

Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption

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In regards to abused and neglected children, federal policy has shifted its emphasis away from efforts to preserve the family unit, and towards efforts to create new families for these children. This policy shift is reflected in the Adoption and Safe Families Act of 1997, which allows for simultaneous efforts to reunite the child with his or her family along with efforts to place the child up for adoption. Professor Cahn argues that placing such an emphasis on adoption will create situations in which otherwise strong familial bonds are disrupted, resulting in severe damage to the child. The author argues that it is unwise to pursue adoption while at the same time pursuing reunification. Rather, each child should be cared for with family reunification as the primary goal.

Professor Cahn begins by providing an overview of federal involvement in foster care. She then discusses some of the problems with the emphasis upon removing a child from his or her family—since each child's situation is not given an individual evaluation, one instance of abuse or neglect may result in permanent damage to an otherwise strong familial relationship. The author continues by noting that the interests of the child often overlap with the interests of the parent, even when these interests diverge, policies can be implemented which benefit both the parents and the child. Finally, Professor Cahn concludes by suggesting a more humane system of foster care and adoption that would emphasize family preservation as the preferred solution.

In 1996, Representative Clay Shaw convened hearings on "Barriers to Adoption."¹ Notwithstanding the title, the hearings focused on barriers to moving children more quickly out of foster care and into an adoptive family. Witnesses narrated horror story after horror story about children who had languished in the foster care system, or who had continued to experience abuse in their families of origin, rather than being placed out for adoption. These and similar hearings culminated in the enactment of the Adoption and Safe Families Act of 1997 (ASFA),² which was designed to promote the adoption of children in foster care,³

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¹ *Barriers to Adoption: Hearings on S. 104-76 Before the Subcomm. on Human Resources of the House Comm. on Ways & Means, 104th Cong. 2-5 (1996)* [hereinafter *Barriers to Adoption*].

² Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

³ See 42 U.S.C. § 671(c) (Supp. III 1997) (requiring that "reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete

and which amended the Adoption Assistance and Child Welfare Act of 1980.

The primary goals of the 1980 Act were to improve the child welfare system, to provide federal support and oversight for foster care, and to encourage adoption of children with special needs. By the time of the 1997 legislation, however, these goals were restated. Although the ASFA reiterates prior law in requiring states to make reasonable efforts to preserve and reunify existing families,⁴ it places new emphasis on permanency planning and adoption. Rather than the previous focus on pursuing reunification before adoption, the new legislation allows for simultaneous pursuit of “reasonable efforts to place a child for adoption or with a legal guardian [and] reasonable efforts [to reunify].”⁵ Moreover, if reunification efforts would conflict with a “permanency plan,” then the plan takes priority.⁶ The legislation also provides incentive payments to states to increase the number of children adopted out of foster care.⁷

The 1997 legislation reflects a major shift in federal policy towards abused and neglected children, and is a dramatic change away from efforts to preserve families towards efforts to create new families for the children. While it is hard to argue against increased permanency planning for children,⁸ at least I am not alone in this venture in calling for family reunification as the primary goal. Professor Marsha Garrison has eloquently articulated the tension between meeting “*both* the child’s need for a stable loving home and the maintenance of his earlier family ties.”⁹ This Article will discuss the flaws in contemporary federal policy towards abused and neglected children. Particularly for poor children, who are

whatever steps are necessary to finalize the permanent placement of the child”).

⁴ See 42 U.S.C. § 671(a)(15)(B) (Supp. III 1997). In addition to the exceptions discussed *infra* in the text, reasonable efforts are required except when the parent has “subjected the child to aggravated circumstances,” 42 U.S.C. § 671(a)(15)(D)(i) (Supp. III 1997), or committed murder or manslaughter, severely abused the child, or has had parental rights terminated for a sibling. See 42 U.S.C. § 671(a)(15)(D)(ii), (iii) (Supp. III 1997). If the parental rights were involuntarily terminated for a sibling, the circumstances and timing are irrelevant. See 42 U.S.C. § 671(a)(15)(D)(iii). The recently released guidelines developed by the Department of Health and Human Services Working Group on Implementation reiterate that “the most preferred placement for a child is safe and permanent reunification with the birth parent,” and add that this includes placement with a member of the extended family. Donald N. Duquette et al., U.S. Dept. Health & Human Servs., *Adoption 2002: The President’s Initiative in Adoption and Foster Care: Guidelines for Public Policy and State Legislation Governing Permanence for Children*, at ch.2, pt.1 (last modified June 1999) <<http://www.acf.dhhs.gov/programs/cb/special/02adpt2.htm#genguide>> [hereinafter ADOPTION 2002].

⁵ 42 U.S.C. § 671(a)(15)(F) (Supp. III 1997).

⁶ 42 U.S.C. § 671(a)(15)(C) (Supp. III 1997).

⁷ See 42 U.S.C. § 673(b) (Supp. III 1997).

⁸ See generally Mychal L. Feldman, Note, *The Child Welfare System and its Implications on the Best Interests of Children*, 14 N.Y.L. SCH. J. HUM. RTS. 615 (1998) (accusing the child welfare system of preserving families at the expense of children’s interests).

⁹ Marsha Garrison, *Parents’ Rights Vs. Children’s Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 396 (1996) (emphasis in original).

disproportionately subjected to the foster care system, the efforts towards permanency planning may lead to unfair and untimely disruptions of their relationships with their parents.

The most recent debate over the federal approach to abuse and neglect has been framed around children's rights to safety, with the implicit assumption that past policies have returned them to their unsafe families of origin.¹⁰ Children's rights to grow up in a safe environment should continue, of course, to be central to any reforms in the abuse and neglect system. But those rights must be placed in the context of, first, children's familial interests of maintaining contact with their parents, siblings, and other relatives, and second, the policies and practices of the existing child welfare system. Removing children from their families of origin may disrupt the otherwise strong emotional bonds between family members and have a particularly severe impact on the child.¹¹

The policy of child protective services exists on a continuum between child removal and family preservation.¹² The ASFA represents a shift towards child rescue, and is an overreaction to a perceived bias towards family preservation. Displacing the continuum by focusing on children in context may result in more humane child protection practices. Indeed, the historical development of federal support for foster care over the past century shows shifting priorities between in-home and out-of-home care, even though prevention is more economically efficient than removal. The tensions between the two different meanings of the child welfare system—the welfare system that provides aid to children and the welfare system that protects children from abuse and neglect—are longstanding. And the tensions between supporting a child inside her family as opposed to outside of her family are similarly enduring. This Article advocates a return to a focus on children as members of an existing family within a larger community as the means for grounding the child welfare system.¹³ It is thus paradoxical to pursue reunification with that family and also to pursue adoption. Each disposition may be appropriate for any particular child at a specific time, but pursuing both charts an inconsistent course. Emphasizing the child in context

¹⁰ In her book on abuse and neglect, Professor Elizabeth Bartholet argues that "underintervention" has been a significant problem, and that "parents who want their children back have generally been given the benefit of the doubt." ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 99, 105 (1999).

¹¹ See Andre P. Derdeyn, *Foster Parent Adoption: The Legal Framework*, in *THE PSYCHOLOGY OF ADOPTION* 332, 336–37 (David M. Brodzinsky et al. eds., 1990).

¹² See Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, *FUTURE CHILDREN*, Spring 1998, at 104, 108; see generally Megan M. O'Laughlin, Note, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations Vs. Reunification*, 51 *VAND. L. REV.* 1427 (1998).

¹³ This approach was supported by the Adoption Assistance and Child Welfare Act. The presumption should be reunification subject to limitations. See 42 U.S.C. § 671(a)(15)(B)(i), (ii) (Supp. III 1997).

should result in more resources for the child's successful return (or even better yet, to prevent removal altogether).

This Article begins with an overview of federal involvement in foster care, starting with the 1909 White House Conference on Dependent Care, to show the historical relationship between aid to children and in-home care. Part II then continues with a discussion of the relationship between poverty and the abuse and neglect system. Part III provides a fuller examination of the implications of the 1997 changes in abuse and neglect policy for poor children. Part IV concludes by suggesting alternative approaches to the current abuse and neglect system that will place children in a safe family.

I. FEDERAL INVOLVEMENT IN FOSTER CARE

On January 25, 1909, President Theodore Roosevelt convened the White House Conference on the Care of Dependent Children, which had a goal of formulating policies to care for poor neglected children who were not juvenile delinquents.¹⁴ At the end of the conference, the participants, who included Jane Addams, Booker T. Washington, and Theodore Dreiser, proposed making payments to poor parents so that their children could stay at home, rather than be removed to an orphanage.¹⁵ Conference members did not specify the source of payments, although they advocated private relief.¹⁶ Two years after the conference, Illinois and Missouri adopted mothers' pensions laws, followed soon thereafter by most other states.¹⁷ The mother's pensions laws certainly received an impetus from the White House Conference,¹⁸ but they built on Progressive Era beliefs that idealized motherhood and the family.¹⁹ As one of the Progressive Era

¹⁴ See MATTHEW A. CRENSON, BUILDING THE INVISIBLE ORPHANAGE: A PREHISTORY OF THE AMERICAN WELFARE SYSTEM 11 (1998); see also Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1751 (1987) (discussing the change in philosophy of the child welfare system at the beginning of the twentieth century from outside placement to family rehabilitation); Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1295-1301 (1999).

¹⁵ See CRENSON, *supra* note 14, at 11-13. For additional discussion of the historical use of out-of-home placements, see Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 3-4 (1995); Catherine Ross, *Families Without Paradigms Child Poverty and Out-of-Home Placement*, 60 OHIO ST. L.J. 1249, 1261-88 (1999).

¹⁶ See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 425 (1992) (quoting PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN, S. DOC. NO. 60-721, at 9-10 (1909)).

¹⁷ See SKOCPOL, *supra* note 16, at 424.

¹⁸ See CRENSON, *supra* note 14, at 262.

¹⁹ See SKOCPOL, *supra* note 16, at 433-34 (noting that women's magazines provided the ideological groundwork for mothers pension enactments).

women's magazines explained, mothers' pension provided compensation to women just as wages provided compensation to men: "[A man] is paid for his work; she for hers. And she should be paid by those for whom she does it—all the citizens of the state."²⁰

The mothers' pension movement thus represented an effort not just to alleviate poverty, but to keep children out of orphanages and foster care.²¹ Matthew Crenson notes that, as early as the 1860s, orphanages had given money to families to enable them to care for their children, so that the orphanage would not become overcrowded.²² The development of foster families seems to have occurred during the latter part of the nineteenth century as well.²³ Other early twentieth century governmental efforts were similarly designed to promote maternal care of their children.²⁴ The Sheppard-Towner Act,²⁵ which provided information to mothers—regardless of class—to enable them to raise healthy children, can also be viewed as an attempt to prevent additional child abuse and neglect. Beginning with these early mothers' pensions' laws, there has been a strong link between aid to dependent children and the assumption that this aid would allow children to be cared for at home, which was the most suitable environment for them. Similarly, as traced in a fifty year history of the efforts of the Federal Children's Bureau, child welfare agencies have shifted their focus from outside placement to maintaining children at home.²⁶

²⁰ See CRENSON, *supra* note 14, at 264 (quoting William Hard, *The Moral Necessity of State Funds to Mothers*, 29 SURVEY 773 (1913)). For contemporary echoes of the importance of state subsidies to mothers, see generally MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 23–33, 228 (1995); EVA FEDER KITTAY, *LOVE'S LABOR: ESSAYS ON WOMEN, EQUALITY, AND DEPENDENCY* (1999); Catherine Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 7 AM. U. J. GENDER & L. (forthcoming 1999) (discussing these proposals); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996).

²¹ See CRENSON, *supra* note 14, at 262; SKOCPOL, *supra* note 165, at 425 (citing to CRENSON); Alexia Pappas, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?* 45 DUKE L.J. 1301, 1304–06 (1996).

²² See CRENSON, *supra* note 14, at 260.

²³ See *id.* at 28, 313–14 (discussing the practice of boarding out, which enabled the orphanage to unburden itself of children with disabilities whose care was expensive, as well as young children who were thought to need family life the most).

²⁴ See SKOCPOL, *supra* note 16, at 494–97 (discussing the Sheppard-Towner Act).

²⁵ This was also called the Maternity and Infancy Act. See Molly Ladd-Taylor, *Why Does Congress Wish Women and Children to Die?: The Rise and Fall of Public Maternal and Infant Health Care in The United States, 1921–1929*, in *WOMEN AND CHILDREN FIRST: INTERNATIONAL MATERNAL AND INFANT WELFARE, 1870–1945*, at 121 (Valerie Fildes, et al. eds. 1992); see also DOROTHY E. BRADBURY, *FIVE DECADES OF ACTION FOR CHILDREN: A HISTORY OF THE CHILDREN'S BUREAU* 23–26 (1962).

²⁶ Dorothy Bradbury mentions field work during the early 1920s on foster home care agencies, in which the agencies "were moving from a strong emphasis 'on adoptions and free-home permanent placements' to 'stressing the preservation of family ties.'" BRADBURY, *supra*

In providing federal aid to dependent children, the government was clearly attempting to provide support so that children could stay within their families, when those families were appropriate recipients of aid.²⁷ States developed their own standards as to which families qualified for aid. Based on the abuse of the qualification process, in January of 1961, however, the Secretary of Health, Education and Welfare prohibited states from terminating aid to children if their homes had been found unsuitable.²⁸

So strong was the policy of providing support only for children who lived at home that, until 1961, a child was ineligible for Aid to Dependent Children (ADC) unless she was living with her parent or a close relative. A child who had been removed for abuse and neglect, then, was no longer eligible for aid under the federal program. In 1961, Congress enacted legislation expanding ADC and changing its name to Aid to Families with Dependant Children (AFDC). The legislation was designed to allow children who were needy as a result of the unemployment of a parent to receive aid. As part of this massive revision to aid for needy children, Senator Robert S. Kerr of Oklahoma proposed to the Senate Finance Committee that children removed from their homes for abuse and neglect pursuant to a court order be eligible for continued federal aid.²⁹ Senator Kerr observed that he had offered this amendment because some state courts might feel a "psychological barrier" to removing a child from an abusive or neglectful home because that child would lose federal aid, and become dependent on the state or locality instead.³⁰ The Finance Committee echoed his concern, explaining that it was worried that the unavailability of continued federal aid had interfered with courts acting in the child's best interests;³¹ prior to the 1961 amendment, the only federal money available for foster care came from Title V of the Social Security Act.³²

note 25, at 34, 37, 113. She also mentions the shift in emphasis at other times, such as at a 1929 meeting on rural children, and during the years from 1957-62 when states made "real progress toward a well-rounded child-welfare program." *Id.* at 34, 113.

²⁷ See Ross & Cahn, *supra* note 20 (forthcoming 1999); see also S. REP. NO. 87-165, at 6 (1961) (discussing federal payments to children in unsuitable homes, and noting that "some States have placed in operation statutes terminating payment when a child's home is found unsuitable because of the immoral or negligent behavior of the parent").

²⁸ For discussion of the "Flemming Rule," see Pappas, *supra* note 21, at 1308-09; see also Levesque, *supra* note 15, at 13.

²⁹ See generally 87 CONG. REC. S6387 (1961) (statement of Sen. Kerr).

³⁰ See *id.* at S6387.

³¹ See *id.* at S6388 (statement of Sen. Byrd). The foster care amendment originated in the Senate, and there was no comparable provision in the House's overhaul of ADC. See H.R. CONF. REP. NO. 87-307, at 5 (1961).

³² See S. REP. NO. 87-165, at 6-7 (1961). The report explained:

[T]here are some home environments that are clearly contrary to the best interests of [dependent] children . . . Often, however, remedial action on behalf of the child was not

There was relatively little debate over the foster care amendment. The primary controversies on the Senate floor concerned the availability of continued federal aid to a child placed in a foster home where she was receiving religious instruction, as well as the potential federal interference with state foster care programs. Senator Kerr explained that the federal government was not attempting to interfere, in any way, with state laws and policies concerning foster care, nor with intrafamilial relations.³³ Instead, he wanted to ensure that courts felt free to act in the child's best interests without feeling financial constraints. Moreover, the amendment contemplated only private, state-licensed foster care homes, not institutional care, and thus religious instruction would not be an issue.³⁴

Since 1961, the federal government has become increasingly involved with foster care, and has consistently attempted to influence state foster care programs. As the population of children in foster care increased dramatically during the 1970s, Congress held hearings on how to manage the crisis.³⁵ In 1980, Congress removed the federal foster care system from Title IV-A of the Social Security Act, and established a separate program under Title IV-E through the Adoption Assistance and Child Welfare Act (AACWA). The AACWA attempted to federalize state foster care programs by establishing comprehensive standards, and it emphasized the importance of providing reasonable efforts both to prevent a child from being removed from her family, and to return her to her family.³⁶ It also regularized federal reimbursements for state-approved foster care.³⁷ Under the AACWA, states were required to submit a plan to the U.S. Department of Health and Human Services (HHS), which provided that in each case, "reasonable efforts will be made . . . (i) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and

possible. We believe that this undesirable situation could be avoided, in many instances, if assistance under this program were available for the care of the child in a foster family home when such care is necessary.

....

While Federal funds available through the child welfare services to States under title V are used for foster care of children to a limited extent, the bulk of the cost of foster care is paid from public funds, State or local, or from funds of voluntary agencies. The lack of financial resources for such care has hindered the development of the most suitable care for children who have to be cared for outside their own home.

See id. at 6-7.

³³ *See generally* 87 CONG. REC. S6387 (1961).

³⁴ *See* S. REP. NO. 87-165, at 6, 16-17 (1961).

³⁵ *See* Shawn L. Raymond, Note, *Where Are the Reasonable Efforts to Enforce the Reasonable Efforts Requirement?: Monitoring State Compliance Under the Adoption Assistance and Child Welfare Act of 1980*, 77 TEX. L. REV. 1235, 1235-36 (1999).

³⁶ *See* Levesque, *supra* note 15, at 14-15.

³⁷ *See* S. REP. NO. 96-336, at 12 (1979) (eliminating the old federal reimbursements that ranged from one-third to two-thirds of the cost of foster care, substituting a flat reimbursement rate of 75%).

(ii) to make it possible for the child to return to his home."³⁸ Moreover, in order to remove a child from her home, states were required to show that the removal occurred because of a finding that staying in the home would be "contrary to the welfare of such child" and that reasonable efforts to keep the child at home had been made.³⁹

Although individuals do not have a right of action against the state agency responsible for establishing reasonable efforts,⁴⁰ the Department of Health and Human Services is responsible for overseeing and approving state foster care programs.

In the hearings that culminated in the 1997 ASFA legislation, witnesses repeatedly emphasized the problems resulting from the provisions in the 1980 law that required reasonable efforts be made to reunify troubled families. Witnesses to the hearings before the House Ways and Means Committee recounted the physical, emotional, and sexual abuse visited upon children as a result of their return to the custody of biological parents who suffered from substance abuse, mental illness, or other conflicts that prevented them from assuming full responsibility for the care of their children.⁴¹ Foster parents and adoptive parents described their efforts to extricate children from troubled homes, only to face recalcitrant judges, social workers, and other actors in the foster care system who enforced compliance with family preservation and reunification policies devised pursuant to the statutory mandate to make reasonable efforts to reunify families.⁴² Moreover, the problems resulting from family preservation and reunification policies were not limited to the abuse inflicted upon children when their biological families resumed custody. Heads of government agencies, attorneys who represented children or parents in the foster care system, and prospective adoptive parents outlined the destabilizing effect of placing children from troubled families in multiple foster homes, while government or nonprofit agencies administered services to the parents in order to enable them to

³⁸ 42 U.S.C. § 671(a)(15) (Supp. III 1997). To ensure the implementation of the reasonable efforts requirement, the state agency was required to develop a case plan for each child which included a description of the placement and an explanation of its appropriateness, and a plan to facilitate the return of the child or another permanent placement. *See* 42 U.S.C. §§ 671(a)(16), 675(1) (Supp. III 1997).

³⁹ *See* 42 U.S.C. § 672(a)(1) (Supp. III 1997).

⁴⁰ *See Suter v. Artist M.*, 503 U.S. 347, 350 (1992); *see also* 42 U.S.C. § 1320a-2 (1994) (allowing private actions to enforce state plans, except with respect to the reasonable efforts requirement).

⁴¹ *See, e.g., Barriers to Adoption*, *supra* note 1, at 27, 57-64, 65, 85, 119 (statements of Connie Binsfield, Sister Josephine Murphy, Patricia Warendas; and D. Bruce Levy). On the floor, House members reiterated these problems. *See, e.g.*, 143 CONG. REC. H2012, H2012 to H2042 (daily ed., Apr. 30, 1997) (statements of Reps. Pryce, Camp, and Burton).

⁴² *See Barriers to Adoption*, *supra* note 1, at 74, 128 (statements of Robert Dean and Patricia Flory); *see also id.* at 168 (reading of a letter from Hear My Voice).

successfully reunify with their children.⁴³ To those individuals who testified at the hearings, the reasonable efforts requirement in the 1980 legislation had been interpreted by many jurisdictions as a requirement that agencies undertake all possible efforts to reunify or preserve the family unit, without regard to the welfare of the children.⁴⁴

The witnesses at the hearings proposed a number of solutions that could be incorporated into the 1997 legislation.⁴⁵ First, many witnesses advocated that limits be placed upon the amount of time needed to assess the problems within troubled families and to administer services to these families for the purpose of family preservation and reunification.⁴⁶ Other witnesses proposed applying a presumption or an outright ban on reunification in circumstances in which the biological parents inflicted severe physical or sexual abuse upon the children, or if the biological parents suffered from chronic substance abuse problems.⁴⁷ Finally, some witnesses supported expediting judicial proceedings for the termination of parental rights and for determining permanent placements for children in dysfunctional families that did not respond to the rehabilitative services provided by state and local agencies.⁴⁸

The ASFA seeks to prevent children from spending too much time in foster care, and to promote adoption. To accomplish the first goal of preventing foster care drift, as well as the second goal of freeing up children for adoption, the ASFA requires, among other things, that a state seek to terminate parental rights for children who have been in foster care for fifteen out of the previous twenty-two months.⁴⁹ It also requires a permanency hearing to be held within twelve months of a child's entry into foster care,⁵⁰ in contrast to the AACWA, which required simply that a "dispositional" hearing be held within eighteen months.⁵¹ The permanency plan required by the AFSA must include a schedule for: (1) returning the child to her parent, if that is an option; (2) placing the child for adoption and terminating her parents' rights; or (3) referring the child for permanent placement.⁵² As an additional method of promoting adoption, the

⁴³ See *id.* at 46, 65, 99 (statements of Judith Goodhand, Lauren D'Ambra, and Patricia Warena).

⁴⁴ Not everyone agrees on the federal government's bias, however. The director of Michigan's Social Services Department claims that the federal government did not provide sufficient support for family preservation efforts. See Rochelle L. Stanfield, *Kids on the Block*, 28 NATL. J. 247, 249 (1996).

⁴⁵ See generally *Barriers to Adoption*, *supra* note 1.

⁴⁶ See *id.*

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See 42 U.S.C. § 675(5)(E) (1997 III Supp.).

⁵⁰ See 42 U.S.C. § 675(5)(C) (1997 III Supp.).

⁵¹ See 42 U.S.C. § 675(5)(C) (1980) amended by 42 U.S.C. § 675(5)(C) (Supp. III 1997).

⁵² See 42 U.S.C. § 675(5)(C) (Supp. III 1997). The House Report explained that the

legislation authorizes financial incentives of up to \$6,000 per child adopted.⁵³ Finally, the Act clarifies that children's safety concerns are the paramount consideration in any family preservation, foster care, or adoption efforts.

II. PROBLEMS WITH THE RETURN TO REMOVAL

A. Poverty and the Abuse and Neglect System

1. *The Relationship Between Poverty and Abuse and Neglect*

Historically, there has been a strong link between child abuse and neglect and poverty.⁵⁴ Poor and African-American families are disproportionately more likely to be charged with child neglect.⁵⁵ Thirty-two percent of the children served by the child welfare system from March 1, 1993 to February 28, 1994 were African-American; fifty-seven percent were white, and eleven percent were Hispanic.⁵⁶ As discussed *infra*, African-American children also spend a longer time involved with the system than do white children. Today, it is 22 times as likely that abuse or neglect will occur in families with incomes less than \$15,000 per year than in families with incomes greater than \$30,000 per year.⁵⁷ The reasons for this variation are unclear, although it is clearly not poverty alone that causes abuse; instead, it appears that poverty interacts with a series of other factors.⁵⁸

The association is particularly strong for poverty and neglect. Children may be removed for poverty alone.⁵⁹ One Illinois study found that almost ten percent

purpose of the change in name from "dispositional" to "permanency" was to "emphasize the goal of early permanent placements." H.R. REP. NO. 105-77, at 13 (1997).

⁵³ See 42 U.S.C. § 673b(d)(1)(A), (B) (Supp. III 1997).

⁵⁴ See generally LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880-1960* (1988); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* (1987). Poverty was the first basis for terminating parental rights. See Marsha Garrison, *Parents' Rights Vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 374 (1996).

⁵⁵ Bernardine Dohm, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 2 (1995).

⁵⁶ See DEPARTMENT OF HEALTH & HUMAN SERVS., NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES: FINAL REPORT IX, at 7-2 (1997) [hereinafter NATIONAL STUDY].

⁵⁷ See Mary B. Lerner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, FUTURE CHILDREN, Spring 1998, at 4, 16 (1998).

⁵⁸ See Diana J. English, *The Extent and Consequences of Child Maltreatment*, FUTURE CHILDREN, Spring 1998, at 39, 47 (asserting that these factors include "unrealistic expectations, depression, isolation, substance abuse, and domestic violence").

⁵⁹ See generally Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEM. L. REV. 447 (1997).

of children were removed because of “environmental neglect,” which is broadly defined as a lack of adequate food, shelter or clothing⁶⁰ rather than any deliberate actions on the part of the parent; and another twelve percent were removed for lack of supervision. These are resource problems, not the problems of abusive or neglectful parents. If there is adequate funding for the necessities of life, then poverty alone will not cause neglect. Similarly, if parents received adequate support for caring for their child, in the forms, for example, of day care or after-school programs, then this will ameliorate the lack of supervision problem.

A recent study of child abuse in Denver found that children in single-headed, African-American households were more likely to be reported for abuse than were white children living in two-parent households who had also been abused.⁶¹ Physicians missed child abuse in white children at a rate of about forty percent; for black children, it was twenty percent.⁶² There were comparable rates for single-headed versus two-parent families. I think these studies show that the abuse and neglect system is not administered even-handedly—and they also show there is a high correlation with poor families and that system. More than one-third of the children in New York City’s foster care system also receive public welfare.

2. Welfare Law and the Abuse System

The disappearance of Aid to Families with Dependent Children, and its replacement by the Temporary Assistance to Needy Families (TANF) program, creates more possibilities for poor people to come into contact with child protective services.⁶³ It is estimated that 3.8 million children will be affected by the 60-month limit on welfare receipt;⁶⁴ their parents will become ineligible for aid sometime early in the new millennium. Their new opportunities for contact with child protective services result from several sources, such as the following. First, the welfare to work program requirements might lead to parents leaving their children unattended because of a lack of good child care.⁶⁵ Even if they do

⁶⁰ Kristin Shook, *Assessing the Consequences of Welfare Reform for Child Welfare*, 2 POVERTY RESEARCH NEWS (Joint Ctr. for Poverty Research, Chicago, Ill.), Winter 1998, at 2, ¶ 26 (visited Nov. 21, 1999) <<http://www.jcpr.org/winter98/article2.html>>.

⁶¹ See Carole Jenny, et al., *Analysis of Missed Cases of Abusive Head Trauma*, 281 JAMA 621, 623 (1999).

⁶² See *id.* at 623.

⁶³ See Mark Hardin, *Sizing Up the Welfare Act’s Impact on Child Protection*, 30 CLEARINGHOUSE REV. 1061, 1068 (1997); see also Braveman & Ramsey, *supra* note 59, at 448–49; Shook, *supra* note 60.

⁶⁴ See GREG J. DUNCAN, ET AL., TIME LIMITS AND WELFARE REFORM: NEW ESTIMATES OF THE NUMBER AND CHARACTERISTICS OF AFFECTED FAMILIES 7 (1997).

⁶⁵ See generally Martha Matthews, *Assessing the Effect of Welfare Reform on Child Welfare*, 32 CLEARINGHOUSE REV. 395 (1999) (noting that there may be benefits if parents get good jobs).

not work, once parents are ineligible for public welfare, they will be unable to provide food and shelter for their children, leading to the potential for contact with child protective services.⁶⁶ Once a child is removed, the requirements of a reunification plan combined with a work plan may make it difficult for a parent to comply with both.⁶⁷ Second, the requirements for drug testing for TANF applicants may lead families with these problems not to apply for benefits, thus triggering more poverty, and more contact with the child protection system. Studies of child abuse and neglect indicate that between one-third and two-thirds of all substantiated reports involve some form of parental substance abuse.⁶⁸ Third, with a decrease in the number of families on public assistance, there may be more voluntary placements in foster care, as parents try to help their children by placing them elsewhere.⁶⁹ The requirement that unmarried teen parents live with an adult may also cause more interest in inspections of their parents' houses.⁷⁰

As this brief survey shows, the abuse and neglect system is integrally tied in with child poverty, and changes in each system affects the other.

B. *Problems with the Adoption Emphasis*

The ASFA isolates one important moment in a child's life—the incidence of abuse or neglect that led to removal—from the child's lifetime relationship with her parents, her extended family, and her community. As a recent student note pointed out, the ASFA simply does not allow for individual evaluation of each

⁶⁶ See Peter Edelman, *The Role of Government in the Prevention of Violence*, 35 HOUS. L. REV. 7, 14–15 (1998) (advocating government actively participating in locating jobs for welfare recipients to help prevent increases in the number of children who will come into contact with protective services); see also Nancy A. Wright, *Welfare Reform Under the Personal Responsibility Act: Ending Welfare as We Know It or Governmental Child Abuse?*, 25 HASTINGS CONST. L.Q. 357, 365–66 (1998) (asserting that welfare policy must include publicly-funded jobs to enable welfare recipients to achieve economic independence, thereby preventing the need to remove children from their home into foster care).

⁶⁷ See generally Matthews, *supra* note 65.

⁶⁸ See DEPARTMENT OF HEALTH & HUMAN SERVS., BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION 41, 41 (1999) [hereinafter BLENDING PERSPECTIVES]; see also B.G. Greg, *Everybody's Children*, CIN. ENQUIRER, Feb. 1, 1998, at A1 (estimating that about one-half of children in foster care in the Cincinnati area had parents with some kind of substance abuse problem).

⁶⁹ See Hardin, *supra* note 63, at 1068. Ironically, foster care parents receive more money than do recipients of public welfare. See Mark E. Courtney, *Report V: Welfare Reform and Child Welfare Services*, in CHILD WELFARE IN THE CONTEXT OF WELFARE "REFORM" 1, 3–4 (Sheila B. Kamerman & Alfred J. Kahn, eds., 1997) (noting that in 1993, the federal government spent almost \$11,000 per child in the foster care system, contrasted with \$975 for every child receiving Aid to Families with Dependent Children).

⁷⁰ See Courtney, *supra* note 69, at 21.

child's situation. It overlooks the psychological effects on the child of parental rights terminations, it does not necessarily ensure that each child will be adopted, and it assumes that child protective services will always do the right thing.⁷¹ Children may be in foster care because they will never be returned to their biological parents, but an adoptive placement is unavailable, either because the agency is attempting to create a basis for family reunification, or because of a lack of adequate planning and resources. The ASFA, however, does not distinguish between these situations, and forces children in all settings into adoption and termination of parental rights.

In order to facilitate adoptions, the ASFA provides for speedier termination of parental rights through a variety of mechanisms. While these provisions are eloquent on paper—who doesn't want to prevent foster care drift and ensure permanency for children?—they are ill-advised in practice. First, the ASFA assumes that a certain amount of time in foster care means that the parents are, and will continue to be, unable to care for their children. Once a child has spent fifteen months out of the prior twenty-two months in foster care, then the state is required to initiate proceedings for termination of parental rights.⁷² Such an assumption is unwarranted under many circumstances. The length of time for permanency planning, especially because it is not based on any substantive ground, ignores the relationship between the child and her parents, overlooks the actual reasons that a child may be in foster care, and is unmoored from any "reasonable efforts" to return the child to her family.⁷³ States could use the length-of-time ground even when parents are responding to services, and the child would like to return home.⁷⁴ Instead of helping children, terminating parental

⁷¹ See O'Laughlin, *supra* note 12, at 1437–48.

⁷² There are certain exceptions to this strict time limit, such as when the child is in kinship care, or where the state has failed to make reasonable efforts. See 42 U.S.C. § 675(5)(E)(i)–(iii) (Supp. III 1997). For criticism of these exceptions as failing to place the child's interests first, see Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 658–61 (1999) (arguing that the mandatory termination requirements favor the interests of adults in ways that are harmful to the children).

⁷³ For an excellent discussion of the problems with such statutes, see generally Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251 (1996). For discussion of the complexities of this ground with respect to incarcerated parents, see Philip Genty, *Permanency Planning in the Context of Parental Incarceration: Legal Issues and Recommendations*, 77 CHILD WELFARE 543, 551–57 (1998).

⁷⁴ As Marylee Allen, from the Children's Defense Fund, explained: "Consider a situation, for example, where a parent has successfully completed substance abuse treatment, has begun weekend visits with the children, had one child returned and will have the other two children returned within the next two months." *Promotion Adoption: Hearings on H.R. 867 Before the Subcomm. on Human Resources Comm. on Ways & Means*, 105th Cong. 33–34 (1997), available in 1997 WL 165564 (statement of Marylee Allen, Children's Defense Fund) [hereinafter *Promotion Adoption*].

rights based on length-of-time could be affirmatively harmful.⁷⁵

Second, in implementing ASFA, states have considered, and begun to adopt, legislation that is particularly punitive to the families of origin. For example, in Arkansas, the welfare agency can only continue to pursue reunification when the parent is making "significant, measurable progress" under the goals of the case plan.⁷⁶ The burden of proving a "genuine, sustainable investment" in completing the provisions of the case plan and complying with court orders has been placed on the parent; if she fails to meet her burden, then the agency need not pursue reunification.⁷⁷ Louisiana legislation requires that the case plan contain documentation of the "compelling reasons for determining that filing a petition for termination of parent rights would not be in the best interest of the child."⁷⁸ In Nevada, a parent's failure to comply substantially with the terms of the reunification plan within six months of the child's placement is evidence that could lead to termination of parental rights.⁷⁹ In North Dakota, a parent who "fails to make substantial, meaningful efforts to secure treatment for the parent's addiction . . . [or] behavior disorder" is deemed to have abandoned her child.⁸⁰ In Illinois, although ASFA provides parents with some protection against termination when the state has failed to provide reasonable efforts, it is the parents' responsibility to file a motion that requests the court to find that no reasonable efforts have been made within sixty days of the end of the time period during which the state is required to make reasonable efforts.⁸¹

Some states are grappling with issues involving drug and alcohol use and treatment concerns.⁸² The treatment process is often complicated, however, relapse may even be an integral part of the healing process. As a recent report from the Department of Health and Human Services explained:

⁷⁵ See Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2293 (1998).

⁷⁶ S.B. 211, 82nd General Assembly, Reg. Sess. (Ark. 1999). By contrast, the Washington state bill simply requires the court to establish where there has been compliance with the case plan. See S.H.B. 173, 56th Leg., Reg. Sess. (Wa. 1999) (re-enacting and amending R.C.W. 26.33.170(7)(b)(iv)).

⁷⁷ Ark. S.B. 211.

⁷⁸ H.B. 827 Art. 675(B)(4), 1999 Reg. Sess. (La. 1999) (enacted).

⁷⁹ See A.B. 158, 70th Leg., Reg. Sess. (Nev. 1999) (amending 128.109(1)(B)).

⁸⁰ S.B. 2171, 56th Leg. Assembly (N.D. 1999) (amending 27-20-02(A)).

⁸¹ See Cheryl A. DeMichele, Comment, *The Illinois Adoption Act: Should a Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 *LOY. U. CHI. L.J.* 727, 754, 758 (1999).

⁸² Recently enacted legislation in Montana provides that, in determining whether the parents are likely to remain unfit and thus unable to care for their child, the court shall consider use of alcohol or a drug that "affects" the parent's capacity for caring for the child. See H.B. 366, 56th Leg., Reg. Sess. (Mont. 1999) (enacted).

[A]ddiction treatment cannot guarantee lifelong health, although nearly one-third of clients achieve abstinence from their first treatment attempt. Relapse, often a part of the recovery process, is always possible and treatable. . . . [A]ddiction treatment can reduce the number and duration of relapses, minimize related problems such as crime and poor overall health, reduce impact of parental addiction on children, improve the individual's and his or her family's ability to function in daily life, and strengthen the individual's ability to cope with the next temptation or craving.⁸³

Third, ASFA seems to blame the length of time that children stay in foster care on the inability of their biological parents to pull their lives together, notwithstanding the massive intervention by social workers seeking to offer the requisite "reasonable efforts."⁸⁴ This is highly improbable, in light of the severe funding shortages and high caseloads of most urban child welfare systems; families are simply not receiving the services that they need, rather than refusing to comply with the services that are offered. From 1977-94, the number of children who received child welfare services decreased by almost fifty percent, from 1.8 million to 1 million.⁸⁵ Even where child maltreatment has been substantiated, approximately forty to sixty percent of these cases receive no additional services.⁸⁶ Fewer than ten percent of child welfare agencies are able to find substance abuse treatment programs for most of their clients within thirty days.⁸⁷ Given that the children's case plans inevitably require their parents to get treatment, the unavailability of programs means that children will remain in foster care, and reunification will be postponed or become impossible.⁸⁸ There is no requirement for providing additional services to parents and children in order to facilitate reunification.⁸⁹ At the time that Congress was considering the ASFA, there were lawsuits in almost half of the states because of the inadequacies of

⁸³ BLENDING PERSPECTIVES, *supra* note 68, at 13-14.

⁸⁴ One recent student note argued, for example, that it was "the abysmal failure of the policy favoring reunification" rather than the actual number of children in foster care which led to ASFA. Cristine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 294.

⁸⁵ See Kim, *supra* note 84, at 300. The lack of resources for child welfare services is certainly not a new problem. See Garrison, *supra* note 14, at 1767.

⁸⁶ See English, *supra* note 58, at 49.

⁸⁷ See BLENDING PERSPECTIVES, *supra* note 68, at 80.

⁸⁸ See E-mail from Martha Matthews to Naomi Cahn, (Jan 28, 1999) (noting that "there aren't enough of the services parents need to comply with their reunification plans") (on file with author).

⁸⁹ The Children's Defense Fund explained that it was concerned because, "without an assurance that services will be available to meet the needs of the children and their parents who come to the attention of the child welfare system that the interests of children will be jeopardized." *Promotion Adoption*, *supra* note 74, at 19.

their child welfare systems.⁹⁰

Judges have enormous discretion in deciding whether the state has met the reasonable efforts requirement, and rely on the testimony of the underfunded child welfare workers.⁹¹ In many cases, it is the failure of the child welfare agency to offer adequate services, rather than the failure of the parents to comply with reunification efforts, that explains the lack of reasonable efforts.⁹²

Finally, a primary concern of ASFA is increasing the number of children adopted, with the underlying assumption that children were not being adopted because their parents' parental rights had not been terminated. As the House Committee on Ways and Means Report explained:

There seems to be almost universal agreement that adoption is preferable to foster care and that the nation's children would be well served by a policy that increases adoption rates. . . .

[T]here seems to be a growing belief that federal statutes, the social work profession, and the courts sometimes err on the side of protecting the rights of parents.⁹³

Prior to ASFA, however, only a small percentage of the children eligible for adoption were actually adopted.⁹⁴ While the ASFA has served to increase the number of children adopted, the problem has not been the number of adoptable children whose parents' rights had not been terminated; the problem was finding adoptive parents for these children. To promote adoption, it is unnecessary to terminate the parental rights of more parents; what is needed is placing the children already available for adoption more quickly. In his study of the number of children whose parental rights had been terminated in Michigan and New York prior to ASFA, Professor Martin Guggenheim found that the number of children adopted out of foster care failed to keep up with the number of children eligible to be adopted, and that the total number of children whose parents' right had been terminated continued to increase.⁹⁵ He expressed concern about the impact on the general child welfare system as well as on the child herself of terminating a child's parental rights without ensuring the availability of a permanent

⁹⁰ See *Barriers to Adoption*, *supra* note 1, at 21 (statement of Rep. George Miller).

⁹¹ See Kim, *supra* note 84, at 303; Raymond, *supra* note 34, at 1263.

⁹² See Kim, *supra* note 84, at 306.

⁹³ H.R. REP. NO. 105-77, at 8 (1997).

⁹⁴ For example in 1995, only 20,000 of the 100,000 children eligible were actually adopted. See H.R. NO. 105-867 § 4 (1997) (statement of Sen. Mike DeWine).

⁹⁵ See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights in Foster Care: An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 132 (1995). Professor Guggenheim also noted that two earlier studies of the adoption rate of foster care children produced consistent results. See *id.* at 132-33 (discussing analysis of Marsha Garrison in 1980 and those of Margaret Beyer and Wallace Myleniec in 1986).

placement.⁹⁶ Moving too quickly to terminate parental rights may often not be in the child's best interests.⁹⁷

A related danger of this provision is that financially-needy states will move too quickly to make children available for adoption in order to receive the incentive bonus.⁹⁸ There is no corresponding incentive for successful family reunification.⁹⁹ In addition, adoption is not always preferable to foster care. As the legislation recognizes, when children are placed in kinship care, there need be no rush to adoption. For older children, foster care may provide an appropriate balance between safety and connection to their families of origin. Where foster care provides support for reunification, then adoption is certainly not the best solution. Nonetheless, some have argued that the AFSA is inadequate because it continues to provide inefficient protection to children, and places too much emphasis on family preservation. Indeed, Professor Elizabeth Bartholet charges that various "loopholes" in the AFSA may prevent child protective services from taking permanent adoptive placements seriously.¹⁰⁰ Instead, she believes that children should be removed regardless of whether they are physically safe in their homes, and that the priority placed on keeping children in their community of origin is misplaced.¹⁰¹ This vision, however, minimizes the relationships of children to their parents¹⁰² and community.

III. FAMILIES' IDENTITY, CHILDREN'S INTERESTS

In arguing that the law should respect the integrity of the family unit, I want to place this concept in the context of children's interests. Of course, in addressing how best to respect children, there are many different frameworks and many

⁹⁶ See *id.* at 133-34; DeMichele, *supra* note 81, at 727.

⁹⁷ See generally Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423 (1983) (commenting that terminating parental visitation rights is unnecessary and may prove damaging to the adopted child).

⁹⁸ The Children Defense Fund's Marylee Allen pointed to this as a potential problem. See *Promotion Adoption*, *supra* note 74, at 36 (stating that "it is important that the adoption . . . be crafted so that it does not encourage states to move children toward adoption without sufficient attention being given to whether adoption was the appropriate plan in a particular case").

⁹⁹ See *Encouraging Adoption: Hearing 105-3 Before the Subcomm. on Human Resources of the House Ways & Means Comm.*, 105th Cong. 6-7 (1997) (statement of Fred H. Wulczyn) [hereinafter *Encouraging Adoption*]. One program, which provided a set amount of foster care payments rather than a per diem reimbursement, resulted in a decrease in the number of children remaining in foster care. See *id.* at 8-18 (discussing the Home Rebuilder Demonstration Project in New York City).

¹⁰⁰ See BARTHOLET, *supra* note 10, at 193, 204.

¹⁰¹ See *id.* at 204.

¹⁰² But see *id.* at 177 ("It is true that *some* older children in foster care have developed meaningful ties with biological parents.") (emphasis added).

disagreements over where the focus should be.¹⁰³ Parents can only be defined in relationship to children. Respecting families does not mean jeopardizing children. It is not a choice in which we respect either parents or children; their rights generally do not conflict. Instead of reifying a dichotomy between the interests of parents and the interests of children, we should recognize that, in most cases, they overlap significantly.¹⁰⁴ Martha Minow reminds us of the importance of not basing politics solely on one's identity.¹⁰⁵ In this context, it is important to remember that parents are all children too.¹⁰⁶ General cultural assumptions that children are best taken care of by their parents serve to respect children's interests. Respecting "rights for children" requires "concern[] about the importance of connection, care-taking, and social relationships" as well as an acknowledgement of the "critical role of relationships with adults."¹⁰⁷

Even when the interests diverge, however, respecting children's interests and safety does not mean overlooking adults' interests. Nor should recognizing adults' interests mean trivializing children's interests. While it is critical to respect children's rights and relationships, to make decisions that are in their best interest, and to listen to them, I believe that parents' rights can also be respected without classifying children as "property" or without ignoring children's actual interests.¹⁰⁸ Whether one recognizes the interests of parents, or the interests of

¹⁰³ For example, Professor Martha Fineman, of Cornell and Columbia Law Schools, has been holding a series of "difficult conversations" between advocates of children's rights and women's rights, both of whom hold strong beliefs.

¹⁰⁴ As discussed in Part III obviously the most difficult cases do involve conflicts between parent's and children's rights (and relationships). After the Supreme Court denied certiorari in *Baby Richard v. Kirchner*, 514 U.S. 1094 (1995), I recall a discussion on the FEMJUR Internet list in which parents were acting selfishly, without regard to the child's best interests. Some maintained that the adoptive parents should have arranged visitation between the biological parents and Richard in order to ease the eventual transition, while others maintained that the biological parents should have recognized that it was in Richard's best interests to remain with the adoptive parents.

This discussion shows how language affects our perspective on what constitutes children's best interests and parental rights. Each set of parents could have phrased its arguments in terms of the best interests of the child.

¹⁰⁵ See generally Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 47 (1996).

¹⁰⁶ See KITTAY, *supra* note 20, at 23 (noting a claim for validity based on having had a mother).

¹⁰⁷ Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1, 3, 18 (1986).

¹⁰⁸ Professor Scott Altman argues that parents, unlike property owners, have duties towards children; property owners do not have similar obligations with respect to the property itself. See Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325, 350 (1996/1997). He notes: "Children become property not when laws consider other interests, but when they fail to treat children's needs with the same seriousness as those of other persons." *Id.* at 350-51.

children, either view recognizes the needs of both individual and community, of both autonomy and family.

Parents develop complex emotional and psychological bonds with their children that should be respected by the law. Even when children do not live with them, parents can develop significant relationships with their children that benefit both the parent and the child.¹⁰⁹ There is a bond that develops out of parents' connection to their children which, in turn, becomes part of how the parents define themselves. They see themselves as parents. This bond can develop in many different ways, and it does not automatically develop because of biological connection.¹¹⁰

Respecting this bond is respecting the emotional connection. It is very different from giving parents rights because they *own* their child.¹¹¹ While I agree that "inchoate possessory right[s]"¹¹² do not entitle a parent to continue to abuse

¹⁰⁹ See generally Garrison, *supra* note 97; Madeleine Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453 (1994). Even in abusive relationships, there is generally some connection between the child and her biological parents. See Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1013-21 (1995); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & LAW 75, 76 (1993) (noting that the contemporary understanding of child abuse tends to look at abusive mothers as mere "perpetrators of abuse"); Susan Brooks, *A Family Systems Paradigm for Legal Decision Making Affecting Child Custody*, 6 CORNELL J.L. & PUB. POL'Y. 1, 11-12 (1996) (discussing a need for a child to maintain a continuous relationship with his or her "psychological parent"); Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 NOTRE DAME L. REV. 497, 498-99 (1993) (recommending "weak adoptions" for older children in foster care).

¹¹⁰ Thus, for example, lesbian co-parents and step-parents who are biologically related to the child may be seen by the child as parents. See, e.g., Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children*, 78 GEO. L.J. 459, 474-83 (1990). This term, the United States Supreme Court will be considering a case in which the parents seek to prevent third parties (in this case, grandparents) from visiting pursuant to a court order. See *Troxel v. Granville*, 120 S. Ct. 11, 11 (1999) (granting petition for writ of certiorari).

¹¹¹ Prior to the mid-nineteenth century, of course, fathers were awarded custody because they owned the labor of their children. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 235 (1985); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS* 1-47 (1994).

¹¹² Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2520 (1995).

As critical race scholars have eloquently argued, rights can be useful for disempowered people. For a discussion of the importance of rights, see, for example, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 306-07 (1987); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 357 (1987); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432-33 (1987).

her child, I do not think that notions of children as property are what is underlying removal of abused and neglected children. Instead, I believe that children are too often removed without an adequate examination of their biological parent's means for support. Such examination is necessary so that children's lives are minimally disrupted. We may use the legal terminology of "rights" to justify recognizing these relationships, but legal terminology is merely the method for phrasing a nonlegal emotion.¹¹³

There can be no safe presumption that parents will always want only what is best for their children, although this remains a good working hypothesis.¹¹⁴ An abusive mother who wants custody of her daughter creates a very dangerous situation.¹¹⁵ In the short term, contact would be harmful. In the long term, however, (and depending on the nature of the abuse, of course) the mother's wishes could be partially accommodated through carefully structured visitation that protects the daughter. The mother has some affective interest that differs from a property right in maintaining contact with her child, and the child often has some affective interest in maintaining contact with his or her mother.¹¹⁶ If the

Moreover, in this context at least, the concept of rights allows us to recognize the relationship at issue. See Minow, *supra* note 107, at 6; see generally Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in a Civil Context*, 64 *FORDHAM L.R.* 1571 (1996) (using a discussion of rights to argue that children should be appointed counsel in civil litigation).

Katherine Federle argues that to truly respect children's rights, we must treat the children as parties to any dispute that affects them, and, to ensure adequate representation, appoint them counsel. She believes, for example, that children must approve any custodial outcome that affects them. See Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 *CARDOZO L. REV.* 1523, 1564 (1994).

¹¹³ As Professor Bartlett points out: "If we have to choose between children and adults, we may prefer to be a society which puts the child's interests first, but our larger concern is how the interests of both parent and child link together in relationships." Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 *YALE L.J.* 293, 304 (1988); see also Katherine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Convention*, 59 *OHIO ST. L.J.* 1523, 1578 (1998) (noting that the conception of property is based on relations between people); Karen Czapanskiy, *Grandparents, Parents and Grandchildren*, 26 *CONN. L. REV.* 1315, 1361-63 (1994) (discussing how not to privilege the interests of grandparents, parents, and grandchildren over each other and, instead, to respect their interdependent relationships).

¹¹⁴ See Martha Albertson Fineman, *What Role for Family Privacy?* 68 *GEO. WASH. U.L. REV.* (forthcoming 1999). As Professor Jane C. Murphy points out, the abuse and neglect system too often presumes that mothers and children are adversaries. See generally Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 *CORNELL L. REV.* 688 (1998).

¹¹⁵ See generally Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 *VAND. L. REV.* 1041 (1991).

¹¹⁶ I saw this frequently while representing parents of abused and neglected children, see Marie Ashe & Naomi R. Cahn, *supra* note 109, and in my work representing victims of domestic violence. For further discussion of the importance of contact between parents and children, even in child abuse and neglect situations, see Altman, *supra* note 108.

mother nonetheless attempts to continue the abuse, then she clearly should not be allowed continued access to her child.

Even in such a situation, I believe it is important to recognize the mother's interests. These interests arise from her prior relationship to the child (not her biological connection), as well as from her own sense of identity, which includes a notion of herself as the mother.

When parents divorce, we accord the noncustodial parent visitation rights, even at the potential expense of the child's best interests.¹¹⁷ I believe that we do this in recognition of the noncustodial parent's relationship to his child. Even though some of our most influential child psychologists argue to the contrary, courts believe that two parents are best for every child.¹¹⁸ I think that we have such a deeply held belief, in part, because we want to find some way of granting the noncustodial parent some "rights" in her child.

The child's best interests are not unmoored from the identity of her "parents." State statutes require that the parents' wishes be considered in child custody litigation. The parents' wishes are not determinative, nor should they be. But a custody standard that did not consider how the parents feel about their child would be a travesty.

Assuming that the parents want to retain custody of the child because she is their "property" demeans the conception of parenthood. So does removing a child from a familial situation because of the neglect that results from poverty. The dichotomy between "child-centered" law, which focuses solely on children's best interests, without deference to the parents, and "children as property" law, which focuses only on to whom the children belong, is false.¹¹⁹ Advocates of a "child-centered" focus bring critical attention to issues concerning children by forcing us to listen to children and attend to their needs. While it is somewhat harder to defend the "children as property" perspective, I think it suggests that parents have rights that must be respected. These positions exist on a continuum, and child welfare policy should respect the interdependent nature of the rights of children and parents.¹²⁰ Children generally need their parents, and their parents depend on

¹¹⁷ See Garrison, *supra* note 9, at 379–80; cf. JOSEPH GOLDSTEIN, ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986) (arguing that a child needs continuity of caretaking and bonds with one psychological parent). *But see infra* note 118.

¹¹⁸ See generally GOLDSTEIN ET AL., *supra* note 118. Professor Ira C. Lupu argues that two parents provide a model of family governance. See generally Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317 (1994).

¹¹⁹ See generally Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Political Theory*, 11 HYPATIA 4 (1996).

¹²⁰ See Annette Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C.L. REV. 577, 610 (1997). Professor Appell advocates that the abuse and neglect system focus on the parent-child relationship, rather than using either a parent-focused or child-focused inquiry. This standard for intervention would not examine the behavior or morals of the caretaker, but rather her functioning as a parent. See *id.* at 611.

support from others.¹²¹

Moreover, a sole focus on parent or child, or even a focus solely on the parent/child relationship, overlooks the child as a member of a family and a community. A family includes not just parent(s) and a child, but also siblings, grandparents, and other relatives. In determining removal, foster care placement, reunification, and adoption, the child's interests must include a consideration of her relationships with these other people.¹²² Looking at children in context considers their relationships to parents, siblings, and other relatives. While this has led to increased use of kinship care, it should also result in fewer removals and more emphasis on reunification.

The goal of permanence, of getting children out of the limbo of foster care, has enormous symbolic value. Adoption symbolizes a complete change in a child's family structure. The rights of her biological parents are terminated, and she receives a new birth certificate that reflects her adoptive family as her birth family. All ties with her family of origin are severed and she is able to begin a new life.¹²³ Yet, "[o]utside the child welfare system, our legal tradition has generally accepted the premise that parents have a paramount claim to the care and custody of their minor children."¹²⁴ Our protection of the family through notions such as family privacy and integrity has, however, depended on the class of the family.¹²⁵ Wealthier families have always received more protection for

¹²¹ For a graceful articulation of interdependency theory, see generally Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999). Professor Czapanskiy explains:

[A] proposed legal intervention is acceptable only when it supports caregivers in maximizing their ability to care for a child. . . . Interdependency theory assumes . . . that the caregiver stands at the threshold between a child and society. Society is dependent on the caregiver to care for the young child; thus what society can do best for the child is to support the caregiver.

Id. at 958, 967.

¹²² See *Adoption of Hugo*, 694 N.E.2d 377, 379–80 (Mass. 1998), *cert. denied*, *Hugo P. v. George P.*, 119 S. Ct. 1286 (1999) (upholding sibling separation notwithstanding importance of that relationship). As professors Martha Minow and Mary Lyndon Shanley point out, family members are individuals, but they are individuals who are in part defined by their relationships with others." Minow & Shanley, *supra* note 119, at 5.

¹²³ See 1 JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE*, at 1-1 (Joan Heifetz Hollinger et al. eds., 1999); Naomi R. Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Records*, 2 U. PA. CONST. L.J. (forthcoming 1999). Professor Bartholet has argued that the adoption solution continues to be overlooked; see generally BARTHOLET, *supra* note 10.

¹²⁴ Garrison, *supra* note 14, at 1769.

¹²⁵ See Michael Grossberg, *Some Queries About Privacy and Constitutional Rights*, 41 CASE W. RES. L. REV. 857, 860 (1991) (discussing the class-based nature of *Wyman v. James*, 400 U.S. 309 (1971)). Professor Grossberg argues, more generally, that "[p]rivacy rights have

their familial based decisionmaking, as the very history of public welfare to children shows.¹²⁶ As discussed earlier, the history of aid to poor women is replete with attempts to control their lives by conditioning public welfare on their compliance with morality requirements that involve state supervision of their lives.¹²⁷ As Jacobus tenBroek originally pointed out thirty years ago,

[W]e have two systems of family law . . . One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.¹²⁸

This two-tiered model pervades every aspect of family law as a result of, first, the different laws that apply to rich and poor; second, the differential administration of any applicable law;¹²⁹ and third, the different patterns of usage of existing laws which seem affected by class. In the foster care system, this dual system is transparently clear; federal funds are not even available for foster care for children who are not eligible for public aid. Abuse within wealthier families is simply not subject to the same level of scrutiny.¹³⁰

never been uniformly granted but have varied according to age, sex, race, marital status, political beliefs, religious practices, and residence." *Id.* at 862. And Professor Martha Fineman has queried why single mothers, particularly poor and divorced mothers, were excluded from the protections of privacy. See FINEMAN, *supra* note 20, at 180.

¹²⁶ See generally Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965 (1997); Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER & L. (forthcoming 1999); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992). For one of the most famous articulations of this concept, see generally Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts. I-III), 16 STAN. L. REV. 257 (1964); 16 STAN. L. REV. 900 (1964); 17 STAN. L. REV. 614 (1965).

¹²⁷ This was true, regardless of the type of "aid" these mothers received. See GORDON, *supra* note 54, at 82 (1988) (noting attempts to impose middle-class norms on poor women who were victims of domestic abuse).

¹²⁸ See Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. I), 16 STAN. L. REV. 257, 257-58 (1964).

¹²⁹ See Barbara Bezdek, *Silence in the Court: Participation and Subordination of Poor Tenants' Voices in Legal Process*, 20 HOFSTRA L. REV. 533, 540 (1992) (explaining that judges grant judgment to the landlords when neither side produces evidence, and that this phenomenon goes beyond the applicable statute).

¹³⁰ See generally Beverly Horsburgh, *Lifting the Veil of Secrecy: Domestic Violence in the Jewish Community*, 18 HARV. WOMEN'S L.J. 171 (1995) (discussing the little attention given to Jewish battered women); Ross & Cahn, *supra* note 20 (forthcoming 1999).

Given the number of children who are removed for poverty alone, a sole emphasis on best interest of the child leads to class and race bias. Instead, children must be viewed in their familial contexts—their relationships to their siblings, parents, relatives and community—and must be supported in this context. Removing a child from her family disrupts all of these relationships. While removal can certainly be justified where there is severe abuse or where the child will not be safe, for most families, there are means short of long-term removal that will provide benefits to the child.

This is particularly true for African-American children, whose foster care placement rate is twice as high as that of white children. An overwhelming majority of white children—seventy-two percent—in the abuse and neglect system received in-home services, while only forty-four percent of African-American children received in-home services.¹³¹ The dimensions of this disparity do not reflect differences in the population of children referred to the child welfare system. As the Department of Health and Human Services concluded, “even when families have the same characteristics and lack of problems, African-American children, and Hispanic children to a lesser extent, are more likely than white children to be placed in foster care.”¹³² In addition, African-American children spend more time in foster care than do white children.¹³³ The disproportionate representation of poor and African-American children in the abuse and neglect system show that something other than the need for more permanency is wrong with the system.

IV. SUGGESTIONS FOR MORE HUMANE IMPLEMENTATION¹³⁴

Placing children in a relational context requires careful thinking about alternatives to traditional foster care and adoption, acknowledging both the importance of preserving the family and removing the child when the family is unsafe. One comparatively recent innovation has been an increasing use of kinship care, allowing relatives rather than strangers to care for children after removal.¹³⁵ While this allows a child to maintain connections with her family, it

¹³¹ See NATIONAL STUDY, *supra* note 56, at 6-3. The placement rate for Hispanic children was 40%, while the in-home service rate was 60%.

¹³² NATIONAL STUDY, *supra* note 56, at 7-22.

¹³³ See *id.* at 7-16 (observing that the length of time was “32.9 months for African-American versus 18 months for white in kinship placement, and 27.2 months for African-American and 19.1 months for whites in non-kinship placement”).

¹³⁴ Family preservation costs \$4,500 per year, while foster care is \$17,500. See Stanfield *supra* note 44, at 250 (citing the Center for Study of Social Policy and Change).

¹³⁵ Under 42 U.S.C. § 671(a)(19) (Supp. III 1997), which was enacted as part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, states must now consider giving preference to adult relatives over unrelated care providers.

attempts to ensure the safety of her familial placement.¹³⁶ Others have suggested changing the standard for intervention such that child protection authorities could not remove children unless placement in foster care would be more effective than remaining in the home situation. Such a proposal grapples with the inadequacies of foster care as well as the benefits of maintaining a child's family of origin.¹³⁷ An additional protection, which would be particularly helpful for poor families, would mandate court-appointed counsel for all parents involved with the abuse and neglect system from the initial suspicion of neglect through all subsequent proceedings.¹³⁸ In addition, there are many mechanisms that keep children safe without terminating their familial ties.

There are a series of different strategies that states, localities, and nonprofits can undertake both before a child is removed and then afterwards to encourage reunification. These strategies do not necessarily involve the expenditure of more state and federal money on abused or neglected children. Instead, they involve a reallocation of existing resources. Given the disparities between the amount of money expended when a child remains in her home as opposed to being placed in foster care, maintaining in-home placements could be supported without additional money. Spending the money well before a child is removed, at the time of initial identification of risk, could prevent escalation of the abuse or neglect as well as a foster care placement.

In considering changes to abuse and neglect services, it is critical to eliminate race-based disparities throughout the system. That is, of course, an extremely difficult premise to implement given contemporary culture.¹³⁹ Using more community-based interventions may be one effective method of distilling the racism that seems to pervade the abuse and neglect system; in addition, child welfare agencies need training and monitoring on these issues.

A. Pre-Removal

The federal government allocates less than five percent of its child protective services budget to family preservation, while the remainder is spent on foster

¹³⁶ Of course kinship care is not perfect. It is unclear whether kinship care is formalized familial care, or is, instead, a conventional foster care placement. This confusion is mirrored in policies surrounding such care. See Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, FUTURE CHILDREN, Spring 1998 at 72, 84. Foster care pays more than public welfare. See Laurie Hanson & Irene Opsahl, *Kinship Caregiving: Law and Policy*, 30 CLEARINGHOUSE REV. 481, 483 (1996). Reunification occurs more slowly in kinship care than in other types of foster care. One reason may be the financial incentives to keep children in familial care rather than returning them. See Berrick, *supra*, at 82-83.

¹³⁷ See Braveman & Ramsey, *supra* note 59, at 463; Kay P. Kindred, *Reconciling Child Welfare and Welfare Reform: Making the Case for Reform of Child Protection Policy and Practice* 39 (1998) (unpublished manuscript, on file with author).

¹³⁸ See Kathleen A. Bailie, *supra* note 75, at 2285 (1998).

¹³⁹ See generally DOROTHY ROBERTS, *KILLING THE BLACK BODY* (1997).

care.¹⁴⁰ Although both the AACWA and ASFA mandate intensive pre-placement services, federal funding for child welfare remains grossly skewed in favor of subsidizing foster care rather than preventive programs. While the number of children in foster care has remained constant, the number of children receiving in-home services declined from 1,244,400 in 1977 to 497,000 in 1994.¹⁴¹

Given the relationship between poverty and neglect, more public welfare funds and better support for poor working parents¹⁴² might obviate the need for any involvement with the abuse and neglect system.. There are many kinds of other interventions before a child is removed that may be effective in preventing her removal, ranging from parenting classes to home visiting, to helping parents find housing and jobs, to coordinating public welfare services and domestic violence interventions with the child welfare system, to providing more intensive substance abuse programs.

1. *The Child Protection Agency*

Child welfare agencies are charged with a variety of tasks. They are frequently underfunded and understaffed. In 1996, child welfare agencies in twenty-one states were subject to court supervision based on their failures with respect to the child abuse and neglect systems.¹⁴³ For example, the foster care system in the District of Columbia has been in court-ordered receivership since 1995.¹⁴⁴ The New York City foster care system has been under legal attack for its failure to protect children.¹⁴⁵ A recent report on the New York system found various continuing problems.¹⁴⁶ The lack of funding affects not only the operations of a child protection agency, but also their ability to offer the needed services.¹⁴⁷

¹⁴⁰ See Courtney, *supra* note 69, at 13. Roger Levesque shows how the AACWA has created incentives for foster care, rather than preventive services. See Levesque, *supra* note 15, at 19; see also Gordon, *supra* note 72, at 664-65. Levesque also discusses how even the limited focus on prevention served to prevent attention being given to postreunification efforts to maintain the family. See Levesque, *supra* note 15, at 19.

¹⁴¹ See NATIONAL STUDY, *supra* note 56, at 8-2. The number of children in foster care in 1977 was 543,000, and it declined slightly to 502,000 in 1994. See *id.*

¹⁴² See generally HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA (Joel F. Handler & Lucie White eds., 1999).

¹⁴³ See Robert Pear, *Many States Fail to Fulfill Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at 1.

¹⁴⁴ See generally *LaShawn v. Kelly*, 887 F. Supp. 297 (D.C. 1995).

¹⁴⁵ See generally *Marisol v. Giuliani*, 924 F. Supp. 662 (S.D.N.Y. 1996) (class certification), *aff'd* 126 F.3d 372 (2d. Cir. 1997).

¹⁴⁶ See Rachel Swams, *Panel Says Agency Lags In Assessing Children's Needs*, N.Y. TIMES, May 22, 1999, at B4.

¹⁴⁷ See *supra* notes 143-46 and accompanying text (discussing these funding problems).

Professor Leroy Pelton has suggested restructuring the child protective services agency to focus on children's issues, rather than on investigative and law-enforcement processes.¹⁴⁸ Such a restructuring might make clients more comfortable seeking and accepting preservation services if they know they are getting help, rather than making themselves subject to a high risk of child removal.¹⁴⁹ Several states have implemented screening programs in which the child welfare agency investigates only the most severe cases of alleged abuse and neglect, while other cases are referred for family assessment and support.¹⁵⁰

2. *Emphasizing Community Involvement*

States are also experimenting with more community involvement, such as working with local community centers, to provide better, and more targeted, services.¹⁵¹ For example, the District of Columbia recently received money from the federal Department of Health and Human Services to hire four people to work with community collaboratives, which include community residents and local service providers, in an effort to prevent removal as well as to improve permanency.¹⁵² Community centers that provide support for parenting could also offer health care, child care and more general monitoring.¹⁵³ The whole concept of kinship care builds upon the strength of the child's extended community.¹⁵⁴

¹⁴⁸ See generally Leroy H. Pelton, *Child Welfare Policy and Practice: The Myth of Family Preservation*, 67 AM. J. ORTHOPSYCHIATRY 545 (1997); Leroy H. Pelton, *Enabling Public Child Welfare Agencies to Promote Family Preservation*, 38 SOC. WORK 491 (1993) [hereinafter *Enabling*]; Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479 (1999).

¹⁴⁹ See Pelton, *Enabling*, *supra* note 148, at 492.

¹⁵⁰ See Waldfogel, *supra* note 12, at 112-114 (discussing efforts of Missouri and Florida). In Florida, a preliminary evaluation of the project found better safety outcomes for children involved in the new system. See *id.* at 114.

¹⁵¹ See *id.* at 115-16 (discussing Iowa's Patch Program).

¹⁵² See HHS Approves Child Welfare Demonstration for the District of Columbia, U.S. Newswire, July 22, 1999, available in 1999 WL 22280690.

¹⁵³ See Lucie White, *Quality Child Care for Low-Income Families: Despair, Impasse, Improvisation*, in HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA, *supra* note 142, at 116, 136.

¹⁵⁴ See Madeline L. Kurtz, *The Purchase of Families into Foster Care: Two Case Studies and the Lessons They Teach*, 26 CONN. L. REV. 1453, 1453-58 (1994).

3. Early Prevention Efforts

Trying to prevent abuse and neglect from occurring in the first place is a critical priority. Other possibilities involve "home visiting,"¹⁵⁵ which provides prevention at an early stage, if families can be identified early enough.¹⁵⁶ Home visits can even begin during a woman's pregnancy. For example, if a sibling has already been placed in foster care, home visiting for a new mother might provide security and stability for a new baby so the baby can remain with the author and so the sibling can be returned. Home visiting includes a range of programs "that equip individual 'visitors' with information about pregnancy, infant needs, child development, nutrition, and parenting tasks" so that they can develop an ongoing relationship with pregnant women or new parents.¹⁵⁷ The visits may continue for several years. Other programs offered as part of home visiting could provide ongoing education and support to parents of young children.¹⁵⁸ Evaluations of home visiting programs show that they are effective at reducing child abuse compared to control groups who did not receive this type of intervention.¹⁵⁹ Home visiting programs can also promote contact with other supportive resources that will strengthen parenting.¹⁶⁰

Although there are legitimate fears based on the historical misuse of home visiting as to the potential for overly zealous intervention with respect to recipients,¹⁶¹ it is possible to develop programs that are sensitive to culture and

¹⁵⁵ See Martha Minow, *Learning from Experience: The Impact of Research About Family Support Programs on Public Policy*, 143 U. PA. L. REV. 221, 222 (1994); see also Barbara Bennett Woodhouse, *Home Visiting and Family Values: The Powers of Conversation, Touching, and Soap*, 143 U. PA. L. REV. 253, 262 (1994) (discussing the benefits that the author, currently a professor at the University of Pennsylvania Law School, received from a "visiting nurse" as a new mother in 1969); see generally *Home Visiting*, 3 FUTURE CHILDREN, Spring 1993, at 1, 4-214 (devoting the entire issue to home visiting); *Home Visiting: Recent Program Evaluations*, 9 FUTURE CHILDREN, Spring/Summer 1999, at 1, 1-223 (same).

¹⁵⁶ See Barbara Bennett Woodhouse, *Poor Mothers, Poor Babies: Law, Medicine, and Crack*, in CHILD, PARENT, AND STATE: LAW AND POLICY READER 111 (Randall Humm et al. eds., 1994). Poor black women, who are among those most likely to need prenatal care, are among those least likely to receive it. See Woodhouse, *supra* note 155, at 255-56. Home visits can begin shortly after the baby is born.

¹⁵⁷ See Minow, *supra* note 155, at 222.

¹⁵⁸ See Naomi R. Cahn, *Pragmatic Questions About Parental Liability Statutes*, 1996 WISC. L. REV. 399, 432.

¹⁵⁹ See generally *Home Visiting*, 3 FUTURE CHILDREN, Spring 1993, at 1, 4-214 (devoting the entire issue to home visiting); *Home Visiting: Recent Program Evaluations*, 9 FUTURE CHILDREN, Spring/Summer 1999, at 1, 1-223 (same).

¹⁶⁰ See Gregory A. Loken, "Throwaway" Children and Throwaway Parenthood, 68 TEMP. L. REV. 1715, 1758-59 (1995).

¹⁶¹ See generally *Wyman v. James*, 400 U.S. 309 (1971) (upholding state AFDC requirement of home visit over objections of welfare recipient). Home visits may serve many purposes other than providing support. See BARTHOLET *supra* note 10, at 65-68.

that provide support to families, rather than further legal involvement. Professor Martha Minow suggests that local communities work with social scientists to plan culture-specific strategies that would meet the needs of families.¹⁶²

Turning to substance abuse issues, a major problem for pregnant, drug-addicted women is the lack of treatment facilities.¹⁶³ Providing treatment before the child is born would help women with their substance-abuse problems. Children need not be removed in order for parents to receive treatment. Child welfare agencies and their community-based agencies can provide services such as family and individual therapy, parenting education, and school-based services. For example, New Hampshire is currently attempting to assess the impact of parental substance abuse treatment on child safety and family stability by examining where substance abuse treatment and subsequent intensive services can support families.¹⁶⁴

4. Poverty and Neglect

Additional preventive services focus on providing sufficient resources so that the family is able to support its children. Given the correlation between poverty and involvement in the abuse and neglect system, addressing a family's financial needs is an extremely effective method for deterring child abuse. The provision of adequate housing¹⁶⁵ and other resources might help to reduce the number of neglect and abuse problems. Homelessness may serve as a basis for denying public welfare benefits to mothers,¹⁶⁶ thereby exacerbating the family's poverty. The head of the foster care system in the district of Columbia estimated that up to fifty percent of the children in foster care could be returned to their parents, if housing was available for them.¹⁶⁷

States should be precluded from bringing a neglect petition based on a family's homelessness,¹⁶⁸ thereby attempting to sever actual neglect from poverty. A comparable problem occurs when mothers are forced to work outside

¹⁶² See Minow, *supra* note 155, at 224–52.

¹⁶³ See ROBERTS, *supra* note 139, at 178.

¹⁶⁴ See HHS Approves Child Welfare Reform Demonstrations for Kansas and New Hampshire, (last modified Sept. 24, 1998 <<http://www.hhs.gov/news/press/1998pres/980924.html>> (press release).

¹⁶⁵ See Evan S. Stolove, Comment, *Pursuing The Educational Rights of Homeless Children: An Overview for Advocates*, 53 MD. L. REV. 1344, 1356 n.100 (1994).

¹⁶⁶ See Stanley S. Herr, *Children Without Homes: Rights to Education and to Family Stability*, 45 U. MIAMI L. REV. 337, 343 n.28 (1996).

¹⁶⁷ See Jason DeParle, *Slamming the Door*, N.Y. TIMES, Oct. 20, 1996, at 52.

¹⁶⁸ See Carl Sanger & Eleanor Willemsen, *Minor Changes: Emancipating Children in Modern Times*, 25 U. MICH. J.L. REFORM 239, 342 (1992) (noting a California statute that precludes finding a child dependent based upon the family's lack of emergency housing).

of the home; the lack of adequate child care may also lead to neglect.¹⁶⁹ One Colorado jurisdiction has sought to coordinate the two aspects of child welfare, the public aid and the abuse and neglect system.¹⁷⁰ Thus, for example child welfare caseworkers have access to public welfare resources in order to support the child's family.¹⁷¹

5. *Child Abuse and Woman Battering*

Although there is a strong nexus between adult and child domestic violence,¹⁷² there is often, nonetheless, a lack of coordination between the domestic violence and child welfare systems.¹⁷³ Indeed, my domestic violence clients often felt that if they reported the violence against them to public authorities, then their children might be removed.¹⁷⁴ Where there has been a report of child abuse, in determining whether to provide services or remove children, the child welfare worker should evaluate who is doing the battering. If it is the mother's boyfriend or another male in the household, then it may be more appropriate to remove him than the children.¹⁷⁵ Child welfare prevention efforts often require support of a battered mother so that she can separate from the batterer,¹⁷⁶ providing safety for both herself and her children. They also require domestic violence and child abuse training and protocols that are sensitively integrated. For example, a local domestic violence center can provide help to parents of children in the abuse and neglect system.

¹⁶⁹ See White, *supra* note 153, at 117.

¹⁷⁰ See generally David A. Berns & Barbara J. Drake, *Combining Child Welfare and Welfare Reform at a Local Level*, 57 POL'Y & PRAC. PUB. HUM. SERVS. 26 (1999).

¹⁷¹ See *id.* at 29–30.

¹⁷² See, e.g., Dohm, *supra* note 55, at 9; see generally Mary McKernan McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, 73 CHILD WELFARE 29 (1994); Melanie Shepard & Michael Raschick, *How Child Welfare Workers Assess and Intervene Around Issues of Domestic Violence*, 4 CHILD MALTREATMENT 148 (1999).

¹⁷³ See Edelman, *supra* note 66, at 16–17 (arguing that “we need to introduce into the child welfare context a battered woman's perspective” and providing examples of jurisdictions that have done so).

¹⁷⁴ See Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1111 (1995) (“The paradox of society's treatment of battered women is that the word is ‘out’: if you report domestic violence in your home, your children might be removed.”).

¹⁷⁵ See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 231 (1996) (arguing “that when determining whether a woman is responsible for harm done to her child by a third person, courts should employ an objective standard”); Murphy, *supra* note 114, at 712, 762.

¹⁷⁶ See Murphy, *supra* note 114, at 763–64; see generally Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991);

B. Post-Removal

One comparatively recent innovation has been an increasing use of kinship care, allowing relatives rather than strangers to care for children after removal.¹⁷⁷ While this allows a child to maintain connections with her family, it also attempts to ensure the safety of her familial placement.¹⁷⁸ In fact, ASFA recommends the use of kinship care. Children in kinship care are less likely to lie in multiple foster home placements. While fifty-nine percent of children in nonkinship care had only one placement, eighty-three percent of children in kinship care had only one placement.¹⁷⁹ Others have suggested changing the standard for intervention such that child protection authorities could not remove children unless placement in foster care would be more effective than remaining in the home situation.¹⁸⁰

In addition, there are many other mechanisms that keep children safe without terminating their familial ties. Where agencies can actually work with biological families in providing needed resources, reunification becomes more feasible. In Cleveland, through the Family-to-Family program, birth parents and foster parents work with the child welfare agency to prepare the best long-term plan for the child, using both community and familial support.¹⁸¹ One of the foster mothers involved in this program said that she had initially believed that she could provide better care for her foster child than could his biological mother, in part due to her greater resources. But after watching him interact with his mother, she knew that she could never give her foster child what his biological mother could.¹⁸² He was in foster care for four years while the two mothers worked together.¹⁸³ Longer term foster care is not inherently a bad idea¹⁸⁴ if it is

¹⁷⁷ Under 42 U.S.C. § 671(a)(19) (Supp. III 1997), which was enacted as a part of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, states must now consider giving preference to adult relatives over unrelated care providers.

¹⁷⁸ Of course, kinship care is not perfect. In fact, the term itself is far from precise. It is unclear whether kinship care is formalized familial care or conventional foster care placement; this confusion is mirrored in policies surrounding such care. Indeed the term is susceptible to many interpretations. *See* Berrick *supra* note 136, at 84; Hanson & Opsahl, *supra* note 136, at 483 (1996); Ross & Cahn, *supra* note 20 (manuscript at nn.12, 74, on file with authors). Reunification occurs more slowly in kinship care than in other types of foster care. One reason may be the financial incentives to keep children in familial care rather than returning them. *See* Berrick, *supra* note 136, at 81-82.

¹⁷⁹ *See* NATIONAL STUDY, *supra* note 56, at 6-16.

¹⁸⁰ *See* Braverman & Ramsey, *supra* note 59, at 463; Kindred, *supra* note 137, at 39.

¹⁸¹ *See* *Barriers to Adoption*, *supra* note 1, at 46-47 (statement of Judith Goodhand).

¹⁸² *See id.* at 52-53 (statement of Patricia Newell).

¹⁸³ *See id.* at 54-55 (statement of Patricia Newell).

¹⁸⁴ Professor Derdeyn suggests the importance of considering "a legal framework for permanent custody with foster parents without terminating parental rights." Derdeyn, *supra* note 11, at 347; *cf.* Gordon, *supra* note 72, at 689 (suggesting federal disincentives to long-term foster care in an effort to promote funding for preventive services).

combined with a coherent and reasonable reunification plan, or if it becomes a permanency plan itself. Particularly for older children, foster care may preserve their sense of family and community.¹⁸⁵ If children are placed in one foster family, rather than being subject to multiple placements, they can develop close relationships with both families.¹⁸⁶ Early termination of parental rights can be detrimental, especially for older children, who will not necessarily be adopted. The termination of parents' rights also means the termination of the rights of other relatives.¹⁸⁷

Where adoption is clearly warranted, there can still be a possibility of "adoption-with-contact," or "open adoption," through which the biological parent and child retain some connection and contact that could be legally enforceable. That is, the adoption occurs but the biological parent can still remain in contact with her child. A number of states have recently enacted legislation designed to validate and enforce such open adoption agreements when both the adoptive and biological parents have consented to the contact.¹⁸⁸ Other states have passed slightly different statutes that authorize a court to award post-adoption visitation to a child's biological relatives, whenever such visitation is in the child's best interests.¹⁸⁹ The Uniform Adoption Act allows for the creation and enforcement of adoption-with-contact orders in step-parent adoptions, even where the parties have not agreed to permit the contact.¹⁹⁰ The federal government's Adoption 2002 Guidelines recommend that state law allow for legally binding agreements concerning post-adoption contact.¹⁹¹

¹⁸⁵ See Gordon, *supra* note 72, at 667 (criticizing ASFA for its lack of sensitivity to the age of the child in foster care).

¹⁸⁶ The recognition of multiple parents or caretakers can be justified from a child's perspective. See Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 410 (1994). For a discussion of the concept of multiple caregivers, see Naomi R. Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 52-54 (1997); Eleanor Willemssen & Kristin Marcel, *Attachment 101 for Attorneys: Implications for Infant Placement Decisions*, 36 SANTA CLARA L. REV. 439, 468-69 (1996).

¹⁸⁷ See Hand, *supra* note 73, at 1268 n. 97; DeMichele, *supra* note 81, at 757-58.

¹⁸⁸ See, e.g., N.M. STAT. ANN. § 32A-5-35 (Michie 1998); OR. REV. STAT. § 109.305 (1998). WASH. REV. CODE § 26.33.295 (1998). For a comprehensive discussion of such legislation, see Annette Ruth Appell, *Increasing Options to Improve Permanency Considerations in Drafting an Adoption with Contact Statute*, 18 CHILDREN'S LEGAL RTS. L.J. 24, 36-42 (1998).

¹⁸⁹ See, e.g., IND. CODE § 31-19-16-1 (1998); NEB. REV. STAT. § 43-162 (1998); N.Y. SOC. SERV. LAW § 383-c (Gould 1997).

¹⁹⁰ See UNIFORM ADOPTION ACT § 4-112-113 (1994); see generally Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under the Uniform Adoption Act*, 59 FLA. L. REV. 89 (1999).

¹⁹¹ See Donald N. Duquette et al., U.S. Dept. Health & Human Servs., *Adoption 2002: The President's Initiative in Adoption and Foster Care: Guidelines for Public Policy and State*

Open adoption is being touted as an option in the foster care context, in part to encourage biological parents who are unable to care for a child to voluntarily relinquish their parental rights without completely severing their connection to the child.¹⁹² While there are various ethical issues involved in negotiating an open adoption agreement in this context,¹⁹³ it nonetheless remains useful to consider this alternative to complete termination of parental rights.

In other situations, perhaps the parental rights should not be terminated unless there is a strong belief that the child will be adopted; otherwise, the courts may be cutting off children from relatives with whom they have close ties.¹⁹⁴

The Alabama abuse and neglect system provides some ideas for improving the system. As a result of a lawsuit forcing the social services agency to change its practices, the consent decree specifies that the abuse and neglect system has as a primary goal, allowing children to remain with their families of origin, so long as they are safe.¹⁹⁵ The child abuse and neglect agency is required to provide intensive in-home services where this will help keep the children at home. Such services range from accompanying a parent to an Alcoholics Anonymous meeting to teaching parents how to help their children do homework to various forms of counseling.¹⁹⁶ By changing their orientation, the child abuse and neglect workers "learned how to look beyond the often abundant negatives and engage families in a genuine partnership by identifying their strengths."¹⁹⁷ If children are removed from the home, then the new system supports contact between foster children and their families of origin.¹⁹⁸ In Alabama, the number of children in foster care declined from 4,625 in 1992 to 3,650 in 1996, and the average time in

Legislation Governing Permanence for Children, at ch.2, pt.4 (last modified June 1999) <<http://www.acf.dhhs.gov/programs/cb/special/02adpt2.htm#guidstgu>>.

¹⁹² See, e.g., Appell, *supra* note 109, at 1013–25.

¹⁹³ See Madelyn Freundlich, *Adoption and Ethics: The Hard Questions*, ADOPTIVE FAMS., July/August 1999, at 8, 11 (raising questions about the fairness of using adoption-with-contact as an inducement to biological parents' agreement to a voluntary termination of their rights).

¹⁹⁴ Martin Guggenheim suggests that parental rights not be terminated unless: (1) there are grounds to terminate; (2) the child's "best interests" require termination; and (3) it is not improbable that the child will be adopted. See Guggenheim, *supra* note 95, at 136.

¹⁹⁵ See *R.C. v. Nachman*, 969 F. Supp. 682, 682 (M.D. Ala. 1997) (rejecting motion to vacate the consent decree); see generally BAZELON CTR. FOR MENTAL HEALTH LAW, MAKING CHILD WELFARE WORK: HOW THE R.C. LAWSUIT FORGED NEW PARTNERSHIPS TO PROTECT CHILDREN AND SUSTAIN FAMILIES 22 (1998) [hereinafter MAKING WELFARE WORK].

¹⁹⁶ See MAKING WELFARE WORK, *supra* note 195, at 62. Other services include helping the parents find housing, helping the parents with vocational training, providing transportation for children and parents, and parent training. See *id.*

¹⁹⁷ See *id.* at 51–52.

¹⁹⁸ The consent decree requires that children be allowed to contact family members, and both the social worker and foster care provided are supposed to encourage "frequent contact" between the child and her family. See *id.* at 101 app.4.

foster care also decreased.¹⁹⁹

Such innovative thinking presents possibilities for changing how we think about child abuse and neglect, and provides hope for the poor children most likely to be subject to that system. There are creative solutions that allow children to remain safely in their families of origin.

Other states have developed initiatives that help reunify families when appropriate. In Arizona, a Housing Assistance Program provided support for families where housing was the primary barrier to reunification.²⁰⁰ As a result, almost twelve percent of the children in foster care between 1991–95 were reunited, and the state saved more than \$1 million in foster care and related expenses.²⁰¹

V. CONCLUSION

Federal policy towards foster care and adoption seems predicated on stereotypes: stereotypes about foster care, adoption, abused and neglected children, and mothers. It establishes dichotomies: the good mother is capable of reforming herself within one year, or else she is a bad parent. Parents and children are adversaries in the abuse and neglect system. Foster care is bad for children, so they need to be freed for adoption. These stereotypes have a particularly strong impact on poor children, who are those most likely to appear in the child protection system. Recent federal policy sacrifices children's interests in its rush towards adoption as the solution for all abused and neglected children, rather than focusing on the relationships of children to their families and communities. Outside of cases involving severe abuse or neglect, family preservation—both pre-removal and post-removal—remains the preferred solution. The origins of the foster care system, as an effort to preserve families and allow children to stay in their families of origin, reflects the impulse reflected throughout American law that children belong with their parents. The disproportionate use of the abuse and neglect system against racial minorities, and the removal of children for poverty alone, show the dangers of not presuming family integrity.

The goals of the 1980 legislation—safety and family connection—remain in the child's best interest. Families have strengths that can be supported so that children are not unjustly removed. Rather than providing for only two options—termination of parental rights and adoption or reunification—on the misguided assumption that they can be pursued simultaneously, federal law should encourage alternatives, such as open adoption or longer term foster care placement. Moreover, the strict time frame during which the states must act on

¹⁹⁹ See *Courts Say Many States Fail to Protect Foster Kids*, DALLAS MORNING NEWS, Mar. 17, 1996, at 8A.

²⁰⁰ See *Encouraging Adoption*, *supra* note 99, at 9–10 (statement of Mark Nadel, U.S. General Accounting Office).

²⁰¹ See *id.* at 9.

termination of parental rights will have a particularly harsh effect on poor children, who are often removed from their homes for neglect stemming from poverty, rather than from severe abuse or neglect. Federal law should return to the presumption that children are best cared for in their families and communities of origin, and should include the presumption that these families deserve the support to enable them to perform and act in the child's best interests.

