

First Steps down the Road Less Traveled

Why child welfare systems are getting a little better - even in Nevada

A presentation for the Greenspun College of Urban Affairs, Scholar Series

University of Nevada, Las Vegas

By Richard Wexler, Executive Director

National Coalition for Child Protection Reform

February 23, 2011

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ABOUT NCCPR

The National Coalition for Child Protection Reform is a non-profit organization whose members have encountered the child protective system in their professional capacities and work to make it better serve America's most vulnerable children. A complete list of NCCPR's Board of Directors is available at www.nccpr.org. **NCCPR's national advocacy activities are funded by grants from the Open Society Foundations. We thank them for their support, but acknowledge that the views expressed here are those of NCCPR alone and do not necessarily reflect the opinions of our funders.**

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This is the second time I've had the honor of speaking at UNLV. Some things have changed in the nearly seven years since I was here last and those changes have been for the better. But a lot more remains the same.

And that's why I have to begin this time exactly as I did last time.

I am very fortunate in that almost all of what I write, from my book to a presentation like this one is critiqued and edited by a brilliant journalist who is now Washington Representative for the Scientific Integrity Program at the Union of Concerned Scientists. That would be my wife, Celia Viggo Wexler. She has endured hearing more of these presentations in our living room than anyone should have to.

Usually, I speak to audiences filled with good people who have devoted their lives to trying their best to help America's most vulnerable children. And that's why one of the most important things she's told me is that "You have to tell them why you're so angry" – or in this case, *still* so angry.

To answer, I need to tell you about the unusual route that led me here.

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

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

This is some of what she said:

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

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

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

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

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

As I did keep coming back to the story, I kept finding that the facts on the ground were not matching what the most widely-quoted so-called "experts" were saying. When the dichotomy became too much to bear, I wrote a book on the topic, *Wounded Innocents*.¹ Ultimately, that led me into advocacy.

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

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

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

After another generation.

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

Why am I angry?

Because now it's another 19 years, and while it no longer is even more likely that children will suffer as that former foster child did, it's still almost as likely.

Here are a few examples:

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

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

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

An outreach worker who specializes in helping homeless, pregnant women does her best – but the couple encounter waiting list after waiting list. When the outreach worker comes up with enough money, the couple stays in cheap hotels. But they're on the streets, one day away from being able to move into an apartment, when their son, Cherokee Wolf William Diedrich, is born.

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

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

Or consider this example, from the groundbreaking case reading in Clark County, done by Prof. Leroy Pelton here at UNLV.

A police officer responds to a woman who complained that she was unable to care for herself or her four children. She and her husband had been evicted from the Las Vegas Rescue Mission for missing a curfew. Now the mother doesn't know where her husband is. She had no income and no way to provide for the children.

The children are taken to the county orphanage - Child Haven, where they are found to be frail, underweight, and lacking in development. After 72 nights, they are returned to their parents, who by then are living in a trailer.

Five months later, the family is evicted, and the children again are placed in Child Haven. The court had ordered the Clark County Department of Family Services to pay for rent on an apartment, but an apartment had not yet been found.

An entry into the court records a month before read: "(The parents) feel that instead of receiving help, they are being punished for their poverty." After five-and-a-half months in Child Haven, the children were sent to live with a paternal aunt in another state. At the time of the casereading, the goal was termination of parental rights.⁵

Legacy of failure

These things did *not* happen because workers are jack-booted thugs who relish tearing children from their parents. Mostly, they're well-meaning people; underprepared, undertrained, and terribly overwhelmed, who then are sent out to make life-and-death decisions.

But I find no comfort to be taken in the fact that most people in the system mean well. The road to foster care hell always has been paved with good intentions. The problem is getting these good people to leave that well-trod path, and take the road less traveled.

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

For example: Three separate studies since 1996 have found that 30 percent of America's foster children could be safely in their own homes right now, if their birth parents had safe, affordable housing.⁶

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

And as Prof. Pelton found in his study: while three percent of the random sample of cases involved sexual abuse, 17 percent involved homelessness.⁸

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

What is neglect? In Ohio, it's when a child's "condition or environment is such as to warrant the state, in the interests of the child, in assuming his guardianship." In Mississippi, it's when a child is "without proper care, custody, supervision, or support." In South Dakota, it's when a child's "environment is injurious to his welfare." And in Nevada, a whole series of definitions for "neglected child" include a child "whose parent, guardian or custodian neglects or refuses to provide proper or necessary subsistence, education, medical or surgical care, or other care necessary for his health, morals or well-being."⁹

Despite this breathtakingly-broad language, the people who run CPS agencies always say: "Foster care is a last resort, -- we only take away children when absolutely necessary, and we never take children because they're poor" -- although that last one is changing a little for reasons I'll describe a little later.

But if these claims were true, then similar places should have similar rates of removal. They don't.

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

It turns out that Nevada takes away children at a rate more than 60 percent above the national average, and more than double the rate of Alabama and triple the rate of Illinois, both national leaders in using safe, proven programs to keep families together.¹⁰

Clark County does a bit better. But its rate of removal is 35 percent above the national average,¹¹ more than triple the rate of metropolitan Miami and five times the rate of metropolitan

Chicago¹² – both places where independent court-appointed monitors have found that, as foster care has declined, child safety has improved.

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

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

The research

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

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

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

Do we have a deal?

Odds are you'd look for another doctor.

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

Odds are you'd be furious.

Now, consider a study of foster care alumni conducted by Casey Family Programs and Harvard Medical School.¹⁴ When compared to adults of the same age and ethnic background who did *not* endure foster care:

- The foster children have double the rate of Post Traumatic Stress Disorder of Gulf War veterans.

- Only 20 percent of the alumni could be said to be “doing well.”

- And nearly one-third of the alumni reported that they had been abused by a foster parent or another adult in a foster home.

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

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

Other studies have produced even more alarming findings:

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

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

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

In fact, it’s not even close.

Children left in their own homes are far *less* likely to become pregnant, far *less* likely to wind up in the juvenile justice system, far less likely to commit crimes as young adults and far *more* likely to hold onto a job than comparably-maltreated children placed in foster care.¹⁵

All of this new research comes on top of the mountain of data concerning how much better children do when their families actually *do* get intensive help, research that has been accumulating for at least 30 years.¹⁶

But even if one accepts the research for families where parents have done nothing wrong, what about cases where, for example, the parent has a substance abuse problem? Indeed, Prof. Pelton's casereading shows that such problems are common among families who lose their children to DFS.

Why bother trying to keep such a family together? After all, aren't these the parents who are said to "choose drugs over their children"?

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

In a University of Florida study of children born with cocaine in their systems, one group was placed in foster care, another with birth mothers able to care for them. After six months, the babies were tested using all the usual measures of infant development: rolling over, sitting up, reaching out. Consistently, the children placed with their birth mothers did better. For the foster children, the separation from their mothers was more toxic than the cocaine.¹⁷

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

That doesn't mean we can simply leave children with addicted parents. But it does mean that in most cases, drug treatment for the mother is a better option than foster care for the child. And that drug treatment works best when it's the kind almost never offered in Clark County: inpatient treatment in places where parents and their children can live together.

And addiction to methamphetamine is just as treatable as other addictions in the same time frame as other addictions.¹⁸

Want to solve your drug and child welfare problems really fast? Take all the group homes, and shelters, and residential treatment centers – starting with that monstrosity known as Child Haven – and convert them into drug treatment campuses.

None of this means that no child ever should be taken from her or his parents. But foster care is an extremely toxic intervention that must be used sparingly and in very small doses. Everybody pays lip service to that, of course. But for more than 150 years, at least since the very first of Charles Loring Brace's "orphan trains" left New York City, filled with many children who were never orphans at all, America has prescribed mega-doses of foster care, and Nevada has been among the worst in America.

The "evidence base"

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

- When it comes to foster care, the evidence is in; so there'd be very little of that.
- Almost all the Residential Treatment Centers would be shut down, since two comprehensive reviews of the scholarly literature found little or no evidence that they do anything¹⁹ except scarf up scarce dollars – and even Shay Bilchik, the former head of their own trade associa-

tion, the Child Welfare League of America, admitted that they lack "good research" showing residential treatment's effectiveness - and "we find it hard to demonstrate success."²⁰

In an evidence-based world, no 21st Century child welfare system would be shoveling children into a place like Child Haven – and, in fact, Clark County DFS is doing a lot less of that than it used to.

Indeed, while it is always risky to use the adjective “worst” to describe anything in child welfare, Child Haven as it was just a few years ago belonged on any short list of worst places in America to warehouse a child.

That’s not just because this latter-day Dickensian orphanage was filled to overflowing, not just because infants were stacked up like cordwood in the gym, not just because the lack of individual attention may have made Child Haven as close as 21st century American child welfare ever has come to the horror stories about orphanages from Eastern Europe.

Child Haven was an abomination because shelters are inherently abominable. Even were there no overcrowding, even if the shift staff always had plenty of time for every child, it’s still an institution, they’re still shift staff, and that makes the place hazardous to the psychological health of any child. The younger the child, the greater the hazard.

One hundred years of research is nearly unanimous: Institutionalization itself – even in so-called good institutions -- is inherently harmful. It takes three single-spaced pages just to list some of the study citations.²¹ It doesn’t matter how pretty the grounds are, and it doesn’t matter how nice the staff are.

Indeed, the harm of “congregate care” is so clear, so obvious that the federal government rates foster care systems in part on how well they do at keeping children under 12 *out* of institutions.

Yes, I know all the excuses from shelter operators and others who run group homes and institutions and want to keep things as they are – what I have come to call the “foster care – industrial complex.” They claim their shelters provide “stability” to they can “assess” the children and find the right placement.

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

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

Shelters are exercises in adult self indulgence and adult self-delusion. This is aptly illustrated by a comment from one staffer talking about how wonderful Child Haven was, back when it was at its worst. He told a television station he loved coming to work at Child Haven because babies and toddlers “grab my leg. They call me Mr. Lou. They tell me they love me.”

But when a young child grabs the legs of anyone who will pay him a little attention and tells him “I love you” he’s not getting better – he’s getting worse. He is losing his ability to truly love at all, because every time he tries to love someone, that person goes away. It’s even worse than the well-known problem of children bouncing from foster home to foster home. We are setting some of these children up to become adults unable to love or trust anyone.

When I first read his comment on the television station's website, I assumed Mr. Lou must be some low-level staffer, in which case failing to understand something so basic about child development would be understandable.

Only last year did I find out that Mr. Lou was Lou Palma – the guy who actually *ran* Child Haven – until he was fired.

And then there is the argument of last resort – literally - from the foster care-industrial complex: In this one, they tell us that they really, truly wish institutions didn't have to exist, but they're the last resort. They claim that they take children who are so very, very difficult that they can't handle a family environment. Or to use the agencies' own, unintentionally-revealing slang, the children "blow out of foster homes."

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

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

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

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

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

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

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

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

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

It took a class-action lawsuit (*Nicholson v. Scopetta*) to curb this pernicious practice in New York City. My organization's Vice President was co-counsel for the plaintiffs. During the trial one expert after another testified that while witnessing domestic violence may harm a child, taking that child from the non-offending parent is far worse. One expert said that for the child it's like "pouring salt into an open wound."²³

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

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

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

The “official” numbers on this are garbage. That’s because official numbers involve agencies investigating themselves. That’s why academic research consistently produces much higher figures.²⁴

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

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

As I said earlier, group homes institutions and shelters – in other words, orphanages, are even worse.

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

The take-the-child-and-run approach makes *all* children less safe. That is the real reason for the horror stories that regularly make headlines – like the horror stories trotted out last year by the Clark County District Attorney’s office, something I’ll discuss in more detail in a little while.

The failure of ASFA

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

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

Myths about family preservation supposedly endangering children and prolonging foster care led to the so-called Adoption and Safe Families Act of 1997.

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

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

And you can't adopt your way out.

Yes, adoptions are up a lot – in percentage terms. But in raw numbers, the average annual increase has been tiny. Meanwhile, ASFA reinforces the take-the-child-and-run message, encouraging agencies to tear more and more children from their families. So it's hardly surprising that it wasn't until a decade after ASFA that the number of children in foster care on any given day finally showed signs of *significant* decline.²⁵

When ASFA was pending, my organization predicted that terminations of parental rights would increase far faster than adoptions creating a generation of legal orphans, with no ties at all to their birth parents, and little hope of adoption either. Sadly, that's exactly what has happened. Since 1998, the number of children aging out of foster care each year with no permanent home has soared by 70 percent.²⁶

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

You're only damned if you don't

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

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

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

In nearly 35 years of following child welfare, I have never seen a caseworker fired, demoted, suspended, reprimanded or so much as slapped on the wrist for taking away too many children.

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

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

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

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

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

On one side is a lawyer for the government who's had at least 72 hours to review the case and prepare the petition. On the other side is an overwhelmed, impoverished, birth parent who, in most cases, if she has a lawyer at all, met him in the hallway five minutes before.

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

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

And in Clark County, unlike the overwhelming majority of the United States, there isn't just one government child welfare agency ready to rush in and take away children. There's actually a second, rogue child welfare agency even more eager to take those children away. And if the official child welfare agency, DFS, wants to return your child home, that second rogue agency might well step in to try to stop it.

I am referring of course to the *ad hoc* child protective services agency set up by and run out of the Clark County District Attorney's office. While similar bizarre arrangements are not unheard of across the country, they are highly unusual – because they are so harmful.

In most of the country, the interaction of child welfare agencies, the rest of the executive branch and the courts is based on a fundamental principle of justice: A judge can't make the best possible decision unless all sides can make the best possible case.

So *in theory*, there is representation for the parent, a law guardian for the child and a government attorney either literally working for the child welfare agency or taking instruction from the child welfare agency.

Again, we're talking theory here. In most of the country there is a huge gap between theory and practice – with parent representation usually ranging from pathetic to non-existent.

But Clark County doesn't even have the theory right. In Clark County, even the child welfare agency isn't represented – unless the child welfare agency happens to agree with the District Attorney's office, which is the office that actually goes into court on these cases.

If the D.A.'s office disagrees, then it's DFS that has no one representing it in court. That means families can wind up whipsawed between two competing, perhaps contradictory sets of hoops they have to jump through to get their children back. They may do everything DFS says they're supposed to do, only to walk into court and find that the second child welfare agency, the rogue agency run by the D.A.'s office isn't satisfied, so their children will continue to languish in foster care.

And since the D.A.'s office has made clear it's opposed even to the modest progress made so far, this also means that denying representation to DFS places one more thumb on the scales of justice, tilting them further against families.

So it's no wonder the American Bar Association's Center on Children and the Law says most of the country has the structure right, and places like Clark County have it wrong.

Last year, the Nevada legislature was starting to catch on to this wasteful, duplicative and enormously harmful absurdity. The D.A.'s office fought back the way child savers - to use the term they gave themselves in the 19th Century - always fight back: with horror stories.

So the D.A.'s office released a list of 82 cases in which supposedly the children would have been returned to or left in dangerous homes had they not stepped in.

Let's assume, hypothetically, that's actually true. It still tells us nothing. Every year, Clark County investigates thousands of allegations of child abuse. They are going to screw up, and they are going to screw up in all directions.

Let Prof. Pelton review every one of those investigations and I have no doubt he would find more than 82 examples of children wrongly torn from everyone they know and love and cast into the chaos of Clark County foster care.

And if he deliberately chose only those cases to prove a point, that, too, would be meaningless. But he didn't do that.

The only way to know how an agency *typically* errs is to look at a random sample, not a set of cases specially selected to prove a point on either side. And that is exactly what Prof. Pelton did – and that random sample showed that the errors do indeed go in all directions, and they are equally serious, but the more common error is needless removal.

And as I noted earlier, the two errors are directly related. The more time caseworkers waste on false allegations, trivial cases and confusing poverty with neglect, the less time they have to find the children in real danger. And that's almost always the real reason for the kinds of errors cited by the D.A.

Even the comments from Assistant District Attorney Teresa Lowry, in her effort to keep her rogue agency, reveal the problem. At one point Lowry said: "The question is, are the *right* children being removed?" Lowry, of course, thinks they are not.

I agree. That is, indeed, the question.

But if the *right* children are *not* being removed, then there is only one way Clark County could take away children at a rate so far above the national average: By taking away the *wrong* children.

So one real solution is to get rid of the D.A.'s rogue child welfare agency and make clear that the lawyers who represent Clark County in these cases are to follow the instructions of DFS. With fewer needless removals, workers will find more children in real danger, and there will be fewer horror stories. And ending the duplication also might free up a little more money to provide badly-needed services for families.

First steps

Now, here's the good news. The research is getting through to the frontlines, people are catching on. Nationwide, the number of children in foster care on any given day in 2009 is 16 percent lower than at its worst a decade before – and about two-thirds of that decline took place just since 2007.²⁷ Not all of the reasons for that are good, and not all of that decline necessarily is real. Nevertheless, it indicates some progress, some first steps down the road less traveled.

Even more significant, entries into care, the number of children taken from their parents over the course of a year, declined about 12 percent from 2007 through 2009. Again, probably not all of it is real. I suspect some of the decline involves children placed with relatives but the placement never is officially reported to the federal government. But even to get away with that, at least the child welfare agency has to place the child with a relative instead of a stranger.

Part of the reason, for this, I believe is the research. Part of it is because groups like NCCPR finally have given the family preservation movement a loud, effective voice. Back in the 1990s, the family preservation movement almost “niced” itself to death. We're working to make sure that doesn't happen again.

And part of the reason is the fact that what was the unspoken problem that has plagued child welfare since the days of Charles Loring Brace now is at the center of the discussion: Racism.

Ever since my board member, prof. Dorothy Roberts of Northwestern University Law School published her groundbreaking book, *Shattered Bonds: the Color of Child Welfare*²⁸ racism has been an important part of the child welfare debate.

And that's had a particularly beneficial side effect. Child savers are so unwilling to admit to racial bias that they'll actually cop to class bias to avoid facing up to it.

So after insisting for decades that they never take children because they're poor, accuse child savers of racism and they'll say the problem is poverty. In effect, they now tell us, "we're not taking the kids because they're Black, we're taking them because they're poor."

In fact, both are at play. Studies that control for poverty make clear that race plays a crucial role in decision making. In one study, for example, when caseworkers were given otherwise-identical, hypothetical cases they were more likely to rate the child as "at risk" if the family were described as Black.²⁹ (By the way, I first read about that study in Prof. Roberts' book. And she first read about it in a publication by Tom Morton).

For all these reasons, even Nevada is making progress, and at a faster rate than the national average, with entries down 27 percent from a peak in 2006 through the end of 2009.³⁰ Clark County DFS reports a similar decline.³¹

The problem is that Nevada and Clark County are moving faster because they were so much more prone to take children needlessly in the first place. And they started in such a deep hole that even with this progress, their rates of removal remain way out of line.

The other sign of progress in Nevada is the emptying of Child Haven. According to the DFS director, they're down to only 20 children a day staying for more than 24 hours - or if you believe one disgruntled employee, more than 30 hours.³²

The question has been asked: But where are the children instead? Well, some weren't taken from their parents in the first place. A greater proportion than before probably are with relatives instead of strangers. Sadly, many others probably are in bad placements – but almost all are someplace less bad than Child Haven.

That's a low bar indeed, but yes, that's improvement.

To see how much farther there is to go, one need only read the latest iteration of the class- action lawsuit against Clark County, the one filed over and over by the National Center for Youth Law.³³

I don't doubt most of what the lawsuit says about the problems in Clark County child welfare. But NCYL is clueless about solutions – and, indeed, their intervention runs the risk of making the Clark County system even worse.

At the heart of the problem with the lawsuit is the fact that it ignores the elephant in the room. There is not a word about Clark County's high rate of removal and not a word about curbing that high rate of removal. But wrongful removal drives everything else.

Rather the suit is based on the now-discredited notion that the only thing we can do about consigning huge numbers of children to needless foster care is to make the foster care experience not quite so bad.

But the only way to fix foster care is to have less of it.

Unfortunately, there's not much of a learning curve at NCYL. This same glaring omission is at the heart of their failure to accomplish much with their settlement in Washington State. And even in Utah, which once looked like a success – thanks less to NCYL than to the expert they brought in to revise their original settlement³⁴ – things are looking shaky. A legislative audit

suggests the settlement may have contributed to a 38 percent increase in the number of children in foster care in Utah.³⁵

And ironically, NCLYL's failure to acknowledge the problem of wrongful removal may have helped contribute to getting its latest version of its Nevada suit thrown out of court. Among other things, the judge said NCYL failed to show that the Nevada foster care system was any worse than the homes these children came from.³⁶

The decision itself is appalling, suggesting that the rights of foster children are, at best, one step up from Prisoners of War under the Geneva Convention, but that doesn't change the fact that NCYL's blindness to wrongful removal contributed to its own defeat.

Had NCYL been willing to acknowledge and discuss wrongful removal, it easily could have met that test.

And in at least one respect, if NCYL gets its way, the Nevada system could get worse.

Study after study has shown that if a child really has to be taken from her or his parents, in the overwhelming majority of cases the least detrimental alternative – the best way to cushion the blow of removal – is to place that child with a relative, usually a grandparent.

These kinship care placements, as they are called, typically are more stable, better for children's well-being and, most important, safer than what should properly be called stranger care.

Kinship care is one of the few areas where Nevada actually outperforms the national average. Statewide, last year, nearly one-third of Nevada foster children were placed with relatives, compared with about one-quarter nationally.³⁷

But just as parents who lose their children to foster care typically are poor; often, so are the grandparents who take those children in. And that means they may have trouble meeting a

whole bunch of licensing standards that, in most states, are geared more to middle-class creature comforts than to health and safety.

And that's why Nevada law wisely allows placing children in unlicensed homes as long as basic health and safety standards are met.

NCYL argues that the standards for unlicensed homes in Nevada are, in fact, too low. But instead of looking for sensible middle ground, NCYL offers up a horror story or two and appears to demand that every impoverished grandparent meet precisely the standards used to license the homes of middle-class strangers. Indeed, NCYL argued that children had a constitutional right *not* to be placed with grandparents who couldn't meet every single licensing requirement.³⁸

This, of course, illustrates the problem with claiming to "represent" children in class action lawsuits through adult "next friends" who may barely know them or who, in this case, may simply be current or former foster parents who may put a shared ideology ahead of what the children really want. It's hard to believe that thousands of children really are begging their case-workers by saying something like "Please, *please* don't place me with grandma unless her house has precisely the square footage required in section 4 subsection A(2) of regulation 456!"

If you want to see the serious harm that can do, one need only look at what's happened since a similar consent decree was imposed in Michigan by NCYL's east coast counterpart, the group that so arrogantly calls itself Children's Rights, as if the "right" children most crave is to be taken from everyone they know and love.

At least 1,800 Michigan children have been forced out of the homes of grandparents and other relatives.³⁹ And no one is tracking what happened to them.

Now there are, in fact, advantages to licensing, both for states and for grandparents. When a kinship care home is licensed it is eligible for the same federal foster care aid as a stran-

ger care home. And the grandparents or other relatives must receive the same monthly payments as strangers.

That's a good reason to streamline licensing requirements, encourage grandparents to seek licensing and help them meet the standards. It is not reason enough to require licensing and force the expulsion of untold numbers of grandchildren from their grandparent's homes.

There is special irony in NCYL's apparent demand, in light of a key issue raised in the NCYL suit: the misuse and overuse of psychiatric medication on foster children.

Florida is closely examining this issue and may be doing more than any other state finally to come to grips with it. Florida's data show that the best protection against overmedicating foster children is – grandma. Foster children in kinship placements are far less likely to be prescribed psychiatric meds than those placed in "stranger care."

It's not hard to figure out why: Grandparents and other relatives are more likely to *love* these children, and so will tolerate more difficult behavior before demanding a prescription. So now we have the spectacle of the National Center for Youth Law simultaneously identifying an extremely important problem – and undermining the best solution.

Solutions

So let's talk about some real solutions:

As I said, the only way to fix foster care is to have less of it. That must begin with meaningful due process for families. And due process begins with opening the system to meaningful public scrutiny.

It's been said that justice must be seen to be done. By that standard, there is no justice in many Nevada juvenile courts or those of most other states – because the hearings where the fates of children are decided are conducted behind closed doors.

Nevada has the weirdest statutory scheme on this issue that I've ever seen. All hearings are presumed closed – except in counties with a population of over 400,000. When that law was passed that meant only Clark County. But the census bureau estimates Washoe County crossed that milestone in 2008. I'm told, however, that nothing will change until the official results from the 2010 census are released.

Meanwhile even in Clark County the law says two of the most important hearings, the first two, still are presumed closed. But in Washoe County, where everything else is closed, termination of parental rights hearings are open.

In contrast, since 1980 roughly 15 states have fully opened their juvenile courts to press and public, two more to reporters only. (Even Britain, long known for the restrictions it puts on press coverage of trials, now allows more press access to juvenile court than most U.S. states.⁴⁰)

Not one of the states that opened its juvenile courts has closed them again. That's because the Chicken Littles were wrong: None of the terrible things that supposedly would happen to children if courts were opened actually happened. And over and over again across the country, one-time opponents of open courts became converts.⁴¹

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

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

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

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

They've been doing that for some time now in many counties in Washington State. The program is so successful that even the lawyers who represent the state child welfare agency in these cases support it. They found that when parents were innocent, there was no reason to tear apart their families; and when the reasons for removal were legitimate, competent lawyers with low caseloads and social work support could show parents exactly what they needed to do to get their children back – and make sure the parents got the help to do it.⁴²

And a just-released independent evaluation finds that the program shortens the time to reunification and also to adoption or guardianship.⁴³

New York City has let contracts to provide similar representation for half of all indigent parents in three boroughs. Families are represented by a team consisting of a lawyer, a social worker and a parent advocate.

In Manhattan, children represented using this model by the Center for Family Representation spend, on average, 73 percent less time in foster care than the average for foster children in New York City. In half the cases, children never enter care at all, but instead stay at home with the services their families need. The cost is \$4,000 and \$6,600 per *family* – compared with anywhere from \$18,000 and \$49,000 per *child* to keep a child in foster care for a year in New York City.⁴⁴

The city is doing this with the full support of its child welfare agency, the Administration for Children's Services. This is probably at least partly because, while at the Annie E. Casey Foundation, before becoming ACS Commissioner, John Mattingly co-authored a scathing report on how the city's Family Courts ran roughshod over families. The report quoted judges

admitting they routinely rubber-stamped removals even when they thought ACS failed to make its case, because they were afraid of winding up on the front page if they sent a child home and something went wrong.⁴⁵

And in fact, some lucky families in Clark County, those represented through the Special Public Defender's office, get that kind of representation as well, thanks to a program set up by Judge Gerald Hardcastle with help from one of my Board members, a former Associate Dean at the Law School here at UNLV, Annette Appell.

That kind of representation needs to be the norm for every family caught in the DFS net.

Other recommendations are in our *Due Process Agenda*.

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

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

- Intensive Family Preservation Services works, provided you don't dilute the service model.⁴⁶

- Family to Family works. This initiative of the Annie E. Casey Foundation, which used to fund NCCPR, has been evaluated by a team from the University of North Carolina. They found that, where Family to Family was implemented, fewer children were taken away, placements were shorter, and there was less bouncing of children from foster home to foster home. Most important: All this positive change was accomplished while making children safer.⁴⁷

Perhaps most instructive are the large-scale, real world changes. I've already mentioned Alabama and Illinois – which I will return to in a moment. Other places well worth looking at are Maine and Florida.

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

There are two sets of financial incentives. One is the appalling incentives created by the federal government.

In his pioneering book “For Reasons of Poverty,”⁴⁸ Prof. Pelton traces the connection between government financial incentives and the rise and fall of the foster care population all through the 20th Century. He shows how foster care plummeted during the depression – because that’s when the government first provided the help which became known as AFDC. And he shows how foster care soared during the prosperous 1960s – because that’s when a change in federal law allowed AFDC payments to follow a child into foster care.

Today, the federal government spends more than ten times more on foster care and adoption than on programs to keep families safety together.⁴⁹

And while aid to keep children out of foster care is severely limited, aid for foster care is an open-ended entitlement. For every eligible child, and roughly half of all foster children are eligible, states are reimbursed anywhere from about half to three-quarters of the cost of foster care. In Nevada, at the moment, it’s at least 54 cents on the dollar.

So while safe, proven alternatives to foster care cost less in total dollars, there are times when it may cost a state or a county less to put a child in foster care.

Florida, which just a few years ago was the national symbol of child welfare failure, has turned its system around in large part by taking advantage of a rare opportunity to break free of this funding trap. It was the only state to accept, statewide, a deal in the form of a waiver. Under the waiver, Florida agreed to take its foster care money as a flat grant indexed to inflation. In exchange, they get to use the money on better alternatives instead of just on foster care. And

Florida can keep any money it saves by reducing foster care, as long as it plows the savings back into child welfare services.

The result: a 35 percent cut in entries into foster care since 2006.⁵⁰ And independent outside evaluations have found that child safety has improved.⁵¹

But Congress allowed the authority of the Department of Health and Human Services to approve such waivers to expire in 2006. A bill to reinstate that authority passed the House late last year but never got out of committee in the Senate.

In a time when every fiscal conservative is talking about the need to curb entitlements that actually do people some good, like Medicaid, Medicare and Social Security, why not target the entitlement that actually does harm and at least offer states that want to follow Florida's example the chance to do so?

But there also is a second set of incentives – and that's within the control of states and counties.

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

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

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

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

And then came the foster care crisis in Illinois.

Earlier, I mentioned the rise and fall of the Illinois foster care population. Let's take a closer look. In 1993, Illinois experienced a foster care panic, a huge sudden spike in entries into foster care in the wake of a high-profile child abuse death. By 1997, Illinois held the dubious distinction of holding more children in foster care, relative to its child population, than any other state – 50,000 in all.

And that's when the Illinois Branch of the ACLU, which has a consent decree in Illinois that is far better than anything NCYL wants for Nevada, was able to persuade the state to start paying the private agencies for permanence.

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

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

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

But while an enormous amount can be accomplished simply by spending smarter, Nevada is one state that also needs to spend more.

The most recent available data go back to 2006, but odds are not much has changed since then, and at that time, only eight states spent proportionately *less* on child welfare than Nevada, when spending is divided by the number of impoverished children.⁵² Nevada spends at a rate 40 percent below the national average. While plenty of systems spend more and still get lousy results, none of the systems getting relatively good results spends as little as Nevada.

Spending a lot of money on child welfare does not guarantee success. But spending too little guarantees failure.

Conclusion

A moment ago, I mentioned the recent success of child welfare reform in Illinois. But things have not always gone so well in Illinois.

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

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

Norman was a steelworker in suburban Chicago

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

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

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

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

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

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

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

James Norman left a noble legacy. He was the lead plaintiff in a class-action lawsuit that led to a ruling that Illinois routinely broke up families because they were poor.⁵³ A settlement calls for providing a series of services, including emergency cash, called “Norman money.”

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

NOTES

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- ³ Nicholas Riccardi, "Grandmother Blames County in Latest Death of Foster Child" *Los Angeles Times*, June 15, 1999, p.B1.
- ⁴ Kate Howard, "Foster baby's tragic beginning, tragic end." *The Tennessean*, Feb. 5, 2010.
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- ⁶ Deborah S. Harburger with Ruth Anne White, "Reunifying Families, Cutting Costs: Housing – Child Welfare Partnerships for Permanent Supportive Housing," *Child Welfare*, Vol. LXXXIII, #5 Sept./Oct. 2004, p.501.
- ⁷ Ruth Anne White and Debra Rog, "Introduction," *Child Welfare*, note 6, supra, p. 393.
- ⁸ Pelton, note 5, supra.
- ⁹ Ohio Statutes, Sec. 2151.04; Mississippi Statutes, Sec. 43-21-105; South Dakota Statutes, Sections 26-8-6 and 26-8-2. Nevada Statutes: NRS 128.014(2).
- ¹⁰ NCCPR compares the propensity of states to take away children by comparing entries into care to a three-year average of a Census Bureau estimate of the number of impoverished children in each state. *Impoverished child population*: U.S. Census Bureau, *Current Population Survey, Annual Demographic Survey, 2009 Annual Social and Economic Supplement*, available online at http://www.census.gov/hhes/www/cpstables/032010/pov/new46_100125_03.htm. To get totals for 2008, change 032010 to 032009 in the preceding URL. For 2007, go here: http://pubdb3.census.gov/macro/032008/pov/new46_100125_03.htm
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- ¹⁴ Illinois Department of Children and Family Services, *Children in Substitute Care: 1985 to Present*, available online at <http://www.state.il.us/dcf/foster/index.shtml>; Illinois Department of Children and Family Services, Division of Quality Assurance, *Executive Statistical Summary*, January, 2010, available online at <http://www.state.il.us/DCFS/docs/execstat.pdf>
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⁴⁹ For full details, see NCCPR's publication, *You Get What you Pay For*, available online at <http://www.nccpr.org/reports/finance.pdf>

⁵⁰ *Foster Care FY 2002 - FY 2009*, note 10, supra.

⁵¹ Armstrong, M.I., et. al. (2009). *Evaluation brief on the status, activities and findings related to Florida's IV-E waiver demonstration project: Two years post-implementation*. (Florida's IV-E Waiver Demonstration Project – Evaluation Brief Series, 250-2). Tampa, FL: University of South Florida, Louis de la Parte Florida Mental Health Institute. Available online at <http://centerforchildwelfare.fmhi.usf.edu/kb/LegislativeMandatedRpts/CBC%20Brief2January2010.pdf>

⁵² Spending data are from Kerry DeVooght et. al, *Federal, State and Local Spending to Address Child Abuse and Neglect in SFY 2006*. Washington, D.C.: Child Trends, December, 2008). Available online at http://www.ChildTrends.org/Files/Child_Trends-2009_02_17_FR_CWFinancePaper.pdf As with our Rate-of-Removal Index, we divide the total spending for each state by a Census Bureau estimate of the number of impoverished children in that state.

⁵³ *Norman v. McDonald*, 739 F. Supp. 1182 (N.D. Ill. 1990); 930 F. Supp. 1219 (N.D. Ill. 1996).