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THE REALITY OF FAMILY PRESERVATION UNDER NORMAN v. JOHNSON

INTRODUCTION

In the past, foster care has often been the first option selected when a family is in trouble. . . . Far too many children and families have been broken apart when they could have been preserved with a little effort. Foster care ought to be a last resort rather than the first.¹

In 1980, Congress passed the Child Welfare and Adoption Assistance Act² (Adoption Assistance Act) to remedy the many problems which plagued the foster care system. The foster care system experienced a dramatic increase in the number of foster children throughout the 1970s and 1980s.³ The excessive length of time which the children spent in foster care also concerned Congress.⁴ Furthermore, many experts argued that foster care was not in children's best interests when they could live safely at home.⁵ As a result, Congress

3. HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 1ST SESS., OVERVIEW OF THE ENTITLEMENT PROGRAM 1991 GREEN BOOK 839 (Comm. Print 1991) (explaining the history of the foster care system and how it evolved into the current system) [hereinafter HOUSE COMM. ON WAYS AND MEANS]; 125 CONG. REC. 22,681 (1979) (estimating that the number of children in foster care in 1977 was approximately three times the number of children in foster care in 1961).
4. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 787; see also 125 CONG. REC. 22,681 (1979) (stating that over half the children in foster care had been away from their families for two years and that approximately 100,000 children had been in foster care for over six years); 23 CONG. REC. 24,861 (1977) (statement of Vice Pres. Mondale) ("Too often children who could be placed with permanent families remain in foster care because the special help to make these children adoptable simply is not available. . . . Often children are simply swallowed up in the system . . . [m]any [of whom] could be forced to spend their entire childhood living in large institutions.").
5. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 784; 126 CONG. REC. 14,645 (1980) (statement of Sen. Maguire) (approving the idea that states adopt new protections against unnecessary and prolonged foster care, and recommending services aimed at preventing the removal of the child from the home); see H.R. REP. NO. 395, 101st Cong., 2d Sess. 89 (1990) (explaining the value of preventing family separation according to a wide range of child welfare experts); 123 CONG. REC. 24,866 (1977) (statement of Sen. Cranston) (stating that the human costs of failing to take whatever steps possible to prevent the removal of a child from his family are beyond calculation); see also Carol R. Golubuck, Cash Assistance to Families: An Essential Component of Reasonable Efforts to Prevent and Eliminate Foster Care Placement of Their Children, 19 CLEARINGHOUSE REV. 1393, 1400 (1986) (concluding that it makes no sense from a humanitarian
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passed the Adoption Assistance Act to remedy these problems by focusing on the goal of keeping families together rather than separating them.6

This Note first discusses the foster care system generally and then specifically in Illinois. The Note focuses on the problems which plague the Illinois foster care system and the way that the system impacts families. Also, since a large number of children entering the Illinois foster care system come from poor families, it is necessary to explore some of the special problems that these poor families face. Consequently, this Note discusses the shortage of affordable housing and resulting homelessness. It illustrates how these problems complicate the situation of poor parents who risk losing or have already lost their children to the foster care system. The Note then examines the possible protection the law offers to these families. Although the Constitution has traditionally protected families, the Note focuses on the Child Welfare and Adoption Assistance Act because of its significant impact on the legal rights of foster children and their families. The Act provides, among other things, that the state must make reasonable efforts to keep families together before placing a child in the foster care system. The Note discusses a recent Supreme Court decision that did not find such a right and explains the ramifications of this case.

Finally, this Note presents the Norman v. Johnson7 decision, which addresses the problems of poor families who, because of inadequate resources, lose their children to the foster care system. In early 1990, a class of impoverished parents sued the Illinois child welfare agency, the Department of Child and Family Services (DCFS), arguing that DCFS violated the Act by taking away their children without making reasonable efforts to keep their families together; Michael B. Mushlin, Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect, 23 HARV. C.R.-C.L. L. REV. 199, 214-15 (1988) (explaining that foster care reform has fallen into two main camps: 1) that which focuses on preventive services which would eliminate the need to separate children from their families, and 2) that which focuses on permanency planning so that children can either be promptly returned home or alternatively, permanently adopted); Reasonable Efforts to Prevent the Necessity for Foster Care Placement: An Important Mandate of Pub. L. No. 96-272, 18 CLEARINGHOUSE REV. 1394 (1985) (stating that one of the philosophies behind the 1980 legislative reforms is that if children can be protected in their home through state assistance, they are better off than in the foster care system).

6. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 787; 124 CONG. REC. 34,715-17 (1978); Mushlin, supra note 5, at 215.

An Illinois federal district court found that before the state can take children from their parents, the state must make reasonable efforts to preserve the family where it would not endanger the children. An analysis of the opinion and consent decree shows how the Adoption Assistance Act should provide poor parents and their children with some relief, but it questions whether impoverished Illinois foster children and their families really have much hope.

I. BACKGROUND

A. The Foster Care System

1. Overview of the System

States funded by the federal government have the responsibility of organizing and providing foster care to children who are abused, neglected, chemically dependent, abandoned, or home-

8. *Id.* at 1184.
9. *Id.* at 1187.
10. These various funding provisions in titles IV-B, IV-E, and XX of the Social Security Act collectively form the Adoption Assistance Act. See *House Comm. on Ways and Means, supra* note 3, at 748.
11. *Black's Law Dictionary* defines child abuse as "any form of cruelty to a child's physical, moral or mental well-being." *Black's Law Dictionary* 239 (6th ed. 1990); see, e.g., *In re Carthen*, 384 N.E.2d 723 (Ill. App. Ct. 1978) (finding abuse where the mother admitted wrapping a television cord around the child's neck and where the child had old scars on his arms, legs, and upper back which appeared to be caused by an electrical cord); *In re Jones*, 376 N.E.2d 49 (Ill. App. Ct. 1978) (finding abuse where the child had burns on each foot, but where there was no evidence of splash marks which the parent asserted caused the burns); *In re Holmes*, 328 N.E.2d 35 (Ill. App. Ct. 1975) (finding abuse where a parent was convicted of aggravated battery upon her child); *see also Ill. Rev. Stat. ch. 37, para. 802-3(2) (1991) (705 ILCS 405/2-3 (1992)) (defining abused minors as those whose parents or any person either responsible for their welfare or living in the same household 1) inflict or allow to be inflicted intentional physical injury which "causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function"; 2) create a substantial risk of physical injury; 3) commit a sex offense; 4) torture or allow torture; or 5) inflict excessive corporal punishment).
12. *Black's Law Dictionary* defines a neglected child as one whose parents or custodians, by reason of cruelty, mental incapacity, immorality, or depravity are unfit to properly care for the child. *Black's Law Dictionary* 1032 (6th ed. 1990). Alternatively, a child is neglected when his or her parents fail to provide necessary physical, emotional, medical, surgical, or hospital care — consequently endangering the health or morals of the child. *Id.; see e.g., In re Stilley*, 363 N.E.2d 820 (Ill. 1977) (finding neglect where the parent allowed a four-year-old child to wander the streets at 11:00 p.m., frequently left the child in the care of others and failed to return, had a drug problem, suffered mental illness, and caused the child to exhibit psychological effects of unstable parenting); *Wallace v. Labrenz*, 104 N.E.2d 769 (Ill. 1952) (finding neglect where the parents failed to provide their child with life saving medical treatment because of their religious beliefs), *cert. denied*, 344 U.S. 824 (1952); *In re Hill*, 430 N.E.2d 75 (Ill. App. Ct. 1981) (finding neglect where the family apartment did not contain food, a stove, a refrigerator, beds, running water, or gas; the toilet was filled with excrement; and the children had neglected wounds and inadequate
less. When a report of abuse or neglect is filed, a temporary custody hearing is held to determine the following: whether there is probable cause to believe that the child is abused, neglected,14 or chemically dependent; if so, whether it is an immediate and urgent necessity to remove the child from the home; and finally, whether reasonable efforts have been made to eliminate the necessity of removing the child from the home (or whether good cause has been shown that reasonable efforts would not or could not be effective).15 If these elements are met, the child enters the state's custody and will be placed in a relative's home, in a foster home, or in a temporary shelter.16 Next, an adjudicatory hearing or trial is held to determine whether the child is abused, neglected, or dependent.17 If the court finds that abuse has occurred, the child becomes a ward of the state.18 Finally, a dispositional hearing is held in which the state petitions to terminate the parental rights of the abused child's parents.19

13. *Black's Law Dictionary* defines abandonment of children as desertion, willful forsaking, or foregoing parental duties. *Black's Law Dictionary* 2 (6th ed. 1990); see, e.g., *In re Adoption of J. Markkan*, 414 N.E.2d 1351 (Ill. App. Ct. 1981) (defining abandonment as conduct which demonstrates a settled purpose to forego all parental duties and to relinquish all parental claims to children); *In re Cech*, 291 N.E.2d 21 (Ill. App. Ct. 1972) (finding that a father did not abandon his child where he saw the child frequently after the separation, continuously inquired about him, sent gifts, provided support, and maintained hospital insurance for him); *Thorpe v. Thorpe*, 198 N.E.2d 743 (Ill. App. Ct. 1964) (finding that a mother did not abandon her child where she sent her clothing and gifts, took out an insurance policy on her life, and visited her several times).

14. *House Comm. on Ways and Means, supra* note 3, at 748; see *supra* notes 11-13 (defining neglect, abuse, and abandonment). But see *Richard Wexler, Wounded Innocents: The Real Victims of the War Against Child Abuse* 17 (1990). Neglect could be found in almost any situation in which a caseworker wants to find it; for example, a case worker may allege neglect if a parent gives a child money to eat at McDonalds too often, if a parent does not allow a child to watch television after 7:30 p.m., or if a parent is late picking a child up from school. *Id.*


16. *Id.* at 12-49.

17. *Id.* at 12-57.

18. *Id.*

19. See Bradner C. Riggs, *Neglected Children — Disposition, in Juvenile Law and Prac-
2. Crisis of the National Foster Care System

Although the state foster care systems are maintained to protect the best interests of abused and neglected children, they traditionally fail in many respects. In the 1970s, increased federal funding and the rapid growth of state child abuse programs led to an explosion in the number of children entering the foster care system. The average estimated monthly number of children in foster care more than doubled from 97,000 in 1982 to 197,000 in 1991. With the increase in children entering the foster care system, many agencies lacked sufficient organization, supervision, personnel, or funding to adequately handle all of the cases.

As a result of both the explosion in the number of children placed in foster care and the economic incentives for the system to continue to feed that trend, the system became less focused on maintaining the children in their homes. Rather than trying to rehabilitate families, the system emphasized foster care. Since the federal government funded the foster care system while the state treasury provided family rehabilitation services, the state saved itself money by placing children into foster care. Moreover, placing children in foster care could be quite lucrative for foster care agencies. One critic explained that "[f]oster care is big business. It keeps thousands of

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TICE, supra note 15, at 10-1, 10-1 to 10-20 (explaining the dispositional hearing).

20. See House Comm. on Ways and Means, supra note 3, at 786 (stating that federal funding grew to over $200 million by the late 1970s); see also Laura Oren, DeShaney's Unfinished Business: The Foster Child's Due Process Right to Safety, 69 N.C. L. Rev. 113, 122 n.48 (1990) (stating that in the 25-year period after the passage of the first federal funding legislation, federal expenditures increased from a few million dollars annually to $325 million annually).

21. See Oren, supra note 20, at 120 n.42 (explaining the increase in child abuse reports as a combination of mandatory reporting statutes of child abuse and the "pediatric awakening" which established that child abuse could be identified through medical examination).

22. Id. at 121-22.

23. House Comm. on Ways and Means, supra note 3, at 797; see also H.R. Rep. 395, supra note 5, at 17-24 (reporting that since 1985, the placement rate has surged).


25. See H.R Rep. 395, supra note 5, at 8-9 (finding that child services systems are overwhelmed because foster homes are far too few and excessive caseloads overburden the systems' ability to provide minimal care and appropriate services); Mushlin, supra note 5, at 212-13 (citing National Commission of Children in Need of Parents, Who Knows? Who Cares? Forgotten Children in Foster Care (1979)) (“Foster care systems are administered by staffs that are 'overburdened, poorly paid and often unprepared professionally' for the difficult work they are called upon to perform.”).

26. See House Comm. on Ways and Means, supra note 3, at 787 (stating that a monetary incentive existed for states to use foster care placements rather than providing preventative or rehabilitative services).
people in jobs. It is good business to keep on keeping kids in care." According to this same critic, if more children are placed in foster care, the voluntary agencies will be able to "swell their budgets, staffs and perks by sucking at a $580-million-a-year trough." The system also frequently failed to minimize the time children spent in the custody of the state. For example, in 1977, a Department of Health Education and Welfare study found that 58% of all children in foster care had been there for more than two years and that their average stay was two and a half years. Researchers further found that the longer a child stayed in foster care, the less likely he or she would be able to leave it. The overall result of this emphasis on foster care rather than family rehabilitation was that more children entered the system, stayed longer, and were less likely to leave it.

In addition to the increase of foster children in the system, the environment of the system deteriorated. First, many foster children experienced multiple placements including time in foster homes, emergency shelters, or group homes. In 1987, for example, 23.7% of foster children experienced two placements, 20.1% of foster children experienced three placements, and 6.9% of foster children experienced four placements. Next, once children entered into foster care, they were often ignored by the system. For example, many foster children did not receive a caseworker until after they had been removed from their homes for as long as three months. Where foster children did receive caseworkers, they sometimes had no contact with them for over a year. Finally, many children suf-

27. Carole Agus, Living in Fear; Foster Care Nightmare Gets Worse, NEWSDAY, May 10, 1992, at 3.
28. Id.
29. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 787; see also H.R. REP. 395, supra note 5, at 6 ("There has been no significant progress in reducing the average length of stay of children in foster care. In 1985, the percentage of children in care more than 2 years stood at 39%, relatively unchanged from 1983.").
30. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 787.
31. Id.
32. Id. at 854; see also H.R. REP. 395, supra note 5, at 6 (finding that "between 1983 and 1985, the number of children placed in foster care more than one time nearly doubled, from 16% to 30%"); Mushlin, supra note 5, at 208 (stating that stays in four or more foster homes are common).
34. Id.
fered abuse and neglect while in the foster care system. Many studies show that the rate of abuse is substantially higher in foster homes than in other homes. Although the foster care system was intended to protect children, abuse prevented realization of this goal. As one scholar noted: “Children don’t go to heaven when they are removed from their parents. . . . They go to the foster care system.”

Traditionally, the state separated children from the home to protect them from abuse, neglect, or abandonment. It is important, however, to carefully distinguish between these three concepts. Although no one would deny that abused, neglected, and abandoned children should be protected from their parents, these labels often hide the reality of the situation. Poor children are frequently found to be “neglected” where their actual harm is minimal. For example, parents may be accused of neglecting their children by giving them money to eat breakfast at McDonalds too often, by letting them watch television after 7:30 p.m., or by picking a child up from school late. Many legal scholars and children’s advocates argue that the real meaning of neglect should not encompass such situations. Such critics of the foster care system contend that many current foster children have been unnecessarily removed from their homes because they were “neglected” even though they were not in any real danger.

Moreover, a permanent home in these situations, particularly that of the biological parents, offers the child a better environment than long-term foster care. According to one congressional report, “[i]t

35. H.R. REP. 395, supra note 5, at 39-44 (discussing many instances of abuse of children in the custody of various states); Mushlin, supra note 5, at 206 (indicating that according to a national study, foster children, at the highest rates, suffered abuse over ten times more often than other children); Amy Sinden, In Search of Affirmative Duties Toward Children under a Post-DeShaney Constitution, 139 U. PA. L. REV. 227, 228-29 n.10 (1990).

36. Sinden, supra note 35, at 229 n.10 (citing DEPARTMENT OF HEALTH & HUMAN SERVICES, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING 10-11 (1978) and VERA INSTITUTE OF JUSTICE, FOSTER HOME AND CHILD PROTECTION 63-64 (1981)).

37. WEXLER, supra note 14, at 167.

38. See DeShaney v. Winnebago Dep't of Social Servs., 489 U.S. 189 (1989). In this case, failure to remove a child from his home resulted in his suffering permanent brain damage from his father’s abuse. Id. at 192-93.

39. See WEXLER, supra note 14, at 17 (discussing the problems of defining “neglect”).

40. Id.

41. Id.

42. Id.

43. HOUSE COMM. ON WAYS AND MEANS, supra note 3, at 786.
is generally agreed that it is in the best interest of children to live with their families." Children in foster care not only suffer the personal trauma of separation from family and friends, but also their absence from a permanent home may harm their social, emotional, and psychological development. Therefore, a child's best interests can often be best protected by staying in her home where poverty may be the underlying problem. This is especially true in "neglect" cases where the neglect stems from poverty rather than from the voluntary action of the parents. This type of neglect can be eliminated by providing children and their parents the necessary resources. Many scholars and advocacy groups argue that the best solution to these problems is to provide the families services so that they can stay together and work out their problems, rather than separating them and compounding their problems within the foster care system. This theory is commonly known as "family rehabilitation" or "family preservation."  

3. The Illinois Foster Care System

Some states have adopted this approach and reformed their systems to focus on family rehabilitation. Illinois, however, has not

44. Id. at 784.
45. See Mushlin, supra note 5, at 207 (emphasizing the inevitable pain of separation that children experience regardless of how terrible the family setting was); Sinden, supra note 35, at 229 n.9 (explaining the harm and feelings of bias a child suffers when removed from a natural parent).
46. Mushlin, supra note 5, at 207.
47. See supra notes 38-42 and accompanying text (discussing the different connotations of "neglect").
48. Stanley S. Herr, Children Without Homes, Rights to Education and to Family Stability, 45 U. MIAMI L. REV. 337, 360 (1990); see The United States Conference of Mayors, Status Report on Hunger and Homelessness in America's Cities: 1988, at 3 (1989) (stating that the emotional and mental health problems of both parents and children are a result of homelessness); Golubuck, supra note 5, at 1400 ("It makes no sense from a humanitarian or financial standpoint for children to enter foster care when cash assistance to provide housing and other essentials could keep the family together."). See generally Brief for American Association for Protecting Children et al., as Amici Curiae Supporting Respondents at 83-102, Suter v. Artist M., 112 S. Ct. 1360 (1992) (No. 90-1488) (arguing that the Adoption Assistance Act was passed in response to the harmful effects on children from unnecessary foster care placement); Brief of the Illinois State Bar Association et al., as Amici Curiae Supporting Respondents at 105-110, Suter v. Artist M., 112 S. Ct. 1360 (1992) (No. 90-1488) (arguing that DCFS systematically violates the Adoption Assistance Act by failing to make foster care prevention and family reunification efforts for children, thereby causing children substantial and irreparable harm); Wexler, supra note 14, at 44-46 (illustrating DCFS's failure to preserve one family).
49. Wexler, supra note 14, at 250-71.
50. H.R. Rep. 395, supra note 5, at 89-95 (discussing the success of family preservation programs in Washington, Utah, Maryland, Virginia, New Hampshire, Vermont, and Louisiana,
yet fully implemented such reforms. In Illinois, DCFS has recently experienced an increase in lawsuits by child welfare advocates in response to the agency's alleged mismanagement, inadequate number of caseworkers and foster homes, failure to provide counseling and medical care for the foster children, and an occasional failure to keep track of the children in the system. There are currently about 23,000 foster children in DCFS's care; however, many of them have suffered additional harm since being removed from their homes.

In re Ashley K. provides a compelling illustration of the failures of DCFS. Ashley, better known as “Sarah” in the newspapers, was born addicted to heroin. Her parents, who were both addicted to heroin and cocaine, were unmarried but living together in a troubled relationship. Her mother occasionally made money to support her drug habit by prostitution. DCFS had previously investigated Ashley’s parents with regard to their two older children and discovered inadequate living conditions.

In 1984, because of her mother’s drug addiction, DCFS took custody of Ashley after she was born. Ashley was soon placed with foster parents who were led to believe that they could eventually adopt her. During the first sixteen months of Ashley’s life, her biological parents visited her three times. DCFS tried to rehabilitate Ashley’s parents, but all attempts failed. In 1985, a circuit court ruled that Ashley’s parents were unfit to care for her for reasons other than financial circumstances. Meanwhile, Ashley’s development seemed to be progressing with her foster parents, despite lingering physical effects from heroin withdrawals. DCFS, however,
did not try to facilitate an adoption or provide her with a permanent home. During 1985, Ashley's parents visited her seven times, and each visit greatly upset Ashley. In 1986, the state circuit court declared Ashley's mother unfit, yet DCFS refused to let Ashley's foster parents adopt her and give her a permanent home. At age three and one half, Ashley still had not received a dispositional hearing as required by the Adoption Assistance Act.

When Ashley was four years old, her parents finally began responding to rehabilitation. Numerous psychological reports, however, recommended that Ashley's foster parents be allowed to adopt her because she considered them her real parents and their home as her real home. The psychologists' testimony further indicated that Ashley would suffer severe psychological harm if she was returned to her biological parents. DCFS ignored these recommendations and continued visitation, which caused Ashley to suffer emotional and behavioral injuries.

In June of 1989, after Ashley had been living with her foster parents for five years, the court ordered her to be removed from their custody. Her foster parents were not allowed to visit without the consent of DCFS. In 1991, an Illinois appellate court reversed the circuit court's order because it was "palpably against the manifest weight of evidence and an abuse of discretion" in light of the psychological testimony of Ashley's best interests. The appellate court characterized Ashley's story as "the account of a helpless child caught in the quagmire of the bureaucratic maze which we mistakenly call our child welfare system." The appellate court ended up returning Ashley to her biological parents upon her plea to restore some sort of stability to her life. Essentially, Ashley was in limbo
the first seven years of her life. This lifestyle did not seem to be in her best interests. If, however, she would have received a dispositional hearing after her first eighteen months in the system, as required by the Adoption Assistance Act, she would not have remained in limbo for so long and could have had a permanent home with her foster parents much sooner.

_B.H. v. Johnson_ also paints a "bleak and Dickensian picture of life under the auspices of the DCFS." Six of the named plaintiffs in this case were brothers and sisters. Their parents locked them in a bedroom filled with human waste. When DCFS found them, they were undernourished and were in need of medical attention. DCFS's only effort at this point was to hire a homemaker to clean the apartment.

By the time DCFS finally removed the children, two of them had experienced eight different placements in one year. In these various placements, they were undernourished and physically and sexually abused. DCFS failed to provide psychological counseling to help them cope with such abuse. They also were not allowed to schedule weekly visits with their siblings, all of whom lived with the same family. Furthermore, DCFS failed to finance treatment for two of the children's special health problems and another's emotional problems. Finally, DCFS failed to adequately reimburse the foster parents for various expenses; the foster parents thus found it increasingly difficult to provide necessary care for the children. The other named plaintiffs suffered many of the same problems: they experienced numerous disruptive placements; they did not have any

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_Solomon to Rule, CHI. TRIB., Oct. 6, 1991, § 2, at 1 (stating that although Sarah was removed from her foster home "kicking and screaming," five years later she told the judge that she wanted to stay with her biological parents and she covered her eyes and said, "I want it to stop").

74. See ILL. REV. STAT. ch. 37, para. 801-2(3)(c) (1991) (705 ILCS 4051-2 (1992)) (constituting the Illinois Juvenile Court Act, which created DCFS, and stating that "[t]he parents' right to the custody of their child shall not prevail when the court determines that it is contrary to the best interests of the child").


77. Id. at 1389.

78. Id. at 1391.

79. Id.

80. Id.

81. Id.

82. Id.; see also Mushlin, _supra_ note 5, at 207 (characterizing the foster care system's failure to provide children with a stable and secure home setting, and medical, psychological, or emotional needs as "program abuse").

counseling to help them deal with their problems; they had infrequent contact with their caseworkers; and they even attempted suicide or faked suicide attempts to secure more attention from DCFS. These children did not receive help until the ACLU finally sued DCFS to stop some of these abuses. Overall, Ashley K. and B.H. provide striking examples of the dangers which foster children face when the foster care system fails to protect them.

B. The Environment of Poor Urban Families

To understand the gravity of the foster care system's problems with respect to poor families, it is necessary to explore the effect of poverty on families. First, poor families are generally at a higher risk of losing their children to state intervention. Moreover, where families lack essentials such as housing, the risk of losing their children increases dramatically. To fully understand the plight of poor families it is necessary to further discuss these two conditions.

1. Disproportionate State Intervention in Poor Families

Poor families as a whole lose their children to the foster care system more often than wealthier families. For example, in 1986, families with annual incomes of less than $15,000 were reported for abusing or neglecting their children five times more than other families. This is partly due to two factors. Since poor families often depend on the state to provide for many of their daily needs, they subject themselves to increased state scrutiny. Where they receive welfare or other federal subsidies, they open up their lives to state intervention. As a result, family problems become more visible than

84. Id. at 1390.
85. One standard for measuring whether a family is poor or "needy" is whether it qualifies for AFDC cash assistance. The needs standard is supposed to represent the monthly income amount that the state has determined necessary for maintenance. Adele M. Blong & Timothy J. Casey, AFDC Program Rules for Advocates: An Overview, 23 CLEARINGHOUSE REV. 802, 806 (1989); see 45 C.F.R. §§ 233.20(a)(1), 233.20(a)(2)(i) (1991). However, in many states, including Illinois, the needs standard is less than the poverty level. For example, in Illinois the needs standard in 1987 for a family of three was $689 per month or $8,268 per year. Lisa VanDeVeer, Adequacy of Current AFDC Need and Payment Standards, 21 CLEARINGHOUSE REV. 141, 144 (1987). The federal poverty threshold was $9,300, so in 1987 families receiving AFDC still remained 11.4% below the federal poverty level. Id. at 141-45.
86. Sinden, supra note 35, at 228 n.7 (citing NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STUDY FINDINGS: STUDY OF NATIONAL INCIDENCE OF CHILD ABUSE AND NEGLECT: 1988, at 5-41 (1988)). According to a further study, 48% of all children reported for abuse and neglect came from families who were receiving public aid. Id. (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1989, at 173 (Table 291) (1989)).
they are in wealthier families. Also, because of their impoverished conditions, many poor parents are coerced by caseworkers into giving up their children in order to avoid being labeled “neglectful.” Poverty often brings added stress which causes more problems within the family. With the added stress comes less tolerance and patience to deal with all the complexities of poverty. Consequently, poor people may be unable to cope passively or to constructively vent their frustrations. Overall, the frustration of poverty takes its toll on the relationships within poor families; this may cause the family to spiral out of control, facilitating state intervention. Poor parents who seek help from state welfare agencies may give their children up for temporary care in order to solve their family crisis. Once the crisis is resolved, however, most of these parents are unable to get their children back.

2. Scarce Affordable Housing and Homelessness

The lack of affordable housing is also an increasingly severe problem for poor families. In Chicago, two of every three poor families must pay more than half of their incomes for housing, leaving them little money to pay for food, clothing, or health care. A lack of these essentials constitutes a sufficient reason for the state to remove children from their parents’ care. Therefore, poor families who risk losing their homes often risk losing their children as well.

A historical look at the evolution of public housing provides a clue to today’s housing problems. In 1937, during the Great Depression,
President Franklin D. Roosevelt made a commitment to end housing indigence;\(^9\) this resulted in the National Housing Act.\(^8\) In 1949, Congress renewed this commitment by embarking on a national urban renewal program.\(^7\) Congress vowed to provide "a decent home in a suitable environment for every American."\(^8\) Next, in 1968, Congress set a goal to eliminate all substandard housing and fulfill all the nation’s housing needs within ten years.\(^10\) During the last twenty years the incidence of substandard housing has decreased, but the lack of affordable housing has become a larger problem.\(^10\) In Chicago alone, there are 225 low income families for every 100 low-rent apartments.\(^10\)

There are many causes of today’s shortage of affordable housing and the consequent increase in homelessness.\(^10\) First, much of the public housing stock has been demolished either intentionally or through neglect.\(^10\) The stock of single-occupancy units in urban areas has been especially hard hit.\(^10\) Next, the government has decreased its funding to some housing and income subsidy programs.\(^10\) For instance, in 1987, only 2,200 units of public housing were started, whereas in 1965, 36,900 units were started and in 1961, 52,000 units were started.\(^10\) Between 1979 and 1988, federal housing outlays dropped from $32 billion to $8 billion.\(^10\) Finally, the number of poor people has increased, thus increasing the demand for affordable housing.\(^10\) For example, a recent study by the Census Bureau showed that 33.6 million people in 1990 lived under

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96. Berger, supra note 93, at 320 ("The test of our progress is not whether we add more to the abundance of those who have too much; it is whether we provide enough for those who have too little.") (quoting President Roosevelt); Mark Peters, Homelessness: A Historical Perspective on Modern Legislation, 88 Mich. L. Rev. 1209, 1227-28 (1990) (discussing housing legislation of the early century).


100. Id. at 320; see also 12 U.S.C. § 1701 (1988) (codifying the Housing and Urban Development Act of 1968).


102. Reardon, supra note 94, at 1-2.


104. White, supra note 103, at 280.

105. Berger, supra note 93, at 322 n.42 (reporting that at least half of the single room occupancy units were recently demolished).

106. Id. at 321 n.40, 322 n.45.

107. Id. at 321 n.40.

108. Id. at 322 n.45.

109. Id. at 322-23; White, supra note 103, at 271.
the poverty line as compared with 31.5 million in 1989 and 29.3
million in 1980.\textsuperscript{110} Since the economy has become increasingly less
industrialized, more people are employed in lower paying service
jobs.\textsuperscript{111} Accordingly, much of the unskilled labor pool is simply not
making as much money as it used to. As a result, the supply of
affordable housing cannot begin to meet the demand.

Poor urban families are hardest hit by the lack of affordable
housing.\textsuperscript{112} First, the increase in housing costs makes affordable
shelter scarce for the poor. As previously mentioned, poor people
must spend a disproportionate percentage of their income on hous-
ing.\textsuperscript{113} According to the federal government, a family should spend
no more than 30\% of its income on housing, but in 1987 a typical
Chicago renter with an income of less than $10,000 spent 68\% of
her income on housing.\textsuperscript{114} Consequently, a parent working at mini-
mum wage may be below the poverty line and may not have suffi-
cient income to pay the rent.\textsuperscript{115}

Unfortunately, subsidized housing fails to offer poor families a vi-
able alternative. There are thousands of people on waiting lists to
obtain low-income housing.\textsuperscript{116} Welfare and housing allowances fail
to keep pace with rising rental costs, so federal benefits are inade-
quate.\textsuperscript{117} This problem is exacerbated by some states decreasing the
amount of public assistance. In 1991, for example, sixteen states cut
AFDC payments, tightened eligibility, or did both; six states re-
duced general assistance (aid to single adults); and Michigan almost

\begin{itemize}
  \item \textsuperscript{110} William Neikirk, 13.5\% of Americans Now in Poverty, \textit{Chi. Trib.}, Sept. 27, 1991, § 1, at 1.
  \item \textsuperscript{111} Berger, \textit{supra} note 93, at 323 n.49 (showing that between 1980 and 1987, manufacturing
  jobs fell from 20.285 million to 19.065 million and that during the same period, service jobs rose
  from 17.89 million to 24.196 million).
  \item \textsuperscript{112} These urban families are largely headed by single female parents; the poverty level within
  this type of family unit has grown at an increasing rate. \textit{See id.} at 323; Herr, \textit{supra} note 48, at
  347 n.52.
  \item \textsuperscript{113} \textit{See} Berger, \textit{supra} note 93, at 317 ("In [1985], the typical poor renter household paid
  sixty-five percent of its income for shelter.").
  \item \textsuperscript{114} \textit{Id.}; Reardon, \textit{supra} note 94, at 1.
  \item \textsuperscript{115} \textit{See} Berger, \textit{supra} note 93, at 323 n.50 (showing that minimum wage will not even put the
  worker above the poverty line).
  \item \textsuperscript{116} Telephone Interview with Lou Wallis, Spokesman for the Chicago Housing Authority's
  Department of External Affairs (Feb. 7, 1992) (estimating that the waiting list for subsidized
  housing is 40,000 people).
  \item \textsuperscript{117} VanDeVeer, \textit{supra} note 85, at 141 (explaining that the AFDC program does not include a
  provision for states to regularly update their needs standards to reflect the increased cost of liv-
ing); \textit{see} Berger, \textit{supra} note 93, at 322 n.47 (describing how federal financial assistance has failed
to adequately deliver recipients from poverty).
\end{itemize}
eliminated its general assistance program altogether.118

Once poor families are in this precarious financial situation, they are more likely to fall behind in rent and thus are more vulnerable to eviction. When these parents lose their housing, they may lack the knowledge or assertiveness to compete for scarce charitable resources.119

Furthermore, when families lose their housing, both parents and children suffer many physical and emotional problems. First, homeless people suffer a greater incidence of disease than do others because they often do not have health insurance to provide preventive care.120 The homeless are also more undernourished than the rest of society.121 They are more vulnerable to violent crimes and death.122 More generally, they lack the basic physical and emotional necessities of human life.123 They are forced to sleep, eat, clean themselves, eliminate bodily wastes, and entertain themselves without the security or privacy of a home.124 Consequently, life on the street is often psychologically devastating.125 The stress of poverty, lack of day care, scarcity of affordable housing, and deprivation of daily essentials often lead to the breakdown of stable family life and prohibit parents from adequately caring for their children.126 Due to the serious nature of this problem, many scholars and advocacy groups argue that the state should take all possible steps to either assist families in keeping their housing or to help them find housing if they have none.127


119. Herr, supra note 48, at 344; see Peter H. Rossi, Down and Out in America: The Origins of Homelessness 127-28 (1989) (stating that a Chicago homeless study found that over two-thirds of the homeless people surveyed had not graduated from high school).


122. Institute of Medicine, Homelessness, Health, and Human Needs 41 (1988) ("Homelessness . . . increases the possibility of trauma, especially as a result of physical assault or rape . . . .").

123. Rossi, supra note 119, at 14.

124. Id.

125. See Herr, supra note 48, at 344-45 ("[Homeless children] are a highly vulnerable population in terms of death during infancy and early childhood, poor physical health, developmental disabilities, depression, and other mental disorders.").

126. Sinden, supra note 35, at 228.

127. See notes 41-49 and accompanying text (discussing the reasoning and arguments of advocates of family reunification).
This lack of affordable housing, together with the problems of DCFS, places poor families in Illinois in a precarious position. Prior to *Norman v. Johnson*, if poor parents lost their jobs, they would probably have been unable to afford housing and were likely to become homeless and possibly lose their children to DCFS. Even if these parents found new jobs, affordable housing was still probably unavailable, so DCFS would refuse to return their children. Alternatively, where parents received AFDC, these payments were often insufficient to provide adequate housing, so parents still could lose their children to DCFS and consequently lose their AFDC benefits. Finally, where a child was taken into DCFS's custody for reasons other than neglect or poverty, parents receiving AFDC experienced a similar cut in benefits. Where a child was taken into DCFS's custody for reasons other than neglect or poverty, parents receiving AFDC experienced a similar cut in benefits. Therefore, even if these parents solved the initial problem that caused the removal of their children, they were still unlikely to get their children back because they lacked resources to provide adequate housing. In many instances, poor parents ended up unable to obtain adequate housing, and their children remained lost in the foster care system. DCFS, however, could change this downward spiral for many families by adhering to the federal mandate of focusing on family reunification rather than separation.

**C. Law and Families**

To fully understand the situation of foster children and their families, it is necessary to explore their legal rights. The Constitution and the Adoption Assistance Act represent two important sources of protection.

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128. 739 F. Supp. 1182 (N.D. Ill. 1990). This case is discussed later as the basis of this Note. See infra notes 375-421 and accompanying text (explaining the *Norman* decision and consent decree).

129. H.R. REP. NO. 395, supra note 5, at 8 (finding that “homelessness was a factor in over 40% of the placements into foster care in New Jersey in 1986, and in 18% of the placements, it was the sole precipitating cause of placement”).


131. Cf. Golubuck, supra note 5 (arguing that cash assistance is a necessary part of reasonable efforts in achieving family reunification).

132. Since most state foster care systems depend on federal funding under the Adoption Assistance Act, states model their laws on the federal law. For the purposes of this discussion, there is no significant distinction between state and federal law, thus only federal law is discussed in this
1. Constitutional Protections of the Family

a. Traditional respect for families

The family holds a special place in constitutional law. According to legal scholars, the family's integral role in our constitutional system is one of the deepest underlying assumptions of our society.\(^1\) Because society adheres so strongly to the notion of family and family values, the law reflects such attachments. The Supreme Court in *Griswold v. Connecticut*,\(^2\) for example, invalidated a statute which prohibited the use of contraceptives by both unmarried and married people.\(^3\) The majority opinion by Justice Douglas focused primarily on the marriage relationship and the First Amendment's role in protecting freedom of association and the right to privacy within such relationships.\(^4\) In looking at the Connecticut statute, the majority concluded, largely out of its respect for autonomy and privacy within marriage and the family, that the statute impermissibly intruded upon the freedom and privacy of the "sacred" relationship of marriage.\(^5\) Although the concurring Justices refrained from adopting the majority's analysis,\(^6\) they all agreed that the interests of

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Note.


134. 381 U.S. 479 (1965).

135. Id. at 480. The director of the Planned Parenthood League of Connecticut and a licensed physician appealed after they were arrested and convicted for giving married people information, instruction, and medical advice about contraceptives. Id.

136. Id. at 482-83. Justice Douglas initially focused on how the First Amendment protects the freedom of association. Id. at 483. Since the right to free association is protected, the First Amendment must offer privacy in one's association. Id. He then focused on the intimate relationship of husband and wife as falling within this First Amendment protection. Id. at 485-86.

137. Id. at 485-86. Justice Douglas stated: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." Id. (emphasis added).

138. See id. at 486-99 (Goldberg, J., concurring); id. at 499-502 (Harlan, J., concurring); id. at 502-07 (White, J., concurring). Justices Goldberg, Warren, and Brennan disagreed with Justice Douglas's analysis, which found such rights in a penumbra of the First Amendment. They felt that this analysis restricted the concept of liberty too much. Rather, these Justices found such rights in the Ninth Amendment. Id. at 486-99. Justice Harlan criticized Justice Douglas's opinion for unnecessarily restricting the Court's power under the Fourteenth Amendment. He opined that the incorporation doctrine was artificial and that the Court need not rely upon the Bill of Rights to find the statute unconstitutional but could do so exclusively through the Due Process Clause of the Fourteenth Amendment, which stands "on its own bottom." Id. at 499-502. Justice White
marriage and family should be protected. *Griswold* illustrates that the Constitution protects the family via either the First Amendment right to privacy in one's associations, 139 the Due Process Clause of the Fourteenth Amendment, 140 or the Constitution as a whole. 141

This constitutional protection for families is not limited to the traditional notion of a nuclear family. 142 In *Moore v. City of East Cleveland*, 143 the Supreme Court invalidated a housing ordinance which basically defined "family" as "husband or wife of the nominal head of the household," "unmarried children" of the nominal head of the household as long as such unmarried children did not have children, or "father or mother" of the nominal head of the household. 144 The appellant, her son, and two grandsons (who were cousins) did not constitute a "family" under such a statute so the appellant was convicted of violating the ordinance 146 by merely living with her two grandsons. 148 By invalidating the statute, the Supreme Court reinforced the notion that the family is honored and protected

agreed that the Fourteenth Amendment Due Process Clause was the more appropriate safeguard of such rights. *Id.* at 502-07.

139. Justice Douglas stated that although the First Amendment did not specifically guarantee such rights and freedoms, the First Amendment had a "penumbra" where marital privacy is protected from government intrusion. *Griswold*, 381 U.S. at 482-83. Justice Douglas explained that the First, Third, Fourth, and Fifth Amendments created zones of privacy via their specific guarantees and that these zones of privacy encompass privacy for married couples in their decisions regarding procreation. *Id.* at 485-86.

140. Justices Harlan and White believed that the Fourteenth Amendment stood on its own to protect the right of privacy within marriage. *Id.* at 500, 502 (Harlan, J., concurring). This was one of the rights "implicit in the concept of ordered liberty." *Id.* at 501.

141. Justices Goldberg, Warren, and Brennan found that the entire fabric of the Constitution guarantees as fundamental the rights to marital privacy and to raise a family. *Id.* at 486-99 (Goldberg, J., concurring). They specifically looked to the Ninth Amendment to protect such rights. *Id.* at 496 (referring to the Ninth Amendment which states: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.").

142. The meaning of the word "family" most commonly refers to groups of persons consisting of parents and children; father, mother and their children; immediate kindred, constituting the fundamental social unit in civilized society. BLACK'S LAW DICTIONARY 604 (6th ed. 1990); see People v. Hasse, 291 N.Y.S.2d 53, 55 (N.Y. Dist. Ct. 1968) (discussing several different definitions of "family").


144. *Id.* at 496 (citing the section of the Housing Code of East Cleveland, Ohio that limits the occupancy of a dwelling unit to members of a single family).

145. *Id.*

146. *Id.* at 495-97. The appellant challenged the constitutionality of the statute claiming that it violated both the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The Court stated that since the statute violated the Due Process Clause of the Fourteenth Amendment, it did not have to analyze the appellant's equal protection claim. *Id.*
because of its roots in the country's history and tradition.\textsuperscript{147} Since the extended relationships between grandparents, aunts, uncles, and cousins played a large role in the history and tradition of the family, the Court held that constitutional protection extends to these relationships as well.\textsuperscript{148} Consequently, \textit{Moore} demonstrates that the Supreme Court is willing to protect a wider range of associations than that of the nuclear family.\textsuperscript{149}

b. Constitutional protection against unwarranted state interference

In accordance with the constitutional protection afforded families, the law establishes a rebuttable presumption that parents are best equipped, and have the primary right, to take care of their children.\textsuperscript{150} Therefore, when the state interferes with choices made within family relationships, it has a significantly increased burden to justify such interference.\textsuperscript{151} \textit{Prince v. Massachusetts,}\textsuperscript{152} for example,

\begin{quote}
\textsuperscript{147} \textit{Id.} at 499-503 (finding a "private realm of family life which the state cannot enter"). The Court relied on a line of Supreme Court cases in reaching its conclusion: \textit{Meyer v. Nebraska}, 262 U.S. 390, 399-401 (1923) (recognizing a person's Fourteenth Amendment due process right to marry, establish a home, and bring up children); \textit{Pierce v. Society of Sisters}, 268 U.S. 510, 534-35 (1925) (holding that parents have a Fourteenth Amendment due process right to direct the upbringing and education of their children); \textit{Prince v. Massachusetts}, 321 U.S. 158, 166 (1944) (recognizing parents' Fourteenth Amendment due process interests in rearing their children); \textit{Wisconsin v. Yoder}, 406 U.S. 205, 231-33 (1972) (emphasizing parents' constitutionally protected right to exclusively control and guide their children's religious beliefs); \textit{Stanley v. Illinois}, 405 U.S. 645, 651 (1972) (finding that a parent had a constitutionally protected interest in the companionship, care, and custody of children). \textit{Moore}, 431 U.S. at 499-503.
\textsuperscript{148} \textit{Moore}, 431 U.S. at 504-05.
\textsuperscript{149} Over the years millions of our citizens have grown up in just such an environment, and most, surely, have profited from it. Even if conditions of modern society have brought about a decline in extended family households, they have not erased the accumulated wisdom of civilization, gained over centuries and honored throughout our history, that supports a larger conception of the family.
\textsuperscript{150} \textit{Id.}
\textsuperscript{149} \textit{See Tribe, supra note 133, § 15-20, at 1419-20 (discussing the Court's willingness to protect intimate relationships beyond the nuclear family).}
\textsuperscript{150} \textit{See Parham v. J.R.}, 442 U.S. 584, 602 (1979) ("The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions."); \textsc{I} \textit{William Blackstone}, \textsc{Commentaries} *447 (stating that the law has historically recognized that natural bonds of affection lead parents to act in the best interests of their children).
\textsuperscript{151} \textit{Tribe, supra note 133, § 15-20, at 1417-20. Tribe discusses the fact that despite the importance of parental rights, such rights are not unlimited. For example, state interference may be justified where the child's welfare trumps family autonomy in a situation where parents fail to bring "obedient social conformance from their children." \textit{Id.} at 1417 (quoting \textit{Burt, supra note 133, at 339-40}); cf. \textsc{American Law Div. Congressional Research Serv. of the Library of Congress, 95th Cong., 2d Sess., Constitutional Rights of Children 4-5} (Comm. Print 1978) (explaining that the law defers to parental authority unless a compelling justification for
\end{quote}
illustrates this conflict between state interference and family autonomy. In *Prince*, the legal guardian of a nine-year-old child violated a labor law by allowing her to distribute religious literature on the street. Although the Court recognized the aunt’s parental interest in rearing her niece, it also recognized the state’s power to limit parental freedom and authority when a child’s welfare is impacted. After weighing the state’s interests against the legal guardian’s parental interests, the Court concluded that the law was necessary to accomplish the state’s legitimate goals and consequently did not constitute an abuse of the state’s power.

Another conflict between state and family emerged in *Wisconsin v. Yoder*, where the Supreme Court held that the state could not force Amish parents to keep their children in public school until the age of sixteen. *Yoder* differs from *Prince* in that the Amish parents established a strong interest in exclusively controlling their children because such control was necessary to further their religious beliefs. Therefore, the Court found that the parents’ interest outweighed the state’s.

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152. 321 U.S. 158 (1944).
153. *Id.* at 160-61. The Massachusetts labor law prohibited boys under twelve and girls under eighteen from “sell[ing], expos[ing] or offer[ing] for sale any newspapers, magazines or periodicals . . . in any street or public place.” *Id.*
154. *Id.*
155. *Id.* at 166 (“It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).
156. *Id.* at 166-67 (equating a legal guardian with a parent).
157. Massachusetts stated that its interest was to secure the healthy, well-rounded growth of its young people by eliminating child employment in public places. *Id.* at 168.
158. The aunt argued that the law violated, among other things, her parental right to bring up the child as she saw fit. *Id.* at 164.
159. *Id.* at 170. The standard applied sounded like intermediate scrutiny, yet the Court merely deferred to the state’s label that the statute was “necessary” to accomplish legitimate state goals. *Id.* The Court focused more on the fact that the statute only applied to distributing literature on public streets, so parental rights were not overly burdened by it. *Id.*
161. *Id.* at 234.
162. *Id.* at 215-20. The court pointed out that “there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability.” *Id.* at 220.
163. *Id.* at 234-35.
c. Constitutional rights to the management and companionship of children

The Constitution protects the family primarily by upholding parents' rights to the management and companionship of their children. For instance, in *Pierce v. Society of Sisters*,\(^{164}\) the Court held that parents have a Fourteenth Amendment due process right to raise and educate children under their control.\(^{165}\) There, the Supreme Court invalidated an amendment to Oregon's school law which required parents and guardians to send their children to Oregon's public schools.\(^{166}\) Since the law hampered the parents' free choice to decide where to educate their children, and no evidence showed that parochial schools were inferior, the state was without sufficient justification to interfere with the parents' Fourteenth Amendment freedoms.\(^{167}\)

Similarly, in *Meyer v. Nebraska*,\(^{168}\) the Supreme Court recognized parents' Fourteenth Amendment due process right to raise their children.\(^{169}\) In this case, Nebraska enacted a statute which prohibited the teaching of any language other than English in public and parochial schools.\(^{170}\) The Court found that the statute unconstitutionally interfered with the Fourteenth Amendment rights of parents to have their children instructed as they chose.\(^{171}\) *Parham v. J.R.*\(^{172}\) offers a final illustration of the Court's willingness to protect parents' constitutional rights to manage their children. There, the Court granted parents broad authority within the family setting by upholding a law that gave parents virtually exclusive power to com-

164. 268 U.S. 510, 535 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").
165. Id.
166. Id. at 522.
167. See id. at 533-35 (explaining that the state simply did not establish the need for such a statute so the legislation had "no reasonable relation to some purpose within the competency of the State").
168. 262 U.S. 390 (1923).
169. Id. at 399.
170. Id. at 399-400.
171. Id. at 400-02. The Court warned against the dangers in restricting the liberty granted by the Fourteenth Amendment. The Court, for example, compared this law with Plato's theory in the *Republic* where "children are to be common, and no parent is to know his own child, nor any child his parent." Id. at 401-02. It then concluded that such state control would violate the letter and the spirit of the Constitution. Id. at 402. The Court also found that the statute violated the plaintiff teacher's Fourteenth Amendment right. Id.
mit their children to mental hospitals.\textsuperscript{173} The \textit{Pierce, Meyer,} and \textit{Parham} decisions thus indicate that the Fourteenth Amendment Due Process Clause constitutes a liberal guarantee of parents' rights to manage their children.\textsuperscript{174}

The Fourteenth Amendment also guarantees a parent's right to companionship with his or her children. In \textit{Stanley v. Illinois,}\textsuperscript{176} the Supreme Court invalidated an Illinois adoption statute that ignored an unwed father's interest in his child.\textsuperscript{176} In reaching its conclusion, the Court stated that the parent has an interest in the companionship, care, and custody of the child, which "undeniably warrants deference" and protection "absent a powerful countervailing interest."\textsuperscript{177} One Illinois court similarly expressed: "[T]he bond between the parents and the child is the deepest feelings of the heart."\textsuperscript{178} Courts also acknowledge that keeping the family together helps promote the child's best interests.\textsuperscript{179} Therefore, both law and social research\textsuperscript{180} support the conclusion that parent-child companionship should be preserved whenever possible.

It is necessary again at this point to emphasize the view which argues against the unquestioned legitimacy of parental authority.\textsuperscript{181} For example, where parents fail to adequately care for their child, as in the case of abuse, the courts will remove the child from the home and place the child in the state's custody. Therefore, the Constitution does not protect abusive parents. However, when poverty enters the picture, the state often mistakenly views children as ne-

\textsuperscript{173} Id. at 603-04. Even though the Court recognized the child's liberty interest, it held that the parents' interest superseded it. \textit{Id.} at 604.

\textsuperscript{174} See \textit{Stanley v. Illinois,} 405 U.S. 645 (1972) (extending the protection of the Fourteenth Amendment to the parental rights of the father of an illegitimate child).

\textsuperscript{175} 405 U.S. 645 (1972).

\textsuperscript{176} \textit{Id.} at 658-59. The statute's narrow definition of parents as the "mother and father of a legitimate child" ignored any rights of the child's unwed father. \textit{Id.} at 650.

\textsuperscript{177} \textit{Id.} at 651 (focusing on the "warm, enduring, and important" bonds within the family regardless of whether it's a formal, organized unit).

\textsuperscript{178} \textit{Schmidt v. Schmidt,} 105 N.E.2d 117 (Ill. App. Ct. 1952); \textit{see Washburn v. Washburn,} 122 P.2d 96 (Cal. 1942) (observing that there is no substitute for a mother's love); \textit{Moody v. Moody,} 211 So. 2d 842, 844 (Miss. 1968) (observing that parents will love and care for their children accordingly).

\textsuperscript{179} \textit{People v. R.G.,} 546 N.E.2d 533, 541 (Ill. 1989). "It is cardinal with us that the custody, care, and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder." \textit{Id.} (citing \textit{Prince v. Massachusetts,} 321 U.S. 158, 166 (1944)).

\textsuperscript{180} \textit{See supra} notes 45-48 and accompanying text (explaining the destructive effects on a child who is removed from his or her parent).

\textsuperscript{181} \textit{Burt, supra} note 133, at 351.
glected. 182 Unfortunately, the Constitution fails to offer protection in such instances, even where the parents have not harmed their children. Accordingly, the impoverished families damaged by the state's misinterpretation must often look elsewhere for legal protection.

2. The Adoption Assistance Act

a. Legislative history

In 1980, Congress passed the Adoption Assistance Act183 in response to the many problems of the nation's foster care system. The legislative history reflects Congress's attempt to reform the welfare system and respond to the many problems which plagued it.184 When Congress passed the Act, the country's foster care system was extremely overcrowded, and many children who did not belong in the system languished there.185 Congress found that child services systems were overwhelmed: permanent homes were far and few between, and excessive caseloads overburdened the systems' ability to provide minimal care and appropriate services.186 Vice President Walter Mondale stated: "Too often children who could be placed with permanent families remain in foster care because the special help to make these children adoptable simply is not available. . . . Often, children are simply swallowed up in the system . . . ."187 In response, Congress passed the Act with the intent of keeping children out of foster care where they could be safe at home with the appropriate services. For example, Senator Cranston stated:

In the past, foster care has often been the first option selected when a family is in trouble. . . . Far too many children and families have been broken apart when they could have been preserved with a little effort. Foster care

182. See supra notes 38-42 and accompanying text (demonstrating the state's frequent labeling of poverty as neglect).
185. See supra notes 20-49 and accompanying text (describing the problems of the foster care system which precipitated the Act).
To resolve the problem of unnecessary placement, Congress included a provision which stated that the state must make reasonable efforts to keep families together before removing children from their homes. According to Senator Cranston:

"The new provisions will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families. Of course, State child protective agencies will continue to have authority to remove immediately children from dangerous situations, but these agencies will be required to provide such services before removing the child and turning to foster care. These provisions, I believe, are among the most important aspects of this legislation."

In light of such clear congressional intent, it appears that the Act's reasonable efforts provision was created so that states would provide services to prevent children from being unnecessarily removed from their homes. However, if families are unable to enforce such services, this provision would seem to be a dead letter.

b. The Act

The Adoption Assistance Act restructured the Social Security Act's program of Aid to Families with Dependent Children (AFDC) in an attempt to prevent children from being removed unnecessarily from their parents. To achieve this goal, Congress

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188. 126 Cong. Rec. 6942 (1980); see 125 Cong. Rec. 22,117 (1979) (remarks of Rep. Rostenkowski) ("In a majority of the cases, there are little or no attempts to reunite the child with the natural family.").


190. AFDC is a "federal-state means-tested income support program under which the states provide monthly or bi-monthly cash grants for basic maintenance to some groups of 'needy' families with 'dependent children' and the federal government reimburses the states for 50-80 percent of their program costs." Blong & Casey, supra note 85, at 802. To be eligible for AFDC, a person must be a U.S. citizen or a legal alien; must have a dependent child living with her or be a relative of a child who is in her care; and must meet the financial eligibility requirements of the state in which she receives the payments. Id. In addition to cash grants, AFDC has other programs, such as job training and day care. Id.; see also Diane Redleaf, Illinois Child-Care Disregard Litigation: Modest Consolation for the Working Poor, 25 Santa Clara L. Rev. 375 (1985). AFDC payments, however, have not been adequate with respect to the rising cost of living. VanDeVeer, supra note 85, at 142.

191. House Comm. on Ways and Means, supra note 3, at 788; see Social Security Act, 42 U.S.C. § 601 (1988) (authorizing federal funds for the states under AFDC "[f]or the purpose of encouraging the care of dependent children in their own homes . . . strengthen[ing] family life and to help such parent or relatives to attain or retain capability for the maximum self-support
conditioned federal funding for state foster care systems on the states' compliance with the Act's policies and procedures. The stated policy of the Act is to prevent unnecessary separation of families by keeping or restoring children to their families through child welfare services. To achieve this goal, the Act requires reunification programs, case plans, reasonable efforts to reunify the family, a case review system, written notice to parents when the agency denies them any benefits, and coordination of programs which will promote child and family welfare. Although the policy underlying the Act focuses on the need to protect children and to secure their best interests, largely by stressing family reunification, the Act's potential has not been fully realized. Unfortu-

and personal independence consistent with the maintenance of continuing parental care and protection . . . .); see also S. REP. NO. 744, 90th Cong., 1st Sess. 3-4 (1967), reprinted in 1967 U.S.C.C.A.N. 2834, 2837-38 (describing how the Aid to Families with Dependent Children program would be changed to provide more incentives for parents to find employment).

192. See 42 U.S.C. §§ 602, 671 (1991); cf. 42 U.S.C. § 627(a)(2)(B), (C)(1988) (conditioning the state's receipt of federal funds on its implementation of a case review system and a service program "designed to help children, where appropriate, to return to families from which they have been removed").

193. 42 U.S.C. § 625(a)(1)(C) (1988); see 42 U.S.C. § 627(b)(3) (1988 & Supp. II 1990) (conditioning the state's level of funding on the fact that it "has implemented a preplacement preventive service program designed to help children remain with their families").

194. 42 U.S.C. § 625(a)(1)(D) (1988); see 42 U.S.C. § 627(a)(2)(C) (1988) (requiring the state to implement "a service program designed to help children, where appropriate, return to families from which they have been removed").

195. 42 U.S.C. § 627(b)(2) (1988 & Supp. II 1990) (conditioning the state's continued level of funding on its implementation of an information system which tells the location and goals for each child in the system, a case review system which acts as a procedural safeguard to ensure that children's rights are being properly reviewed and evaluated, and a service program designed to help children return to their families, when appropriate).

196. 42 U.S.C. § 671(a)(16) (1988); 42 U.S.C. § 675(1) (1988 & Supp. II 1990) (defining a case plan as a written document including "[a] description of the type of home in which a child is to be placed," a "discussion of the appropriateness of the placement," a plan that assures the child is receiving proper care, a plan that assures that the state is trying to improve the conditions of the child's home so that the child can return, and the child's health and education records).


198. 42 U.S.C. §§ 627(a)(2)(B), 671(a)(16), 675(5) (1988 & Supp. II 1990) (mandating and defining a case review system as a procedure for assuring that each child has a case plan designed to achieve placement in the most family-like setting, that the status of the child is reviewed at least every six months, that each child receives a hearing to determine the future status of the child within eighteen months after the child enters the foster care system, and that each child's health and education records are reviewed).


201. See supra notes 1 & 2 and accompanying text (explaining Congress's goal in passing the Act); see also 126 CONG. REC. 14,767 (1980) (remarks of Sen. Cranston). "The new provisions
nately, "the American foster care system has developed a remarkable immunity to reform." 202

c. Judicial interpretation of the Adoption Assistance Act

Generally, courts have held that the Adoption Assistance Act and its regulations create enforceable rights203 for foster children in states which accept federal assistance.204 They have upheld the specific statutory rights to case plans, a case review system, and dispositional hearings.205 In both Lynch v. Dukakis206 and B.H. v. Johnson,207 children brought suit under 42 U.S.C. §1983 claiming that the state failed to comply with the Adoption Assistance Act.208 In Lynch, the First Circuit held that the state's failure to comply with the case plan and review requirements violated the plaintiffs' enforceable rights under the statute.209 The court reasoned that the Act did create enforceable rights because Congress did not intend to

will require States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families. . . . These provisions, I believe, are among the most important aspects of this legislation." Id.

202. Mushlin, supra note 5, at 212.

203. Under the Civil Rights Act, section 1983 gives an injured person the right to sue where she was deprived of a right guaranteed by a federal statute. Section 1983 specifically states:

Every person who, under color of any statute, ordinance, regulation custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.


204. See, e.g., Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989); In re Burns, 519 A.2d 638 (Del. 1986). The Burns court held that where the Division of Child Protective Services did not furnish meaningful case plans or make reasonable efforts to reunify the family as mandated in the Delaware statutes, it violated due process. Id. at 644-49. Although the Delaware Supreme Court did not provide a detailed discussion, it nonetheless protected the foster children's statutory entitlement. Id.

205. See Vermont Dep't of Social & Rehabilitation Servs. v. United States Dep't of Health and Human Servs., 798 F.2d 57 (2d Cir. 1986) (granting the right to a dispositional hearing); Lynch v. Dukakis, 719 F.2d 504 (1st Cir. 1983) (upholding the right to a case plan and review); B.H. v. Johnson, 715 F. Supp. 1387 (N.D. Ill. 1989) (granting the right to a case plan and review).

206. 719 F.2d 504 (1st Cir. 1983).

207. 715 F. Supp. 1387 (N.D. Ill. 1989); see also Aristotle P. v. Johnson, 721 F. Supp. 1002 (N.D. Ill. 1989) (illustrating a section 1983 action brought by foster children challenging the Illinois Department of Children and Family Service's practice of placing siblings in separate foster homes and denying them the opportunity to visit their sisters and brothers).

208. Lynch, 719 F.2d at 506; B.H., 715 F. Supp. at 1392.

209. Lynch, 719 F.2d at 511-12.
close “the avenue of effective judicial review to those individuals most directly affected by the administration of its program.” Likewise, the court in B.H. recognized the enforceable right to a case plan and case review system because the Act specifically mandated such affirmative obligations.

Finally, in Vermont Department of Social and Rehabilitation Services v. Bowen, the Second Circuit read the provisions requiring a dispositional hearing as specifically demanding state compliance. Since Vermont’s statutory scheme failed to provide dispositional hearings within eighteen months of each child’s original placement in the foster care system (as required by statute), the state did not satisfy the federal requirements for funding. Consequently, the Second Circuit upheld the Grant Appeal Board’s decision to deny federal reimbursement for Vermont’s foster care system. According to Lynch, B.H., and Bowen, courts are willing to create enforceable rights under the Adoption Assistance Act where the Act specifically mandates the state to fulfill well-defined affirmative obligations.

Courts are reluctant, however, to include as enforceable rights broad and vague benefits not specifically defined in the Adoption Assistance Act. For a right to be enforceable under a statute, Con-

210. Id. at 510.
211. B.H., 715 F. Supp. at 1402 (focusing on the narrow and specific nature of the case plan and case review provisions and emphasizing that “plaintiffs’ entitlement to a . . . case plan does not give rise to the [other] sweeping rights asserted by plaintiffs”).
212. 798 F.2d 57 (2d Cir. 1986).
213. Id. at 63.
214. The dispositional hearing is a hearing which determines the future status of a child. 42 U.S.C. § 675(5)(C) (1988); see also ILL. REV. STAT. ch. 37, para. 801-3(6) (1991) (705 ILCS 405/1-3 (1992)) (defining a dispositional hearing as “a hearing to determine whether a minor should be adjudged to be a ward of the court, and to determine what order of disposition should be made in respect to a minor adjudged to be a ward of the court”). The purpose of the dispositional hearing is basically to determine whether it is in the minor’s best interest to be removed from the home and made a ward of the state. Riggs, supra note 19, at 10-15.
215. Vermont Dep’t of Social & Rehabilitation Servs., 798 F.2d at 60.
216. Id. at 65.
217. Id. Although the court does not specifically state the implication of its holding, by affirming the Grant Appeal Board’s decision, it seems that the Vermont foster care system lost its federal funding for that fiscal year. Id.
218. The Supreme Court recently ruled on the issue of the enforceable rights embodied in the Act in Suter v. Artist M., 112 S. Ct. 1360 (1992). Although the Court ruled specifically on the “reasonable efforts” for family rehabilitation provision in 42 U.S.C. § 671(a)(15) (1988), in dicta the Court suggested that a state plan might be the only enforceable right under the Act. Artist M., 112 S. Ct. at 1367. Consequently, Artist M. may threaten the holdings in Lynch, Dukakis, and B.H. See supra notes 203-18 and accompanying text (discussing the provisions which have been held to create enforceable rights).
gress must have unambiguously created such a right.\textsuperscript{219} For example, the Eleventh Circuit in \textit{Taylor v. Ledbetter}\textsuperscript{220} refused to recognize a foster child's claim for gross negligence against a caseworker under the Adoption Assistance Act.\textsuperscript{221} The caseworker in \textit{Taylor} placed the foster child in a home where the foster mother willfully struck, shook, threw down, beat, and otherwise severely abused the child.\textsuperscript{222} As a result of this abuse, the child fell into a coma.\textsuperscript{223} Although the court found that the plaintiff had a constitutional remedy, it refused to hold that the Adoption Assistance Act contained the "right to be free from the infliction of unnecessary pain."\textsuperscript{224}

Likewise, in \textit{Lesher v. Lavrich},\textsuperscript{225} the Sixth Circuit held that the Adoption Assistance Act did not embody the statutory right to challenge the decision of a juvenile court or the right to damages.\textsuperscript{226} In \textit{Lesher}, parents sought to use the state's failure to provide preventive services under the Adoption Assistance Act to nullify a prior decision of the juvenile court and get damages.\textsuperscript{227} Although the Sixth Circuit suggested that the Adoption Assistance Act does provide statutory rights as in the case of \textit{Lynch v. Dukakis}, it concluded that no rights existed there.\textsuperscript{228}

\textit{In re J.S.}\textsuperscript{229} provides a further illustration of courts' reluctance to expand the statutory rights embodied in the Adoption Assistance Act. There, a child in the state's custody claimed that the Adoption Assistance Act mandated that a change in a child's case plan be approved by the case review board.\textsuperscript{230} The court disagreed, narrowly limiting the provisions concerning case plans and review. It concluded that the state was only obligated to an eighteen-month review of case plans, not to a review every time the plan was changed.\textsuperscript{231} \textit{Taylor}, \textit{Lesher}, and \textit{In re J.S.} indicate that courts seem willing to grant statutory rights under the Adoption Assistance Act

\textsuperscript{219} See Maine v. Thiboutot, 448 U.S. 1 (1980).
\textsuperscript{220} 818 F.2d 791 (11th Cir. 1987).
\textsuperscript{221} Id. at 800.
\textsuperscript{222} Id. at 792.
\textsuperscript{223} Id.
\textsuperscript{224} Id. at 794.
\textsuperscript{225} 784 F.2d 193 (6th Cir. 1986).
\textsuperscript{226} Id. at 197-98.
\textsuperscript{227} Id. at 194.
\textsuperscript{228} Id. at 197.
\textsuperscript{229} In re J.S., 571 A.2d 658 (Vt. 1989).
\textsuperscript{230} Id. at 660.
\textsuperscript{231} Id. at 663.
only where a specific provision requires the state to fulfill concrete obligations.\textsuperscript{232}

Just as some courts refuse to extend the rights in the Adoption Assistance Act, other courts refuse to interpret broad and vague rights even if specifically granted by the Act.\textsuperscript{233} The Adoption Assistance Act states, in pertinent part, that "[i]n order for a State to be eligible for payments under this part, it shall have a plan . . . which . . . provides that, in each case, reasonable efforts will be made" to prevent the separation of families (the reasonable efforts provision).\textsuperscript{234} Although some lower courts found that the Adoption Assistance Act contained the enforceable right to reasonable efforts for family reunification,\textsuperscript{235} the United States Supreme Court recently overruled such decisions in Suter v. Artist M.\textsuperscript{236}

In Artist M., the agency which runs the Illinois foster care system, DCFS, failed to promptly assign caseworkers or reassign caseworkers when the original caseworkers left.\textsuperscript{237} The District Court for the Northern District of Illinois classified such actions as a failure to make reasonable efforts in reunifying the family.\textsuperscript{238} The district court then concluded, by equating this reunification right with a foster child's right to a case plan and review, that the plaintiffs had a statutorily protected right to reasonable efforts from DCFS.\textsuperscript{239} The district court rejected the arguments that the reasonable efforts mandate was too vague and that Congress did not intend to confer such rights.\textsuperscript{240} On appeal, the Seventh Circuit upheld

\textsuperscript{232} But see infra text accompanying notes 243-70 (exploring the issue of whether the reasonable efforts provision, 42 U.S.C. § 671(a)(15) (1988), imposes concrete obligations on the states).


\textsuperscript{235} See Artist M. v. Johnson, 917 F.2d 980 (7th Cir. 1990), rev'd sub nom., Suter v. Artist M., 112 S. Ct. 1360 (1992); Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990); see also In re Burns, 519 A.2d 638, 648-49 (Del. 1986) (concluding that the state had failed to comply with the Act's reasonable efforts provision); In re M.H., 444 N.W.2d 110, 113 (Iowa Ct. App. 1989) (finding that the state did not make reasonable efforts to keep a family together before placing the children in foster homes); In re Kenny F., 786 P.2d 699, 702 (N.M. Ct. App. 1990) (recognizing the reasonable efforts mandate); In re S.A.D., 555 A.2d 123, 127-28 (Pa. Super. Ct. 1989) (deciding that a state agency had not made reasonable efforts as required by the Act).

\textsuperscript{236} 112 S. Ct. 1360 (1992).

\textsuperscript{237} Id. at 1364.


\textsuperscript{239} Id.

\textsuperscript{240} Id. The court stated: "Courts have long proved themselves adequate to the task of enforc-
the district court's conclusions and thus approved the child's right to enforce the reasonable efforts provision. The Supreme Court, however, reversed the Seventh Circuit's decision.

DCFS appealed the Seventh Circuit's decision, claiming that there is no enforceable federal right to reasonable efforts under the Adoption Assistance Act, so there would not be a section 1983 cause of action. DCFS primarily relied on *Pennhurst State School and Hospital v. Halderman*, which stated that if Congress intended for federal funding statutes like the Adoption Assistance Act to create individually enforceable obligations on the states, then such rights must have been clearly expressed by Congress. DCFS argued that Congress did not clearly mandate reasonable efforts as a new standard. DCFS further claimed that Congress intended child welfare law to remain in state, not federal, courts so no federally enforceable rights were created. Since Congress did not clearly intend to mandate reasonable efforts, DCFS argued, it did not create an enforceable right to reasonable efforts under section 1983. Finally, DCFS contended that even if the federal right to reasonable efforts exists, Congress foreclosed section 1983 as a remedy because the Adoption Assistance Act calls for the state to de-

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241. *Artist M.*, 917 F.2d at 988.
244. Brief for Petitioners at 14, *Suter v. Artist M.*, 112 S. Ct. 1360 (1992) (No. 90-1488); see also Linda P. Campbell, *DCFS Seeks Relief from Suits in U.S. Courts*, CHI. TRIB., Dec. 3, 1991, § 2, at 4 (reporting DCFS's claim that the Act was too unclear and vague to create a federal right); Linda P. Campbell & William Grady, *Suing to Keep Kids, Families Together*, CHI. TRIB., Dec. 1, 1991, § 2, at 1, 5 (reciting DCFS's claim that the "reasonable efforts" language is too vague to create a federal right).
246. *Id.* at 17, 23-25; see Brief for Petitioners at 16, *Artist M.* (No. 90-1488).
247. Brief for Petitioners at 22. At oral argument before the Supreme Court, DCFS argued that when Congress adopted the Act, Congress understood that states would need a degree of flexibility in administering the Act and so did not make "reasonable efforts" an enforceable right.
248. Brief for Petitioners at 32.
249. *Id.*
cide such issues. Therefore, DCFS insisted that the elements of a section 1983 claim were not met.

The Cook County Public Guardian’s Office, representing the rights of foster children, argued that the “inquiry turns on whether the provision in question was intended to benefit the putative plaintiff.” If such a benefit was intended, then it constituted an enforceable right unless it was too vague and amorphous for a court to interpret. According to the Public Guardian’s Office, federal courts often have to interpret reasonableness requirements in different statutes and the reasonable efforts provision of the Adoption Assistance Act is no different. Moreover, they argued that the history of the Adoption Assistance Act clearly reflects Congress’s intent to create the enforceable right of “reasonable efforts.” They asserted that the congressional record illustrates Congress’s intent to instill affirmative duties in the Act and that the Act’s regulations provide guidance for federal courts to determine whether the state satisfied its burden.

Finally, they argued that since the role of the state courts is not to supervise DCFS’s efforts to return foster children to their home, the Act does not foreclose a section 1983 remedy. Moreover, even though the Act states that the federal government has the genera-

250. Id. at 40-41; see 42 U.S.C. § 672(a) (1988) (describing states’ foster care maintenance programs).
251. The Office of the Public Guardian provides guardians ad litem (GAL) for abused and neglected children. Its role is to represent the best interests of the child in the temporary custody hearing, the dispositional hearing, and where the child’s parents’ rights are terminated. See Lowder, supra note 15, at 12-1.
253. Id.
255. Brief for Respondents at 32, Artist M. (No. 90-1488).
256. Id.; see 126 CONG. REC. 14,767 (1980) (statement of Sen. Cranston) (“These very generalized provisions have had little specific impact upon a State’s responsibility to provide services designed to prevent a child’s removal from his or her home, or to help alleviate the problem which caused the child’s removal in the first place.”).
257. Brief for Respondents at 32-33, Artist M. (No. 90-1488); see 45 C:F.R. §§ 1356.21(b), 1357.15(e)(2) (1983) (establishing specific services which a state may provide to satisfy the reasonable efforts requirement).
258. Brief for Respondents at 36, Artist M. (No. 90-1488). But see Family Law, supra note 247, at 3429 (quoting Justice Souter, who reminded the Office of the Public Guardian that ultimately the state budget will be implicated in these federal decisions so the state is not entirely isolated).
lized power to cut off funds where the state does not comply with the Act,²⁶⁹ the Public Guardian’s Office argued that this fact also does not foreclose a section 1983 remedy.²⁶⁰ It concluded that nothing should preclude foster children from bringing section 1983 claims to enforce the reasonable efforts provision of the Adoption Assistance Act.

The Supreme Court agreed with DCFS and found that there was not an enforceable right to reasonable efforts for family reunification because Congress did not “unambiguously” confer such a right.²⁶¹ It relied on Wright v. City of Roanoke Redevelopment and Housing Authority²⁶² and Wilder v. Virginia Hospital Association²⁶³ as authority as to whether or not a reasonable efforts provision is enforceable.²⁶⁴ The Court then distinguished the Adoption Assistance Act’s reasonable efforts provision from the statutory provisions in Wright and Wilder, on the grounds that it was too vague.²⁶⁵ Although the dissent argued that the language of all three reasonable efforts provisions was extremely similar,²⁶⁶ the majority nonetheless concluded that the Adoption Assistance Act’s provision was more generalized and less specific than the provisions in Wright and Wilder.²⁶⁷ The Court further justified its conclusion by stating that the legislative history did not contradict its holding.²⁶⁸ Finally, the Court reasoned that foster children and their families were not entirely left without a remedy because the federal government could still withdraw federal funds if the states failed to comply with the Act.²⁶⁹ Although the dissent argued that cutting off federal aid to the state would not be a viable remedy,²⁷⁰ as it stands, foster children and their families have no right to expect that the state will try to keep them together prior to splitting their families apart.

Despite the outcome of Artist M., the reasonable efforts provision

²⁶². 479 U.S. 418 (1987) (finding an enforceable right to a reasonable amount of utilities).
²⁶³. 496 U.S. 498 (1990) (finding an enforceable right to reasonable and adequate rates).
²⁶⁵. Id. at 1367-68.
²⁶⁶. Id. at 1371-76 (Blackmun, J., dissenting).
²⁶⁷. Artist M., 112 S.Ct. at 1370.
²⁶⁸. Id. at 1369.
²⁶⁹. Id. at 1368.
²⁷⁰. Id. at 1376-77 (Blackmun, J., dissenting).
may still contain some life in Illinois. As a result of some Illinois decisions, DCFS has entered into a number of consent decrees\(^{271}\) in which it agreed to comply with the form and substance of the Adoption Assistance Act.\(^{272}\) The consent decrees may dictate DCFS’s policy even though foster children will not have the right to sue to force them to make reasonable efforts.\(^{273}\)

d. The Act’s importance with respect to other laws affecting foster children and their families

The effect of the Adoption Assistance Act on the lives of foster children is even more important considering the lack of other sources of legal rights. First, children often do not receive full constitutional protection.\(^{274}\) For example, in *Parham v. J.R.*,\(^{275}\) the Supreme Court subverted the rights of children to parental authority. As previously discussed, the *Parham* Court gave parents the unilateral power to institutionalize their children.\(^{276}\) Likewise, in *Goss v. Lopez*\(^{277}\) and *Ingraham v. Wright*,\(^{278}\) the Supreme Court subverted

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\(^{271}\) For a discussion of consent decrees, see 47 AM. JUR.2D Judgments §§1080-1097 (1969 & Supp. 1991). Consent decrees have attributes of both judgments, because they are entered into as a result of litigation, and contracts, because they are a mutual agreement of the parties. *Id.* §1085. A consent decree embodies a compromise where the parties each give up something they might have won in litigation but save the cost and time of further litigation. *Id.* §1082. The decrees have the effect of estopping future litigation just as a normal judgment does. *Id.* §1091. Courts look at the intent of the parties to the agreement to decide the scope of the agreement’s estoppel effect. *Id.* The court maintains its jurisdiction in the case. If the decree is violated, the court can use its contempt power to sanction the noncomplying party. *Id.* §1082.


\(^{273}\) See *Artist M.*, 112 S. Ct. at 1365 n.6 (explaining that the consent decree in *B.H.* does not affect the Court’s holding).

\(^{274}\) See Wisconsin v. Yoder, 406 U.S. 205, 243 (1972) (Douglas, J., dissenting) ("[W]e have in the past analyzed similar conflicts between parent and State with little regard for the views of the child. Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests."); cf. Stanley v. Illinois, 405 U.S. 645 (1972) (holding that an unmarried father, upon the death of the mother, was entitled to a hearing on his fitness as a father prior to having his children taken from him by the state); Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that the interests of state and society to protect the welfare of children outweighed the asserted interests of a parent to raise the child as he or she sees fit and the child’s freedom to observe religious tenets and practices taught by a parent). See generally Mushlin, supra note 5, at 203 (explaining that federal courts did not become involved in cases involving custodial conditions because of the courts’ deference to administrators).

\(^{275}\) 442 U.S. 584 (1979); see supra notes 172-74 and accompanying text (discussing the *Parham* decision).

\(^{276}\) *Parham*, 442 U.S. at 603-04; see supra notes 172-74 (discussing *Parham*).

\(^{277}\) 419 U.S. 565 (1975).
the rights of children to the authority of school officials.²⁷⁹ In these two cases, the Court focused on the importance of the teacher's undisturbed power to discipline the students and to "shap[e] the[ir] character and value judgments."²⁸⁰

In 1967, the Court began to give children's constitutional rights more respect.²⁸¹ For example, in In re Gault,²⁸² the Court ruled that children in juvenile court must be given the same type of constitutional protection that is afforded to adult criminals.²⁸³ Also, in Tinker v. Des Moines Independent Community School District,²⁸⁴ the Court protected children's First Amendment right to free speech. There, the Court overrode the school's authority to discipline students by concluding that the schoolchildren had a First Amendment right to wear armbands in protest of the Vietnam War.²⁸⁵ Still, while children have some constitutional rights, these rights remain quite limited.²⁸⁶

Constitutional rights are particularly important to children in the foster care system.²⁸⁷ In the case of an abused or neglected child, where the child is in imminent physical danger (as opposed to the situation of a child whose only problem is poverty), the state foster care system provides the child some protection.²⁸⁸ Consequently, the Constitution's Fourteenth Amendment²⁸⁹ and the principle of sub-

²⁷⁹. See Burt, supra note 133, at 340-41.
²⁸⁰. Goss, 419 U.S. at 593; see Ingraham, 430 U.S. at 683.
²⁸¹. Burt, supra note 133, at 345-49.
²⁸². 387 U.S. 1 (1967).
²⁸³. Id. at 41-42. Previously, minors who were taken to juvenile court were not given notice of their charges, did not have the opportunity to defend themselves against state intervention, and had no right to a lawyer; also, the adjudication proceeding was not adversarial. Burt, supra note 133, at 345-47.
²⁸⁵. Id. at 513.
²⁸⁶. See generally Burt, supra note 133, at 329-58 (explaining how traditional authority and institutions curtail the rights of children as well as parents).
²⁸⁷. Mushlin, supra note 5, at 214 (emphasizing the powerlessness of foster children); see also Barbara Sullivan, Back Burner: Is a Nation of Children Being Neglected?, CHI. TRIB., Sept. 22, 1991, § 6, at 5 ("Never before in the history of America has one generation of children been less healthy, less cared for or less prepared for life than their parents were at the same age.").
²⁸⁸. See supra text accompanying notes 10-19, 38 (discussing the situations where state interference in family autonomy is justified); see also Burt, supra note 133, at 351. The state has historically had the power under the parens patriae doctrine to remove children from their parents in cases of neglect, abuse, and abandonment. See BLACK'S LAW DICTIONARY, supra note 11, at 1114 (defining the state's traditional role as sovereign and guardian of persons under legal disability who can not take care of themselves, such as minors who lack proper care and custody from their parents).
²⁸⁹. The Fourteenth Amendment states in pertinent part: "No State shall make or enforce any
stantive due process come into play. If the state fails to protect the child, the child may be able to claim that the state deprived him of his due process rights. In this respect, the Constitution should serve as an ultimate guardian of the rights of that child.

An abused child, however, is not necessarily guaranteed constitutional protection. The Supreme Court recently held that the state is not constitutionally liable for failing to protect a child from private violence even though the state has already intervened to protect the child. In *DeShaney v. Winnebago County Department of Social Services*, a caseworker from the county department of social services knew that the petitioner, Joshua, was being abused by his father. The caseworker took various steps to protect Joshua but did not remove Joshua from his home. Subsequently, Joshua’s father beat him so severely that he suffered permanent brain damage; he is expected to be institutionalized for the rest of his life. Joshua, through his mother and guardian ad litem, brought a suit against the state, alleging that the state breached a duty to protect him.

law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. XIV, § 1.

290. Substantive due process evolved as a way in which the United States Supreme Court found fundamental rights and values within the Constitution. GUNTHER, supra note 133, at 441. At first, the Court used substantive due process to find economic and property rights. *Id.; see Lochner v. New York, 198 U.S. 45 (1905).* Later the Court extended the Due Process Clause to embody rights which were not traceable to the text or history of the Constitution. GUNTHER, supra note 133, at 501-66; *see Roe v. Wade, 410 U.S. 113 (1973) (finding that a woman has a right to privacy in making the decision to terminate her pregnancy); Griswold v. Connecticut, 381 U.S. 479 (1965) (finding a right to privacy in making birth control decisions).*

291. *See Sinden, supra note 35, at 233 (“It is well-established that the Constitution generally does not impose duties on the State to provide care or protection to its citizens.”). For other cases which limit the state’s duties in providing services to its citizens, see Youngberg v. Romeo, 457 U.S. 307 (1982) (finding that the state does not have a duty to provide services to those within its borders); Harris v. McRae, 448 U.S. 297 (1980) (finding that the state has no duty to pay for medically necessary abortions); Maher v. Roe, 432 U.S. 464 (1977) (finding that the state does not have a duty to provide medical services).*

292. *See DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989).*

293. *Id. at 192.*

294. *Id. at 192-93. The caseworker suggested that the father enroll Joshua in a preschool, which he never did, that the father’s girlfriend move out, which never happened, and that the father be provided with counseling. The caseworker also visited Joshua’s home every month and noticed and faithfully reported bruises on Joshua. Still, Joshua was never removed from the home. Id.*

295. *Id. at 193.*

296. *Id. Joshua argued that he had a special relationship with the state. Id. at 197. In this sense, Joshua’s claim was like that of a constitutional tort. Although common law tort law does not impose liability for general nonfeasance, it does impose liability for nonfeasance where there is a special relationship. Here, Joshua claimed that a special relationship existed because the state*
The Court, however, refused to hold the state liable for Joshua's injuries because Joshua's father, not the state, had physical custody of Joshua at the time the injury occurred.\textsuperscript{297} Moreover, the Court held that the state did not take any affirmative action to place Joshua in a dangerous position which caused his injury,\textsuperscript{298} even though the case worker had actively intervened in the family for the purpose of protecting Joshua. The Court concluded that the state was under no obligation to guarantee a minimal level of safety and security for a child against the abuse of a private actor (i.e., his father).\textsuperscript{299}

Since the Court based its decision largely on the facts that Joshua was not in the state's custody and that the state was not restraining Joshua in any manner, the \textit{DeShaney} decision does not offer guidance where an abused or neglected child is removed from the home and taken into state custody (i.e., the foster care system). The constitutional rights of children within the foster care system thus remain somewhat unclear.

Appellate courts are split on this issue. On the one hand, the Eleventh Circuit, in \textit{Taylor v. Ledbetter},\textsuperscript{300} held that a child abused by his foster parents had a constitutional right to physical safety and the right to be free from infliction of unnecessary pain.\textsuperscript{301} Likewise, in \textit{Doe v. New York City Department of Social Services},\textsuperscript{302} the Second Circuit reinstated a jury verdict and damages in favor of a foster child sexually abused by a foster parent. On the other hand, was aware of his danger, stated that it would protect him, and acted as if it was going to protect him. \textit{Id.} This theory failed, however, because constitutional torts do not encompass the common law tort doctrine of special relationships where a government official fails to act. \textit{Id.} at 198-201. See Sinden, supra note 35, at 233-35.

\textsuperscript{297} \textit{DeShaney}, 489 U.S. at 201; see also Rush v. Johnson, 702 F. Supp. 1416 (N.D. Ill. 1989) (finding no state action where a child was placed in the custody of his father and was beaten to death by a man who was staying at the father's house).

\textsuperscript{298} \textit{DeShaney}, 489 U.S. at 201-02; see also Sinden, supra note 35, at 238-39. This commentator explained the Court's state-created danger theory upon which it partially based its opinion:

\begin{quote}
If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit.
\end{quote}

\textit{Id.} For cases illustrating this theory, see Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); White v. Rochford, 592 F.2d 381 (7th Cir. 1979); Byrd v. Brishke, 466 F.2d 6 (7th Cir. 1972).

\textsuperscript{299} \textit{DeShaney}, 489 U.S. at 195.

\textsuperscript{300} 818 F.2d 791 (11th Cir. 1987), \textit{cert. denied}, 489 U.S. 1065 (1989).

\textsuperscript{301} \textit{Id.} at 795; see also Brooks v. Richardson, 478 F. Supp. 793 (S.D.N.Y. 1979) (using a right-to-safety theory to protect foster children).

the Fourth Circuit, in *Milburn v. Anne Arundel County Department of Social Services*, \(^{303}\) disagreed with both the Eleventh and the Second Circuits and did not find the state liable for injuries inflicted by a foster parent.\(^{304}\)

This conflict in the circuits, which *DeShaney* did not address, may be resolved by distinguishing the nature of the child’s path into foster care.\(^{305}\) In *Taylor*, the state removed an abused child from the biological parents pursuant to a court order.\(^{306}\) Consequently, the child’s custody was classified as involuntary.\(^{307}\) The court implied that where the custody is involuntary, state action occurs and constitutional guarantees apply. However, in *Milburn*, the parents voluntarily placed their child into the state’s custody pursuant to Maryland’s family law statute.\(^{308}\) In this respect, the state had voluntary custody of the child.\(^{309}\) Therefore, the Constitution arguably does not guarantee the rights of all foster children. Rather, foster children’s rights depend on the nature of entry into the state’s custody.\(^{310}\)

Some scholars suggest that this factual distinction, whether the parents voluntarily placed the children in the state’s custody or whether the placement was involuntary by the state pursuant to a court order, is overly formalistic and dangerous.\(^{311}\) This view further posits that once the state operates a foster care system and affirmatively acts to supplant the role of the natural parent, it has the duty to keep those children safe regardless of the nature of the child’s entry into foster care.\(^{312}\) Moreover, a child’s “voluntary” entry into the foster care system may be deceiving. Often, caseworkers persuade parents to place their children in foster care as a way to avoid being labeled a neglectful parent.\(^{313}\) Likewise, when poor parents

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303. 871 F.2d 474 (4th Cir.) (holding that the state did not have an affirmative duty to protect a child in the custody of foster parents), *cert. denied*, 493 U.S. 850 (1989).
304. *Id.* at 479.
305. *Oren*, supra note 20, at 119.
307. *Id.* at 795 (comparing the child’s removal from his home with the state’s commitment of a mentally retarded child to a state mental institution).
308. *Milburn*, 871 F.2d at 474.
309. *Oren*, supra note 20, at 117.
310. *Id.* at 127-28.
311. *Id.* at 127-29.
312. *Id.*; cf. *B.H. v. Johnson*, 715 F. Supp. 1387, 1395 (N.D. Ill. 1989) (“[A] child who is in the state’s custody has a substantive due process right to be free from unreasonable and unnecessary intrusions on both its physical and emotional well-being.”).
313. *See supra* note 88 and accompanying text (identifying the problem of “voluntary”
face a temporary financial crisis, they may place their children in the state’s care until they are able to overcome the problem.\footnote{314} However, when they attempt to get their children back, the foster care system refuses.\footnote{318} Therefore, voluntary placement is not always an accurate description and does not always present a useful distinction in considering a child’s entry into the foster care system.

As a whole, regardless of this formalistic approach, poor foster children receive little, if any, constitutional protection. Moreover, since the state often mistakenly perceives poor parents to be abusive or neglectful,\footnote{316} the parents’ constitutional rights are likewise curtailed.\footnote{317} Consequently, poor parents and their children who have been subjected to the foster care system have relied primarily on the Adoption Assistance Act to afford them some type of legal protection. Although the \textit{Artist M.} decision precludes the Act from providing them with the enforceable right to family integrity, the Act’s other enforceable rights\footnote{318} and the consent decrees prior to \textit{Artist M.} are still valid. Therefore, poor families look to the Act, through existing consent decrees, as their only legal source for the right to family integrity.

II. The \textbf{Norman Case}

\textbf{A. Facts and Procedure}

In \textit{Norman v. Johnson},\footnote{319} a class of impoverished parents who were separated from their children because of their inability to obtain adequate subsistence sued DCFS for violating the Adoption Assistance Act.\footnote{320} The Adoption Assistance Act and its codified regulations establish policies and procedures with which Illinois and DCFS must comply to obtain federal funding. First, DCFS’s policies and practices must be designed to prevent the unnecessary sepa-
ration of children from their families. The Adoption Assistance Act mandates that child welfare services make reasonable efforts to either prevent families from separating or to reunify families which have already been separated. The Act also requires that various social service agencies cooperate to fully achieve the policies of the Act. To achieve these policies, the Act requires reunification programs, case plans, reasonable efforts to reunify the family, a case review system containing procedural safeguards, and written notice to parents when the agency denies them any benefits.

The class of plaintiffs in Norman consisted of "impoverished parents and legal guardians who have lost, are at risk of losing, will lose, or cannot regain custody of their children from [DCFS] because they are homeless or unable to provide food or shelter for their children." The plaintiffs claimed that DCFS's policies violated the Adoption Assistance Act. The complaint alleged that DCFS took and retained custody of children from impoverished parents and legal guardians because of their inability to secure cash, food, shelter, or other subsistence, while DCFS failed to assist these parents to meet these needs. The complaint also alleged that DCFS failed to help needy families secure these necessities. The plaintiffs further claimed that DCFS did not make reasonable efforts to prevent the removal of plaintiffs' children or to reunite the families after they were separated. A final count in the complaint alleged that DCFS violated the First and Fourteenth Amendments of the United States Constitution by abridging the plaintiffs' liberty and property interests in retaining custody of their children and in maintaining the means to support themselves and their children.

Although the named plaintiff, James Norman, died before the district court's ruling, his story is important in illustrating the dy-

324. Id. § 627(b)(2).
325. Id. §§ 671(a)(16), 675.
326. Id. § 671(a)(15).
330. Id.
331. Id.
332. Id.
333. Id.
334. Id.
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James Norman worked in a steel mill in Chicago. He had three children, a stepson who graduated from high school and two girls who were in school and doing well. Norman had to quit his job to care for his terminally ill wife, and he also developed a heart condition. He worked part-time and took auto mechanic classes in his spare time, but eventually he was unable to pay his bills. As a result, his electricity was turned off in August of 1988.

Soon thereafter, a DCFS caseworker visited his home. She reported that it was messy, littered with clothes and paper, and that the refrigerator contained spoiled food and bugs (due to the fact that there was no electricity). The caseworker reported, however, that the children looked "very healthy." The worker then filled out a risk assessment form, but she completed the form incorrectly; it thus appeared that the Norman children were at a much greater risk than they actually were. As a result, DCFS removed the Norman children from their father’s home without even talking to Norman and placed them in their great-grandparent’s home.

To visit his children, who now lived over ten miles away, Norman had to take three different buses and walk one mile. DCFS did not provide him with any help in finding an apartment, finding a job, coping with his heart condition, or travelling to his job interviews. Rather they accused him of “lack of supervision” because of his part-time jobs and classes. This accusation was later held to be unfounded. Finally, after a year, Norman received disability benefits for his heart condition but only through the help of the Legal Assistance Foundation of Chicago. Norman was then able to afford a new apartment. Unfortunately, twelve days before the court hearing to get his children back, Norman died of a heart attack.

335. WEXLER, supra note 14, at 44 (describing Norman’s story in detail).
336. Id.
337. Id.
338. Id.
339. Id. at 45.
340. Id.
341. Id.
342. Id.
343. Id.
344. Id.
345. Id. at 46; Interview with Diane Redleaf, Supervising Attorney of the Children’s Rights Project of the Legal Assistance Foundation of Chicago, in Chicago, Ill. (Feb. 7, 1992).
346. WEXLER, supra note 14, at 45.
The surviving plaintiffs’ stories are set forth in the magistrate’s findings of fact. In the case of one plaintiff, Gina Johnson, DCFS took custody of her child after finding the child had been sexually abused.\textsuperscript{347} Three days later, DCFS won temporary custody of the child after a court hearing.\textsuperscript{348} DCFS created a case plan and referred Johnson to counseling.\textsuperscript{349} Johnson lost her AFDC benefits and housing, but she was referred to a facility which provided apartments, counseling for emotional, physical, and sexual abuse, and counseling to help her find housing and employment.\textsuperscript{350} Johnson’s case plan included the goals of obtaining a high school diploma, taking her asthma medication, getting further counseling, joining a family support group, and retaining an attorney to regain custody of her children.\textsuperscript{351}

Johnson later obtained an apartment, and her counselor felt that she was ready for the return of her children.\textsuperscript{352} The DCFS caseworker, however, denied the return of the children because he wanted to see her demonstrate “independent functioning” and “stability.”\textsuperscript{353} Consequently, the magistrate found that DCFS did not deny Johnson the return of the children for economic reasons.\textsuperscript{354} Also, in light of the coordinated referral services and counseling, the magistrate found that DCFS made reasonable efforts to reunify the family.\textsuperscript{355}

Another plaintiff, Wanda Hilliard, lived with her five children at her sister’s house.\textsuperscript{356} DCFS took custody of three of Hilliard’s children when she left them with her sister without any money or care plan.\textsuperscript{357} Hilliard still lived with her two younger children and found a studio apartment for them, but the apartment had severe heating and water problems.\textsuperscript{358} Three different DCFS caseworkers prepared

\textsuperscript{347} Norman v. Johnson, 739 F. Supp. 1182, 1196 (N.D. Ill. 1990). Although the DCFS investigator found that the child had a long history of sexual abuse, he did not specify how and by whom she was abused. Id.
\textsuperscript{348} Id.
\textsuperscript{349} Id. at 1196-97.
\textsuperscript{350} Id. at 1197.
\textsuperscript{351} Id.
\textsuperscript{352} Id. at 1198.
\textsuperscript{353} Id.
\textsuperscript{354} Id.
\textsuperscript{355} Id. at 1198-99.
\textsuperscript{356} Id. at 1199.
\textsuperscript{357} Id. (finding inadequate food and inadequate supervision as the basis for removal).
\textsuperscript{358} Id.
numerous case plans,\textsuperscript{359} and Hilliard completed all the requirements of the case plans, but DCFS refused to return her three children because of the inadequate size of her apartment.\textsuperscript{360} Hilliard visited her children frequently and tried unsuccessfully to find housing.\textsuperscript{361} DCFS did not provide her with any cash assistance,\textsuperscript{362} referrals for housing, help in locating housing, or transportation money so that she could look for housing or work.\textsuperscript{363} Consequently, the magistrate found that DCFS failed to make reasonable efforts to reunite the family.\textsuperscript{364}

The magistrate likewise found that DCFS failed to make reasonable efforts to reunite plaintiff Joann Mitchell and her family.\textsuperscript{365} DCFS took custody of Mitchell's children in 1985 when the man with whom she lived reported them as abandoned.\textsuperscript{366} Mitchell, however, claimed that she left the children in the man's care while she was out for a few hours.\textsuperscript{367} Her AFDC grant was canceled due to the removal of her children.\textsuperscript{368} Mitchell called DCFS frequently to inquire about her children, but DCFS never returned her calls.\textsuperscript{369} She finally won custody of her children six months after they were originally taken.\textsuperscript{370} The juvenile court judge instructed Mitchell not to pick up her children, but to have DCFS deliver them.\textsuperscript{371} However, because Mitchell was living in shelters, DCFS refused to return her children and took custody again. It stated that it would return the children when she found a three-bedroom apartment.\textsuperscript{372}

DCFS offered no assistance to Mitchell in her attempt to obtain housing, employment, and transportation because the caseworker stated that she did not know of any such available assistance.\textsuperscript{373}

\begin{itemize}
  \item \textsuperscript{359} Id.
  \item \textsuperscript{360} Id.
  \item \textsuperscript{361} Id. at 1200.
  \item \textsuperscript{362} DCFS filed a single application for a Harris Fund grant (a privately funded grant), but it did not make any other efforts for Hilliard to receive money from other charitable sources. Id. at 1199.
  \item \textsuperscript{363} Id.
  \item \textsuperscript{364} Id. at 1202.
  \item \textsuperscript{365} Id.
  \item \textsuperscript{366} Id. at 1200.
  \item \textsuperscript{367} Id.
  \item \textsuperscript{368} Id.
  \item \textsuperscript{369} Id. at 1201. Mitchell had to learn from a friend where her children were seven weeks after they had been taken. Id.
  \item \textsuperscript{370} Id.
  \item \textsuperscript{371} Id.
  \item \textsuperscript{372} Id. Mitchell had lost her home and was living in shelters. Id.
  \item \textsuperscript{373} Id. at 1201-02.
\end{itemize}
DCFS also consistently failed to keep visitation appointments and failed to remove Mitchell's children from their foster home even though they found that one child had been abused there.\textsuperscript{374}

\section*{B. The Court's Opinion}

Although \textit{Artist M. v. Johnson} rendered the \textit{Norman} decision ineffective, it is important to understand how the \textit{Norman} court analyzed the issues before it. The \textit{Norman} court decided three major issues. First, it held that section 1983 provided a remedy under the Adoption Assistance Act.\textsuperscript{376} Second, the court found that section 671(a)(15)(B) of the Adoption Assistance Act created a private enforceable right to reasonable efforts to prevent family separation.\textsuperscript{376} Third, the court ruled that both parents and children had standing to sue under the Adoption Assistance Act.\textsuperscript{377}

The threshold issue which the \textit{Norman} court faced was whether section 1983 constituted a proper cause of action.\textsuperscript{378} The district court ruled that section 1983 was an appropriate cause of action because the Adoption Assistance Act created clear obligations upon the states to provide specific benefits.\textsuperscript{379} Since DCFS did not provide such benefits, the plaintiffs could sue to obtain them.\textsuperscript{380} In ruling this way, the \textit{Norman} court kept Illinois in pace with other jurisdictions that held that rights provided in the Adoption Assistance Act are enforceable under section 1983.\textsuperscript{381}

Before allowing the plaintiffs to bring this claim under the reasonable efforts provision of the Adoption Assistance Act, the court had to determine whether this specific provision created clearly enforceable rights. The court and the magistrate focused on the statutory language of the provisions that prior courts found to contain en-
forceable rights. In this respect, the court rejected earlier case law that either held that the language of the reasonable efforts provision was too broad to confer any statutory rights or that the Adoption Assistance Act was merely an appropriations act which created no enforceable rights whatsoever.

The court began by citing cases which held that the reasonable efforts requirement was enforceable, but it recognized that the states were not in agreement on such enforceable rights. Although the Norman court did not reconcile this conflict between the states, it addressed the conflict within its own district. On one hand, the court in Aristotle P. v. Johnson held that reasonable efforts to reunify families were too amorphous to create an enforceable right. Likewise, the court in B.H. v. Johnson held that there was no enforceable right to reasonable efforts to prevent the removal of the children. On the other hand, the Northern District of Illinois, in Artist M. v. Johnson, more recently held that the Adoption Assistance Act created the enforceable right to the prompt assignment of caseworkers as a part of the Act’s reasonable efforts mandate.

The Seventh Circuit subsequently affirmed Artist M., which consequently overruled the decision in B.H. The Seventh Circuit justified its finding by construing Congress’s intent from the language of the reasonable efforts provision. Nonetheless, even before the Seventh Circuit affirmed this issue, the Norman court agreed with the Artist M. analysis and found it more convincing than that of the

383. See In re Cynthia A., 514 A.2d 360, 365 (Conn. App. Ct. 1986) (holding that the reasonable rights provision was too amorphous to be enforced); see also Aristotle P., 721 F. Supp. 1002; B.H., 715 F. Supp. 1387 (holding that the Act did not create an enforceable right to reasonable efforts).
384. See In re Cynthia A., 514 A.2d at 365.
386. See In re Cynthia A., 514 A.2d at 365 (rejecting the idea that the Adoption Assistance Act was anything more than a funding act).
391. Artist M., 917 F.2d at 986-89.

The *Norman* court also dismissed the courts' arguments that the reasonable efforts standard was too vague as compared to the case plan and case review provisions. It acknowledged that the reasonable efforts provision was not crystal clear, but it held that difficulty in determining whether the state has complied with this standard is not a reason for the provision to be unenforceable. Thus, the court rejected DCFS's argument that the reasonable efforts standard was too vague and amorphous to be enforceable.

The court also found that either the child or the parent can enforce such a right with a section 1983 action. The only problem that would have barred the parents from bringing suit was their lack of standing, but the court found that this was not an obstacle. Although no cases addressed such an issue, the court looked to other decisions which recognized the rights of parents.

Instead of narrowly limiting the rights granted by the statute to children, the court broadly construed the purposes of the Adoption Assistance Act. Whereas one court had called the Act merely an appropriations act, the *Norman* court stated that "when a statute provides for the continued unification or reunification of a family, it cannot be said to be only for the benefit of the children, both the children and the parents are the beneficiaries of such a policy." Consequently the court treated this issue as a standing issue, providing that whoever could satisfy the standing requirements would have the right to sue DCFS. The plaintiffs suffered a personal injury when DCFS refused to return their children, and this injury

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394. *Id.* at 1187 ("Contrary to defendant's argument, permitting enforcement does not unduly deprive the state of flexibility and discretion in providing child welfare services. A standard of 'reasonable efforts' is a flexible standard that leaves much to the discretion of the states.").
395. *Id.*
396. *Id.* ("Just as there are no precedents expressly holding that parents can enforce rights under the AAA, there are no precedents holding parents cannot enforce such rights.").
397. *Id.* at 1187-88 (finding that the plaintiffs alleged a personal injury which was fairly traceable to the defendant's conduct and likely to be redressed by the requested relief).
398. *Id.*; see also Lynch v. Dukakis, 719 F.2d 504, 511-12 (1st Cir. 1983).
401. A person has standing where: 1) he suffered a personal injury; 2) which is fairly traceable to the defendant's unlawful action; and 3) the requested relief is likely able to redress the alleged injury. *Id.* at 1187 (quoting Frank Rosenberg, Inc. v. Tazewell Co., 822 F.2d 1165, 1168 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 726 (1990)).
402. *Id.* at 1188.
resulted from DCFS's failure to make reasonable efforts to prevent family separation. Thus, the court concluded that the parents had standing to sue. 403

Finally, the *Norman* court held that plaintiffs Hilliard and Mitchell successfully stated a section 1983 action by claiming that DCFS violated their right to reasonable efforts for family preservation. 404 Since the court found that DCFS made reasonable efforts with respect to Johnson, it denied her relief. 405 As a remedy, the court granted plaintiffs Hilliard and Mitchell a preliminary injunction. 406 It believed that an injunction was the proper remedy because Hilliard and Mitchell did not have an adequate remedy at law and because they would suffer irreparable harm absent injunctive relief. 407 The court also ordered that a caseworker be assigned to prepare a written case plan outlining any obstacles to obtaining adequate housing, any resources available to overcoming such obstacles, and solutions to such problems. 408 In this respect, the injunction and order insured that DCFS made reasonable efforts to reunify the families.

C. The Consent Decree

Since *Artist M.* overruled much of the *Norman* decision, the consent decree takes on a heightened importance. Pursuant to the decision, the parties entered a consent decree “[i]n an effort to avoid the burden, costs and inherent risks of further litigation” and to settle the matter with respect to the best interests of the class members. 409 In the decree, DCFS agreed to comply with the policy of not taking children from their homes because of living circumstances of the family, lack of provisions for the child’s substantive needs, or lack of adequate housing. 410 DCFS was allowed to remove a child from a home where the child was in imminent danger and where DCFS had already made reasonable efforts to eliminate the risk to the

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403. *Id.*  
404. *Id.*  
405. *Id.* at 1188-89.  
406. *Id.* at 1190-92.  
407. *Id.*  
408. *Id.* at 1191.  
409. Consent Decree at 2, *Norman* (No. 89-C-1624); *Norman*, 739 F. Supp. at 1182. The class members are impoverished parents and legal guardians who have lost, are at risk of losing, will lose, or cannot regain custody of their children because they are homeless or unable to provide food or shelter for their children. *Id.* at 1192.  
"Reasonable efforts" included assistance in locating and securing housing, cash, food, clothing, child care, emergency caretakers, and advocacy with public and community agencies providing such services. Pursuant to this section, DCFS agreed to begin a cash assistance program which would provide class members up to $800 a year to prevent the need for removing children from their homes.

The decree also reached beyond the singular agency of DCFS. For instance, the decree mandated that DCFS make its "best efforts" to obtain an agreement with the Department of Public Aid to continue AFDC benefits for ninety days after taking temporary custody with a possible extra thirty-day extension. It also required DCFS to establish a "housing advocacy program" to help class members obtain housing or shelter, provide the cost of transportation to such shelter, apply for low-income housing and utilities, secure necessary cash for rent, and obtain current information about housing opportunities.

The decree further established rules for DCFS to increase the efficiency and accuracy of its documentation, its reunification plans, its risk assessment, and its practices in locating absent parents. Under this requirement, DCFS agreed to develop a current information manual to help DCFS employees obtain goods and services for class members and to annually train employees to fulfill their obligations under the Adoption Assistance Act.

In addition to all the policies set forth, the decree addressed the legal rights of impoverished parents. It required that DCFS give class members written notice of such policies when DCFS first takes custody of a class member's child, during an administrative case review, and before DCFS requests a class member to sign a service

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411. Id.
412. Id. at 8.
413. Id. at 10 (specifying that the purpose of the money is to pay for a security deposit, a utility connection, utility deposits, furniture, or other necessary items).
414. Id. at 11.
415. Such efforts include a good-faith effort to obtain assistance from the Chicago Housing Authority and other social service agencies so DCFS can meet its obligation under the decree. Id. at 14.
416. Risk assessment means those methods and factors which DCFS uses to evaluate the living conditions when it considers removing a child from the home. Id. at 17.
417. Id. at 16-18.
418. Id. at 15, 20-21 (detailing the training requirements of DCFS employees).
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plan. It also granted all class members an administrative appeal as set forth in Chapter 89 of the Illinois Administrative Code, section 337.420 Finally, to insure that the provisions in the decree were implemented, a monitor was to be assigned, DCFS's actions were subject to review from the plaintiffs' counsel, and the court retained jurisdiction.421

III. ANALYSIS

In analyzing Norman it is necessary to separate the opinion from the consent decree. However, to understand the case's overall effect they should be viewed as a whole. The consent decree originated and was dependent on the court's decision, but its validity survives that decision, which is severely weakened by Suter v. Artist M.422

A. The Court's Opinion

The main value of the Norman decision is that it is a useful illustration of a section 1983 analysis. The court's reasoning is largely mirrored by the argument of the Artist M. dissent, and it provides a persuasive, albeit rejected, analysis on the enforceability of the right to reasonable efforts. Although Artist M. held differently, legal precedent, legislative history, and public policy support the Norman court's conclusion that the Act contains the enforceable right to reasonable efforts for family preservation.

1. Legal Precedent

As the Supreme Court indicated in Suter v. Artist M., a section 1983 action lies to enforce rights under the Social Security Act.423 In fact, section 1983 actions constitute the norm where plaintiffs sue to enforce rights under the Social Security Act.424 Only where the statute does not create an enforceable right or where Congress precluded a section 1983 remedy under the statute will section 1983

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421. Consent Decree at 17, 19, 23.
423. Id. at 1366; see supra note 190 and accompanying text (explaining that the Adoption Assistance Act is part of the Social Security Act).
424. See Lynch v. Dukakis, 719 F.2d 504, 510 (1st Cir. 1983) ("Since at least 1968 the Supreme Court has implicitly and explicitly held that rights under various provisions of the Social Security Act are enforceable under section 1983.").
fail to provide a cause of action.\textsuperscript{425} Therefore, section 671(a)(15) would not create an enforceable right for foster children and their families where the Adoption Assistance Act failed to create such a right or where Congress somehow precluded foster children and their families from suing under section 1983.

The main argument espoused by the opponents of the enforceable right to reasonable efforts stresses that the reasonable efforts provision of the Act is too vague to create such a right. In order for a statute to create a federal right, the statute’s provision cannot be “‘too vague and amorphous’ such that it is ‘beyond the competence of the judiciary to enforce.’”\textsuperscript{426} As the \textit{Artist M.} Court recognized, other statutes’ reasonable efforts provisions have created enforceable rights.\textsuperscript{427} For example, the Brooke Amendment to the National Housing Act and its regulations, discussed in \textit{Wright v. City of Roanoke Redevelopment and Housing Authority},\textsuperscript{428} limited the rent for low-income tenants of public housing. The Act’s regulations stated that the maximum calculated rent must include “a reasonable amount for utilities.”\textsuperscript{429} The \textit{Wright} Court had no problem finding that this provision created the enforceable right to rent calculated by a “reasonable amount for utilities.”\textsuperscript{430} Likewise, the Boren Amendment to the Medicaid Act discussed in \textit{Wilder v. Virginia Hospital Association}\textsuperscript{431} contained reasonableness language. There, the amendment mandated that the government reimburse Medicaid providers according to “reasonable and adequate” rates which the “State finds . . . [to be] satisfactory to the Secretary.”\textsuperscript{432} Similar to its conclusion in \textit{Wright}, the Court found that this provision created an enforceable right to reasonable and adequate rates.\textsuperscript{433}

The Adoption Assistance Act contains a “reasonable” provision similar to that in the Brooke and Boren Amendments. Although the \textit{Artist M.} Court distinguished the three provisions, the differences are not great. In fact, as the \textit{Artist M.} dissent argued, the language is virtually identical.\textsuperscript{434} The reasonable efforts provision states:

\textsuperscript{426} \textit{Id.} at 509 (quoting Golden State Transit v. Los Angeles, 493 U.S. 103 (1989)).
\textsuperscript{428} 479 U.S. 418 (1987).
\textsuperscript{429} Id. at 420.
\textsuperscript{430} Id. at 431-32.
\textsuperscript{431} 496 U.S. 498 (1990).
\textsuperscript{432} Id. at 507.
\textsuperscript{433} Id. at 512.
FAMILY REUNIFICATION

In order for a state to be eligible for payments . . . , it shall have a plan approved by the Secretary which . . . provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for the removal of the child from his home and . . . to make it possible for the child to return to his home.435

On its face, the "reasonableness" language of all three acts seems to contain a similar amount of specificity. Consequently, the Supreme Court's basis for denying the enforceability of the reasonable efforts provision is grounded on a weak factual distinction.

Moreover, the reasonable efforts language mirrors that of the Act's other provisions that create enforceable rights. The provision pertaining to case plans and a case review system states: "In order for a state to be eligible for payments . . . , it shall have a plan approved by the Secretary which . . . provides for the development of a case plan . . . for each child receiving foster care maintenance payments under the State plan and provides for a case review system."436 Since the language pertaining to the reasonable efforts provision is essentially the same as that mandating case plans and a case review system, it appears that Congress intended the reasonable efforts provision to be construed the same as the other provisions. Therefore, all provisions should create enforceable rights. Moreover, the reasonable efforts provision is contained within the state plan requirement; it seems illogical to confer the right to a state plan and then only enforce certain aspects of that right. By holding that the Act created the enforceable right to reasonable efforts, the Norman court interpreted the Adoption Assistance Act's language in the only logical way it could be interpreted.

Others have posited, however, that regardless of the enforceable rights to case plans and case reviews, the reasonable efforts provision remains vague and amorphous and thus is not enforceable.437 The Norman court correctly pointed out that the reasonableness standard, although vague, has frequently been used successfully. Other federal statutes, for example, contain similar standards which have been held to be enforceable.438 Moreover, this country's tort system is largely based on the reasonable person standard. This

436. Id. § 671(a)(16).
437. See supra notes 243-50 and accompanying text (explaining DCFS's argument in Artist M. where it was contended that the reasonable efforts provision does not create an enforceable right).
438. See supra notes 428-33 and accompanying text (discussing Wilder and Wright).
standard surely cannot be less vague than the reasonable efforts for family preservation standard.

Finally, the Norman opinion implicitly invalidated the "vague and amorphous" argument where it delineated the appropriate factors to use when interpreting reasonable efforts. By focusing on the affirmative services which DCFS provided the parents, the court clarified the reasonable efforts standard.\(^{439}\) For example, in plaintiff Johnson's case, DCFS arranged for her counseling, parenting classes, housing,\(^{440}\) and medical support.\(^{441}\) Even though DCFS did not return her children, the court found that DCFS's involvement and affirmative action constituted reasonable efforts because they were specifically aimed at helping Johnson solve the problems which had caused her children to be removed.\(^{442}\) DCFS did not take sufficient affirmative action to help the other plaintiffs eliminate the obstacles which blocked the return of their children. Unlike Johnson's case, DCFS did not return Hilliard's children due to her inadequate housing. DCFS did not provide any cash assistance, housing referrals, or real effort to obtain private funding.\(^{443}\) Similarly, in plaintiff Mitchell's case, DCFS refused to return her children because of her inadequate housing, yet it failed to help Mitchell obtain housing.\(^{444}\) Although the case seems to unrealistically divide DCFS efforts into two categories, one where DCFS provides many services and the other where it provides none, it still establishes some concrete guidance as to what constitutes reasonable efforts. This provision is not so vague and amorphous that it is "beyond the competence of the judiciary to enforce."\(^{448}\)

2. Legislative History

The legislative history of the Adoption Assistance Act also supports the Norman court's conclusion, thus weakening the persuasiveness of the Artist M. decision. First of all, the legislative history of the Act contains many references to the importance of family reha-
In 1980, when Congress passed the Adoption Assistance Act, it specifically focused on keeping children out of the foster care system. The country's foster care system was extremely overcrowded and many children who languished in the system did not belong there. To resolve the problem of unnecessary placement, Congress placed a provision in the Act requiring states to make reasonable efforts to keep families together before removing children from their homes. This new provision "require[s] States to examine alternatives and provide, wherever feasible, home-based services that will help keep families together, or help reunite families." Congress still intended that the states continue to immediately remove children from dangerous situations, but "these agencies will be required to provide such services before removing the child and turning to foster care. These provisions . . . are among the most important aspects of this legislation."

Congressional intent is clear; the Act's reasonable efforts provision was created so that states would provide services to prevent children from being unnecessarily removed from their homes. Consequently, if families are prevented from enforcing such services, as in Artist M., the intent of Congress would be defeated. Therefore, the Norman decision merely reinforced congressional intent for the Adoption Assistance Act.

3. Policy

The Norman court's approach is even more logical when compared to the alternative remedy proposed by opponents of a section 1983 remedy. Such opponents argue that the Adoption Assistance


447. Senator Cranston stated: "In the past, foster care has often been the first option selected when a family is in trouble . . . . Far too many children and families have been broken apart when they could have been preserved with a little effort. Foster care ought to be a last resort rather than the first." 126 Cong. Rec. 6942 (1980); see also 125 Cong. Rec. 22,117 (1979) (remarks of Rep. Rostenkowski) ("In a majority of the cases, there are little or no attempts to reunite the child with the natural family.").

448. See supra notes 20-37 and accompanying text (describing the alarming conditions of national foster care).


The Adoption Assistance Act provides its own remedial devices which preclude a section 1983 claim. They assert that the Act is a type of funding contract in which the state’s failure to perform removes the federal government’s obligation to provide funding. Where the state fails to comply with the requirements of the Act, the federal government can simply cut off funding for the state’s foster care system. This argument, however, ignores the purpose behind the Adoption Assistance Act. The Act was not created to merely fund state foster care systems; it was created to fund such systems for the purpose of protecting children. As one court aptly stated, Congress did not intend to close “the avenue of effective judicial review to those individuals most directly affected by the administration of its program.” If funding was completely cut off, state foster care systems would be even less able to effectively protect children. Therefore, the remedy suggested by the opponents of a section 1983 action is inconsistent with the goal of providing children a safe home environment. If families are unable to enforce the rights created by the Adoption Assistance Act, the purpose of the Act will be lost. The Norman decision, in holding that the plaintiffs may bring a section 1983 claim under the Adoption Assistance Act, implicitly adheres to the logical intent of Congress.

Moreover, the Norman court’s opinion fully effectuated the underlying policy of the Adoption Assistance Act by recognizing that poverty does not justify the removal of children from their homes. Where children are removed from their parents solely because of their parents’ impoverishment, the children, their families, and the foster care system suffer. As shown by the children in B.H. and Ashley K., the foster care system is not always a safe haven. Furthermore, the harm to children increases when they are removed from a happy home as in the Norman situation. The lack of afforda-

452. Id.
453. Id.
456. See supra text accompanying notes 44-46 (describing the real harm to children and families where children are unnecessarily removed from their home).
457. See supra notes 53-84 and accompanying text (illustrating the cases of two sets of foster children who suffered greatly in the foster care system).
ble housing,\textsuperscript{458} coupled with the simultaneous insistence on removing children from their homes because of such poverty,\textsuperscript{459} will undoubtedly increase the harm to children. Only decisions such as \textit{Norman} can stop this trend. The \textit{Norman} court, in recognizing the policy of the Adoption Assistance Act, ultimately rejected the inflexible technical analysis\textsuperscript{460} which many courts used in dealing with the rights of foster children. Unlike other courts which solely concentrated on the specificity of the language of the reasonable efforts provision,\textsuperscript{461} the \textit{Norman} court synthesized the specific mandates of the Act with the logical intent of Congress in enacting the legislation.\textsuperscript{462} Absent the requirement that DCFS make reasonable efforts, history has proved that reasonable efforts will not be made.\textsuperscript{463} The reasonable efforts provision must create enforceable rights or poverty will continue to separate families and the goal of the Act will be defeated. Overall, the \textit{Norman} decision illustrated a marked step in fulfilling Congress's goal by mandating the right to reasonable efforts to preserve the family.

\subsection*{B. The Consent Decree}

The consent decree reflects DCFS's promise to adhere to the federal mandates of the Adoption Assistance Act in establishing specific DCFS policies, goals, and practices.\textsuperscript{464} More importantly, it binds DCFS to family reunification despite the outcome of \textit{Artist M}. The consent decree's policy statement generally follows the federal mandate of family reunification. DCFS essentially agreed to re-

\begin{itemize}
\item \textsuperscript{458} See supra notes 85-131 and accompanying text (explaining the increasing difficulties that poor parents face, especially in the area of housing).
\item \textsuperscript{459} See \textit{Wexler}, supra note 14, at 47-54 (showing that poverty is currently used as one of the major justifications for removing children from the home).
\item \textsuperscript{460} See \textit{Oren}, supra note 20, and accompanying text.
\item \textsuperscript{461} Cf. \textit{Vermont Dep't of Social & Rehabilitation Servs. v. Bowen}, 798 F.2d 57 (2d Cir. 1986) (finding an enforceable right to a dispositional hearing); \textit{Lynch v. Dukakis}, 719 F.2d 504 (1st Cir. 1983) (finding an enforceable right to a case plan and review system); \textit{B.H. v. Johnson}, 715 F. Supp. 1387 (N.D. Ill. 1989) (finding limited enforceable rights to a case review system and individualized case plans).
\item \textsuperscript{462} \textit{Norman v. Johnson}, 739 F. Supp. 1182, 1186 (N.D. Ill. 1990) (analogizing the Act's reasonable efforts provision with the "least restrictive setting" provision in the Developmentally Disabled Assistance and Bill of Rights Act: "[T]he 'crucial inquiry . . . is not whether a State would knowingly undertake that obligation, but whether Congress spoke so clearly that we can fairly say that the state could make an informed choice.'") (quoting \textit{Pennhurst State Sch. & Hosp. v. Halderman}, 451 U.S. 1, 25 (1981)).
\item \textsuperscript{463} See \textit{House Comm. on Ways and Means}, supra note 3, at 787.
\item \textsuperscript{464} Consent Decree at 7-10, \textit{Norman} (No. 89-C-1624).
\end{itemize}
move the children only after all reasonable efforts to keep the family together have failed or would have failed, and where the children are in imminent danger. This last point is important because it follows the Adoption Assistance Act's purpose of protecting abused and neglected children. In this respect, if the children are in danger at home, the Norman case and the consent decree do not bar the child's removal. For example, since DCFS still felt plaintiff Johnson needed to establish that she could act in a "stable and independent manner," it refused to return her children. Poverty was not the obstacle to reuniting Johnson with her children; rather, DCFS was concerned about her ability on a sustained basis "to undertake the responsibilities of being a parent." Consequently, DCFS still retains the power to keep children within the foster care system where it is in the child's best interests, but the consent decree limits DCFS's discretion to separate the family for economic reasons.

In comparison to the Adoption Assistance Act, the consent decree takes a strong position. Even though the Act requires reasonable efforts, it is silent as to the point at which the child should be removed when such reasonable efforts fail. Likewise, the Act does not give a concrete definition of "reasonable efforts" whereas the consent decree does. In this sense, DCFS's agreement to be bound by such a working definition obligates it to a minimum level of compliance under the statute. Moreover, this definition finally gives substance to the standard the Supreme Court found as too amorphous to be enforced.

Not only does the consent decree insure DCFS's commitment to the policy behind the Adoption Assistance Act, it establishes procedures to reach the policy goals. It sets deadlines for different programs DCFS promised to implement. It grants the plaintiffs the right to appeal the DCFS decisions that threaten their benefits.

465. Id.
466. Norman, 739 F. Supp. at 1197.
467. Id. at 1198.
469. Consent Decree at 8, Norman (No. 89-C-1624).
470. Id. at 7-13. It is also important to keep in mind that by establishing what reasonable efforts are, the consent decree implicitly limits the standard to what DCFS agreed to in the decree. In this sense, it may restrict the Norman holding.
472. Consent Decree at 10-19, Norman (No. 89-C-1624).
473. Id.
474. Id. at 19.
also provides for a monitor to oversee DCFS's compliance with the decree.\textsuperscript{475} It gives the plaintiff's counsel the right to review DCFS's actions and gives the court continuing jurisdiction in the event that DCFS fails to comply.\textsuperscript{476} In this respect, the consent decree contains an internal mechanism to secure DCFS compliance and to protect the integrity of the court's opinion.

The consent decree's third and probably most important aspect is the inclusion of specific programs which DCFS agreed to implement. At a minimum, the consent decree reflects DCFS's efforts to comply with federal law. Like the Adoption Assistance Act, DCFS officially stated its policy for family reunification.\textsuperscript{477} In accordance with this policy, DCFS agreed to implement interagency coordination, and to help families secure cash assistance, Illinois public aid, federal assistance, and housing. This provision directly addresses the problems of parents like Hilliard and Mitchell. With cash and housing assistance, poor families can weather the tough times without losing their children. DCFS also agreed to reform some internal practices and training to better comply with its stated policy. For example, the revised documentation, risk assessment, employee training, and case review provisions\textsuperscript{478} address the problems illustrated in \textit{Ashley K.} and \textit{B.H.} With such improvements, children will be less likely to end up in the bureaucratic quagmire reflected in \textit{Ashley K.} and will be less likely to face the unsuccessful multiple placements of the \textit{B.H.} children. Finally, the decree insures all class members an appeal of all issues related to hard services.\textsuperscript{479} In this sense, DCFS's obligations merely represent an effort to comply with the federal statute. However, in light of DCFS's troubled past and the lack of a section 1983 remedy, this reform is monumental.

One of the most important provisions in the consent decree is its guarantee of hard services. Whereas the Act is silent on specific

\textsuperscript{475} Id. at 23-27.
\textsuperscript{476} Id. at 19-20, 27.
\textsuperscript{477} Id. at 7-10.
\textsuperscript{478} \textit{See id.} at 16-18, 20-21.
\textsuperscript{479} \textit{Id.} at 19-20. "Hard Services," as defined in the consent decree, refers to:

\begin{quote}
Provision of, or assistance in obtaining cash, shelter, utility services, food, clothing, furniture, or other goods or services to meet subsistence needs or other needs relating to features of the physical environment that DCFS deems relevant to the issue of whether a child should be retained in or returned to the custody of their [sic] parents.
\end{quote}

\textit{Id.} at 5.

According to Diane Redleaf, counsel for the plaintiffs, this provision was not implemented as of February 7, 1992. Interview with Diane Redleaf, \textit{supra} note 345.
measures states should take to prevent family separation, the decree provides for cash and services which enable families to solve the problems which caused the removal of their children. Poverty is often the largest cause of both abuse and neglect because it multiplies the stress of parenting and makes it difficult for parents to provide many of the necessary resources for their family. Many of these problems, however, may be eliminated by simple cash assistance. By increasing AFDC benefits alone, for example, more than 6,000 children in the Los Angeles County foster care system would be able to return home. In addressing this situation, DCFS promised in the decree to provide cash assistance of up to $800 a year so that poverty will not force families to separate. The decree also provides for an arrangement between DCFS and the Department of Public Aid so that AFDC benefits may be temporarily continued when DCFS takes children into temporary custody. This arrangement addresses the dilemma which plaintiff Mitchell faced. Since her AFDC grant was canceled after her children were removed, she did not have enough money to pay her rent. She ended up homeless, moving from shelter to shelter, thus eliminating any chance of getting her children back. Had her AFDC benefits continued until she got her children back, the family could have been reunited rather than remaining splintered.

Although the consent decree provides impoverished parents with some services, it does have some drawbacks. First, it should not be mistaken for a solution to the underlying problem of poverty. It addresses immediate emergencies and risks to the child and is not aimed at raising the standard of living of the parents. While no one can deny that $800 or assistance in finding an apartment is a real gain, it is important to remember that such assistance is temporary.

480. Consent Decree at 19-20, Norman (No. 89-C-1624); see also Golubuck, supra note 5.
481. See WEXLER, supra note 14, at 47.
482. Id.
483. WEXLER, supra note 14, at 53.
484. Consent Decree at 10, Norman (No. 89-C-1624).
485. Id. at 11-13. According to Diane Redleaf, counsel for the plaintiffs, such an arrangement was not completed as of February 7, 1992. Interview with Diane Redleaf, supra note 345.
A further factor limiting the value of the *Norman* consent decree is the general nature of consent decrees. First, consent decrees are difficult to enforce. Although the *Norman* decree has a monitor, there is no guarantee that the monitor oversee the decree's enforcement. Likewise, there is no way to guarantee that the monitor is effectively monitoring.\(^{487}\) Even if the monitor is effective and determines that the consent decree has been violated, the lengthy process of litigation begins all over again. Therefore, by the time a judge issues a ruling of contempt,\(^ {488}\) irreparable harm may have already occurred.\(^ {489}\)

Third, since consent decrees usually arise from class action litigation, they involve lengthy negotiations and all class members must be notified of any settlement.\(^ {490}\) This involves time, effort, expense, and inevitable delay. In this respect, the decree may not be the most effective and timely device to enforce a plaintiff's rights, especially in the area of foster care. For example, by the time the *Norman* consent decree came down in 1991, the case had been in the courts for over two years and the named plaintiff had died. During this period many families were presumably separated without reasonable efforts to keep the family together. In light of the burdensome and time-consuming character of such decrees, their usefulness in attacking the abuses of the foster care system is limited.

Despite these limitations, consent decrees remain the only viable solution. Where there is a need for social change, litigation provides a quicker remedy than legislation. Moreover, the *Norman* consent decree may survive the adverse ruling in *Artist M*. Since DCFS obliged itself in the consent decree, the *Norman* court will still have jurisdiction to enforce the consent decree, regardless of the result in *Artist M*.\(^ {491}\) Furthermore, if DCFS tries to modify the consent decree pursuant to the *Artist M*. ruling, it would likely be unsuccessful. The Supreme Court has explicitly stated that "[i]f it is clear that a party anticipated changing conditions that would make per-


\(^{488}\) Consent decrees are enforced by the contempt power of the court. See Consent Decree at 27, *Norman* (No. 89-C-1624).

\(^{489}\) Brooks, supra note 487, at 1159 n.220.

\(^{490}\) Id. at 1158 n.213.

\(^{491}\) The consent decree in *B.H.*, which covers all the children in the foster care system, also remains intact despite the *Artist M*. decision. See Suter v. *Artist M.*, 112 S. Ct. 1360, 1365 n.6 (1992).
formance of the decree more onerous but nevertheless agreed to the decree, that party would have to satisfy a heavy burden to convince a court . . . that it should be relieved of [its obligations]. Since the Artist M. case was pending in the Supreme Court at the time DCFS entered into the Norman decree, DCFS clearly knew that its obligation to make reasonable efforts was at issue. Nevertheless, it agreed to be bound by such obligations in the Norman decree so it is unlikely to be relieved of its obligations.

Overall, the consent decree offers Illinois foster children some hope and protection. How this plays out in reality, however, is yet to be seen.

IV. Impact

A. The Court's Opinion

Norman signals the increased national movement for family re habilitation. The Norman court's broad interpretation of the Adoption Assistance Act demonstrates Illinois's willingness to liberally grant foster children and their parents substantive rights under the reason able efforts provision. Consequently, Illinois families should no longer be helpless once DCFS enters their lives. If the Norman decision worked in a vacuum, families could expect help from DCFS whenever they experienced a crisis. Previously, DCFS took children while maintaining an attitude of indifference towards the families' problems. Without the help of DCFS, these families would have had the right, under Norman, to force DCFS to make such efforts. Moreover, if DCFS removes children without providing assistance, parents should be able to challenge DCFS when they feel that the family has been unnecessarily separated. If the reasonable efforts mandate of Norman binds DCFS as the plaintiffs envisioned, poor parents like plaintiffs Norman, Hilliard, and Mitchell should not have to suffer the trauma of having their children taken away as a result of their poverty. Likewise, poor children would not be subjected to the foster care system just because their parents are poor.

The scenario embraced by the Norman plaintiffs applies to many

493. Norman v. Johnson, 739 F. Supp. 1182, 1187-88 (N.D. Ill. 1990) ("A standard of 'reasonable efforts' is a flexible standard that leaves much to the discretion of the states. . . . [W]hen a statute provides for the continued unification or reunification of a family, it cannot be said to be only for the benefit of the children, both the children and the parents are beneficiaries of such a policy.").
poor families nationwide. Many states have responded similarly to the Norman court; Washington, Utah, Maryland, Virginia, New Hampshire, Louisiana, and Vermont have established highly successful family rehabilitation programs.494 New Hampshire’s system illustrates this success. There, families receive intensive services (including family counseling, social work, and education) and have a caseworker on call all of the time.495 These intensive services help the families cope with their problems and help alleviate some of the stresses which accompany poverty. In New Hampshire, 76% of the families helped were able to remain together rather than being splintered by the foster care system.496 Thus, the integrity and preservation of poor families can be protected by such programs.497

Reasonable efforts, as depicted in the Norman case and the rehabilitation programs of these states, can begin to address poverty and the resulting problems it causes in poor families. Unless poor families can force DCFS to provide extra money for a security deposit or to help pay electricity bills, healthy and happy children will be separated from their parents not because they are abused or neglected, but because they are poor. Without the enforceable right to reasonable efforts, these families will often be unable to remedy their problem of poverty and may never regain their family integrity.

Not only would the enforceable right to reasonable efforts and family rehabilitation programs protect the integrity and stability of many poor families, it would also save the state a substantial sum of money in the long run. It is expensive to remove children from their parents; it costs up to $3,000 a month for a child to remain in foster care.498 Since temporary custody is rarely “temporary,”499 the state’s expenses rapidly accumulate. The skyrocketing number of reports of abuse and neglect and the sheer number of children enter-

494. H.R. REP. No. 395, supra note 5, at 91-95.
495. Id. at 92-93.
496. Id. at 93.
497. See supra text accompanying notes 181-82 (emphasizing that there is no constitutional right to family preservation or to services which would help keep the families together).
498. Interview with Diane Redleaf, supra note 345; see 134 CONG. REC. 15,857-58 (daily ed. June 23, 1988) (statement of Rep. Miller) (stating that it costs anywhere between $500 to $1000 per month for each child in foster care simply because their parents did not have housing); WEXLER, supra note 14, at 51.
499. See WEXLER, supra note 14, at 11-29 (describing the horrifying story of parents whose children were taken away because of unfounded reports of abuse, and the trials which they experienced to get their children back).
ing the system further add to the astronomical cost.  

By comparison, the minimal cash and housing assistance needed to keep families together is a more cost effective alternative. This is evident in the states which have family rehabilitation programs: Maryland saved $6.2 million for every 1,000 children who received family rehabilitation services; Louisiana saved nearly $1 million in implementing its family rehabilitation system; and Vermont saved approximately $1.24 million. In light of Illinois's budget problems, the ramifications of Norman should not be minimized. In addition to the cost of keeping children in the system, the burden on the courts and the state could be greatly reduced by eliminating much of the underlying causes of abuse and neglect.

Moreover, an enforceable right to reasonable efforts and family rehabilitation could also decrease homelessness by helping those families on the verge of losing their housing. A major cause of children being put into the foster care system is homelessness among families. When children are taken away, impoverished parents must expend even more money to prove to DCFS that they are suitable parents, either by spending money on transportation or by spending money on gifts for the children. Accordingly, they have less money to solve their housing problem in order to get their children back. Furthermore, foster care is often little better than homelessness; the children may be better off with their parent's inadequate housing than in the state's custody. If DCFS assists such families in holding on to their current houses, or assists them in finding new housing, it could solve their housing and their family

501. See John Hartstock, Foster Care, St. News Serv., June 9, 1987, available in LEXIS, Government News Library, SNS File (illustrating a case where intensive family services were less expensive then keeping a child in foster care).
503. Wexler, supra note 14, at 50-53.
504. Id. at 187. Parents may give their children gifts to try to impress the caseworker and to prove that they are genuinely interested in getting their children back.
505. Id. at 180 (equating the foster care system's overnight shelters with the same conditions of homelessness).
506. See generally id. at 179-86 (detailing the conditions of emergency shelters); Rob Karwath, Culture of Violence, Abuse Reported at Horner Center, Chi. Trib. Oct. 29, 1991, § 1, at 1, 17 (describing the horrors at Illinois's largest mental hospital for children as one example of this state's facilities which are intended to protect children).
problems at the same time. However, since foster children and their families cannot sue to enforce reasonable efforts, they lose family integrity, the state spends more money, and the problems associated with poverty are exacerbated.

Since the Supreme Court in *Suter v. Artist M.* ruled that foster children do not have an enforceable right to reasonable efforts under the Adoption Assistance Act, many rights of poor children and families have been taken away. First, the Supreme Court decision may be interpreted to go even further, holding that the Act creates no enforceable rights whatsoever. If the majority's dicta about the Act only requiring a state plan is followed, this could eliminate the right of foster children to a case plan, a case review system, and a dispositional hearing. *Artist M.* also signals a retreat from section 1983 actions. It illustrates the Supreme Court's reluctance to let beneficiaries of federal funding sue to enforce their statutory rights. This has grave repercussions in areas such as Medicaid, welfare, national housing, and Social Security. In a worst case scenario, the Supreme Court could strike down the enforceability of all slightly vague or broad rights that these statutes embody.

Moreover, the constitutional analysis of family rights does not compensate for an enforceable right to reasonable efforts. On the one hand, the Supreme Court recognizes and praises the family. On the other hand, the Court has yet to accept a constitutional right to family preservation. Likewise, there is no constitutional right to assistance. Therefore, neither parents nor children have a constitutional right to reasonable efforts for family preservation such as cash or housing assistance.

**B. The Consent Decree**

The consent decree, as the enforcement mechanism of the deci-
sion, has more potential to bring reform to DCFS and to finally fulfill many of the goals of the Adoption Assistance Act. First, the form of the decree is important. Since it provides for a monitor and for continued jurisdiction of the court, it appears readily enforceable. In one sense, the decree reflects a structural injunction aimed at reforming DCFS.\textsuperscript{514} Such an injunction can be highly effective especially where it orders specific affirmative action and hard cash.\textsuperscript{515} For example, the consent decree binds DCFS to provide parents with hard services including assistance in locating and securing housing, temporary shelter, cash assistance, food, clothing, child care, emergency caretakers, or efforts to obtain these services from other community organizations.\textsuperscript{516} This agreement alone should provide great help to poor parents to improve themselves and become better parents. Without such aid, these parents risk losing their income and home. Without an income or a home, the probability of the parents solving their problems and getting their children back is quite low.\textsuperscript{517} In this respect, the consent decree should provide relief to many poor families.

Although the consent decree represents a concentrated effort to reform one aspect of DCFS, inherent problems in the decree preclude long range reform. First, many of the decree's provisions depend on interagency coordination.\textsuperscript{518} Since the \textit{Norman} decree only binds DCFS, some of DCFS's reasonable efforts will be largely ineffective unless other agencies have funds and resources to provide services. For example, if the Chicago Housing Authority does not agree to help DCFS find alternative housing for parents with inadequate shelter,\textsuperscript{519} the benefits promised by \textit{Norman} may not reach such parents. The referral services provision is similar to the housing assistance provision in that it depends on the willingness of other

\begin{itemize}
\item \textsuperscript{514} See Mushlin, \textit{supra} note 5 at 252-56 (arguing that structural injunctions, like the \textit{Brown v. Board of Education} injunctions enjoining segregation in school districts, are the most effective judicial measures in reforming state foster care systems).
\item \textsuperscript{515} \textit{Id.}
\item \textsuperscript{516} Consent Decree at 8, \textit{Norman v. Johnson}, 739 F. Supp. 1182 (N.D. Ill. 1990) (No. 89-C-1624).
\item \textsuperscript{517} See \textit{supra} text accompanying notes 128-31 (explaining the downward cycle that traps impoverished parents when they lose their children to the foster care system).
\item \textsuperscript{518} See \textit{supra} text accompanying notes 409-21 (detailing the provisions of the consent decree).
\item \textsuperscript{519} Consent Decree at 14, \textit{Norman} (No. 89-C-1624). The decree failed to guarantee assistance from the Chicago Housing Authority, stating instead that the "[d]efendant shall make good-faith efforts to secure interagency agreements with the Chicago Housing Authority . . . ."
\item \textit{Id.} (emphasis added).
\end{itemize}
agencies to help the class of parents.\(^{520}\)

In addition to the weakness of the specific provisions, the *Norman* consent decree was not intended to completely reform DCFS.\(^{521}\) Rather, the *Norman* decree is focused on family preservation. Even in this one area, reform may be slow. The large barrage of current lawsuits against DCFS\(^{522}\) illustrates that this agency suffers from a nearly complete organizational breakdown. Even though DCFS may have bound itself to certain duties,\(^{523}\) it takes time and money to effectuate such changes. Workers remain poorly trained and overworked, so children continue to suffer.\(^{524}\) Thus, due to the difficulty of interagency coordination and the magnitude of needed reforms, the potential positive impact of the *Norman* consent decree is limited.

Furthermore, the potential benefit of a consent decree, like that in the *Norman* decision, remains unrealized as long as poor families are not aware of their rights and do not have the power to enforce such rights. Until poor families are educated about the benefits to which they are entitled in the consent decree, such benefits will be of no use. To educate families like the plaintiffs in *Norman*, DCFS must adhere to the decree's requirement to inform families of the alternatives to losing their children because of their poverty. Since DCFS workers are in close contact with families, they have the power and the responsibility to make reasonable efforts to maintain families instead of removing children from their homes. This, however, is not a perfect world. DCFS, rather than embracing such duties, challenged such obligations before the Supreme Court.\(^{525}\) Therefore, it is unlikely that poor families will be fully informed of their rights.

Despite the limitations of the opinion and the consent decree, the

\(\text{\textsuperscript{520}}\) Id. at 15.

\(\text{\textsuperscript{521}}\) Interview with Diane Redleaf, *supra* note 345.


\(\text{\textsuperscript{523}}\) See *supra* text accompanying notes 409-21 (discussing DCFS's duties under the consent decree).

\(\text{\textsuperscript{524}}\) See, e.g., Karwath, *Month's after Kids' Deaths, supra* note 51, at 1, 16 (describing cases where DCFS workers lied about their completed efforts for children in their care). In September 1991, a DCFS caseworker went to trial because of his failure to protect a child in his care. *Id*.

\(\text{\textsuperscript{525}}\) See *supra* text accompanying notes 243-50 (explaining DCFS's challenge to the reasonable efforts provision as an enforceable right under the Adoption Assistance Act).
real gain of *Norman* should not be ignored. Even if its potential is not fully realized, some families are being protected. In terms of real figures, the gain is substantial.\textsuperscript{526} Not only has the *Norman* decision succeeded in Illinois, but other family preservation programs have shared similar success. For example, in Washington and Utah, 68\% of the children whose families received family preservation services remained at home, while 69\% of children whose families did not receive such services entered the foster care system.\textsuperscript{527} Similarly, Maryland's Intensive Family Services program greatly decreased the number of children entering the system and consequently saved the state $6.2 million.\textsuperscript{528} Other successful state programs include those implemented in Virginia, New Hampshire, and Vermont.\textsuperscript{529} Thanks to the *Norman* decision, Illinois can join in the success of these states and focus on family preservation rather than separation.

**CONCLUSION**

Overall, *Norman v. Johnson* offered protection to Illinois foster children by providing them with the substantive right of reasonable efforts to family reunification, at least until the Supreme Court's decision in *Artist M*. Despite ten years of lingering in the Illinois foster care system, children are still unable to realize the federal rights granted by the Adoption Assistance Act. Without the *Norman* consent decree, children and their families would not have the right to stay together. *Norman* illuminates the best interests of the child. The ideals encompassed by *Norman*, however, are tarnished by the reality of reforming the foster care system and are endangered by DCFS's resistance to its obligation of reasonable efforts to keep poor families together.

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\textsuperscript{526} Interview with Diane Redleaf, supra note 345.
\textsuperscript{527} H.R. Rep. No. 395, supra note 5, at 91.
\textsuperscript{528} Id. at 91-92.
\textsuperscript{529} See id. at 92-94 (illustrating the success which each of these states has had with its family preservation programs).