at the heart of the inquiry. Even so, the new standard did emphasize the importance of family-preservation efforts.

Crucially, AACWA changed the funding structure for foster care. Rather than reimbursing states only for the cost of foster care, which created an incentive for removal, AACWA authorized funds for "preservation services," intended to prevent the removal of children, and "reunification services," intended to speed the return of children back to their homes.⁵⁰ (Subsequent legislation, the Family Preservation and Family Support Act of 1993, authorized additional funding for these services as well as broader "family support" efforts, which are intended to keep families out of the child welfare system entirely.⁵¹) Other aspects of AACWA were consistent with Mnookin's recommendations as well, such as the requirement that states develop a system for tracking children and reviewing their placement goals.⁵²

Children Are Entering Foster Care?, 2 J. CONST. L. 141, 141 (1999) (describing the Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.), as a response to the critique of the foster-care system by Mnookin and others).

46. Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

47. 42 U.S.C. § 625(a)(1)(C) (2000) ("preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible").

48. *Id.* § 625(a)(1)(D) ("restoring to their families children who have been removed, by the provision of services to the child and the families").

49. *Id.* § 672(a)(1); *see also id.* § 671(a)(15) (requiring states, as a condition of receiving funding, to ensure that in each case, "reasonable efforts shall be made to preserve and unify families—(i) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home; and (ii) to make it possible for the child to return to his home").

50. *Id.* at §§ 670–676.

51. Pub. L. No. 103-66, § 13711, 107 Stat. 649, 649 (codified at 42 U.S.C. § 629 (1994)),

52. *See* 42 U.S.C. § 671(a)(16) (2000) (requiring states, as a condition of receiving funding, to "provide[] for the development of a case plan . . . for each child receiving foster care maintenance payments under the State plan and provide[] for a case review system . . . with respect to each such child"); *see also id.* § 675(5)(C) (1994) (requiring reviews by an administrative or judicial body "no later than eighteen months after the original placement (and periodically thereafter during the continuation

The promises of AACWA, however, never materialized. Instead, the foster-care population soared through the 1980s and 1990s, with more children entering foster care, staying longer, and experiencing multiple placements.⁵³ There are numerous explanations for these trends, including the increasing use of crack cocaine in low-income neighborhoods and the failure of Congress to authorize, and states to provide, sufficient funds for preservation and reunification services, despite changes to the funding structure of foster care intended to promote alternatives to removal.⁵⁴ Indeed, studies from the late 1980s found that states often did not in fact provide preservation services,⁵⁵ and that courts either ignored this requirement or simply rubber-stamped the state's assertion that it had provided services.⁵⁶

The increases in placement and the extended stays in foster care set the stage for the next major wave of foster-care reform. In 1997, Congress enacted the Adoption and Safe Families Act (ASFA),⁵⁷ which dramatically altered the child-welfare landscape. Both Congress and the Clinton administration had found that the child-welfare system was not serving the interests of children because family-preservation efforts were keeping some children in dangerous homes, the problem of "foster care drift," (the term used to describe both long stays in foster care and placement in multiple homes) was getting worse, and children would be better served by promoting adoption rather than family preservation.⁵⁸ Congress thus sought to move children to permanent homes more quickly and to make child safety, rather than family preservation, the paramount concern of the child-welfare system.⁵⁹

of foster care)").

53. See STAFF OF THE H. COMM. ON WAYS & MEANS, 112TH CONG., 2012 GREEN BOOK: BACKGROUND DATA AND MATERIAL WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS tbl.11-4 (2012) [hereinafter GREEN BOOK], available at http://greenbook.waysandmeans.house.gov/sites/greenbook.waysandmeans.house.gov/files/2012/CW%20Table11-4_FC-Entering_Served_Exiting_Incare_82-11%20RM-ES.pdf (tracking foster-care rates); GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 45, at 188.

54. See GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, *supra* note 45, at 188-89 (describing these explanations, and noting that although AACWA authorized funds for preservation and reunification services, Congress never allocated the funds, or at least not sufficient funds; further noting that "[b]etween 1981 and 1983, federal foster care spending grew by more than 400 percent in real terms, while preventive and reunification spending grew by only 14 percent").

55. See, e.g., MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 29, 64 (1987) (finding that in fifty-two percent of cases, the most pressing need was day care or babysitting, but that the state typically offered foster care rather than child care).

56. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, MAKING REASONABLE EFFORTS: STEPS FOR KEEPING FAMILIES TOGETHER 8 (1987) (finding that numerous judges "remain unaware of their obligation to determine if reasonable efforts to preserve families were made," and that even when the court did make such inquiries, judges "routinely 'rubber stamp[ed]' assertions by social service agencies" that such services had been offered).

57. Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at scattered sections of 42 U.S.C.).

58. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 646-50 (1999).

59. ASFA conditioned federal funds on states developing a foster-care and adoption-assistance plan in which "the child's health and safety shall be the paramount concern." 42 U.S.C. § 671(a)(15)(A)

The centerpiece of ASFA was a determinate standard that set a time limit on family-reunification efforts, much as Mnookin had advocated. The time limit was not tailored to individual families, as Mnookin proposed, but it was clear cut: As a condition of receiving federal funds, states had to commence proceedings to terminate parental rights for children who had been in foster care for fifteen of the most recent twenty-two months.⁶⁰ Congress also required states to conduct a permanency hearing within twelve months (shortened from eighteen months) of a child entering foster care,⁶¹ and created greater incentives for adoption by giving subsidies to adoptive families.⁶² ASFA established three permissible exceptions to the time limit: the child is living with a relative, the state provides a compelling reason for not seeking termination of parental rights, or the state has not make “reasonable efforts” to work with the family to return the child home.⁶³

Additionally, ASFA broadened the focus of existing family-preservation funding, which diluted the focus on family preservation and reunification. Calling the new program Promoting Safe and Stable Families, Congress expanded the scope of the funding stream to include services to promote and support adoption and adoptive families.⁶⁴

C. State Legislation

States responded to these congressional conditions on federal funding by adopting some version of the family-preservation and time-limit requirements. All fifty states and the District of Columbia now require their child-welfare agencies to provide preservation services, although states typically do not specify what kinds of services a family is entitled to receive.⁶⁵ Arizona, for example, simply requires its child-welfare agency “to promote the well-being of the child in a permanent home and to coordinate services to strengthen the

(2006). There were other goals as well, including a focus on child well-being and improving innovation and accountability. *See generally* Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in URBAN INST., CTR. FOR THE STUDY OF SOC. POL’Y, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 16–17 (2009), available at http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

60. 42 U.S.C. § 675(5)(E) (2006). Additionally, the state must file for termination of parental rights without seeking to preserve the family in other specified circumstances, for example, where (1) the parent has subjected the child to certain aggravating circumstances, including abandonment, torture, chronic abuse, and sexual abuse; (2) the parent has murdered another child; or (3) the parent’s rights have been involuntarily terminated with respect to another child. *Id.* § 671(a)(15)(D)(i)–(iii).

61. *Id.* § 675(5)(C).

62. *Id.* § 673b.

63. *Id.* § 675(5)(E).

64. *Id.* § 629b(a)(4)–(5). The two existing service areas—family preservation and family reunification—remained.

65. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN: SUMMARY OF STATE LAWS (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/reunify.pdf (listing statutes).

family.”⁶⁶ Other jurisdictions provide somewhat more detailed guidance, such as the District of Columbia, which defines family-preservation services to include “[r]espice care services,” and “services designed to improve parenting skills and abilities.”⁶⁷ Illinois defines “family preservation services” to include homemakers, counseling, family therapy, group therapy, self-help groups, drug and alcohol abuse counseling, vocational counseling, and postadoptive services.⁶⁸

No state, however, has adopted Mnookin’s stringent removal standard: conditioning removal on a showing that there are “no reasonable means” to keep the child at home.⁶⁹ Instead, all fifty states and the District of Columbia continue to use some variant of the best-interests standard to determine whether to place a child in foster care.⁷⁰ States often list overarching goals to inform the standard, such as the preference for avoiding removal,⁷¹ or protecting the health and safety of the child,⁷² but only twenty-one states and the District of Columbia list specific factors that courts *must* consider.⁷³ The remaining twenty-nine states simply give general guidance,⁷⁴ stating, for example, that courts should “remove the child from the custody of his or her parent or parents only when it is judicially determined to be in his or her best interests or for the safety and protection of the public.”⁷⁵ In this way, despite a greater emphasis on family preservation, the underlying removal standard has not changed much since 1975 and is not significantly more determinate.

Turning to the time limit, all states have incorporated ASFA’s time limit, either by amending state laws or by incorporating the requirement into regulations or administrative policies.⁷⁶ Thirty-two states and the District of Columbia have incorporated ASFA’s three permissible exceptions to the time limit: (1) the child is living with a relative, (2) the state provides a compelling reason for not seeking the termination, or (3) the state has not make

66. ARIZ. REV. STAT. ANN. § 8-801 (2007).

67. D.C. CODE § 4-1301.02(10) (2001).

68. 325 ILL. COMP. STAT. 5/8.2 (2008).

69. See Mnookin, *supra* note 1, at 278.

70. See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD: SUMMARY OF STATE LAWS (2012) [hereinafter SUMMARY OF STATE BEST-INTERESTS STANDARDS], available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf (setting forth the state standards).

71. *Id.* at 2 & n.1 (listing twenty-eight states).

72. *Id.* at 2 & n.2 (listing nineteen states).

73. *Id.* at 3. These factors include a consideration of (1) the emotional relationship between the child and parents, siblings, and other household members, (2) the ability of the parents to provide a safe home and care for the child, (3) the mental and physical health of the parent and the child, and (4) the presence of domestic violence in the home.

74. See SUMMARY OF STATE BEST-INTERESTS STANDARDS, *supra* note 70, at 4.

75. ALA. CODE § 12-15-101(b)(2) (2008).

76. See CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS (2013) [hereinafter SUMMARY OF STATE GROUNDS FOR INVOLUNTARY TERMINATION], available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.pdf (listing all state statutes).

“reasonable efforts” to provide the family the services needed to ensure the child can return home.⁷⁷

In sum, the current legal standards have moved at least partially in the direction advocated by Mnookin, most notably with the imposition of a time limit for returning a child home. This raises a series of questions: How do these changes work in practice? Are families receiving family-preservation services and are these services keeping children safe in their homes? And are the time limits resulting in shorter stays in foster care and greater permanency for children? In part III, I explore these questions.

III

DETERMINACY IN PRACTICE

One important lesson of the reforms of the last few decades is that legal standards have moved in the direction that Mnookin sought, but there is still considerable discrepancy between what is promised in the laws and what is practiced on the ground. States do not fully invest in family-preservation efforts, and the efforts that are in place appear to have had little impact on foster-care placement rates. By contrast, even with only partial implementation, the time limits have moved children more quickly through the system. There are some data constraints, largely because the federal government did not begin compiling comprehensive statistics until 1998,⁷⁸ but the statistics set forth below paint a vivid picture of the child-welfare system in the wake of legislative reform.

A. Family-Preservation Efforts

1. In Practice

There is no requirement that states truly invest in family-preservation services,⁷⁹ and generally they do not. A quick glance at the federal budget reveals that the federal funds available for out-of-home placement far exceed the federal funds available for family preservation. In fiscal year 2011, Congress

77. For the federal statutory exceptions, see 42 U.S.C. § 675(5)(E) (2006). For the states that incorporate these exceptions, see SUMMARY OF STATE GROUNDS FOR INVOLUNTARY TERMINATION, *supra* note 76, at 4.

78. ASFA introduced several reporting mechanisms. This article relies in particular on the Adoption and Foster Care Analysis and Reporting System (AFCARS), which began with fiscal year 1998. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002, at 14 (2006) [hereinafter AFCARS FINAL ESTIMATES], available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf>. For a discussion of the limitations of the federal data, and particularly the biases that stem from the failure to track entry cohorts, see Mark E. Courtney, Barbara Needell & Fred Wolczyn, *Unintended consequences of the push for accountability: The case of National Child Welfare Performance Standards*, 26 CHILD. & YOUTH SERVICES REV. 1141, 1146–50 (2004).

79. See 42 U.S.C. § 629b(a)(4) (2006) (requiring states to provide family-preservation services along with “community-based family support services, time-limited family reunification services, and adoption promotion and support services,” but requiring only “significant portions of . . . expenditures for each such program”).

allocated \$4.4 billion for foster-care services, but only \$365 million for family services, an amount that is intended to cover family-preservation services, community-based family-support services, adoption-promotion and support services, and reunification services.⁸⁰ There are other sources of discretionary funds available for states to use for preventive programs, but even adding these together, the bulk of federal money is still spent on foster care, not prevention.⁸¹

To appreciate just how limited family-preservation-services funds are, consider the experience of California. As one state official has said, two pressing challenges facing California's child-welfare system are that the bulk of federal funds are reserved for out-of-home placement rather than services to families, and that there is a "[w]oeful lack of [other] funding for prevention, early intervention, and post-permanency services."⁸² The budget numbers demonstrate this reality: California receives \$1.9 billion from the federal government,⁸³ but eighty-nine percent of this money is for out-of-home placement.⁸⁴ Only four percent is earmarked for family-preservation services and other programs designed to keep children out of foster care or help children who have left foster care.⁸⁵

At the national level, comprehensive assessments of family-preservation efforts commissioned by the federal government paint a fairly dismal picture of family-preservation services in practice.⁸⁶ The overarching conclusion of one

80. ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., ALL-PURPOSE TABLE — FY 2010–12 (2012) [hereinafter ALL-PURPOSE TABLE], available at <http://www.acf.hhs.gov/sites/default/files/assets/fy2012apt.pdf>. The Children's Bureau, within the U.S. Department of Health and Human Services, administers the federal funds available for child protection. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP'T OF HEALTH & HUMAN SERVS., DIRECTORY OF PROGRAM SERVICES 15, available at https://www.acf.hhs.gov/sites/default/files/assets/acf_directory.pdf (describing the work of the Children's Bureau as providing support and guidance to programs that (1) strengthen families and prevent child abuse and neglect, (2) protect children who have been abused or neglected, and (3) ensure permanency for children).

81. There are numerous ways to count the prevention funds, and the comparison in the text accounts only for mandatory (guaranteed) spending, not discretionary programs. Several funding streams could be counted as preservation or, more broadly, prevention programs. But even after aggregating these funds, the total amount still falls far short of the amount of money for foster-care placement. See ALL-PURPOSE TABLE, *supra* note 80.

82. FRANK MECCA, CNTY. WELFARE DIRECTORS ASS'N OF CAL., FUNDING CHILD WELFARE SERVICES IN CALIFORNIA 31 (2008), available at <http://www.cwda.org/downloads/publications/cws/CWSPresentation041408.ppt> (further listing three additional challenges: "[o]bsolete and inflexible federal funding scheme"; "[h]igh caseloads"; and "[r]eliance on other systems with their own priorities, funding limitations, and accountability structures").

83. *Id.* at 4.

84. See *id.* at 5–7 (showing that eighty percent of the funds are from Title IV-E and nine percent are from the Temporary Assistance to Needy Families, both of which restrict spending to out-of-home cases and do not fund prevention services).

85. See *id.* The remaining seven percent is in a category entitled "other." *Id.* at 5. The state supplements the federal funds with private funds to bolster prevention and preservation programs. See *id.* at 8.

86. See JAMES BELL ASSOCS., U.S. DEP'T OF HEALTH & HUMAN SERVS., FAMILY PRESERVATION AND FAMILY SUPPORT (FP/FS) SERVICES IMPLEMENTATION STUDY 26–27 (2003) [hereinafter FAMILY PRESERVATION AND FAMILY SUPPORT STUDY], available at <http://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/45860.pdf;jsessionid=CAAA8047B63>

report is that despite AACWA's promises, the child-welfare system still falls short of the goal of keeping children in their homes when possible.⁸⁷ The report found that although there are some quality programs, there are considerable challenges in the delivery of services.⁸⁸ Part of the problem is that of the four different program areas—family preservation, community-based support, adoption support, and reunification services—many states spend their funds on adoption support and family reunification, not family preservation.⁸⁹ In other words, instead of working to keep children from *entering* foster care, states are using the funds to help children *exit* foster care, often to adoptive homes.

Additionally, there is considerable resistance to family-preservation efforts in agencies, particularly after a high-profile abuse case. Even when child-fatality cases had not gone through the family-preservation system, for example, the report found there was still a sense among child-welfare agencies that the family-preservation mentality was responsible for children's deaths in such abuse cases.⁹⁰ Finally, the report found that family-preservation programs do little to address the multiple and complex problems facing families at risk of involvement in the child-welfare system.⁹¹

The choice not to invest in family-preservation services is understandable in light of the mixed evidence about the effectiveness of such late-stage interventions.⁹² Family-preservation programs typically aim to prevent foster-care placement and also to strengthen family functioning and improve child safety. There are three basic program models: crisis intervention, home-based treatment, and family treatment.⁹³ One well-known crisis-intervention program is Homebuilders, which was developed in Washington State in 1974.

74AE785AD3A759AE2A0A1?w+=NATIVE%28%27recno%3D45860%27%29&upp=0&rpp=10&r=1&m=1; [VOL. A] JEAN I. LAYZER ET AL., ABT ASSOCS., U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL EVALUATION OF FAMILY SUPPORT PROGRAMS: THE META-ANALYSIS (2001), available at <http://www.abtassociates.com/reports/nefsp-vola.pdf>; 2 WESTAT ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., EVALUATION OF FAMILY PRESERVATION AND REUNIFICATION PROGRAMS: FINAL REPORT ch. 1 (2003), available at <http://aspe.hhs.gov/hsp/evalfampres94/final/Vol2/index.htm>.

87. See FAMILY PRESERVATION AND FAMILY SUPPORT STUDY, *supra* note 86, at 26–27.

88. *Id.*

89. *Id.* at xv.

90. *Id.* at 27–28.

91. *Id.* at 34. The report identified numerous other challenges, such as a lack of coordination between social workers in the family-preservation programs and child-welfare case workers, with the latter often unaware of the services provided through federally funded preservation programs. *Id.* at xiv.

92. See WESTAT ET AL., *supra* note 86, at pt. 1.4 (reviewing studies of program effectiveness and finding that in “[s]even of eleven studies . . . the programs did not produce significant overall reductions in placement”).

93. Crisis intervention involves intensive work with a family, sometimes as much as twenty hours a week, during a four- to six-week period, focusing on the provision of concrete services and counseling. Home-based treatment is longer-term work over a period of four to five months, focusing on family interaction and drawing on family-systems theory, and it also includes concrete services and counseling. Finally, family treatment is less intensive treatment in the home and office and focuses more on counseling rather than concrete services; it typically involves ninety-day treatment period followed by weekly visits for up to five-and-a-half months. See *id.* at pts. 1.2 & 1.3.

Homebuilders is an intensive program that delivers in-home services to families, up to twenty hours a week, immediately following a crisis. The principle of Homebuilders is that families, as a result of a crisis and the potential placement of a child, will be more willing to change. Caseworkers, handling only one to two families at a time, work intensively with the family, offering counseling and concrete services for four to six weeks.⁹⁴

A national assessment of family-preservation efforts conducted a randomized study of three programs based on the Homebuilders model, as well as one less intensive but still home-based program.⁹⁵ The assessment tracked foster-care placement, child safety, family functioning, and the closure rate for child-welfare cases.⁹⁶ After following these outcomes for families in the experimental and control groups, the evaluators concluded that there was no statistically significant difference in foster-care placement between families receiving the services and the control group, nor was there a difference in case-closure rates.⁹⁷ Additionally, families that received the intensive services did not reunify with their children more quickly following a placement.⁹⁸ Looking at child safety, the study found no significant differences in maltreatment rates for children in the two groups.⁹⁹ Family functioning was somewhat higher for the families receiving intensive treatment, but these improvements were not sustained over time.¹⁰⁰

2. A Limited Effect

Turning to the statistical impact of family preservation, there is little evidence that the introduction of these services since the time Mnookin was writing has affected foster-care placement. Looking at three different measures—the total number of children in care in the fiscal year, the number of children in care on the last day of the fiscal year, and the number of children entering care in the fiscal year—the statistics all tell a similar story.¹⁰¹ Rather than lowering foster-care placement, the introduction of family-preservation efforts in the 1980s is correlated with an *increase* in foster-care placement, which rose steadily through the 1980s and 1990s, reaching a high in the late 1990s, and then steadily decreased in the 2000s.¹⁰²

94. *Id.* at pt. 1.1.

95. WESTAT ET AL., *supra* note 86, at executive summary. The final program offered family counseling and services over a twelve-week period, focusing particularly on substance-abuse treatment. *Id.*

96. *Id.* The control group was not an intervention-free group, but rather was assigned regular child-welfare services. *Id.* at 4; *see also id.* at tbl.4 (setting forth the difference between the caseworker intervention in the intensive family-preservation programs and the control groups, and noting substantial differences in the amount and type of caseworker support and intervention).

97. *Id.*

98. *Id.*

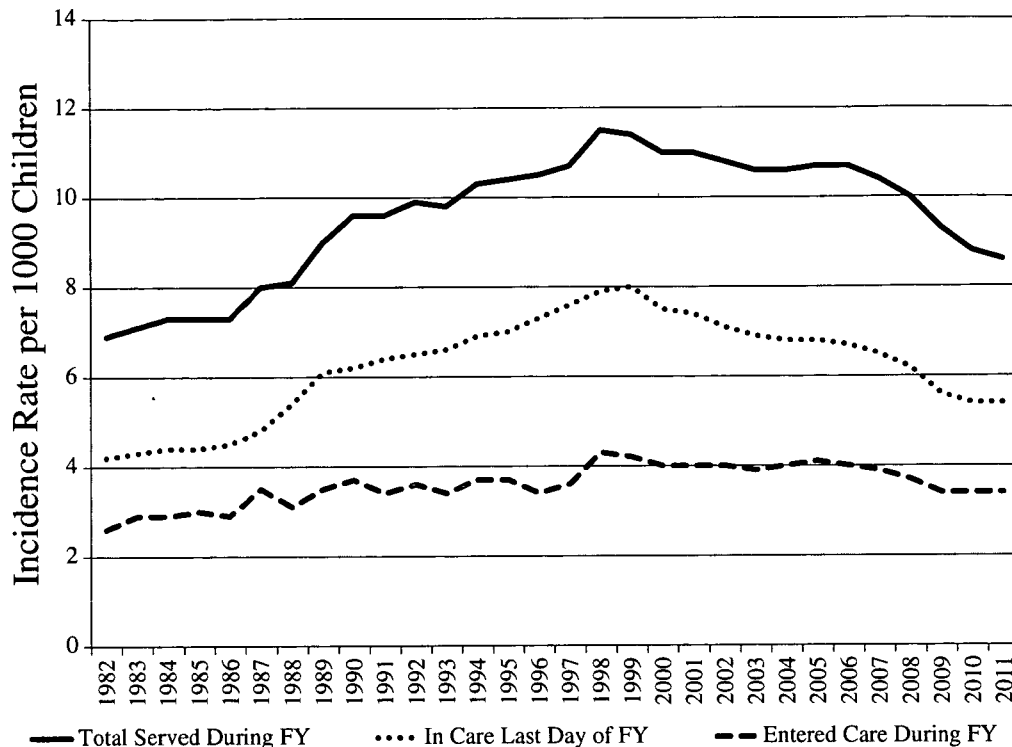
99. *Id.*

100. *Id.*

101. *See* GREEN BOOK, *supra* note 53.

102. *See id.* Decreases were uneven across the country, with some states, such as Nevada and Texas,

Figure 1: Foster-Care Population, 1982–2011



Source: GREEN BOOK, *supra* note 53.

This is not to suggest that the introduction of family-preservation services caused the higher rates of foster-care placement. As any student of child welfare readily knows, numerous factors affect placement rates, such as the well-publicized death of a child known to the child-welfare system.¹⁰³

Beyond the politics of the child-welfare system, it is possible that the changing foster-care rates are explained, at least partially, by an increase and then decrease in rates of child abuse and neglect. The National Incidence Study is an effort by the federal government to capture the actual incidence of child maltreatment. The study—conducted in 1980, 1986, 1993, and 2006—relies on

experiencing sharp increases during the 2000s. CHILD TRENDS, FOSTER CARE DATA SNAPSHOT 4 (2011), available at http://www.childtrends.org/wp-content/uploads/2011/05/Child_Trends_2011_05_31_DS_FosterCare1.pdf.

103. See John Courtney et al., *Aggressive Prosecutions Flooding the System*, 4 CHILD WELFARE WATCH 4, 4 (1999) (documenting a fifty-five percent increase in filings of neglect cases and a fifty-seven percent increase in filings of abuse cases from 1995 to 1998 in New York City following the well-publicized death of Elisa Izquierdo, a six-year-old girl who had been subjected to fatal abuse by her mother and was known to the child-welfare authorities).

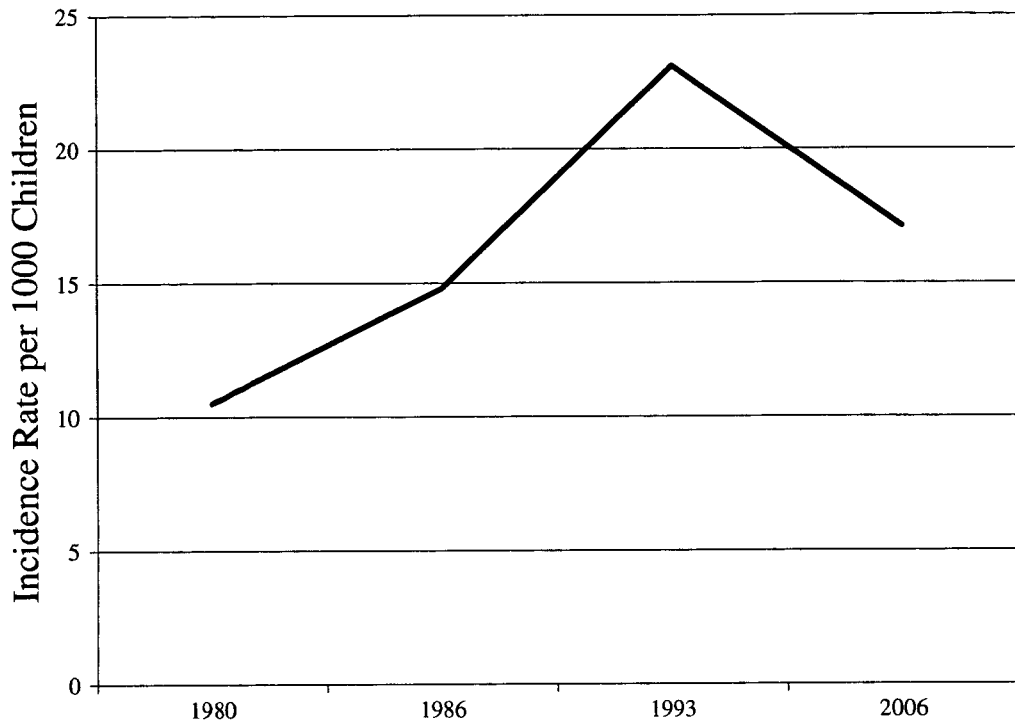
interviews with professionals who work with children in a variety of settings,¹⁰⁴ and it sweeps in far more incidents of maltreatment than those investigated by the child-welfare system.¹⁰⁵ These studies show an increase in child maltreatment in the 1980s and 1990s and then a decrease in the 2000s.¹⁰⁶

104. See ANDREA J. SEDLAK ET AL., U.S. DEPT. OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 1-4 (2010) [hereinafter NIS-4], available at http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf (describing the study's sentinel-survey methodology, which looks far beyond the reported cases by surveying community professionals who work with children in a variety of settings, from police stations and hospitals to schools and emergency shelters).

105. Of the total number of maltreatment incidents found in the four iterations of the study, only a minority were investigated by the child-welfare system: 33 percent, 44 percent, 28 percent, and 32 percent of the total incidents in 1980, 1986, 1993, and 2006, respectively. See NIS-4, *supra* note 104, at 16; ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEPT. OF HEALTH AND HUMAN SERVS., THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-3): REPORT TO CONGRESS 7-16 (1996) [hereinafter NIS-3], available at <http://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/13635.pdf?w=+NATIVE%28%27IPDET+PH+IS+%27%27nis-3%27%27%27%29&upp=0&rpp=-10&order=+NATIVE%28%27year%2Fdescend%27%29&r=1&m=6>. The authors of the study could not explain this discrepancy. See NIS-4, *supra* note 104, at 18 ("Children who do not receive a CPS investigation represent an enigma to the study, in that it is not possible to say whether sentinels who recognized their maltreatment did not report it to CPS or whether they did report it but CPS screened their reports out without an investigation.").

106. Looking only at the more stringent harm standard for maltreatment (and not the broader category of endangerment added with the NIS-2), the overall maltreatment rate was 10.5 incidents per 1000 children in 1980, 14.8 in 1986, 23.1 in 1993, and then 17.1 in 2006. NIS-4, *supra* note 104, at 3-4; U.S. DEP'T OF HEALTH & HUMAN SERVS., STUDY FINDINGS: NATIONAL STUDY OF THE INCIDENCE AND SEVERITY OF CHILD ABUSE AND NEGLECT 16 (1981) [hereinafter NIS-1], available at <http://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/12686.pdf?w=+NATIVE%28%27IPDET+PH+IS+%27%27nis-1%27%27%27%29&upp=0&rpp=-10&order=+NATIVE%28%27year%2Fdescend%27%29&r=1&m=2>. The National Incidence Study uses a narrow definition of child maltreatment, defined to include incidents where "through the purposive acts or marked inattention to the child's basic needs, behavior of a parent/substitute or other adult caretaker caused foreseeable or avoidable injury or impairment to a child or materially contributed unreasonable prolongation or worsening of an existing injury or impairment." See NIS-1, *supra*, at 4. The narrow definition thus does not include acts of a noncaretaker, unless the parent "knowingly permitted" the acts or omissions. See *id.*

Figure 2: Child-Maltreatment Rates, 1980–2006



Source: NIS-4, *supra* note 104, at 3–4; NIS-1, *supra* note 106, at 16.

This increase and then decrease in child-maltreatment follows the same trajectory as the foster-care placement rates, raising the possibility that an increase in child maltreatment drove the increase in foster care. It is hard to confirm this link as a definitive matter, because the relationship between child-maltreatment rates and foster-care placement is complex,¹⁰⁷ but the main point

107. A straightforward conclusion—supported by figure 1 and figure 2—is that an increase in child maltreatment drove the increase in foster-care involvement. It could also be argued, however, that the inverse is true. A change in the child-welfare-investigation policies might have driven up the child-maltreatment rate because the child-welfare system was more aggressive in identifying and investigating cases. This theory might partially explain the increase in child maltreatment between 1980 and 1986, because both the number of cases investigated by the child-welfare system, and the overall proportion of investigated to noninvestigated cases, rose during this time period. *See* NIS-3, *supra* note 105, at 7–16. Between 1986 and 1993, however, the foster-care population was rising but the number of children investigated by the child-welfare system remained roughly the same. *See id.* (explaining that the overall number of child-maltreatment incidents rose substantially during this period but that the number of incidents investigated by child-welfare authorities in this period remained stable). A third explanation, then, is that the kind of maltreatment investigated by the child-welfare system between 1986 and 1993 was more likely to result in removal and this is why the foster care population increased during that period even though there were no more child-welfare investigations. In other words, the system did not investigate more cases, but it was more likely to remove children based on what the authorities found. At any rate, the point here is not to explain fully the relationship between foster-care placement and child-maltreatment rates, but rather to note that family-preservation policies do not

is that there is little evidence that AACWA's emphasis on family preservation had a significant impact on foster-care placement or that family-preservation efforts sufficiently counteracted other forces pushing children into foster care. Rather, the increase and then decrease in the foster-care population is likely tied to other factors.

B. The Time Limit on Reunification Efforts

1. In Practice

Turning to Mnookin's proposal that the law set a time limit on states' efforts to reunite children with their families, ASFA has resulted in some considerable changes in practice, although fewer than might be expected. Rather than applying the time limit strictly, states are more likely to invoke one of the three exceptions to the time limit.¹⁰⁸ Indeed, a report from the Government Accounting Office found that the number of children subject to the exceptions was far greater than the number of children subject to the limit.¹⁰⁹

Despite the repeated invocation of the time-limit exceptions, however, there is some evidence that agency culture has changed in response to ASFA, with caseworkers and agencies more generally focused on permanency.¹¹⁰ In particular, it appears that state agencies are making greater efforts to find adoptive homes, even for otherwise hard-to-adopt children, such as children with special needs and older children.¹¹¹

2. A Substantial Impact

Even partially implemented, ASFA's time limit has had a substantial effect on speeding children to permanent placements. It is difficult to compare today's system with that of 1975 because the federal statistics were not as thorough in the 1970s, but there is evidence that children were in foster care for extended periods of time when Mnookin was writing. Mnookin cited a study of foster children in San Francisco, for example, which found that the average length of time in foster care was five years and that sixty-two percent of the children were

appear to be a strong factor in foster care placement in the 1980s and early 1990s.

108. See Golden & Macomber, *supra* note 59, at 18–20. The U.S. Department of Health and Human Services does not track states' use of the limit or the exceptions. *Id.* at 20. Moreover, in a phrase that echoes Mnookin's critique of the best-interests standard, this report also found that "[b]ecause the statutory provisions [setting the time limits] allow states discretion in individual cases, it is difficult to assess how often states are applying these provisions in their strict form." See *id.* at 18. (For the content of the three exceptions, see text accompanying *supra* note 77.)

109. GEN. ACCOUNTING OFFICE, GAO-02-585, RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN 27 (2002), available at <http://www.gao.gov/assets/240/234761.pdf>. The reasons for this vary by state, with some states reporting a high number of children living with relatives, others saying they had not provided parents needed services, and still others reporting that they were waiting for parents to voluntarily relinquish their parental rights. See *id.* at 27–31.

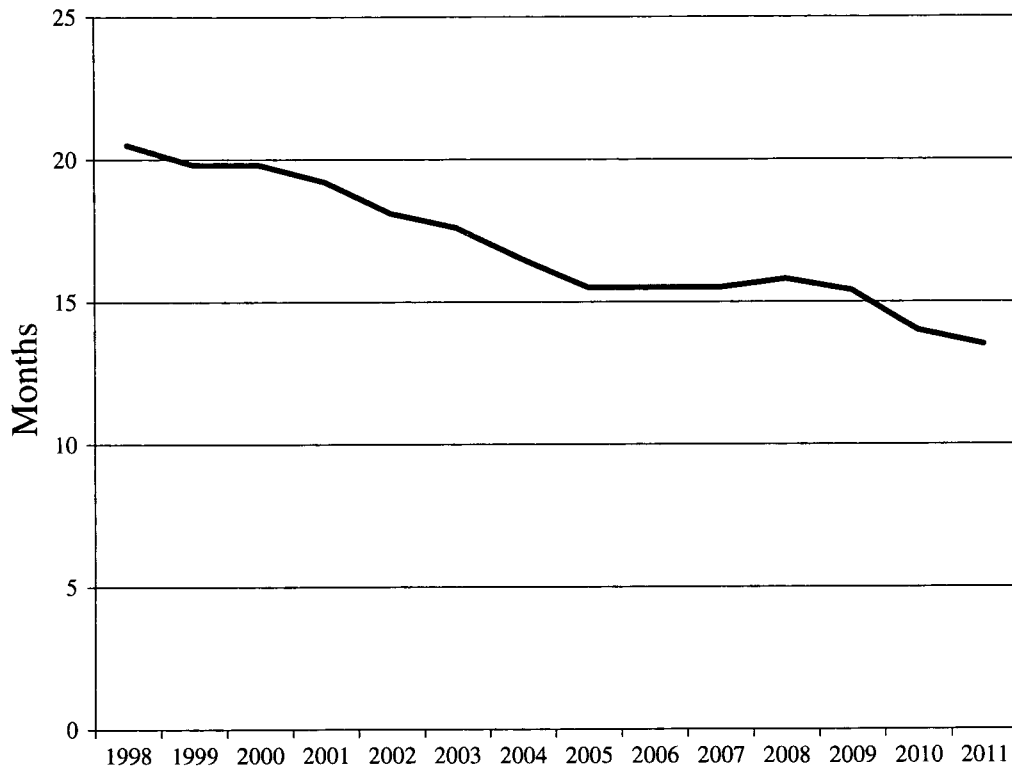
110. Golden & Macomber, *supra* note 59, at 21–24.

111. See *id.* at 21–22.

expected to remain in care until they reached the age of majority.¹¹²

Looking at the impact of ASFA, the law appears to have had a significant effect in a number of areas. Beginning with the median stay in foster care, in the first year after ASFA was enacted (before the provisions had a chance to take effect), the median stay for the children currently in foster care was 20.5 months.¹¹³ By 2011, the median stay in foster care had declined to 13.5 months.¹¹⁴

Figure 3: Median Length of Stay in Foster Care, 1998–2011



Source: See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE STATISTICS, available at <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars> (follow hyperlinks to AFCARS Reports 10–20).

112. See Mnookin, *supra* note 1, at 275 n.217 (citing unpublished manuscript).

113. See AFCARS FINAL ESTIMATES, *supra* note 78, at 3. This report replaced the data from the earlier AFCARS reports. See *id.* at 14.

114. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES AS OF JULY 2012, at 2 (2006) [hereinafter AFCARS FY 2011 DATA], available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf>. The mean, however, was 23.9 months. *Id.* Of the children who exited foster care in fiscal year 2011, the median stay was 13.2 months. *Id.* at 3.

These shorter stays translate into greater permanency for children. Looking at adoption, of the children who exited foster care in 2011, twenty percent were adopted,¹¹⁵ as compared with only fifteen percent in 1998.¹¹⁶ Adoption rates, however, differ by race. Even though fewer African American children are entering foster care today,¹¹⁷ the adoption rates for African American children have declined considerably, while the adoption rates of Latino and white children have increased.¹¹⁸

ASFA's emphasis on adoption has also translated into faster adoptions for more children. Of the children adopted in 1998, only sixteen percent had spent less than two years in foster care.¹¹⁹ By 2005, twenty-nine percent of the children adopted that year had spent less than two years in foster care.¹²⁰ Additionally, the time between the termination of parental rights and adoption has also shortened since ASFA, from more than twelve months in 1998¹²¹ to 9.7 months in 2011.¹²²

One of the biggest successes in permanency is the increased use of guardianships, which allow a child to be placed in the permanent custody of an adult without terminating parental rights. In 2011, six percent of all children leaving foster care were placed with guardians,¹²³ as compared with only two percent in 1998.¹²⁴ This is a much-needed permanency option for older children who may not want to be adopted, and for kinship caregivers who may not want

115. AFCARS FY 2011 DATA, *supra* note 114, at 3 (reporting 49,866 children adopted from foster care in fiscal year 2011). This is clearly an improvement in adoption rates as compared with when Mnookin was writing. Although there are not as reliable statistics, Mnookin reported there were very few adoptions out of the child-welfare system in the 1970s. *See* Mnookin, *supra* note 1, at 275 n.217 (citing A. GRUBER, FOSTER HOME CARE IN MASSACHUSETTS 28 (1973)) (describing a study of the foster care population in Massachusetts, which found that children had little chance of being adopted, even though the parents of fewer than thirty percent of the children were interested in regaining custody; the social workers' primary reason for not finding adoptive homes was that the parents were still interested).

116. AFCARS FINAL ESTIMATES, *supra* note 78, at 8 (reporting 38,221 children adopted from foster care in fiscal year 1998). Looking at cohorts, it appears that the cohort of children entering foster care after ASFA had a greater chance of being adopted than the cohort of children entering foster care before ASFA. *See* Golden & Macomber, *supra* note 59, at 26.

117. *See* CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS FY 2011, at 10 (2011) (finding that of the children entering foster care between 2001 and 2011, the percentage who were African American declined from twenty-eight percent to twenty-three percent, and that the largest percentage increase was for Latino children).

118. Golden & Macomber, *supra* note 59, at 26–27. The national rate of transracial adoptions for children in foster care has not increased since ASFA, with African American children still the least likely to be adopted by white parents, and Latino children the most likely to be adopted by different-race parents. *See id.* at 26.

119. *Id.* at 28. The period is measured by the length of time between the last removal and a finalized adoption.

120. *Id.*

121. AFCARS FINAL ESTIMATES, *supra* note 78, at 13.

122. *See* AFCARS FY 2011 DATA, *supra* note 114, at 5.

123. *Id.* at 3.

124. AFCARS FINAL ESTIMATES, *supra* note 78, at 8.

to adopt.¹²⁵ One of the reasons for the greater use of guardianships is the Fostering Connections to Success Act of 2008,¹²⁶ which permits states to use federal child-welfare funds to subsidize guardianships when the guardian is a relative, thus making guardianship a more viable option.¹²⁷

C. Assessing Mnookin's Proposals

Looking at determinacy on the front end of foster-care placement, there is no basis for evaluating Mnookin's proposed standard because no state adopted Mnookin's stringent standard of removing a child only where (1) there are no reasonable means for treating the family with the child still at home, and (2) there are threats to a child's health. If states had taken this approach, perhaps the foster-care population would not have skyrocketed in the 1980s and 1990s. We simply do not know, and the jury is still out on the effect of a more determinate removal standard.

As the data demonstrate, foster-care placement rates do not seem affected by an increased emphasis on family preservation through an indeterminate standard. There are several possible explanations for this lack of success—including differing maltreatment rates, poor study design, and underinvestment—but it is also possible that the disconnect between family-preservation services and placement rates is because family preservation is so difficult to achieve in the face of a family crisis. This does not necessarily mean more children should be placed in foster care, but rather that we should reassess how we can better prevent foster-care placement.

Turning to determinacy on the back end, when states adopted a determinate standard for reunifying a family, and even when this reform was only partially implemented, there was a substantial effect on permanency, speeding children through the system more quickly and putting many of them in permanent homes. It is here that Mnookin's proposed reform appears to have had the greatest effect. It is evidence that a determinate standard, even one with considerable exceptions, can produce a sea change in practice. Whether the costs of this change are acceptable is the subject of the next part.

IV

REFLECTIONS ON DETERMINACY

With several years experience, the time is ripe to assess the impact of child-welfare reform and think more broadly about the goals of the child-welfare

125. For an overview of this law and its place more generally in the child-welfare system, see Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 145–48 (2013). Subsidizing guardianships also has helped move children out of foster care more quickly, contributing to greater permanency. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., SUBSIDIZED GUARDIANSHIP: CHILD WELFARE WAIVER DEMONSTRATIONS, at ii, 18 (2011), available at www.acf.hhs.gov/sites/default/files/cb/subsidized.pdf (finding that in some states, subsidized guardianship has reduced length of time in foster care twenty-two to forty-three percent).

126. Pub. L. No. 110-351, 122 Stat. 3949 (codified at scattered sections of the U.S. Code).

127. See 42 U.S.C. §§ 671(a)(28), 673(d) (2006 & Supp. II 2008).

system. As elaborated below, the relative success of back-end determinacy appears to have come at the cost of family reunification. And this tension between permanency and reunification is not nearly as stark as it might be with full implementation of the time limits. It is also time to reconsider what can be done on the front end, to prevent foster-care involvement and, more precisely, to lower rates of child maltreatment.

Given the challenge of late-stage preservation efforts, and the trade-off between permanency and family reunification, the real emphasis in the child-welfare system should be on early-stage prevention, particularly programs that address the root causes of child abuse and neglect. For the small number of cases that will inevitably end up in the child-welfare system, we need to formulate more realistic goals for children and parents based on the acknowledgement that some parents will not make the needed changes in their lives within the given time frame and that there will not be adoptive homes for all children.

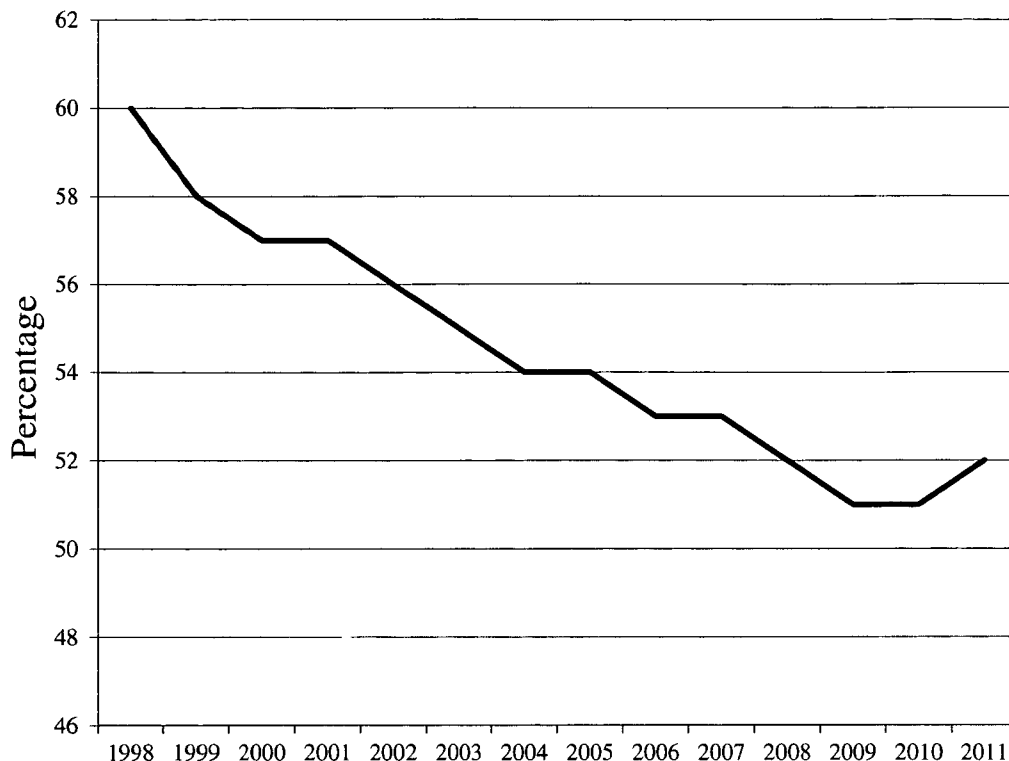
A. The Trade-Off Between Permanency and Reunification

The flip side of a time limit is that, not surprisingly, fewer children are returning to their parents since the enactment of ASFA. In 1998, shortly after the enactment of ASFA, sixty percent of the children leaving foster care returned home to their parents.¹²⁸ By contrast, in 2011, only fifty-two percent of the children leaving foster care were reunified with their families.¹²⁹

128. AFCARS FINAL ESTIMATES, *supra* note 78, at 8.

129. AFCARS FY 2011 DATA, *supra* note 114, at 3. Reunification rates vary by race, with African American children the least likely to return to their families, even accounting for the higher rate of kinship placements for African American children. *See* Golden & Macomber, *supra* note 59, at 28. In other words, African American children in foster care are more likely than children of other races to be placed with a relative—placements that are often long-term and that can turn into guardianships—but even taking this into account, African American children are less likely to return to the care of their parents. *See id.*

Figure 4: Children Exiting Foster Care to Parental Custody, 1998–2011



Source: See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE STATISTICS, available at <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars> (follow hyperlinks to AFCARS Reports 10–20).

The shorter time frame allowed for foster-care placement is intended to move children quickly to reunification or adoption, but in many cases the expedited time line does not allow a parent to make the changes necessary to regain custody. This is unsurprising in light of the substantial challenges facing parents.¹³⁰ This decline in reunifications occurred with only partial implementation of the time limit, so, presumably, there would be even fewer reunifications if states imposed the time limit in more cases than they currently

130. See CHERYL SMITHGALL ET AL, PARENTS’ PASTS AND FAMILIES’ FUTURES 27 (2012), available at http://www.chapinhall.org/sites/default/files/Parents%20Past%20and%20Families_08_30_12-FINAL.pdf (describing a study of parents with children in the child-welfare system and finding that “[t]he comprehensive assessments of these particular parents suggest that they have histories replete with childhood trauma; adolescence characterized by substance use, limited educational attainment, dysfunctional family paradigms, poor models for romantic relationships, a lack of stable employment, and compounded problems in their current functioning (e.g., mental health, substance abuse, domestic violence, etc.)”). See generally Fred Wulczyn, *Family Reunification*, FUTURE OF CHILD., Winter 2004, at 95, available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_05.pdf (describing the challenges of reunification).

do.

This lower reunification rate is partly explained by the higher rate of adoptions and guardianships. Deciding whether this trade-off between permanency and reunification is acceptable is largely a matter of perspective and values, but with the introduction of the time limit, the choice is in sharp relief. It is tempting to imagine that the trade-off is avoidable and that there are means for reunifying families within the tight time frame, but there has been very little innovation on this front,¹³¹ so there is no evidence for evaluating promising programs. Additionally, the return of children into foster care after a failed reunification has always been a substantial risk,¹³² so the answer is not necessarily returning children more quickly.

Even if reasonable minds can disagree about whether more adoptions and guardianships and fewer reunifications is an acceptable trade-off, a more troubling result of ASFA is that recent statistics show that children are increasingly likely to leave foster care through emancipation. In these cases, the state determines that the child cannot safely return home but the state also does not find an alternative permanent home for the child. When the child reaches age eighteen or twenty-one, foster care ends and the child is left with limited support from the state.¹³³ The young adults who are emancipated from foster care tend to have very poor outcomes, including low educational attainment, low earnings, high rates of pregnancy, relatively high rates of homelessness, and so on.¹³⁴ It is troubling, then, that eleven percent of the children leaving foster care in 2011 were emancipated,¹³⁵ as compared with only seven percent in 1998.¹³⁶ Although there may be numerous reasons for this increase, the data suggest that there are not adoptive homes for all children, particularly older children. “Permanency” can be a lonely place.

131. See Golden & Macomber, *supra* note 59, at 28.

132. See Wulczyn, *supra* note 130, at 103–04 (discussing the high failure rate for family reunifications, which appears to be decreasing over time, although also noting that this decrease could be at least partly because the more recent reunifications have not had a chance to fail).

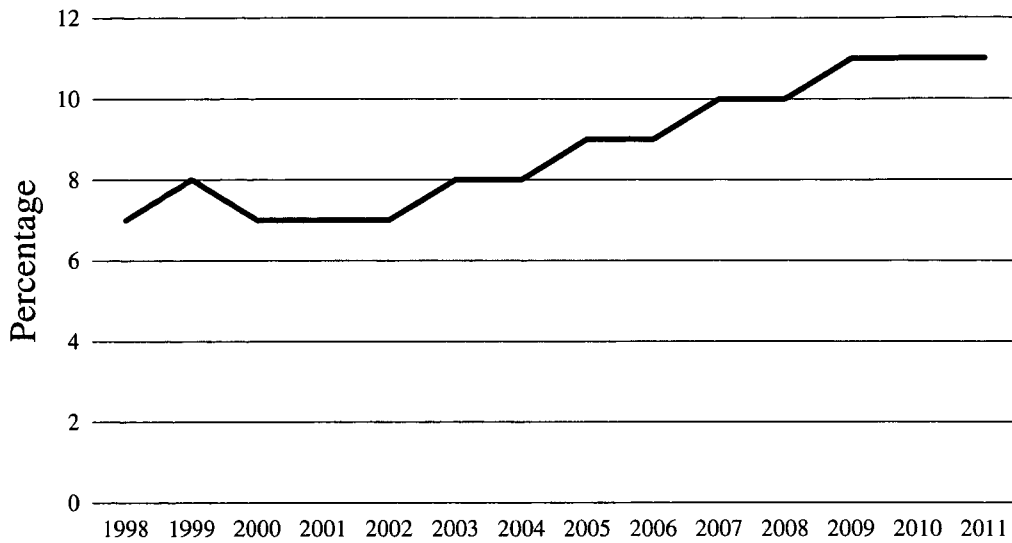
133. See CLARK M. PETERS ET AL., EXTENDING FOSTER CARE TO AGE 21: WEIGHING THE COSTS TO GOVERNMENT AGAINST THE BENEFITS TO YOUTH 1–2 (2009), available at www.chapinhall.org/sites/default/files/publications/Issue_Brief_06_23_09.pdf (describing the different state foster-care systems that typically end at age eighteen; further describing a recent federal law making funds available for states to extend foster care to age twenty-one).

134. *Children Who Age Out of the Foster Care System: Hearing on H.R. 6893 and H.R. 6307 Before the Subcomm. on Income Sec. & Family Support of the H. Comm. on Ways & Means*, 110th Cong. 75–76 (2007) (statement of Mark Courtney, Ballmer Chair in Child Well-Being, School of Social Work, University of Washington).

135. AFCARS FY 2011 DATA, *supra* note 114, at 3.

136. AFCARS FINAL ESTIMATES, *supra* note 78, at 8.

Figure 5: Children Exiting Foster Care to Emancipation, 1998–2011



Source: See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION AND FOSTER CARE STATISTICS, available at <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars> (follow hyperlinks to AFCARS Reports 10–20).

There are ways to tinker with the system, by, for example, developing a more flexible time limit, perhaps along the lines suggested by Mnookin—where each case would have a predetermined time limit, reflecting the circumstances of each family. These particularized determinations would go beyond the three exceptions already built into the law. With older children, for example, a longer time frame would be permissible. Or if the problem is securing adequate housing, rather than treating a recurring substance abuse problem, a longer time frame might also make sense.

But the hard truth is that for many families the math does not favor family reunification. The determinate standard exposes this reality. It also forces us to rethink the goals and possibilities of the child-welfare system. Rather than believe that a shortened time frame truly gives parents a chance to address the issues that led to the removal, and rather than wish there were adoptive families or guardianships for all children, the system should work much harder and, crucially, much earlier to keep children out of foster care altogether.

B. Building a Different Machine

At some level, Mnookin's proposals are thoughtful efforts to fix a broken machine. It certainly might be possible to develop a more determinate removal standard that states would be willing to adopt, but this will not be easy in light of the general resistance among child-welfare agencies to family-preservation

efforts.¹³⁷ Nor is it clear such a standard would affect foster-care placement given the unproven record of family-preservation efforts.¹³⁸ By contrast, the determinate reunification standard is successful, but it comes at considerable costs.

Rather than focusing so much attention on families at the brink of a crisis or immediately afterwards, we should build a different machine that more directly addresses the conditions that lead to child abuse and neglect, particularly limited social and financial resources. There will always be some need for a child-welfare system, but rather than try so hard to fix the system, we should reduce the need for it.

A promising approach is to strengthen families from the start. There are numerous ways to do so,¹³⁹ but there is a mechanism that is already part of the current child-welfare system. One of the permissible expenditures for funds from the Promoting Safe and Stable Families Act is for “family support services.”¹⁴⁰ In contrast to family-preservation programs, which are intended for specific families facing imminent risk of foster-care placement, family-support programs are intended to serve an entire community in order to strengthen families to avoid crises.¹⁴¹ These programs offer services such as parenting education, social support, case management and referral services, center-based early-childhood education, adult education, and so on.¹⁴² With the exception of center-based early-childhood education, most of the programs work with parents rather than directly with children, reflecting the belief that helping parents helps children.¹⁴³

There is considerable evidence that these efforts are effective at avoiding family breakdown. In a national assessment commissioned by the federal government, evaluators conducted a meta-analysis of 665 studies of 260 different family-support programs around the country.¹⁴⁴ The assessment found that the programs made measurable improvements for children’s cognitive development, children’s social and emotional development, parenting attitudes and knowledge, parenting behavior, and family functioning.¹⁴⁵ Many of the

137. See *supra* text accompanying note 90.

138. See *supra* text accompanying note 91.

139. Indeed, this is the subject of my recent book, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014).

140. 42 U.S.C. § 629 (2006).

141. JEAN I. LAYZER ET AL., *supra* note 86, at ii. Both family-preservation services and family-support programs are funded through the Promoting Safe and Stable Families Act of 2001, Pub. L. No. 107-133, 115 Stat. 2413 (2002).

142. JEAN I. LAYZER ET AL., *supra* note 86, at A5-1.

143. *Id.*

144. *Id.* at A2-7.

145. See *id.* at A5-2 to -9. The assessment tracked four child outcomes (cognitive development and school performance, social and emotional development, health, and safety) and five parent outcomes (parent attitudes and knowledge, parenting behavior, family functioning, parental mental health and health-risk behaviors, and economic well-being). For the other child and parent outcomes, there were also statistically significant improvements, but the meaning of the differences was less clear and thus

programs did not track child maltreatment specifically,¹⁴⁶ but the improvement in family functioning and parenting skills is some evidence that these programs can prevent child abuse and neglect.

I have written at length elsewhere about the value of broad-based prevention programs.¹⁴⁷ The point here is not to describe these programs and their benefits in detail, but rather to argue that there is another way to improve outcomes for children. Prevention can work, but it requires considerable investment in family functioning. Given the enormous direct costs of the current system—\$29.4 billion in 2010¹⁴⁸—this is not necessarily a matter of new investments, but rather shifting the focus from a reactive child-welfare system toward a system that nurtures family functioning early on, long before a family maltreats a child. This approach differs from family preservation because it does not begin work when a family reaches a crisis. Instead, the work starts at the point of family formation, seeking to strengthen the family to avoid a crisis entirely. This new approach should not be part of the child-welfare system at all but instead integrated into broader policies about children and families.

A preventive approach to child well-being is both better for children and more cost-effective,¹⁴⁹ but transitioning away from the current reactive approach will not be easy culturally, politically, or fiscally.¹⁵⁰ Consider, for example, the funding challenges. Saving substantial amounts of money over the long run is appealing, but funding streams are baroque. Investments made by one segment of the government (a health department providing prenatal care, for example), may be realized by another (the education system), but when budgets are in silos, there is little incentive for one institution to make investments that another institution will realize. This is difficult within any one level of government—say, at the local or state level—but the problem is even more difficult in our federalist system. When a state government invests in early-childhood education, expenditures may result in fewer welfare applicants down the road, but the savings will be reaped, at least in part, by the federal government. This is not an easy problem to solve, but it does clarify the need to think about costs and benefits more holistically and to create a funding scheme

the researchers were wary about attributing the differences to the programs. *See id.* at A5-2 to -3.

146. *See id.* at A5-24.

147. *See* Clare Huntington, *Mutual Dependency in Child Welfare*, 82 NOTRE DAME L. REV. 1485, 1531–34 (2007) [hereinafter Huntington, *Mutual Dependency*]; Clare Huntington, *Neuroscience and the Child Welfare System*, 21 J.L. & POL'Y 37 (2012); Clare Huntington, *Purple Haze*, 109 MICH. L. REV. 903, 913–14 (2011) (reviewing NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE* (2010)).

148. GREEN BOOK, *supra* note 53, at ch. 11, available at <http://greenbook.waysandmeans.house.gov/2012-green-book/chapter-11-child-welfare/introduction-and-overview> (providing statistics for state fiscal year 2010). A little more than half the money came from state and local sources and the remainder from the federal government. *See id.* (reporting that \$15.8 billion, or fifty-four percent of the total, was from state and local sources and that \$13.6 billion, or forty-six percent of the total, was from the federal government).

149. *See* Huntington, *Mutual Dependency*, *supra* note 147.

150. I address all these issues in my book, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS*, *supra* note 139.

that provides the correct incentives to invest in family relationships.

Another challenge is that unlike the federal government, which can legally run a deficit, state and local governments are often required by law to balance their budgets every year.¹⁵¹ For this reason, a program that requires an outlay today but provides a return only in the future simply may not be possible. There is no way around this problem of a delayed return on investment and this is a reason why centralized federal funding, even if it devolves control to states and localities, is essential.

Even with an effective prevention program in place, there will still be some need for foster care. In these cases, it is essential to develop more realistic goals for children and parents. This means accepting the dual reality that many parents cannot turn their lives around in a short period, and that there is not an adoptive home for every child. One promising way forward is to expand guardianships. As described above,¹⁵² guardianship is an excellent option for older children and children in care with relatives because it provides a permanent home for the child without terminating parental rights. Guardianship programs recognize that family members' lives are complex and that a child and parent often maintain a connection even though it is inappropriate to return the child to the parent's custody. There is room for much innovation on this front, and guardianships may be a way around the unforgiving math of the current legal framework.

V

CONCLUSION

Mnookin was right to focus on determinacy. Many of the problems in the child-welfare system in both 1975 and today stem from unclear standards about when the state can remove a child and what the state should do with a family afterwards. But even with substantial efforts to increase determinacy, the child-welfare system still too often fails to serve families well. Children may be spending less time in foster care, but they endure the trauma of removal. And too many children are never finding a home, either with their original or a new family. The real challenge then is to strengthen families long before a crisis. Increasingly, we are learning that this is possible. It will take money and effort, but it will be well worth the investment.

151. See, e.g., TENN. CONST. art. II, § 24.

152. See *supra* text accompanying notes 123–127.