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The Amendment to the Adoption Assistance and Child Welfare Act of 1980 - Preserving Our Most Valuable Resource

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THE AMENDMENT TO THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980—PRESERVING OUR MOST VALUABLE RESOURCE

I believe the children are our future.
Teach them well and let them lead the way.
Show them all the beauty they possess inside.
Give them a sense of pride to make it easier.
Let the children's laughter, remind us of how
we used to be.[1]

The words to this popular song reflect the philosophy that health care professionals, educators, and most parents project when working with or dealing with children today. Most people believe that children are entitled to a safe place in which to live and grow, where they can develop their individual, inherent capabilities.[2] In spite of this, during 1986, 2,086,000 children in the United States were reported abused or neglected.[3] These

1. L. Creed, *The Greatest Love of All*, (Hialeah, Florida: Columbia Picture Publications, 1984).

2. R. KEMPE & C.H. KEMPE, CHILD ABUSE 120 (1978) (The Developing Child Series).

3. News Release from the American Humane Association (July 1988) [hereinafter News Release] (reporting 1986 data on child abuse in the United States). The American Humane Association, which has gathered data on child abuse since 1973, has worked toward providing improved services for children for 112 years. *Id.* The American Humane Association's 1986 documented report of child abuse shows a 212% increase over the 1976 statistics on documented reports of child abuse. *Id.* Because of increased public awareness and declining economic conditions, child abuse reporting has increased dramatically. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 100th Cong., 1st Sess., ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT xiv (Comm. Print 1987).

Child abuse includes the infliction of physical, emotional, or sexual maltreatment of children. V. FONTANA & D. BESHAROV, THE MALTREATED CHILD 7 (3rd ed. 1977). Neglect, on the other hand, involves the omission of necessary physical, medical, or emotional attention. *Id.*

Data, reported to the House of Representatives in a 1987 Committee report, revealed that 58.5% of all child abuse cases reported in 1985 stem from neglect. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra*, at xii. Especially alarming is the fact that sexual abuse cases have taken the largest jump of all types of child abuse cases reported, increasing from 25,677 in 1981 to 70,767 in 1985, as represented by nineteen reporting states. *Id.* at 10. Sexual abuse made up 13.2% of all reported cases for 1985, leaving approximately 28% of all reported cases attributed to physical injury. *Id.* Other types of child abuse such as emotional

children were deprived of a safe place to live, a safe place to grow, and a safe place to develop their potential.

Abused and neglected children in the United States have endured many horrors.[4] Consequently, in later life, these children often suffer from loss of self-esteem, chronic depression, social isolation,[5] suicidal behavior, and even multiple personality states.[6] These children frequently manifest their suffering in socially unacceptable and even illegal ways.[7] These manifestations include drug and alcohol abuse, prostitution, homicidal frenzies and instillation of the cycle of physical and sexual abuse[8] into future gener-

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abuse were not included in this committee survey. *Id.* Additionally, the House Committee report reveals that many states have reported more serious and complex cases today than previously found. *Id.* at iii, 16. *See* I. SLOAN, CHILD ABUSE: GOVERNING LAW & LEGISLATION 1-8 (1983) (for the characteristics of different types of child abuse). *See generally* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, STUDY FINDINGS, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT: 1988 (for a wide variety of child abuse statistics from 1986).

4. In a 1987 Illinois case, a live-in boyfriend, Dale Wachal, was convicted of the manslaughter of his girlfriend's son, 16-month-old Shawn. One day Wachal hit Shawn between his chest and stomach for crying; when Shawn went limp, Wachal and his girlfriend, Cindy, rushed Shawn to a local hospital. At the hospital, physicians discovered 27 bruises and four bite marks on Shawn's body. Shawn never regained consciousness. State v. Dale Wachal, 156 Ill. App. 3d 331-38, 509 N.E.2d 648-55 (1987).

In Re Scott County Master Docket, 672 F. Supp. 1152 (D. Minn. 1987) reveals a community where sexual exploitation of children was commonplace. One incident tells of sexual abuse by James Rud, who sexually penetrated twin girls age five, with their mother's consent. *Id.* at 1161, 1175. James Rud was later convicted of 108 counts of sexual abuse against children. Myers v. Morris, 810 F.2d 1437, 1441 (8th Cir. 1987).

5. R. KEMPE & C.H. KEMPE, *supra* note 2, at 52.

6. Prager, *"Sexual Psychopathy" and Child Molesters: The Experiment Fails*, 6 J. JUV. L. 49, 64 (1982) (referring to the consequences of sexual molestation of children).

7. *See id.* At the age of 15, Paula Cooper murdered a 78-year-old Bible teacher in Gary, Indiana. Paula and a friend stabbed the elderly woman 33 times for $10.00. From the age of seven, Paula Cooper's father beat Paula every day of her life. When Paula was nine, she was forced at knife point to watch her father rape her mother. C. Gysin, *A Girl on Death Row*, in Sassy 66, 67 (August 1988). *See also* M. Weisman, *Should We Execute Kids Who Kill?*, WOMEN'S DAY 90-91 (May 30, 1989).

A study done by Dr. Dorothy Lewis at the meeting of the federal Juvenile Coordinating Council in Washington, D.C. revealed that 75.4% of 85 "violent" incarcerated youth had been abused during childhood. *Juvenile Justice*, 9 CHILD WELFARE PLANNING NOTES 46 (1986).

8. R. KEMPE & C.H. KEMPE, *supra* note 2, at 43. Sexual abuse is divided into three types: pedophilia, rape, and incest. *Id.* Pedophilia, the preference of an adult for sexual relations with children, may not be curable. *Id.* The recidivism rate for a pedophile is 55%, but that reflects only the offenders that are convicted. Many more are never convicted, and 90% of actual molestation occurrences are never reported. Thus, the actual recidivism rate of child molestation is considerably higher. Prager, *supra* note 6, at 72, 74.

One of the more serious effects of sexual abuse is that the sexual abuse and exploitation of young children often produces future generations of abusers. *See* Prager, *supra* note 6, at 62-63. Like many physically abused children, sexually abused children often repeat the crime of sexual abuse when they become adults. *Id.* Furthermore, a pedophile can victimize a large

ations.[9] However, Congress can eliminate the source of many of these problems by creating laws to help break the cycle of child abuse through preventive educational services to families.[10] In contemplating the creation of child abuse laws, experts agree that the main goal is to stop abuse.[11] At the same time, child abuse laws must fulfill an additional requirement: they must protect children without usurpation of the parents' right to family unity.[12]

Congress has promulgated laws to accomplish both protection of children and the unification of families.[13] On June 17, 1980, Congress enacted the Amendment to the Adoption Assistance and Child Welfare Act[14] (hereinafter AAACWA). A key element of the AAACWA is the "reasonable

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number of children. *Id.* at 62-63. If the adult, sexually abused as a child, victimizes other children, the number of sexually abused children increases geometrically each year. *Id.* at 63-65.

Rape is the violent sexual exploitation of another person. R. KEMPE & C.H. KEMPE, *supra* note 2, at 46. The sociopath who engages in violent sexual rape may never be cured. *Id.* at 53. Until a treatment is discovered, convicted rapists are imprisoned to protect society. *Id.*

Incest is the non-violent sexual exploitation of a vulnerable family member. *See id.* at 43-56. Examples include brother-sister incest, father-daughter incest, and mother-son incest. *Id.* at 47. Usually, a family will hide incest for years. *Id.* at 45. The incestuous relationship surfaces when the family experiences a sudden change in the family situation. *Id.* Circumstances such as adolescent rebellion, pregnancy, venereal disease, or psychiatric illness may suddenly bring the subject of incest to the attention of someone outside the family. *Id.*

9. Prager, *supra* note 6, at 63-65.

10. *See supra* notes 5-9 and accompanying text. By educating abusive parents about appropriate child rearing skills, social service agencies can help to eliminate the devastating effects that result from child abuse. *See id.*

11. Chamberlain, *Abuse and Neglect: Federal Proposals—Perpetuating Uncertainty*, 36 NLADA BRIEFCASE 123-24 (1979) (explaining the problems with vagueness and overbreadth in interpreting federal proposals prior to 1979).

12. *Id.* at 124. *See infra* notes 13-16 and accompanying text.

13. *See* Social Security Act 42 U.S.C. §§ 670-679(a) (1985) (to find the federal statute that protects foster children, abused and neglected children, special needs children, and additionally, strives to maintain family unity) (Section 42 U.S.C. §§ 670-679(a) also called the Amendment to the Adoption Assistance and Child Welfare Act of 1980).

14. 42 U.S.C. § 670.

§ 670 Congressional declaration of purpose; authorization of appropriations.

For the purpose of enabling each state to provide, in appropriate cases, foster care and adoption assistance for children who otherwise would be eligible for assistance under the State's plan approved under part A [42 U.S.C. §§ 601 et seq.] (or, in the case of adoption assistance, would be eligible for benefits under Subchapter XVI [42 U.S.C. §§ 1381 et seq.]), there are authorized to be appropriated for each fiscal year (commencing with the fiscal year which begins October 1, 1980) such sums as may be necessary to carry out the provisions of this part [42 U.S.C. §§ 670 et seq.]. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under the part [42 U.S.C. §§ 670 et seq.].

Id.

effort provision,"[15] providing that states that choose to accept government funds for abused and neglected children must make reasonable efforts to keep families intact.[16] Under the AAACWA, the state must provide preventive services to the family to ensure both the integrity of the family, when reasonable, and the safety of the child.[17] The news media has criticized the courts and social workers for failing to act quickly when parents harm their children.[18] As a result, many states have reinforced the policies behind the federal "reasonable effort" statute by enacting similar state statutes[19] and through court rulings[20] that allow for the removal of children when emergency situations arise.[21] Under case law, social workers are given qualified immunity when they remove abused children in emergency situations.[22] In some states, social workers are protected by statutes that allow

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15. 42 U.S.C. § 671(a)(15).

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

Id. D. RATTERMAN, G. DODSON & M. HARDIN, REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT, A GUIDE TO IMPLEMENTATION (2d ed. 1987) [hereinafter RATTERMAN, DODSON & HARDIN]. *See generally Reasonable Efforts to Prevent the Necessity for Foster Care Placement: An Important Mandate of Pub. L. No. 96-272*, 18 CLEARINGHOUSE REV. 1394-98 (1985) (for an overview of the federal requirements contained in the AAACWA).

16. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 4.

17. *Id.* at 4-5. The federal government has listed some suggested services which include: twenty-four hour emergency caretakers and homemaker services, day care, crisis counseling, individual and family counseling, emergency shelters, home-based family services, self-help groups, and services to unmarried parents. *Id. See infra* note 119 and accompanying text for a direct quote from 42 U.S.C. § 675(1).

18. *See, e.g., In Re* Scott County Master Docket, 672 F. Supp. 1152, 1166-67 n.2 (D. Minn. 1987) (The Minneapolis Star & Tribune, June 24, 1987, at 7B, col. 6, reported that a fifteen-month old boy died after social workers investigated a vague report of child abuse. After the investigation, the social workers did not remove the boy from the home, and the boy was beaten to death one month later.)

19. *See infra* note 22 and accompanying text (for cites of state statutes).

20. *See infra* notes 22, 23 and accompanying text (for cites and explanations of court rulings).

21. *See infra* notes 22, 23 and accompanying text.

22. Courts have protected social workers who removed a child from his home, when the social worker believed that the child was in danger of physical harm. *In Re Scott*, 672 F. Supp. at 1171 n.5. Social workers must "make decisions about temporary or protective custody of minors . . . often . . . on an emergency basis." *Id.* Mazor v. Shelton, 637 F. Supp. 330, 334 (N.D. Cal. 1986) (where the court granted summary judgment to a social worker who was accused of conspiring to keep a mother from her child). The independent decision-making of the social worker must be protected and should not be compromised by overconcern about making a mistake that "could result in a time-consuming and financially devastating civil suit." Meyers v. Contra Costa County Dep't of Social Servs., 812 F.2d 1154, 1157 (9th Cir. 1987) (granting absolute immunity to the social worker who was charged with conspiring to prevent a father from associating with his child); *In Re Scott*, 672 F. Supp. at 1171 n.5 (granting qualified immunity to the social workers who were accused of continuing to separate

for emergency removal[23] and court decisions that sanction emergency removal.[24]

The courts, the Congress, and the state legislatures have made many thoughtful and compassionate decisions concerning children.[25] In deciding to enact the AAACWA, Congress created a law with an underlying concept that is beneficial and constructive to children and families.[26] Nevertheless, Congress structured the AAACWA in such a way that the positive results from the law are severely diminished.[27] Congress made the provisions of the amendment optional to the states, and thus, abused children and dysfunctional families[28] are not automatically entitled to services for rehabilitation. In contrast, some federal programs, such as the nutrition and the senior center programs for the elderly,[29] provide that once a person qualifies for the federal program, he is entitled to certain financial benefits from the federal government.[30] On the other hand, programs for children and families leave too much discretion to the state. The state decides whether it will meet the criteria set forth by the federal government to secure available money for abused children and families.[31] As a result of

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parents from their children).

23. Some states have recently enacted statutes that allow for emergency removal of abused children. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 9. *See, e.g.*, ARK. STAT. ANN. § 45-436(5)(d) (Supp. 1985); MO. ANN. STAT. § 211.183(4) (Vernon Supp. 1989); OR. REV. STAT. § 419.505(5) (1985) [1985 Or. Laws Ch. 721 §§ 17(2)].

24. A policy announced by the Department of Health and Human Services allows courts to make decisions that reinforce emergency removal. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 13. In emergency circumstances, the judge can find that the social worker acted reasonably when the social worker immediately removed the child instead of providing prevention and unification services. *In Re Scott*, 672 F. Supp. 1152, 1204. When the home presents a substantial and immediate danger to the child and preventive services would not mitigate that danger, emergency removal is proper. In such a case, placement of the child outside the home would be appropriate regardless of whether a judicial determination had been made. *Id.* H.R. REP. NO. 96-136, 96th Cong., 1st Sess. 47 (1979). Congress has urged flexibility in reuniting families. Certainly, in cases where probable cause exists that parents have sexually abused their child and criminal charges are pending, reunification would not be appropriate. *In Re Scott*, 672 F. Supp. at 1204.

25. *See supra* notes 13-17, 19-24 and accompanying text (for court rulings and statutes).

26. *See supra* notes 15-16 and accompanying text (for the federal reasonable effort statute and a list of suggested services).

27. *See infra* note 31 and accompanying text (explaining cooperative federalism).

28. Families that are impaired or abnormal are dysfunctional. *See* SCHMIDT'S ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER D-139 (1986).

29. Major problems for the elderly are entitlements in which the government pays benefits directly to anyone who qualifies. The Indianapolis Star, Dec. 28, 1988, at A-14, col. 3 [hereinafter Indianapolis Star]. Some of the major programs that are entitlement programs are the nutrition and the senior center programs. *See* Social Security Act 42 U.S.C. §§ 3030d(b), 3030f (1983 & Supp. 1988).

30. 42 U.S.C. § 3030d(b), 3030f.

31. Native Village of Stevens v. Smith, 770 F.2d 1486-87 (9th Cir. 1985) (construing

state discretion, federal money, given to states to benefit children under certain federal programs, has declined thirty-five percent since 1970.[32]

Similarly, under the reasonable effort provision of the AAACWA, only twenty-one states have promulgated statutes that require a reasonable effort determination.[33] Thus, twenty-nine states are not required to supply preventive services or attempt to reunify families.[34] In those states, the federal government is not adequately protecting the rights of children or the rights of families.[35] Thus, Congress has created a good law, but the implementation of that law makes the law virtually ineffective.[36]

This note proposes changes to the AAACWA that will require all states to provide preventive services and will include special additions to the

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King v. Smith, 392 U.S. 309, 316-17 (1968)) *cert. denied* 475 U.S. 1121 (1986). The reasonable effort provision is part of Subchapter IV of Title 42 of the United States Code. Subchapter IV establishes the Aid to Families with Dependent Children Program [hereinafter AFDC]. AFDC is based on the principle of cooperative federalism. Cooperative federalism guarantees federal funds to states that agree to participate in the federal program. Participation is optional. Participating states must conform to certain federal requirements. *Id.*

32. Specifically, the federal programs whose funding has declined since 1970 are the AFDC programs. Indianapolis Star, *supra* note 29, at A-14.

33. S. SMITH, CHILD WELFARE IN THE STATES, FIFTY STATE SURVEY REPORT 28 (1986). The following states promulgated mandatory statutes requiring a reasonable effort determination: Arkansas (Ark. Stat. Ann. § 45-436(5) (Supp. 1985)), California (Cal. Wefl. & Inst. Code § 319, § 361, § 11404 (West 1989)), Florida (Fla. Stat. Ann. § 39.402, § 39.408, § 39.41 (West Supp. 1986)), Georgia (Ga. Code Ann. § 15-11-41 (Supp. 1989)), Illinois (Ill. Ann. Stat. ch. 37, ¶ 703-6 (Smith-Hurd 1986)), Indiana (Ind. Code Ann. § 31-6-4-6, § 31-6-4-10, § 31-6-4-15, § 31-6-11-10 (West Supp. 1989)), Iowa (Iowa Code Ann. § 232.52, § 232.95, § 232.102 (West Supp. 1989)), Kansas (Kan. Stat. Ann. §§ 38-1542(f), -1543(i), -1563(h) (Supp. 1985 as amended by S.B. 713), Louisiana (La. Code Juv. Proc. Ann. 87 (West 1986); La. Rev. Stat. Ann. § 2418 (West 1986)), Maine (Me. Rev. Stat. Ann. tit. 15, § 3314-1, § 3317 (Supp. 1988)), Massachusetts (Mass. Gen. Laws Ann. ch. 119 § 29C (West Supp. 1989)), Mississippi (Miss. Code Ann. § 43-21-301, § 43-21-309, § 43-21-405, § 43-21-603 (Supp. 1988)), Missouri (Mo. Ann. Stat. § 211.183 (Vernon Supp. 1989), Nevada (Nev. Rev. Stat. Ann. §§ 432B-360 (Michie 1986), § 432B-550 (Michie Supp. 1987), New Mexico (N.M. Stat. Ann. § 32-1-34 (1989), New York (N.Y. Soc. Serv. Law § 358-a (McKinney Supp. 1989)), (N.Y. Fam. Ct. Act § 352.2, § 754 (McKinney Supp. 1989)), Oklahoma (Okla. Stat. Ann. tit. 10 § 1104.1 (Supp. 1987)), Oregon (Or. Rev. Stat. § 419.577 (Supp. 1988), Virginia (Va. Code Ann. § 16.1-251, § 16.1-252, § 16.1-279 (Supp. 1989)), Washington (Wash. Rev. Code Ann. § 13.32A.170, § 13.34.060, § 13.34.130 (Supp. 1986)), Wisconsin (Wis. Stat. Ann. § 48.21 (West 1987) § 48.355, § 48.38 (West Supp. 1988)). Additionally, Alabama, Alaska, Rhode Island, Tennessee, and Utah have regulations or rules to implement reasonable efforts. *Id.* [Reprinted with permission from the National Conference of State Legislatures. Copyright 1986].

34. Only States accepting reasonable effort provisions have to provide preventive services. S. SMITH, *supra* note 33 and accompanying text.

35. S. SMITH, *supra* note 33. The court retains wide discretion in placement decisions when the legislature has not provided for statutory direction. *Id.*

36. *See supra* notes 15-16, 31-35 and accompanying text (for reasonable effort statute, list of services, and an explanation of cooperative federalism).

existing plan to make the AAACWA more effective and to provide services to more people.[37] This note illustrates that the AAACWA has fallen short of its potential because the government has relied on federal incentives[38] and home rule[39] to implement the statute, instead of block grants and specific federal objectives. Part I explains historical attitudes towards child abuse and looks at an overview of the problem of child abuse in the United States.[40] The purpose and the dynamics of the AAACWA are discussed in Part II.[41] Part III examines the strengths and the weaknesses of the AAACWA[42] and presents a rationale for the AAACWA and an explanation of the need to strengthen it.[43] Part IV concludes with a plan to strengthen the impact of the AAACWA through a mandatory statute that defines new objectives and provides services to all children and families in need.[44]

I. OVERVIEW OF THE PROBLEM OF CHILD ABUSE

Ancient Roman law gave fathers the power of life and death over their child.[45] This power was bestowed on the father because of the belief that one who gave life also had the power to take life away.[46] Although most people would agree this is a despicable concept, adults carried the power of life or death over children for many centuries.[47]

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37. *See infra* pp. 142-44 (for the model statute).

38. *See infra* notes 121-36 and accompanying text (for an explanation of the federal incentives).

39. Home rule is a type of legislative action that allows local cities and towns to govern with little interference from the state or federal government. *See* BLACK'S LAW DICTIONARY 660 (5th ed. 1979). When each community functions independently, nearby communities do not benefit from the sharing of services, facilities, and materials. *See* SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, 100th Cong., 1st Sess., ABUSED CHILDREN IN AMERICA: VICTIMS OF OFFICIAL NEGLECT 88 (Comm. Print 1987) [hereinafter SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES].

40. *See infra* text accompanying notes 45-104 (for the historical attitudes and the current status of physical and sexual child abuse).

41. *See infra* text accompanying notes 105-84 (for details on the history and specific reforms of title IV-E of the Social Security Act).

42. *See infra* text accompanying notes 185-261 (for a discussion of the constitutional issues and administrative problems associated with the reasonable effort statute).

43. *Id.*

44. *See infra* text accompanying notes 262-83 (for the model statute).

45. J. WHITEHEAD, PARENT'S RIGHTS 93 (1986). Note, *Child Abuse: The Role of Adoption as a Preventative Measure*, 10 J. MARSHALL J. OF PRAC. & PROC. 547 (1977) (explaining the role that adoption plays in the prevention of child abuse).

46. J. WHITEHEAD, *supra* note 45, at 93; Note, *supra* note 45, at 547.

47. *See* R. KEMPE & C.H. KEMPE, *supra* note 2, at 3. In London, during the nineteenth century, the concept of the power of life and death over children took a different twist. Illegitimate babies were given to unscrupulous nursemaids. These women were paid a fee and were expected to nurse the babies. Instead, the nurses accepted the money and killed the babies. Eighty percent of these illegitimate babies died. When money was the motive, adults sold

Despite centuries of corrupt values,[48] the child reform movement began to grow in the United States as early as 1825.[49] The work of various groups[50] stirred the public consciousness throughout the country and brought to the public an awarness of the complexity of child abuse.[51] In spite of the American reforms[52] and public awareness, parents gave little attention to the physical and emotional needs of children.[53] Change was slow for two reasons. First, parents still viewed children as property; second, parents and teachers believed that harsh punishment was necessary to maintain discipline at home and at school.[54] Furthermore, between 1842 and 1960, state courts found parents' rights to be plenary.[55] However, in 1960, the Missouri Supreme Court created a rebuttable presumption that parents know what is best for their child. The Missouri court stated, ". . . unless shown to the contrary, the presumption is that natural parents will make the best decision for their offspring."[56] The following year, in 1961, C. Henry Kempe presented a paper at the Annual Meeting of the American Academy of Pediatrics that explained the "battered-child syndrome."[57]

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children into slavery or used them for cheap labor. The values of the times sanctioned many practices currently considered abusive. *Id.*

48. *Id.*

49. *Id.* at 4, 5. In 1825, a concerned group of people established the New York Society for the Reformation of Juvenile Delinquents to help wayward, neglected, and abused children. Forty-six years later, in 1871, a group in New York City founded the Society for the Prevention of Cruelty to Children. *Id.*

50. *See supra* note 49 and accompanying text. In 1909, additional groups concerned with child abuse surfaced. R. KEMPE & C.H. KEMPE, *supra* note 2, at 2. One group was the American Association for Study and Prevention of Infant Mortality. In the same year, 1912, the first White House Conference convened and dealt with concerns about harm to children. *See id.* For more than seven decades, leadership from the White House Conference continued to improve the condition of childhood in this century. H. RUBIN, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW 308 (2d ed. 1985).

51. R. KEMPE & C.H. KEMPE, *supra* note 2, at 5.

52. *See supra* notes 49-51 and accompanying text (for a brief discussion of the history of American organizations concerned with child abuse issues).

53. *See* R. KEMPE & C.H. KEMPE, *supra* note 2, at 4.

54. *Id.*

55. *See generally* J. WHITEHEAD, *supra* note 45, at 91-92. (A classic statement from the Rhode Island Supreme Court explains parents' absolute power over their children, — "Anything that brings the child into conflict with the father or diminishes the father's authority or hampers him in its exercise is repugnant to the family establishment" (quoting Matarese v. Matarese, 17 R.I. 131, 132-33, 131 A. 198-99 (1925)). *Id.* at 92.

56. J. WHITEHEAD, *supra* note 45, at 92 (quoting *In Re* Guardianship of Faust, 239 Miss. 299, 305-07, 123 So. 2d 218, 220-21 (1960)).

57. R. KEMPE & C.H. KEMPE, *supra* note 2, at 5. The phrase "battered child syndrome" was coined by Kempe in 1962. Note, *supra* note 45, at 548. Kempe defined the "battered child syndrome" as a specific pattern of injuries found on a child in various stages of healing, often combined with malnutrition and poor hygiene. *Id.* Additionally, conflicts exist between information supplied by the parent about the child's medical history and the clinical observations of the attending physician. *Id.*

In 1962, Kempe described the syndrome in an article published in the Journal of the American Medical Association.[58] Since Kempe's article was published, hundreds of articles and books have increased the public's understanding and awareness of child abuse and neglect.[59]

Remnants of the old values, however, still linger.[60] Yet, as the twenty-first century approaches, the concept of the "sacred"[61] right of parents' absolute authority over their children falls more and more into question.[62] Today, society generally views the maltreatment of children as an unnecessary evil.[63] Despite this view of child abuse as unnecessary and morally wrong,[64] many adults cannot control the intense emotions that cause them to physically harm their children.[65]

An example of intense parental emotions happened in December of 1982 when nine month old Billie Rae[66] was brought to St. Joseph Hospital in a Rhode Island town.[67] Reportedly, Billie Rae suddenly had a seizure

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58. R. KEMPE & C.H. KEMPE, *supra* note 2, at 5, 6. *See generally* Kempe, *The Battered Child Syndrome*, 1962 J.A.M.A. 181 (for Kempe's original article on the "Battered Child Syndrome").

59. R. KEMPE & C.H. KEMPE, *supra* note 2, at 6. For examples of books on child abuse, see V. FONTANA & D. BESHAROV, THE MALTREATED CHILD (3rd ed. 1977); R. HELFER & C.H. KEMPE, THE BATTERED CHILD (2d ed. 1974); THE ABUSED CHILD: A MULTIDISCIPLINARY APPROACH TO DEVELOPMENTAL ISSUES AND TREATMENT (H. Martin ed. 1976).

60. Only 13 years ago, in 1975, the Supreme Court ruled that states would be allowed to decide if teachers could physically punish school children. R. KEMPE & C.H. KEMPE, *supra* note 2, at 6.

61. The "sacred" right of parents is the right that gives the parent absolute power over his child without any interference from the state, the general public, or the child. *See* J. WHITEHEAD, *supra* note 55, at 85-93.

62. R. KEMPE & C.H. KEMPE, *supra* note 2, at 6.

63. *Id.* Today society appears ready and willing to address the problem of the maltreatment of children. *Id.* Recently, our federal and state governments have passed laws to address child abuse. *See id. See also supra* note 13 and accompanying text (for a provision of the federal statute protecting abused and neglected children); *see also infra* note 175 and accompanying text (for state statutes protecting abused and neglected children).

64. R. KEMPE & C.H. KEMPE, *supra* note 2, at 6.

65. *See id.* at 11-12, 21-22. Often an abusive parent is the parent who tries extra hard to be a good and loving parent. *Id.* at 21. When his child cries, the abusive parent feels compelled to pacify the child. *Id.* The abusive parent will try harder and harder to calm down his child. *Id.* If the child continues to cry, the abusive parent will become overwhelmed with frustration, and finally he will snap. *Id.* In the mind of the abusive parent, the crying child is accusing the parent and saying, "If you were a good parent, I would not be crying." *Id.* The abusive parent views the unmanageable crying as total rejection, and this rejection leads to the parent's rage and finally his violent act. *Id.* at 22.

66. Billie Rae is an alias, not the child's real name. *In Re* Frances, 505 A.2d 1380, 1382 n.3 (R.I. 1986).

67. *Id.* at 1382. Two months earlier Billie Rae's mother reported that Billie Rae started jerking her arms and stiffened out. Additionally, Billie Rae's eyes rolled around, she passed out, and then Billie Rae stopped breathing. *Id.*

and passed out.[68] After leaving the hospital, Billie Rae's mother failed to follow up on any of the treatment recommended by the hospital personnel, and two months later Billie Rae was back in the hospital.[69] The attending physician reported that Billie Rae showed signs of extreme dehydration, suggesting days of inadequate intake.[70] There was also evidence of poor hygiene as the child's body was dirty and her genitals were caked with feces.[71] Furthermore, Billie Rae had sustained multiple bruises; some were fresh, and others that were healing had probably been present for weeks.[72] The physician also noted extreme brain swelling caused by great force to the head, which signified the death of large areas of the brain.[73] Billie Rae was in a vegetative state and, at the time of her mother's trial, recovery seemed unlikely.[74]

In contemplating the above case, one wonders about the causes of abuse and neglect. Child abuse is attributed to both external and internal stresses.[75] The external stress factors include poverty, unemployment, and lack of social and emotional support/networking.[76] The internal stress factors include health problems, problems with family interaction,[77] psychological problems that are associated with poor nurturing in the parents' childhood, which contribute to inadequate information about parenting and child development.[78] Furthermore, abuse is not confined to the poor; wealthy par-

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68. *Id.*

69. *Id.* When Billie Rae's mother was seventeen, she was adjudicated a delinquent for committing an act that would have constituted murder for an adult. *Id.* at 1381.

70. *In Re* Frances, 505 A.2d 1380, 1382 (R.I. 1986).

71. *Id.*

72. *Id.* Physicians treated Billie Rae for severe injuries, particularly of the head and left lip. *Id.* at 1382.

73. *Id.* at 1382-83. The physician reported that Billie Rae's injuries were not caused by a mere accident or fall from her walker. *Id.* at 1383.

74. *Id.* at 1383. Major physical injury, as found in *In Re* Francis, represented 2% and 2.55% of all reported cases of abuse in the years 1985 and 1986 respectively. Meriwether, *Child Abuse Reporting Laws: Time for a Change*, 20 FAM. L.Q. 156 (1986). *See also* News Release, *supra* note 3 (reporting percentage of children with major physical injury in 1986).

75. R. KEMPE & C.H. KEMPE, *supra* note 2, at 20-24. Any sudden crisis, whether coming from inside the home (for example, a sudden illness), or externally, from outside the home (for example, loss of a job), can trigger child abuse. *See id.* at 20.

76. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 62. Abusive parents often have difficulty asking others for help or even trusting others to help. R. KEMPE & C.H. KEMPE, *supra* note 2, at 21. Often the abusive parent is lonely, isolates herself from others, and feels she must struggle alone. *Id.*

77. News Release, *supra* note 3. In abusive families, spouses are generally unsupportive. R. KEMPE & C.H. KEMPE, *supra* note 2, at 23. Instead of finding helpful ways to care for his children, an abusive parent tends to criticize his spouse or withdraw from any involvement, leaving the spouse feeling more helpless and antagonistic than ever. *Id.*

78. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 62. Abusive parents generally have unrealistic perceptions of themselves and the world. R. KEMPE & C.H. KEMPE, *supra* note 2, at 14-24. An abusive parent may distrust the world, have a poor

ents also abuse their children.[79]

The most consistent feature found in child abuse cases is the cycle of intergenerational abuse.[80] Often abusive parents will harm their children in the same way the parents were harmed when they were children.[81] Many abusive parents are unable to discard the disciplinary patterns of their parents and are unable to think and act independently as adults.[82] Intervention and prevention programs providing family therapy can help to protect the abused child, to reach the parents, and to break the chain of intergenerational abuse, thereby protecting future generations.[83] Interestingly, the suc-

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self-image, be unable to please others without depriving herself of pleasure, or withdraw from or fight with others rather than solve problems. *Id.* at 15. Consequently, the abusive parent reaches adulthood without the proper tools to function as an emotionally mature, productive adult. *See id.* at 20.

79. R. KEMPE & C.H. KEMPE, *supra* note 2, at 10. At one time, people who observed patterns of child abuse believed that most abusers came from the lower socioeconomic classes. Today, observers understand that abusers come from all walks of life. *Id.*

80. *See* SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 62 (for information on the cycle of abuse). *See also* R. KEMPE & C.H. KEMPE, *supra* note 2, at 12-13. Evidence exists that children repeat behavior they experience during the first two years of life, even though they could not verbalize about that behavior at the time it happened. Because of the intensity of these pre-memory feelings combined with repeated experiences during childhood, abusive parents have difficulty, when under stress, responding to their children in a rational way. Instead, the abusive parent falls back to the familiar response she remembers from her childhood. *See* R. KEMPE & C.H. KEMPE, *supra* note 2, at 12-14.

81. *See supra* note 75 and accompanying text.

82. R. KEMPE & C.H. KEMPE, *supra* note 2, at 21. Often an abusive mother may see her child as some "monstrously greedy parasite who will exhaust her reserve of food, energy, and love." *Id.* at 19. Today, mental health professionals know that the abusive parent cannot understand his child's needs until the abusive parent's own needs are met. *Id.* at 20. *See* I. SLOAN, CHILD ABUSE: GOVERNING LAW & LEGISLATION 9-13 (1983) (for characteristics of abusive parents).

83. *See generally* R. KEMPE & C.H. KEMPE, *supra* note 2, at 59-113. Early intervention into abusive situations is most useful to the safety of abused and neglected children. *Id.* at 59. Doctors, nurses, social workers, volunteers, and teachers are all in a position to notice and report signs of child abuse. *See id.* at 59-67. C. Henry Kempe developed the following checklist for medical staff and social workers to use in assessing the risk of returning a child to his parents:

1. As a child, was the parent repeatedly beaten or deprived?
2. Does the parent have a record of mental illness or criminal activities?
3. Is the parent suspected of physical abuse in the past?
4. Is the parent suffering lost self-esteem, social isolation, or depression?
5. Has the parent experienced multiple stresses, such as marital discord, divorce, debt, frequent moves, significant losses?
6. Does the parent have violent outbursts of temper?
7. Does the parent have rigid, unrealistic expectations of the child's behavior?
8. Does the parent punish the child harshly?
9. Does the parent see the child as difficult and provocative (whether or not the child is)?
10. Does the parent reject the child or have difficulty forming a bond with the child? *Id.*

cess rate of family treatment is often as high as ninety percent.[84] Family therapy and preventive services are the heart of the reasonable effort provision.[85]

In spite of the preventive programs generated by the AAACWA, many families and abused children are not benefitting from the programs.[86] The discretionary structure of the AAACWA prevents this law from protecting the rights of many abused children and dysfunctional families in the United States.[87] Congress must change the discretionary structure of this law in order to reach the children and families in need.

The largest increase in all types of abuse occurred in the area of sexual abuse.[88] Of the three different types of sexual abuse, (pedophilia, incest, and rape) incest is most likely to respond to treatment.[89] The social worker's goals in incest cases are to stop the practice, to provide treatment for the victim and the parents, to heal the wounds of the victim, and to

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at 67.

In studies done by Kempe at Colorado General Hospital, the checklist above was extremely accurate in predicting high risk parents. *Id.* at 67. Coupled with appropriately selected preventive services, social workers and therapists can educate parents to break the cycle of abuse. *Id.* at 59.

A variety of programs are used by social service agencies to counsel troubled families. *See infra* notes 148-52 and accompanying text (for a list of reunification services and a description of the four most commonly used services).

84. R. KEMPE & C.H. KEMPE, *supra* note 2, at 70. *See also* S. SMITH, CHILD WELFARE IN THE STATES, FIFTY STATE SURVEY REPORT 25 (1986).

85. *See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at v, 1. The reasonable effort provision compels the social service agency to provide services to families to prevent removal of a child from his original home (preventive services) or to bring families back together after removal of a child from his original home (reunification services). M. HARDIN, FOSTER CHILDREN IN THE COURTS 23, 78 (1983) (providing a useful tool for attorneys and others concerned with providing necessary care for children within the judicial system). Reasonable effort is considered the heart of the AAACWA because the provision attempts to get to the "heart" of the problem of child abuse: the lack of education about child rearing and the emotional immaturity of the parent. *See generally* R. KEMPE & C.H. KEMPE, *supra* note 2, at 3-122.

86. *See supra* note 17 and accompanying text. Decreased funding and the practice of states not opting to follow the federal program have created a situation in which many families and children cannot benefit from the variety of potential programs. Indianapolis Star, *supra* note 29, at A-14. *See* S. SMITH, *supra* note 33, at 2; *see also supra* notes 32-35 and accompanying text.

87. *See supra* notes 30, 33-34 and accompanying text (explaining cooperative federalism and listing the states that have cooperated in the federal program by adopting reasonable effort statutes).

88. News Release, *supra* note 3.

89. R. KEMPE & C.H. KEMPE, *supra* note 2, at 53-54. *See also supra* note 8 and accompanying text for definition of rape, incest, and pedophilia. For more information on incest, the effects on children and families, intervention and treatment, see D. DEPANFILIS, LITERATURE REVIEW OF SEXUAL ABUSE 1-56 (1986). *See generally* J. COLEMAN, J. BUTCHER, R. CARSON, ABNORMAL PSYCHOLOGY AND MODERN LIFE 564-73 (Scott, Foresman & Co., 6th ed. 1980) (describing and explaining the treatment for incest, rape, and pedophilia).

allow for the victim's growth as a whole person.[90] However, reuniting families after incest is generally not possible or advisable.[91] Federal cases interpreting the reasonable effort statute generally have reflected this premise.[92]

However, under current law, states that have not opted for funding under the reasonable effort statute[93] are not required to separate incest victims from incest offenders.[94] Without a state statute to provide legislative direction in abuse cases, the court has wide discretion in placement decisions.[95] In the twenty-nine states without reasonable effort statutes,[96] the court determines the ultimate placement of abused children.[97] In states without reasonable effort statutes, the court is not required to carefully monitor the entry of children into the foster care system or to ensure that the state agency provides adequate services to reunify families.[98] For these reasons, the AAACWA fails to adequately protect children and families in many states.[99]

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90. *Id. See generally* H. RUBIN, *supra* note 50, at 329-331 (for more information on the sexual abuse of children).

91. H. RUBIN, *supra* note 50, at 329. *In Re* Scott County Master Docket, 672 F. Supp. 1152 (D. Minn. 1987). Irene Meisinger performed oral sex on her young daughter, J.M. Meisinger; Irene Meisinger also encouraged men to have sex with her daughter. The daughter was later hospitalized for two months for suicidal tendencies. *Id.* Judge MacLaughlin of the Minnesota District Court found that "where probable cause exists to believe that parents have sexually abused their children, the state is not required to make efforts to prevent removal or facilitate return." *Id.* at 1203. J.M. Meisinger was put under court custody and her status was monitored according to the provisions of the AAACWA, through a case plan and periodic reviews. *Id.* at 1204.

92. *See, e.g., In Re Scott*, 672 F. Supp. 1152, 1204 (explaining that returning a child to a home where a question of sexual abuse remained unresolved would be unthinkable). Opinions of professionals differ widely as to whether any program can successfully cure incest offenders. *See* Prager, *supra* note 6, at 68. Even though some incest offenders have reformed, many never do. *Id.* at 77. Because the results of incest are devastating to a child and because many offenders do not change, many professionals believe separation of the incestuous parent offers the best protection for the child. *See generally* Prager, *supra* note 6, at 61-75 (for additional information on child molesters).

93. *See* Social Security Act, 42 U.S.C. § 671(a) (1985) (explaining that only the states opting for the AAACWA, by submitting an accepted state plan, must follow the provisions of the statute).

94. *See* S. SMITH, *supra* note 33, at 27.

95. *Id.* When the state does not provide legislation to guide social workers and judges in making placement decisions for children, judges must use professional discretion in making a choice for placement. *Id. See generally* M. HARDIN, THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980: AN INTRODUCTION FOR JUVENILE COURT JUDGES (1983). *See also infra* note 168 (listing the criteria that the judge may consider when making a discretionary decision about placement of a child).

96. *See supra* note 33 and accompanying text (for the list of 21 states with reasonable effort statutes).

97. *See* S. SMITH, *supra* note 33, at 27.

98. *Id.*

99. *See supra* notes 94-98 and accompanying text.

II. THE 1980 AMENDMENT TO THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT

A brief outline will help to clarify the progression of section II, which explains the provisions of the AAACWA. Part A of section II will examine why the amendment was enacted[100] and how it is structured.[101] Part B will discuss how a case plan is developed and how the case plan benefits the child and the family.[102] Part C will then explain how a case review system works.[103] Finally, Part D will explain how the reasonable effort provision of the AAACWA guides the judge in making a judicial determination of "reasonable effort."[104]

A. Statutory Scheme

Prior to the 1980 AAACWA, children who were removed from their homes because of abuse or neglect were put into foster care homes.[105] Many of these children remained in foster care for most of their childhood,[106] being placed in as many as five different homes or institutions.[107] Often, caseworkers with heavy caseloads were unable to facilitate appropriate planning, review, or monitoring of the children moving through the foster care system.[108] Because of case overload, little or no effort was made to

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100. *See infra* notes 105-84 and accompanying text.

101. *See infra* notes 120-42 and accompanying text.

102. *See infra* notes 143-59 and accompanying text.

103. *See infra* notes 160-64 and accompanying text.

104. *See infra* notes 165-84 and accompanying text.

105. *See* Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 559 (1985) (clarifying the difficulties of narrowing intervention laws in a way that will protect the rights of parents and rights of children).

106. *See* Lynch v. King, 550 F. Supp. 325, 338 (D. Mass. 1982). *Lynch* was decided in 1982 prior to the 1983 date set for the reasonable effort provision to go into effect. *Id.* at 344-45. In *Lynch*, foster parents and natural parents of a class of children filed a class action suit to compel the Massachusetts Department of Social Services to provide each foster child with a case plan and periodic reviews as required by federal law. Judge Keeton held that to prevent loss of funds and injury to children, the court would give the Massachusetts Department of Social Services 60 days to submit a Title IV-E plan to the Secretary. *Id.* at 357. During that time the Massachusetts Department of Social Services must also conform with the requirements of case plans and periodic reviews for children in foster care as Section 671(a)(16) does support a private right of action. *Id.* at 343, 357.

107. *Id.* at 338. Because no law compelled a state agency to facilitate case plans and periodic reviews, children often stayed in foster care homes for many years. *Id.* The move from one foster home to another created an unstable environment for the child, causing irreversible harm and emotional insecurity. *Id.* at 339.

108. *Id.* at 336. Because of case overload, the caseworker's time was spent responding to crises and little time was left for appropriate planning and review. *Id.* In *Lynch*, Judge Keeton determined that a caseworker should only handle approximately 20 cases. *Id.* at 345, 356. *See also infra* text accompanying note 231 (for statistics on ratios of cases to caseworkers in one

improve conditions in the original home or to reunify families.[109] Often, states simply did not have services to offer.[110] Children in foster care, as many as 300,000 in 1980,[111] were frequently lost in a system that was confusing and unsettling. The foster care system often denied these children support and nurturing, and also placed them at risk of emotional and physical injury.[112] Many health care professionals believed that the long-lasting psychological scars of the foster care system were more damaging than the original home environment.[113]

Minnesota county).

109. Lynch v. King, 550 F. Supp. at 336. When social workers handle so many cases that they can only respond to crises and have no time for case planning and review, children are often seriously injured. *Id.* In Jensen v. Conrad, 747 F.2d 185 (4th Cir. 1984), Mrs. Brown brought her four month old child, Sylvia, to the hospital with a fractured skull on February 28, 1979. While Sylvia was in the hospital, medical workers found Mrs. Brown's boyfriend holding Sylvia by the neck and slapping Sylvia in a rough way. The local county department of Social Services reviewed the situation. Mrs. Brown and the department of social services agreed that Mrs. Brown and Sylvia would live with Mrs. Brown's mother instead of Mrs. Brown's boyfriend. Although the department decided that intensive follow-up supervision would occur, the caseworker failed to adequately supervise and monitor Sylvia's case. On May 11, 1979, Mrs. Brown brought Sylvia to Richland Hospital where Sylvia was pronounced dead on arrival. An autopsy revealed that brain hemorrhaging had occurred three times during the last week of Sylvia's life. *Id.* at 187-88. *See also* D. BESHAROV, THE VULNERABLE SOCIAL WORKER 70-75 (1985) (discussing additional cases in which social workers failed to monitor cases adequately).

110. Besharov, *supra* note 105, at 561. Michael Wald, Professor of Law at Stanford University, believes that the state removes many children from their homes because the state has no appropriate services to offer the family. Furthermore, Wald believes that in many situations removal is inappropriate because the child is not in danger. *Id.* For more information on Wald's ideas on state intervention, see M. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, in PURSUING JUSTICE FOR THE CHILDREN 246-78 (M. Rosenheim 1976).

111. Besharov, *supra* note 105, at 560.

112. *Id.* at 560. *See also supra* note 107 and accompanying text (explaining why foster children were at risk of emotional harm). Although many foster homes are safe, some foster parents cannot meet the special needs that abused children require for physical and emotional care. Besharov, *supra* note 105, at 553. Unfortunately, some children are abused, neglected, or even killed in foster homes. *Id. See also* H. RUBIN, *supra* note 50, at 312 (discussing such problems of children in foster care as abuse, neglect, and sexual assault). *See generally* Schor, *A Summary of a White Paper on the Health Care of Children in Foster Care: Report of Colloquiism on Health Care for Children in Foster Homes*, 8 CHILDREN'S LEGAL RTS. J. 16-25 (1986-87) (providing lists of needs and recommendations to caseworkers and foster parents for protecting the health of children in foster care).

113. Besharov, *supra* note 105, at 561. Even in recent years, staff shortages limit the efficiency of caseworkers trying to cover too many cases. In states where no legislation demands case plans and case reviews, children are still at high risk of getting lost in the system. Lynch v. King, 550 F. Supp. 325, 336-39 (D. Mass. 1982). Professor Wald believes that some children are removed from homes when they are not in danger. Besharov, *supra* note 105, at 561. When a child is removed from her original home, foster care placement may deny her the constant support and nurturing that she needs. *Id.* In such a case, foster care placement has put the child in a worse situation than when the child was in her original home. *Id.*

In an effort to remedy the existing state of foster care, prior to 1980, and to protect the welfare of foster children, Congress enacted the AAACWA.[114] The AAACWA is designed to lessen the emphasis on foster care and to find permanent homes for children.[115] The state accomplishes this goal by helping the child to return to his original home or, when returning the child to his original home is not possible, by allowing a new family to adopt the child.[116] Thus, states opting for the AAACWA must make reasonable efforts[117] to eliminate the need for foster placement and to allow children to remain at home safely.[118]

To help children to return home or to remain at home safely, Congress also requires participating states to establish reunification and preventive programs for all children in foster care.[119] Additionally, Congress provides safeguards for minor children in temporary foster care by requiring that caseworkers in social service agencies implement a stringent case plan with periodic reviews for each foster care child.[120] To receive maximum federal funding for foster care and adoption assistance, a state agency must provide for each child and his family both a judicial determination of the reasona-

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114. S. REP. No. 96-336, 96th Cong., 2d Sess. 15-17, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1450-52. Congress hoped for a concerted effort and commitment by state and local governments to carry on the programs initiated in the Adoption Assistance and Child Welfare Act of 1980. *Id.* at 1451. *See* Lynch v. King, 550. F. Supp. 325, 329 (D. Mass. 1982). 550 F. Supp. at 325, 329. *See generally* Erickson, *Preventing Foster Care Placement: Supportive Services in the Home*, 19 J. FAM. L. 569-613 (1981) (supporting the premise that foster care is a last resort for children, when supportive services cannot keep the family intact).

115. S. REP. No. 96-336, 96th Cong., 2d Sess. *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 1450.

116. Social Security Act, 42 U.S.C. § 670. (1985 & Supp. 1988). *See supra* note 14 and accompanying text. *See generally* Masewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633-77 (1981) (for information on the child's developmental needs and the right to permanence).

117. *See infra* notes 165-84 and accompanying text (for a more detailed discussion of how different states have defined reasonable efforts).

118. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1. *See also* Social Security Act, 42 U.S.C. § 671(a)(15) (1985).

119. Social Security Act, 42 U.S.C. § 675(1) (1985 & Supp. 1988). "[A]nd a plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parent in order to improve the conditions in the parents' home, facilitate return of the child to his own home . . . ." *Id. See also* SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 299.

120. Social Security Act, 42 U.S.C. § 671(a)(16) (1985).

> (a) In order for a state to be eligible for payments under this part, it shall have a plan approved by the Secretary which - (16) Provides for the development of a case plan (as defined in section 475(1) [42 U.S.C. § 675(1)] for each child receiving foster care maintenance payments under the state plan and provides for a case review system which meets the requirements described in section 675(5)(B) [42 U.S.C. § 675(5)(B)] with respect to each child;

Id. See Lynch v. King, 550 F. Supp. 325, 339, 341 (D. Mass. 1982). *See infra* notes 143-64 and accompanying text.

ble effort requirement and preventive programs.[121] Beyond this, states can transfer unused federal foster care funds and use them for preventive, reunification, or adoption services.[122]

Despite positive substantive reforms[123] and fiscal incentives,[124] states are under no obligation to comply with any of the provisions of the Title IV-E program.[125] A state becomes eligible for funds at its own discretion.[126] This discretionary feature is the weak link in the statutory scheme of the AAACWA.[127] Accordingly, the state becomes obligated to comply with the provisions of the AAACWA only if the state opts for the federal program.[128] To adequately protect abused and neglected children and their families, Congress must change the discretionary feature so that all states comply with the provisions of the AAACWA.[129]

If, on the contrary, a state voluntarily submits and obtains approval of its Title IV-E plan,[130] the state's social service agencies must conform to the requirements of Title IV-E of the Social Security Act.[131] When a state is in

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121. 42 U.S.C. §§ 671(a)(15), 671(a)(16). RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1. *See generally* Allen, Golubock, & Olson, *A Guide to Adoption Assistance and Child Welfare Act of 1980*, in FOSTER CHILDREN IN THE COURTS 575-609 (M. Hardin ed. 1983) (discussing how states receive funding under the AAACWA).

122. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1; Social Security Act, 42 U.S.C. § 674(c)(2),(4) (1985 & Supp. 1988). *See* Allen, Golubock & Olson, *supra* note 121, at 580. Any state that has implemented all the provisions of the AAACWA (Title IV-E) can get unused funds targeted for that state for the child welfare services authorized under Title IV-B. *Id.*

123. *See supra* notes 115-20 and accompanying text.

124. *See supra* note 123 and accompanying text.

125. Lynch v. King, 550 F. Supp. 325, 342 (D. Mass. 1982). Social Security Act, 42 U.S.C. § 671(a) (1985). *See* M. HARDIN, *supra* note 85, at 578-80.

126. *Lynch*, 550 F. Supp. at 342; 42 U.S.C. § 671(a). The Title IV-E Foster Care and Adoption Assistance Programs provide a per child subsidy to states for maintaining children in foster care or with adoptive families. M. HARDIN, *supra* note 85, at 579. The Title IV-E Foster Care and Adoption Assistance Programs plus amendments to the Title IV-B of the Social Security Act comprise the AAACWA of 1980. *Id.*

127. *See infra* notes 130-42 and accompanying text. *See also* Indianapolis Star, *supra* note 29, at A-14 (explaining that when a statute is discretionary, states do not have to follow the statute and may lose needed funding).

128. *See Lynch*, 550 F. Supp. at 342; 42 U.S.C. § 671(a) (1985). *See also supra* note 31 and accompanying text (for a discussion of cooperative federalism).

129. *See* Indianapolis Star, *supra* note 28, at A-14. By compelling the states to comply with the provisions of the AAACWA, all states will receive federal money and must follow the case plan, the periodic review, and the reasonable effort provisions of the federal statute. *See id.*

130. 42 U.S.C. § 671(a). *See, e.g.*, Office of Human Development Services, HHS, 45 C.F.R. § 1356.20(c) 1-8 (1987) (explaining that the state that opts for Title IV-E money must have a state plan approved by the Secretary meeting the federal government's specific requirements).

131. King v. Smith, 392 U.S. 309, 316-17 (1968) (invalidating an Alabama state law that disqualified eligible children from aid to dependent children if their mother "cohabits"

noncompliance with statutory requirements, Congress has given the Department of Health and Human Services (hereinafter HHS) the power to terminate funds.[132] Therefore, when a court has made a judicial determination that reasonable efforts to reunify the family were not provided, federal funding to the state will not be matched.[133] However, in a Massachusetts District Court, Judge Keeton allowed an agency, which violated provisions of the AAACWA, sixty days to comply with the case plan and the periodic case review system before terminating federal funds.[134] This appears to be a more equitable solution, as cutting funds harms children and families.[135] Unfortunately, noncompliance is usually based on rigid standards and determined by HHS, not the courts.[136]

The AAACWA offers many positive features to help families of abused and neglected children.[137] Many states have adopted some of these features.[138] For example, thirty-eight states have statutes providing mandatory court review for foster care children.[139] Unfortunately, only eighteen states provide family preservation services, and twenty-nine states

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with a man); Native Village of Stevens v. Smith, 770 F.2d 1486 (9th Cir. 1985) (denying federal foster care funds to an Indian tribe seeking funds for foster care homes approved by the tribe); *In Re* Scott County Master Docket, 672 F. Supp. 1152, 1200 (D. Mass. 1987).

132. Lynch v. King, 550 F. Supp. at 325, 343 (D. Mass. 1982). HHS is the distributor of federal funds for the AAACWA. *Id.*; *see* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 4.

133. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 4; Office of Human Development Services, HHS, 45 C.F.R. § 1356.65(a)(1)(2)(3) (1987). Under the Title IV-E plan the federal government provides reimbursement to states, with state approved plans, on a per child basis. Specifically, for each dollar the state spends on a child under a state approved Title IV-E program, the federal government will reimburse the state for that child's expenses. Allen, Golubock & Olson, *supra* note 122, at 579.

134. *Lynch*, 550 F. Supp. at 356-57.

135. *See id.* at 345, 353-54.

136. Rosado v. Wyman, 397 U.S. 397, 420 (1970) (remanding and granting an injunction to give the state of New York time to develop a plan to evaluate the need for AFDC payments which conform to the federal standard); *Lynch*, 550 F. Supp. 325, 343 (explaining that the Social Security Act, 42 U.S.C. § 671(b) (1985) does not provide an exclusive remedy for violations of the terms of the statute).

137. *See infra* notes 144-86 and accompanying text. Some of these features include the provision in the AAACWA that provides for a case plan, a review system, and preventive and reunification services. *Id.*

138. *See infra* notes 139-42 and accompanying text.

139. S. SMITH, *supra* note 33, at 32. States with a statute providing mandatory court review for foster care children include Alaska, Arkansas, California, Colorado, Connecticut, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin. [Reprinted with permission from the National Conference of State Legislatures. Copyright 1986.] *See also supra* note 33 and accompanying text (for states that include mandatory court review of foster care children).

do not require judicial reasonable effort determinations before placement.[140] In addition, approximately twenty states do not have statutes requiring either reunification programs or preventive services.[141] Although the AAACWA is caring for the needs of abused children and their families, many needy people will not benefit from its positive features because their state has not opted into the AAACWA program.[142]

B. Case Plan

To understand the operation of the AAACWA requires an examination of both the statute and its interpretation under case law. Under Massachusetts case law, in a federal district court, the judge determined that an agency should assign a child/client to a social worker within twenty-four hours after receipt of that child's case.[143] The same federal court held that a social worker should handle no more than twenty cases at one time.[144] Once given a case, the social worker must develop a case plan for the child within a reasonable time; sixty days is the limit.[145] The plan must explain the type and the appropriateness of the situation in which the child will be placed.[146] In addition, the plan must list goals for the child and also list the specific services that the agency will use to reach those goals.[147]

In implementing a child's case plan, an agency can choose from a wide

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140. S. SMITH, *supra* note 33, at 27-30 (for statistics on family preservation services). *See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 9 (for statistics and additional information on reasonable effort determinations). *See infra* notes 165-77 and accompanying text (for an explanation of the judicial reasonable effort determination).

141. *See* S. SMITH, *supra* note 33, at 30.

142. *See supra* note 127 and accompanying text. *See also* Golubock, *Current Status of Federal 1980 Foster Care Reforms*, 17 CLEARINGHOUSE REV. 294 (1983) (for the opinion of the Children's Defense Fund stating that the benefits of the AAACWA are not reaching enough people).

143. Lynch v. King, 550 F. Supp. 325, 346-47 (D. Mass. 1982). Many cases of child abuse are reported to an agency by means of "hot lines". D. BESHAROV, *supra* note 109, at 57. Almost all states require social workers, teachers, and physicians to report child abuse. I. SLOAN, *supra* note 82, at 24-27.

144. *Lynch*, 550 F. Supp. at 326, 345.

145. *Id.* at 355; Office of Human Development Services, HHS, 45 C.F.R. § 1356.21(d)(2) (1987). *See* English, *Is There a Private Right of Action Under the Adoption Assistance and Child Welfare Act of 1980?*, 16 CLEARINGHOUSE REV. 870-74 (1983) (explaining that a private right of action exists when a case plan is not provided by the social service agency).

146. Social Security Act, 42 U.S.C. § 675(1) (1985 & Supp. 1988).

147. *Lynch*, 550 F. Supp. at 355; 42 U.S.C. § 675(1). A case plan must explain why the placement situation chosen for the child is the most appropriate. Some primary goals include providing for the child's short term needs while in foster care and improving conditions in the parent's home. *Lynch*, 550 F. Supp. at 355. *See* Allen, Golubock & Olson, *supra* note 121, at 582 (for additional information on case plans).

variety of preventive services specified by the state.[148] The four most commonly used by local agencies are: counseling,[149] day care,[150] homemakers,[151] and parent education.[152] Several states have recently developed intensive concentrated family-based services.[153] These family-based services include: 24-hour crisis intervention, therapy, parenting education, skills development, day care, employment assistance, housing, and other basic supportive services.[154] Typically, these family-based programs last only three months or less, and the success rate of the family-based programs averages about eighty-five percent.[155] Because of the intensity of the program, caseworkers handle only two to five families at a time.[156] Family preservation services offer substantial monetary reductions to the state through

148. Office of Human Development Services, HHS, 45 C.F.R. § 1354.20(e)(2)(1987). A state may choose from a list of specified services. Specified services include: twenty-four hour emergency caretaker and homemaker services; day care; crisis counseling; individual and family counseling; emergency shelters; procedures and arrangements for access to available emergency financial assistance; arrangements for the provision of temporary child care to provide respite to the family for a brief period, as part of a plan for preventing children's removal from home; other services which the agency identifies as necessary and appropriate such as home-based family services, self-help groups, services to unmarried parents, provision of, or arrangements for, mental health, drug and alcohol abuse counseling, vocational counseling, or vocational rehabilitation; and post-adoption services. *Id. See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 49 (for additional preventive and reunification services).

149. Counseling services include both supportive and therapeutic activities provided to a child or the child's family. The goal of the counseling service is to prevent or alleviate adverse conditions that are a risk to the child's safety. Counseling accomplishes this goal of promoting child safety by improving problem solving and coping skills, interpersonal functioning, family stability, or the family's ability to function independently. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 5.

150. Day care is a service that provides care and supervision for a child outside the home. *Id.*

151. Homemakers is a home-based service that provides help in the home, home care skills instruction, and child care and supervision in the child's home. *Id.* Of the four major services, homemakers has received the highest state funding in 22 states. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at xiv.

152. The parent education service gives parents practical education and training in child care, child development, parent-child relationships, and the experiences and responsibilities of parenthood. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 5.

153. *Id. See also*, S. SMITH, *supra* note 33, at 23. The home-based services focus on the family as a whole rather than on one individual member. *Id.* States that offer intensive home-based services include Iowa, New Hampshire, Wisconsin, Washington, New York, and Oregon. *Id.* at 25-26.

154. S. SMITH, *supra* note 33, at 23.

155. *See id.* at 23, 25. *See generally* FAMILY-CENTERED SOCIAL SERVICES: A MODEL FOR CHILD WELFARE AGENCIES (Nat'l Resource Center on Family-Based Services, 1983) (guiding those persons who are planning preventive and restorative programs for children and families).

156. S. SMITH, *supra* note 33, at 23. *See generally* ANNOTATED BIBLIOGRAPHY ON FAMILY-BASED SERVICES (Nat'l Resource Center on Family-Based Services, 1986) (explaining how to make the major advantages of the family-centered approach available to all family clients).

long-term direct cost savings.[157] Unfortunately, as of 1985, only eighteen states reported that they provide family preservation services.[158] If all states provided this service, more families would receive services, and states could reduce overall long-term agency costs, freeing up needed money for additional programs, training of social workers, and coordination of local services.[159]

C. *The Case Review System*

Periodic case review is an essential element of the AAACWA.[160] The court or agency must place the child in the least restrictive setting and, if the child will benefit, close to the parents' home.[161] A court or agency must review the child's status once every six months in the presence of the parents.[162] The review will determine the degree of agency compliance with the plan, the necessity of continuing foster placement, the extent of progress made, and a projection of a likely date for the child's return to her home.[163] No later than eighteen months after placement in foster care, a court or administrative body will determine whether the child will be returned to the parent, whether the child will be placed for adoption, or whether the child must remain in foster care.[164]

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157. *See* S. SMITH, *supra* note 33, at 24; *see also*, SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 102. A 1988 Indiana report on child care issues revealed that foster care costs for one child averaged $3,000. INDIANA LEGISLATIVE COUNCIL, FINAL REPORT OF THE 1988 INTERIM STUDY ON CHILDREN'S CARE ISSUES 6 (1987-1988). The residential costs for one child for a year averaged $25,000. *Id.* However, the study indicated that costs for the pilot home-based services averaged between $1,150 and $1,160 per child, a considerable savings over foster care and residential treatment costs. *Id.* at 5.

158. *See* SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at xiv.

159. *See supra* note 157 and accompanying text. *See generally* Havgaard & Hokanson, Measuring the Cost-Effectiveness of Family Based Services and Out-of Home-Care (1983) (unpublished paper) (available from the National Resource Center on Family Based Services, School of Social Work, University of Iowa, Oakdale Campus, Oakdale, IA 52319).

160. Periodic review insures that the court or administrative agency reviews the status of the child at least every six months. Social Security Act, 42 U.S.C. § 675(5)(a) (1985). English, *supra* note 145, at 870-74 (explaining that a private right of action exists when a social service agency fails to provide periodic reviews).

161. *See* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (The principal case where the Court determined that a state cannot confine a dangerous person capable of taking care of himself or surviving with the help of a responsible family.). Social Security Act, 42 U.S.C. § 675(5)(a); *see* Office of Human Development Services, *supra* note 145, at 45 C.F.R. § 1356.21(d)(3).

162. Social Security Act, 42 U.S.C. § 675(5)(b), (6) (1985).

163. *Id.*; Williams v. Carras, 576 F. Supp. 545, 548 (W.D. Penn. 1983). *See also* Allen, Golubock & Olson, *supra* note 122, at 582-84 (for additional information on periodic reviews).

164. *In Re* Scott County Master Docket, 672 F. Supp. 1152, 1201 (D. Minn. 1987). *See* Social Security Act, 42 U.S.C. § 675(5)(c) (1985). A court or administrative body may also determine that a child should remain in foster care for a specified time or permanently. *Id.*

D. The Reasonable Effort Standard

Before placement of a child outside of his original home, section 671(a)(15) of the AAACWA[165] requires that a judge make a determination to assure that the agency made reasonable efforts to prevent foster placement and to keep families together.[166] When state law guidelines are not available, a judge, by considering many factors, makes the discretionary decision as to whether the agency made reasonable efforts to prevent placement.[167] In making his decision, the judge will consider the relevance and the adequacy of the services provided, the availability of the services from which to draw, and the degree of the agency's diligence in assisting the family.[168]

In emergency circumstances, where children have sustained serious physical or sexual abuse, social workers must decide whether to immediately remove the child from the home.[169] If the social worker determines

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165. Social Security Act, 42 U.S.C. § 671(a)(15) (1985). *See also supra* note 15 and accompanying text (for direct quote from 42 U.S.C. § 671(a)(15)).

166. *See supra* note 165; *see also* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1. *See generally* REASONABLE EFFORTS PROTOCOL FOR CHILD WELFARE AGENCIES (Edna McConnell Clark Foundation 1987) (for information on how Child Welfare Agencies deal with the reasonable effort provision). *See generally* English, *supra* note 145 (explaining that a private right of action exists when a social service agency fails to make reasonable efforts to prevent removal of a child or promote reunification of families).

167. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 10-12. The judge must look first to state law guidelines, but when guidelines are not available, the judge must use his own discretion. *Id.* at 10. *See generally* REASONABLE EFFORTS: A MANUAL FOR JUDGES (ABA 1987) (giving guidelines to judges for making reasonable effort determinations).

168. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 10-11. Other factors that the judge considers in making a reasonable effort determination include accessibility of the services to the parent as well as the staffing, caseload, and funding constraints under which an agency must function. *Id.* at 11. The following cases illustrate situations in which the court made a "reasonable effort" determination in deciding whether to terminate parental rights. *In Re* Candie Lee "W", 458 N.Y.S.2d 347, 91 A.D.2d 1106 (App. Div. 1983), the daughter of a mentally retarded mother was removed from the mother's home because the mother could not adequately provide for her child. The agency provided transportation for the mother to attend six different community programs, designed to help the mother learn how to care for her child. The attempts proved unsuccessful, but because of the sincere attempts of the agency, the court found that the agency had met its duty of reasonable effort. *Id.* at 349, 91 A.D.2d at 1107. In a different case, *In Re* Jamie "M", 63 N.Y.2d 388, 472 N.E.2d 311 (1984), a child with special needs was removed from her mother because of inadequate housing and income. The local agency referred the mother to the state employment service and a local housing council. Other than encouraging the mother to continue to search for housing and employment, no services were provided. In this case, the court determined that the agency did not make 'diligent efforts' to assist the mother. *Id.* at 395, 472 N.E.2d at 314; RATTERMAN, DODSON & HARDIN, *supra* note 15, at 13.

169. *See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 13, 14. *See generally* T. STEIN & J. RZEPNICKI, DECISIONMAKING AT CHILD WELFARE INTAKE (Child Welfare League of America, 1983) (providing social service workers, who work with families, guidance in deci-

that, even with reasonable services, the child will not be able to remain safely in his home, the social worker will immediately remove the child.[170] In 1984, HHS, the distributor of federal funds for the AAACWA, announced a new policy for the reasonable effort requirement.[171] HHS stated that when an agency removes a child from the home in an emergency situation because services are not available to protect the child at home, the court, making a reasonable effort determination, is required to find "that the lack of preventive efforts was reasonable to meet the federal reasonable effort requirements."[172] HHS has further stated that the state law and the judgment of the court would prevail in defining emergency cases.[173] Judges in several recent cases have used HHS's new policy.[174] Even though state laws vary considerably on removal standards,[175] the new HHS policy assures each state that it will not lose federal funding because of emergency removal with the lack of documentation of reasonable efforts.[176] The judge must merely state in his court order that the absence of efforts was reasonable.[177]

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sion making when initial information about possible abuse is received, when workers investigate and assess family problems, and when workers negotiate a written service agreement with clients).

170. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 13, 14. *See* Allen, Golubock & Olson, *supra* note 121, at 588-92 (for additional information on emergency removal and preventive and reunification services).

171. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 14 (describing the policy announcement of the HHS in HHS, Human Development Service, Policy Announcement, *ACYF-PA-84-1*, at 4 (Jan. 13, 1984)).

172. *Id.*

173. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 14 (explaining letter to Henry Gunn, Director of Region III Resource Center for Children, Youth & Families, from Alvin Pearis, Regional Program, Director of Children, Youth & Families Div., at 4 (Apr. 18, 1984)).

174. *See, e.g.*, Duchesne v. Sugarman, 566 F.2d 817-18, 825-26 (2d Cir. 1977) (where the court determined that the removal of the children from their home while their mother was in a psychiatric ward was constitutionally permissible because of an emergency situation). *See also, e.g., In Re* Scott County Master Docket, 672 F. Supp. 1152, 1170, 1171 (D. Minn. 1987) (where the judge determined that fuller procedural protections might jeopardize a vulnerable child).

175. State laws vary considerably in the interpretation of the definition of "emergency." Arkansas defines "emergency" as a situation in which the child cannot remain safely at home, even with reasonable services provided. ARK. STAT. ANN. § 45-436(5)(b)(2) (Supp. 1986). Missouri and Louisiana define an "emergency situation" as one where the child could not remain safely at home even with reasonable in-home services. MO. ANN. STAT. § 211.183(1) (Vernon Supp. 1986); LA. CODE JUV. PROC. ANN. art 87(F) (West 1985). Florida defines an emergency situation "as one where appropriate and available services" could not insure the safety of the child. FLA. STAT. ANN. §§ 39.402(q)(a), .41(2)(d) (West Supp. 1986).

176. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 14. Under the new HHS policy, emergency removal without documentation of reasonable efforts will not violate section 671(a)(15) of the AAACWA if the judge finds removal reasonable. *Id.* In this circumstance, the state will not lose federal funding. *Id.*

177. *Id.*

To protect the social workers' ability to make independent decisions in emergency situations, courts have extended qualified immunity[178] to social workers.[179] Generally, the court shows deference to the judgment of qualified professionals.[180] In one federal Court of Appeals case, the court determined that to obtain even an evidentiary hearing against a social worker, a plaintiff must show substantial dishonesty.[181] In summary, the federal and state laws,[182] the emergency removal policy of the HHS,[183] and the qualified immunity of social workers,[184] combine to allow social workers to make discretionary decisions about removal that adequately protect children.

III. Constitutional Issues and Administrative Problems

A. *Due Process*

The fourteenth amendment to the United States Constitution asserts "nor shall any State deprive any person of life, liberty, or property, without due process of law."[185] As early as 1923, the fundamental nature of a parent's liberty interest was recognized by the Supreme Court when it held that the fourteenth amendment grants to the individual freedom from physical restraint and also the right to marry, establish a home and bring up children.[186] Later cases held that the most fundamental and basic of the

178. Fowler v. Cross, 635 F.2d 476-77 (5th Cir. 1981) (discussing qualified immunity of public officers). Qualified immunity protects a public officer from liability during the discretionary performance of a public duty. The underlying philosophy is that public officials execute discretionary decisions more effectively when they have no fear of liability. *In Re* Scott County Master Docket 672 F. Supp. 1152, 1172 (D. Minn. 1987).

179. *In Re Scott*, 672 F. Supp. at 1173.

180. *See* Gibson v. Merced County Dep't of Human Resources, 799 F.2d 582 (9th Cir. 1986) (where a county agency removed a foster child from her foster home with indifference to the child's serious medical needs). *See also* Myers v. Morris, 810 F.2d 1437, 1467 (8th Cir. 1987) (where the court showed deference to the judgment of a therapist). A therapist had the responsibility of questioning children to determine their needs, to protect their interests, and to make recommendations to the court. *Id.* at 1149. Thus, the court gave the therapist absolute immunity. *Id.* at 1148. *In Re Scott*, 672 F. Supp. at 1171-74.

181. *Myers*, 810 F.2d at 1457. In an attempt to impeach a probable cause warrant, a defendant must show substantial dishonesty by the arresting officer. *Id. See In Re Scott*, 672 F. Supp. at 1171-74.

182. *See supra* notes 165-68 and accompanying text.

183. *See supra* notes 169-77 and accompanying text.

184. *See supra* notes 178-81 and accompanying text.

185. U.S. Const. amend. XIV, § 1. Lehr v. Robertson, 463 U.S. 248, 256 (1983) (where the court determined that an unwed father who had not established a custodial, a personal, or a financial relationship with his child was not entitled to notice or opportunity to be heard prior to his child's adoption proceeding).

186. Davis v. Page, 618 F.2d 374, 378 (5th Cir. 1980) Brown v. County of San Joaquin, 601 F. Supp. 653, 663 (E.D. Cal. 1985) (where the court granted procedural due process to the foster parents before the termination of their relationship with their foster child). ("[T]he Fourteenth Amendment 'denotes not merely freedom from bodily restraint but also the right of

liberty interests granted in the fourteenth amendment is a parent's interest in the custody of his or her child.[187]

The Supreme Court has clearly established that parents have a constitutionally protected liberty interest in the unity of their family.[188] Furthermore, even where a parent is less than a positive influence on the family, the state must preserve the integrity of that family.[189] On the other hand, a compelling government interest may outweigh a parent's liberty interest in family unity.[190] The state has a legitimate interest in protecting the welfare of vulnerable children, children whose parents have neglected or abused them.[191] In other words, protecting the interest of children is both a right and a duty of the state.[192]

Nevertheless, at some point the state's intrusion into the family situation may violate the due process right of the parent.[193] Understandably, the state's interest in protecting a child is more compelling than the parent's liberty interest when a reasonable suspicion exists that the parent may be

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the individual . . . to marry, establish a home and bring up children.' " (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923))).

187. *In Re* Scott County Master Docket, 672 F. Supp. 1152, 1165 (D. Minn. 1987) (quoting Davis v. Page, 618 F.2d 374, 379 (5th Cir. 1980)). "[A] parent's interest in the custody of his or her child is among the most basic and fundamental of the liberties protected by the Constitution." *Id.*

188. Santosky v. Kramer, 455 U.S. 745, 752, 769 (1982) (declaring that the state must support its allegations of neglect in an attempt to sever parental rights with clear and convincing evidence). Williams v. Carros, 576 F. Supp. 545, 547 (W.D. Pa. 1983) (where the court ordered an injunction to allow a mother to visit her child in temporary foster care). *See generally Developments in the Law, The Constitution and the Family*, 93 HARV. L. REV. 1156-93 (Apr. 1980) [hereinafter *Developments in the Law*] (for additional sources of Constitutional protection of family rights).

189. *Santosky*, 455 U.S. at 754 (where the court found that removal of the children from the parent's home did not indicate that termination of parental rights was proper); *Williams*, 576 F. Supp. at 545 (where the mother encountered continual difficulties with her children in the home, and the court allowed visitation).

190. *See In Re Scott*, 672 F. Supp. at 1173. *See generally* S. DAVIS & M. SCHWARTZ, CHILDREN'S RIGHTS AND THE LAW 163-200 (1987) (discussing the protection of children from inadequate parenting).

191. *In Re* Scott, 672 F. Supp. at 1165; Alsager v. District Court of Polk County, 406 F. Supp. 10, 22 (S.D. Iowa 1975) (where the probation officer removed children from their home because of parental neglect). *See generally Developments in the Law*, *supra* note 188, at 1198-1247, 1315-22 (for additional information on state interests in and intervention into the family).

192. Stanley v. Illinois, 405 U.S. 645 (1972) (where the court determined that an unwed father, who was the only living parent of the children, was entitled to a hearing on his fitness as a parent before the children could be taken from him); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (where the custodian of a nine-year-old girl was convicted of violating child labor laws); *In Re Scott*, 672 F. Supp. at 1165; *Alsager*, 406 F. Supp. at 22.

193. *See In Re Scott*, 672 F. Supp. at 1166.

abusing his child.[194] However, the means of enforcing that interest must be no more restrictive than necessary; the state's intrusion must not severely violate the rights of parents by being "so disproportionate to the need presented, and . . . so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience."[195] If the intrusion reaches this point, the state has overstepped its boundaries and has violated the parents' due process rights.[196]

In *Williams v. Carros*,[197] the court described the AAACWA[198] as codifying the procedural and substantive rights of parents.[199] By reinforcing the concept of the protection of family unity, the AAACWA preserves parents' constitutional liberty interests in family unity;[200] however, the AAACWA does even more. The amendment also protects children.[201] State statutes and case law that incorporate the policy of HHS and qualified immunity of social workers support the position that emergency removal is necessary to prevent harm to children.[202] Furthermore, the Second Circuit concluded that when a reasonable effort hearing before removal means jeopardizing vulnerable children, a reasonable effort hearing after removal satisfies the court's constitutional obligation.[203] Thus, the case law compliments the AAACWA by balancing both the rights of parents and the rights of children.[204]

Despite the equitable substantive features of the AAACWA, the law is

194. *Id. See generally* R. KEMPE & C.H. KEMPE, *supra* note 49, at 315-26 (for information on issues concerning court intervention).

195. Hall v. Tawney, 621 F.2d 607, 613 (4th Cir. 1980) (where the court determined that the corporal punishment inflicted on a student was not severe enough to violate the student's constitutional rights); *In Re Scott*, 672 F. Supp. at 1166.

196. *In Re Scott*, 672 F. Supp. at 1166.

197. 576 F. Supp. 545 (W.D. Pa. 1983).

198. Social Security Act, 42 U.S.C. §§ 670-676 (1985).

199. *Williams*, 576 F.Supp. at 548.

200. *Id.* The AAACWA preserves a parent's liberty interest in family by requiring preventive and reunification programs for troubled families supervised by state social service agencies. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1.

201. *See supra* notes 114-22 and accompanying text. *See generally Develpments in the Law*, *supra* note 191, at 51-78 (for a separate discussion on the Supreme Court and children's rights).

202. *See supra* notes 165-84 and accompanying text.

203. *In Re* Scott County Master Docket, 672 F. Supp. 1152, 1170 (D. Minn. 1987) (quoting Giglio v. Dunn, 732 F.2d 1133, 1135 (2d Cir. 1984), *cert. denied*, 469 U.S. 932 (1984)). "Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligation by providing the latter." *Id. See also* Parratt v. Taylor, 451 U.S. 527, 540 (1981) (explaining that a hearing must be granted at a meaningful time and in a meaningful manner).

204. *See supra* notes 181-98 and accompanying text.

not without flaws.[205] Many children and families will not benefit from the equitable features of the AAACWA because the state in which they live may be one that has not opted for federal money for family preservation and reunification programs.[206] Precisely because the AAACWA is substantively such a good law and balances the rights of parents and children, Congress must act to ensure that all states follow the provisions of the AAACWA.[207] If, however, Congress fails to act, more children will get lost in the foster care system,[208] families will not have federal support to build family unity,[209] and many states will not have guidelines to protect children in emergency situations.[210] Therefore, Congress must make the AAACWA mandatory and entitle all abused and neglected children and their families to federally funded programs.[211] In doing so, Congress will take greater steps toward controlling child abuse and eradicating the effects of child abuse in the United States.[212] By stopping the cycle of abuse and by strengthening the family, Congress can help to prepare a generation of young people for productive lives as adults.[213]

B. Vagueness and Overbreadth

Some observers have blamed vagueness and overbreadth of legal standards for the difficulty of determining when state intervention into the family is appropriate.[214] At first glance, the wording of the reasonable effort statute appears so vague that reasonable men could easily differ as to its meaning.[215] In fact, reasonable men have differed as to its meaning.[216] Of

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205. *See supra* notes 185-203 and accompanying text.

206. *See supra* S. SMITH, note 33, at 27.

207. *See supra* notes 185-203 and accompanying text.

208. *See supra* notes 105-13 and accompanying text (for background on children lost in the foster care system).

209. *See supra* notes 120-29 and accompanying text. *See generally* Golubock, *Cash Assistance to Families: An Essential Component of Reasonable Efforts to Prevent and Eliminate Foster Care Placement of Their Children* 19 CLEARINGHOUSE REV. 1392-1400 (1986) (for a description of the circumstances in which the child is available for financial assistance under Title IV-E).

210. *See supra* notes 169-84 and accompanying text (explaining how guidelines protect children in emergency situations).

211. *See supra* notes 120-29 and accompanying text.

212. *See supra* notes 5-10 and accompanying text (for a discussion of the effects of child abuse in the United States); *see also Sixty Minutes* (CBS television broadcast Jan. 29, 1989) [hereinafter *Sixty Minutes*] (describing the problems of child abuse from the viewpoint of the agency social worker). The program reported that in later life, many untreated victims of child abuse become murderers and rapists. *Id.*

213. *See supra* note 10 and accompanying text.

214. *See*, Besharov, *supra* note 105, at 573.

215. W. WADLINGTON, CASES OF DOMESTIC RELATIONS 532, 534 (Successor Edition 1984). *See* Connally v. General Constr. Co., 269 U.S. 385 (1926) (declaring that a statute in which men of common intelligence must guess at the statute's meaning is vague and violates

the twenty-one states that have promulgated reasonable effort statutes, none have interpreted the federal statute in exactly the same way.[217] Some states have defined "reasonable efforts," while other states have not.[218] Some states have defined "emergency" for the purpose of reasonable effort; other states have not.[219]

One commentator argued that more specific guidelines would result in more even-handed nondiscriminatory application of the child abuse and neglect laws.[220] This commentator believes that social workers often do not have the expertise to make good clinical decisions, and that definitive standards would relieve the social worker of this burden.[221] Others argue that more precise standards for child protective intervention cannot be developed.[222] They believe that "the complexity of the parent/child relationship, environmental variables, and the subjectivity of social values" account for the insurmountable obstacles.[223]

In creating the AAACWA's federal cooperative program, the government understandably wanted to give the states the freedom to create their own laws to encompass the variety of community standards that vary from state to state.[224] The funds available within each state also vary, impacting the services that each state can afford to provide.[225] Congress intentionally enacted the federal reasonable effort provision without the term "reasonable

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due process of the law).

216. *See supra* note 175 (for the different ways courts have interpreted "emergency situations").

217. *Id.*

218. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 3. Missouri defines reasonable efforts as "the exercise of ordinary diligence and care by the division." MO. ANN. STAT. § 211.183(2) (Vernon Supp. 1986). Arkansas states that "reasonable efforts means the exercise of reasonable diligence and care by the responsible State agency to utilize all available services related to meeting the needs of the juveniles and their families." ARK. STAT. ANN. § 45-436(5)(a)(3) (Supp. 1986). *Id.*

219. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 14. *See supra* note 75.

220. Meriwether, *Child Abuse Reporting Laws: Time for a Change* 1986 FAM. L.Q. 141, 153 (discussing the problems with child abuse reporting laws).

221. *Id.* Parents and children have charged hundreds of social workers with professional malpractice after the death of or injury to a child left in the original home. D. BESHAROV, *supra* note 109, at 1.

222. Besharov, *supra* note 105, at 573. Because of variations and changes in social values, defining child abuse is an impossible task. *Id.*

223. *Id.*

224. *See* GELLES, *A Profile of Violence Toward Children in the United States*, in CHILD ABUSE: AN AGENDA FOR ACTION 82, 83 (G. Gerber, C. Ross, & E. Zigler eds. 1980) (explaining that individual terms in statutes, such as child abuse, vary "over time, across cultures, and between different social and cultural groups"). S. SMITH, *supra* note 33, at 11. *See also*, Besharov, *supra* note 105, at 573 (explaining why a national definition for child abuse may not be effective).

225. *See* S. SMITH, *supra* note 33, at 4.

effort" defined.[226] In doing so, Congress has allowed each state opting for the program to define reasonable efforts according to its own social values and financial restrictions.[227]

C. *Administrative Problems*

Many problems exist at the agency level. The most compelling of the problems include staff shortages, inadequate training, high personnel turnover, and lack of resources for staffing and services.[228] States have repeatedly cited poor coordination of services as an important impediment to providing adequate and appropriate services.[229]

Because of staff shortages, the caseloads of state agency social workers are extremely burdensome.[230] A caseload survey by the Minnesota Attorney General showed that a caseload variation, existing in one Minnesota county alone, ranged from one hundred and nineteen cases, assigned to one social worker, to only ten cases, assigned to another social worker.[231] Because of the tremendous number of cases, workers often can only respond to crises; the maintenance of written case plans and review is often put aside.[232] Heavy caseloads, however, are not the only problem. Many workers experience emotional burnout from the constant exposure to abused children and dysfunctional families.[233] Between fifty to one hundred percent of the workers employed in child protection leave each year because of the emotional burdens.[234] Reports have shown that the need for well-trained professionals is great,[235] but the costs of retaining them are prohibitive.[236] Nevertheless,

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226. *See* Social Security Act, 42 U.S.C. §§ 670-676 (1985) (showing that reasonable effort is not defined in the statute). *See also* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 3 (providing a wide variety of state definitions for reasonable efforts).

227. *See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 3 (explaining that the definition of reasonable effort is determined by each state and is effected by the resources of that state).

228. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at xiii, 83.

229. *Id.*

230. ATTORNEY GENERAL'S TASK FORCE ON CHILD ABUSE WITHIN THE FAMILY 17 (October 2, 1986) [hereinafter TASK FORCE ON CHILD ABUSE]. Lynch v. King, 550 F. Supp. 325, 336 (D. Mass. 1982). *See infra* notes 231-37 and accompanying text (describing the reasons for staff shortages).

231. TASK FORCE ON CHILD ABUSE, *supra* note 230, at 18 n.17.

232. *Lynch*, 550 F. Supp. at 336. A 1982 Massachusetts program review revealed that some agencies had no case plan for 20% of the agency-monitored foster children, 37% of the cases that had plans were incomplete, and 17% of the cases with written case plans had not been reviewed within a six month period. *Id.* at 336-37.

233. TASK FORCE ON CHILD ABUSE, *supra* note 230, at 16.

234. R. KEMPE & C.H. KEMPE, *supra* note 2, at 115.

235. TASK FORCE ON CHILD ABUSE, *supra* note 230, at 11.

236. *See* SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at

the well-trained and competent professional offers the best hope of protecting children.[237]

From investigation, to provision of services, to incarceration of offenders, the community costs of child abuse are staggering.[238] Unfortunately, many of the states with the greatest increases in reported abuse cases are the states that have suffered the greatest shortfall of funds.[239] Of course, some states with increases in child abuse reporting also showed some increase in federal funds, but not enough to approach the level of increased child abuse reports.[240] Between 1981 and 1985, federal, state, and local funding showed a $37.7 million increase in funds that were targeted for child abuse.[241] However, a loss of $131.5 million in federal resources was reported in thirty-one states during the same period.[242] The federal losses represented the biggest monetary loss in resources; however, state and local funds supplemented the decreased federal funds resulting in a less than two percent total increase in overall funding for state agencies between 1981 and 1985.[243] Twenty-two states have identified lack of funds as a major problem in serving abused and neglected children.[244]

The lack of resources has contributed to staff shortages and the inability to provide appropriate services. Furthermore, the efforts of states to provide permanency planning has increased expenses for the states trying to

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237. TASK FORCE ON CHILD ABUSE, *supra* note 230, at 11.

238. *E.g*, *id.* at 7.

239. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 50. Between 1981 and 1985, South Dakota had an 82.3% increase in reporting and a 37.2% decrease in total funding. Similarly, Maryland had a 65.7% increase in reported cases and a 33.2% decrease in total funding. *Id.*

240. *Id.* Michigan, during the period between 1981 and 1985, had a 66.2% increase in child abuse reports and a 13.5% increase in total funding. *Id.*

241. SELECT COMMITTEE FOR CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 335.

242. *Id.* at 45. The loss in federal funding included losses for some programs, such as Title XX, and gains in the Title IV-B and E program. *Id.* at 43, 45-46. Title XX provides states with federal money for social services. Guidelines in the Title XX program are broad, and states can use their discretion in determining which population and what programs receive the money. During 1985, 27 states used more Title XX money for child protection and child welfare than from any other federal source. *Id.* at 46, 297.

243. *Id.* at xiii, 35.

244. *Id.* at 87. States identifying lack of funds as a major problem are: Alabama, Alaska, Connecticut, Florida, Maryland, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia. *Id.* In 1984, California reported that because of federal cutbacks in funding, county welfare departments had to lay off large numbers of workers. *Californians Tell House Panel Foster Care is Not Last Resort*, 9 CHILD WELFARE PLANNING NOTES 38 (1986). The department was forced to replace the laid-off workers with inexperienced and unqualified personnel. *Id.* Caseloads increased during that time from 100 to 150 homes. *Id.*

provide these services.[245] The recent federal budget cuts have aggravated the problem of expanding services to children and parents.[246] Additionally, many social workers have left protective services to advance their education, and agencies cannot entice them to re-enter protective services because the highly educated social worker can command a better salary in the private sector.[247]

Finally, states have reported that poor coordination of services within the state contributes to the poor delivery of services.[248] The AAACWA provides a plan to coordinate services within the state.[249] This plan provides that the agency or individual whom the state has designated as supervisor of these services coordinates all state programs relating to child welfare.[250] Most of the states that have complained about the coordination of services have not enacted a statute to provide for preventive services.[251] However, even some states with statutes or regulations have complained about a lack of coordination of services.[252]

In summary, organization at the state level is not adequately solving the complex problems that encompass staff shortages, training and motivation of personnel, and coordination of services between local agencies.[253] Presently, the AAACWA guidelines only authorize the state agency to establish and maintain, in the administration of its programs, personnel standards on a merit basis, to monitor and conduct periodic evaluations of activities carried out under section 670 of the AAACWA, and to report to the Secretary of HHS as required.[254] Additionally, as mentioned above, the

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245. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 58.

246. Besharov, *supra* note 105, at 562.

247. R. KEMPE & C.H. KEMPE, *supra* note 2, at 115. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 84.

248. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 88.

249. Social Security Act, 42 U.S.C. § 671(a) (1985).

250. Social Security Act, 42 U.S.C. § 671(a)(4) (1985) provides that:

> the State shall assure that the programs at the local level assisted under this part [42 U.S.C. §§ 670 et seq.] will be coordinated with the programs at the State or local level assisted under parts A and B of this title [42 U.S.C. §§ 601 et seq., 620 et. seq.] under title XX of this Act [42 U.S.C. § 1397 et seq.], and under any other appropriate provision of Federal law;

Id.

251. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 88. Of the eight states reporting poor services, District of Columbia, Georgia, Oregon, South Dakota, and Tennessee do not have a statutory basis for preventive or reunification services. S. SMITH, *supra* note 33, at 30.

252. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 88. Of the eight states reporting poor coordination of services, Hawaii, South Carolina, and Texas have either a statute or a regulation as a basis for preventive and reunification services. S. SMITH, *supra* note 33, at 30.

253. *See supra* notes 228-37, 248-52 and accompanying text.

254. Social Security Act, 42 U.S.C. § 671(A)(5,6,7) (1985).

state agency must coordinate local and state programs under Title B, XX, or any other appropriate federal law.[255] No specific objectives are offered.[256]

Even though the AAACWA provides for coordination between child welfare programs within a state, Congress must do more. First, Congress must define specific objectives for the coordinating body so that local agencies can find solutions to their complex problems.[257] Second, Congress must extend funding to all states and at the same time compel compliance with all the provisions of the AAACWA.[258] Federal funding is necessary to accomplish the objectives that the state agency is authorized to fulfill.[259] Additionally, federal funding is necessary to guarantee preventive and reunification services to parents and children.[260] In conclusion, funding, compliance by all states, and restructuring of state agency objectives are crucial to the success of the AAACWA.[261]

IV. STRENGTHENING THE AAACWA

When Congress enacted the AAACWA in 1980, Congress gave the states three years to redesign their programs before imposing reunification services as a condition of receiving Title IV-E funds.[262] The duty date was set for October 1, 1983.[263] Four years later, in 1987, twenty-nine states still had not enacted reasonable effort statutes providing for preventive and reunification services.[264] In those twenty-nine states, many people are not profiting from the resources and education that the statute provides.[265] The time has come for Congress to respond and to change this statute from a voluntary cooperative program to a grant of funds to each state with the

255. Social Security Act, 42 U.S.C. § 671(a)(4) (1985). SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 297. Title XX is a social service block grant to the states, distributed to the states according to the state's relative population. *Id.* Under Title XX, states are free to develop their own priorities for use of funds. Many states include home-based services, protective and emergency services for children and adults, child day care, employment and education training, adoption and foster care services, counseling, and information/referral. *Id.*

256. *See* 42 U.S.C. §§ 671(a)(4-7) (1985).

257. *See id.* (based on the inadequacy of objectives and authority for the state agency to act to solve problems that create inefficiency).

258. *See supra* notes 64-227 and accompanying text.

259. *See supra* notes 238-47 and accompanying text. *See generally* 9 CHILD WELFARE PLANNING NOTES 1-120 (1984) (for reports from all states for additional federal funding for child abuse programs).

260. Besharov, *supra* note 105, at 562-63.

261. *See supra* notes 214-52 and accompanying text.

262. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 1. *See* Social Security Act, 42 U.S.C. §§ 670, 671(a)(15) (1985).

263. 42 U.S.C. § 671(a)(15) (1985).

264. *See* RATTERMAN, DODSON & HARDIN, *supra* note 15, at 2.

265. *See supra* notes 3-35 and accompanying text.

AAACWA as a mandatory basis for programs and procedures. The following is a suggested model:

> §671(A) In order for a State to protect children in foster care and abused or neglected children living at home, but under local level state agency supervision, all states must comply with and administer all sections of Title IV-E of the Social Security Act.[266] The Secretary is authorized to make grants to each State Agency based on the reimbursement of the per child costs of a plan submitted to the Secretary.[267] The plan will be one that
> (1) . . .[268]
> (2) . . .
> (3) . . .
> (4) creates in each state an interagency committee made up of representatives from different regions of the state that will
>
> (a) coordinate with programs at the state level from title A and B of this title [42 U.S.C.S. §§ 601 et seq., 620 et seq.] and Title XX of this act [42 U.S.C.S. § 1397 et seq.] and any other appropriate provisions of Federal law;[269]
>
> (b) track and supervise, through six month periodic inspections, the coordination of services offered on a local level from various agencies within the regions of the state, to maximize efficiency in costs and services;
>
> (c) create new programs for home-based reunification that will fulfill the needs of families from different regions of the state;
>
> (d) develop new sources for state funding;
>
> (e) develop criteria for attracting and motivating trained professionals and set educational standards for social workers;

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266. *See infra* notes 271-73 and accompanying text (explaining that presently federal money for preventive and reunification services only reaches 20 states). *See supra* note 120 and accompanying text (introducing the requisite features of the state plan and quoting Social Security Act, 42 U.S.C. § 671(a) (1985)). The model statute does demand compliance. However, the model statute only provides guidelines and structure, thereby allowing the states to determine such integral matters as the definition of reasonable effort, which home-based programs for unification the state will create, and what new sources of state funding the state will develop. *See* Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). Furthermore, the nature of the federal interest, which is protecting children from abuse and neglect, certainly justifies state submission to guidelines, objectives, and some routine procedures. *Id.* at 288-290.

267. *See supra* notes 105-84 and accompanying text (explaining the advantage of issuing grants to the states). *See supra* note 120 and accompanying text for the introduction to the requisite features of the state plan (quoting 42 U.S.C. § 671(a) (1985)).

268. The ellipsis signifies no change in the original statute. *See* 42 U.S.C. § 671(a)(1-3) (1985).

269. Replaces Social Security Act, 42 U.S.C. § 671(a)(4) (1985). *See supra* note 250 (for a direct quote from the statute).

> (f) work with the state legislature so that effective October 1, 1991, state legislation is in place to give guidelines to state agencies in furtherance of the directives in title E [42 U.S.C.S. §§ 670-79(a)(1985)].

Sections (5) - (17) remain unchanged.[270]

Despite the role that the federal government has played through the AAACWA, states continue to carry the primary financial responsibility for child welfare.[271] Making the situation worse, of the thirty-one states audited for Title IV-E compliance in 1987, only twenty states passed the audit.[272] Thus, thirty states did not receive funding because of noncompliance with the act or because the state did not opt for the program.[273] By making grants to each state, as the proposed section 671(A) provides, Congress can compel compliance by state agencies and begin to protect all abused and neglected children and their parents.[274]

By coordinating services within each region of a state, as provided by the model section 671(A)(4)(b), the federal government can save money.[275] A state saves $1,700 for each child it helps through family preservation services rather than through foster care.[276] By having an interagency committee coordinate services within a region or general area of a state, states can utilize the services of various agencies and facilities to help reduce the number of children who go into foster care.[277] Furthermore, by assuring that programs are not duplicated, as provided by the model section 671(A)(4)(a), the state agencies can conserve money and use that money to create new programs, as provided by the model section 671(A)(4)(c).[278] Thus, by ensuring the use of preventive and reunification services in each state, case plans, and periodic system review, Congress makes a commitment to enforce each child's right to a stable home environment.[279]

In addition, the interagency committee will develop criteria for at-

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270. These selections include the important provisions on reasonable efforts, case plan, and the case review system. *See supra* notes 15 and 120 and accompanying text (for quotes from Social Security Act, 42 U.S.C. §§ 671(a)(15)(16) (1985).

271. S. SMITH, *supra* note 33, at 2, 4. Sixteen states reported that their federal share of child welfare expenses declined eight percent between 1981 and 1985. *Id.* at 4.

272. RATTERMAN, DODSON & HARDIN, *supra* note 15, at 2.

273. *See id.*

274. *See supra* notes 105-84 and accompanying text.

275. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at xiii, 88, 102.

276. S. SMITH, *supra* note 33, at 11.

277. SELECT COMMITTEE ON CHILDREN, YOUTH, AND FAMILIES, *supra* note 39, at 88.

278. For a list of suggested services, *see supra* notes 17, 148.

279. S. SMITH, *supra* note 33, at 2. The commitment to a stable home environment is provided through reunification with the natural family or by placement with an adoptive family. *Id.*

tracting and motivating staff and sources for funding. States have repeatedly reported concern in staffing and funding.[280] The concern of the states is understandable. Only a competent professional can offer a community the best hope of protecting children.[281]

Finally, by compelling states to enact legislation, as provided by model section 671(A)(4)(f), to advance directives of the AAACWA, Congress can provide "maximum guidance for consistent, appropriate action by welfare agencies and courts."[282] By allowing individual states to enact legislation, Congress will have taken into account the unique composition of each state.[283]

V. CONCLUSION

With a mandatory statute to ensure compliance with the "reasonable effort" provision and with each state working toward increasing funds in order to provide more and cost-efficient services, coordinating area services to families and enticing trained professionals back into protective services, the chances of reversing the cycle of abuse become more favorable. The heart of the "reasonable effort" provision is the preventive educational services to the families. These services teach a troubled adult how to meet his own needs and the needs of his child. With education comes awareness, and through awareness and struggle comes change. The process is often slow and sometimes painful, but definitely worth the time, and the concern, and the effort.

Many disciplines must participate in bringing about a change. The school systems, the law enforcement agencies, and the judicial system all must participate and work toward fighting child abuse and neglect. However, the results of all the professionals working in the child protection field are only as successful as the laws to which these professionals must adhere. Congress can give the needed guidelines and financial support to make the child protection system work. Certainly, the states have identified the problems. The children, the families, the states, and the nation will all ben-

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280. *See supra* notes 230-47 and accompanying text. As a source of state funds for child abuse prevention programs, fifteen states, as of 1984, passed legislation to place surcharges on marriage licenses, birth certificates, or divorce decrees. *States Helping Children*, 9 CHILD WELFARE PLANNING NOTES 7 (1986). *See also* Birch, *Children's Trust Funds: New Resources for Preventing Child Abuse*, 7 CHILDREN'S LEGAL RTS. J. 7-12 (Fall 1986) (for additional information on state funding for child abuse programs).

281. TASK FORCE ON CHILD ABUSE, *supra* note 230, at 11.

282. S. SMITH, *supra* note 33, at 10.

283. *Id. See also supra* note 224 and accompanying text. *See generally* Sneed, *Providing Child Protective Services to Culturally Diverse Families*, in PERSPECTIVES ON CHILD MALTREATMENT IN THE MID '80s 31-33 (discussing ideas for treating families from a variety of cultures in protective services).

efit from the proposals in the model statute. If, however, Congress does not compel each state to adhere to the provisions of the model statute, the manifestations of child abuse will continue to plague our society. Surely, Congress does not want to hand over to the next generation a society ravaged by drug abuse, prostitution, and criminal violence. The strength and vitality of our nation is only as viable as the strength and vitality of each individual member of our society, the men, the women, and the children. Thus, the model statute will give to the states the needed structure and financial support so that states and communities can begin to protect and preserve for the future of our country, our most precious and valuable resource: our children.

SUSAN F. CASTNER