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A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification

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A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification

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[T]he philosophy behind child welfare programs has swung like a pendulum over time—going back and forth between the extremes of the perceived interests of children and the perceived interests of the family. . . . [O]nly a balanced approach that recognizes both interests will truly promote the well-being of children.¹

I. INTRODUCTION

The foster care system in the United States is universally regarded as a disaster: too many children languishing for too many years, bouncing from foster home to foster home, or worse yet, returning to the abusive or neglectful home only to face more danger. The failures of the federal foster care system have spurred members of Congress to advocate reform.²

Answering the call for reform, Congress overwhelmingly passed³ and, on November 19, 1997, President Clinton signed into law the Adoption and Safe Families Act of 1997 ("ASFA").⁴ One of the primary purposes of the ASFA is to correct many of the perceived deficiencies of its predecessor, the Adoption Assistance and Child Welfare Act of 1980 ("AACWA").⁵ The AACWA's requirement that states use "reasonable efforts" to reunite foster children with their

1. *The Safe Adoptions and Family Environments Act: Hearing to Consider S.511 Before the Senate Comm. on Finance*, 105th Cong., available in 1997 WL 271610 (testimony of Sister Rose Logan on behalf of Catholic Charities USA) [hereinafter Logan testimony].

2. For example, during congressional debate, one congressman stated:

When a child of the streets stands before you in rags, with tear-stained face, you cannot easily forget him, and yet you are perplexed what to do. The human soul is difficult to interfere with. You hesitate how far you should go. Congress has been considering adoption and foster care reform this year that has caused all of us to ask, how far should we go? But after extensive research into the failure of the foster care system, I ask how far can we go?

143 CONG. REC. S12,211 (daily ed. Nov. 8, 1997) (statement of Sen. Grassley).

3. One of the few representatives to vote against the bill, Don Manzullo of Illinois, summed up the large margin in three words: "Nobody read it." Toby Eckert & Dori Meinert, *LaHood: Adoption Law Infringes Upon States*, STATE J. REG. (Springfield, Ill.), Jan. 2, 1998, at 2. Manzullo objected to the bill because it "is a very subtle, yet overt, effort that says that parental rights are not as important as they should be." *Id.* at 3.

4. Pub. L. No. 105-89, §§ 101-501, 111 Stat. 2115 (1997).

5. Pub. L. No. 96-272, § 1, 94 Stat. 500 (1980) (codified as amended in scattered sections of 42 U.S.C. (1994)). Among the chief criticisms of the AACWA is that the bill has created a system in which foster care becomes a permanent, rather than a temporary, life for children. Congresswoman Pryce stated, "This bill corrects the perverse incentives of the current system that gives States more money if they have more children in foster care. That is just crazy. Now we will provide States more money if they reduce their foster care caseload by placing kids in permanent, stable homes." 143 CONG. REC. H10,789 (daily ed. Nov. 13, 1997) (statement of Rep. Pryce).

biological parents⁶ drew the sharpest criticism as going too far to ensure family preservation.⁷ The ASFA “clarifies” the reasonable efforts requirement, providing that the child’s safety shall be the paramount concern in all foster care decisions.⁸

Although this statute remedies some of the AACWA’s deficiencies, the ASFA also creates new problems. Of particular concern is the provision that requires states to seek the termination of parental rights, with few exceptions, in the case of any child who has been in foster care for fifteen of the most recent twenty-two months.⁹ While this provision intends to create permanency for children in foster care, it may instead terminate rights of parents who with assistance could provide a stable home, without guaranteeing that the child will be placed in a permanent home.¹⁰ Indeed, just as the pendulum swung too far towards reunification in 1980, in 1998 the pendulum is swinging too far towards termination.¹¹

This Note argues that the swing of the pendulum in either direction is inconsistent with a child’s best interests. Part II examines the failures of the AACWA and the “solution” embodied in the ASFA. Part III discusses the shortcomings of the ASFA and argues that its strong endorsement of adoption is both short-sighted and inconsistent with a “best interests of the child” analysis. Part IV discusses kinship foster care, in which extended family members of

6. 42 U.S.C. § 671(a)(15) (1994).

7. On May 21, 1997, in testimony before the subcommittee on Social Security and Family Policy of the Senate, Gary J. Stangler, Director of the Missouri Department of Social Services, stated, “[a]lthough it was never intended that this provision be interpreted as requiring unreasonable efforts, or returning children to unsafe homes or impeding permanency, Congress has learned in previous hearings that in practice, such action is, on occasion, an unintended consequence of an erroneous interpretation of the law.” *Hearing on Child Welfare Reform Before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance, 105th Cong., available in 1997 WL 274386.*

8. See § 101, 111 Stat. at 2116-17 (amending 42 U.S.C. § 671(a)(15)).

9. See § 103(a)(3), 111 Stat. at 2118 (amending 42 U.S.C. § 675(5)).

10. This provision only recognizes cases at each extreme, despite the fact that “most child welfare cases do not fall into simple categories of good or bad, black or white. When they do, experts usually agree about what to do. The vast majority of cases fall into a more difficult, gray area, often involving ‘a beleaguered parent with an uneven track record.’” Nancy Goldhill, *Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 301 (1996) (citation omitted).

11. See R. Bruce Dold, *Giving Kids a Little More ‘Wiggle Room’*, CHI. TRIB., Dec. 12, 1997, at 27 (quoting drafter Patrick Murphy). Murphy notes, “It’s a good idea to send the message that we can’t give these parents forever. But we have to be very careful in how we do it.” *Id.* Sister Rose Logan advocates a balanced approach: Termination of parental rights should be swift when there is “blatant abuse” and when there is no hope of returning the children to their biological parents, but “we should not ride the pendulum too far in this direction. . . . Families that make mistakes must be given the support they need to become whole.” See Logan testimony, *supra* note 1.

the child serve as foster parents, as a solution to the swinging pendulum. Finally, Part V makes suggestions for a federal kinship care policy.

II. FOSTER CARE IN THE UNITED STATES: REASONABLE REUNIFICATION EFFORTS UNDER ATTACK

A. *A Review of the Current Foster Care System*

The Supreme Court has repeatedly held that parents have a recognizable liberty interest in raising their children without intrusion by the state.¹² The parents' liberty interest is not, however, absolute. The state, through its *parens patriae* power, has the duty to intervene and protect a child when his or her parents have endangered the child's well-being.¹³ One modern embodiment of the state's *parens patriae* power is the foster care system.¹⁴

Although the foster care system is implemented by individual states, federal guidelines are the key to understanding this system because states must comply with these guidelines in order to receive federal funds under Title IV-E of the Social Security Act ("Title IV-E").¹⁵ Typically, the foster care process begins when a state child

12. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 212 (1972) (recognizing that although the state has an interest in the education of children, this interest does not outweigh the parents' right to choose a method of education for their children more consistent with their religious practices); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925) (holding that a law that deprived parents from enrolling their children in the school of their choice was unconstitutional and recognizing that "[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

13. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (recognizing that "[a]cting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . ."). Justice Joseph Story wrote over a century ago that "[a]llthough, in general, parents are entrusted with the custody of the persons . . . of their children, yet this is done upon the natural presumption, that the children will be properly taken care of . . . [b]ut, whenever this presumption is removed . . . the Court of Chancery will interfere, and deprive him of custody of his children." Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973) (quoting JOSEPH STORY, 2 EQUITY JURISPRUDENCE § 1341 (1857)), reprinted in ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY AND THE STATE* 455-56 (3d ed. 1995).

14. Other examples of the state acting in its *parens patriae* power are laws prohibiting child labor, requiring education, and creating "status offenses," activities which are crimes when committed by those under a statutory age.

15. See generally MARIANNE TAKAS, *KINSHIP CARE AND FAMILY PRESERVATION: OPTIONS FOR STATES IN LEGAL AND POLICY DEVELOPMENT* 11 (final rev. ed. 1994). Because of states' efforts to reduce their own budgets, most states utilize the federally funded options. See *id.* at 13. Title IV-E requirements are enacted in 42 U.S.C. §§ 670-679 (1994).

welfare department receives a report of child abuse or neglect.¹⁶ In most cases, a social worker then makes a home visit to determine whether the situation requires state action,¹⁷ and if so, whether the child(ren) may safely remain with the parent(s) while the state provides services, or whether the state must remove the child(ren) immediately.¹⁸

If the social worker determines that circumstances do not require immediate removal, but that the home situation is still problematic, the state must provide services to prevent foster care placement.¹⁹ Although Title IV-E does not specify required services, federal regulations contain suggested services,²⁰ such as providing daycare, homemaker services, counseling, and emergency financial assistance.²¹ The regulations also recommend that states provide job training and substance abuse counseling when necessary.²²

If these preventive services fail or if during the initial home visit the social worker discovers an emergency situation from which the child must be removed immediately, the agency will seek temporary custody of the child²³ and place the child in a group home with a licensed foster family²⁴ or with another family member.²⁵ Since

16. Most complaints arise from social workers or police, but some also come from neighbors, doctors, and teachers. MNOOKIN & WEISBERG, *supra* note 13, at 456.

17. *See id.* The law permits parents to use some degree of corporal punishment. In *State v. Crouser*, 911 P.2d 725, 732 (Hawaii 1996), the Hawaii Supreme Court recognized that a parent may use corporal punishment only to the extent that it is proportional to the offense and reasonably believed necessary. Courts must balance a parent's privilege to use corporal punishment with the state's interest to deter child abuse. *See id.* at 734. The Restatement (Second) of Torts recognizes that a "parent is privileged to apply such reasonable force or to impose such reasonable confinement upon his child as he reasonably believes to be necessary for its proper control, training, or education." RESTATEMENT (SECOND) OF TORTS § 147 (1979). In determining whether the force was reasonable, the considerations include the child's age and physical and mental condition and the parent's motive in utilizing corporal punishment. *See id.* § 150. The purpose of the punishment is the primary consideration because "[f]orce applied . . . primarily for any purpose other than the proper training or education of the child or for the preservation of discipline is not privileged although applied or imposed in an amount and upon an occasion which would be privileged had it been applied for such purpose." *Id.* § 151.

18. *See MNOOKIN & WEISBERG, supra* note 13, at 456.

19. Title IV-E requires that states use "reasonable efforts" to avoid the removal of the child from the home. This requirement will be discussed extensively in Part II.

20. *See DEBRA RATTERMAN ET AL., REASONABLE EFFORTS TO PREVENT FOSTER PLACEMENT: A GUIDE TO IMPLEMENTATION* 4 (2d ed. 1987) (listing services suggested by the federal government).

21. *See id.*

22. *See id.*

23. *See JUNE MELVIN MICKENS & DEBRA RATTERMAN BAKER, MAKING GOOD DECISIONS ABOUT KINSHIP CARE* 5 (1997) (noting that goal at this point "becomes speedy reunification with the parents through specialized services").

24. Title IV-E requires states to create and enforce a licensing procedure, which "includ[es] standards related to admission policies, safety, sanitation, and protection of civil

1996, federal law has required that states give a preference to a relative over an unrelated prospective foster parent in determining placement, provided that the relative satisfies the relevant child protection standards.²⁶ Federal law also requires that the state place the child in the "least restrictive" setting,²⁷ which has been interpreted as the "most family like" setting available.²⁸

After removal, the state must establish a permanency plan for the child.²⁹ In most cases, the plan will seek eventual reunification of the child and the parent.³⁰ When this is the goal, states must make "reasonable efforts" and provide services to accomplish reunification.³¹ If reunification is not the goal because of severe abuse or neglect or if the child has been in the foster care system for a statutorily-prescribed time period, the state is required to initiate or join proceedings to terminate parental rights and "free" the child for adoption or another permanent arrangement.³² Ideally, then, the state moves the child out of the foster care system, either by returning the child to the parent or by allowing another family to adopt the child.

B. Grim Realities of the Foster Care System

Statistics paint a disturbing picture of the United States' foster care system, with the number of children entering the system continually exceeding the number leaving. Commentators estimate that more than a half-million children are in the foster care system,³³ nearly double the number of a decade ago.³⁴ Further, children placed

rights," for foster care providers. 42 U.S.C. § 671(a)(10) (1994). Licenses typically require training of the foster parent and require the home to meet certain health and safety standards. See TAKAS, *supra* note 15, at 42.

25. See TAKAS, *supra* note 15, at 42.

26. See 42 U.S.C.A. § 671(a)(19) (West Supp. 1998).

27. 42 U.S.C. § 675(5)(A) (1994).

28. MICKENS & BAKER, *supra* note 23, at 53.

29. See 42 U.S.C. § 671(a)(16). A permanency plan is also known as a case plan. As set forth in 42 U.S.C. § 675(1), a case plan is a written document that covers several aspects of the child placement program.

30. See 42 U.S.C. § 671(a)(15)(B).

31. *Id.* The services are similar to those required before removal of the child. See *supra* notes 20-22 and accompanying text.

32. These key provisions of the ASFA are included here only as a means of introduction to the workings of the foster care system and will be discussed extensively later in this Note. See *infra* Part III.

33. See Pete du Pont, *A Chance to Fix Foster Care*, TAMPA TRIB., Oct. 29, 1997, at 15. Approximately 650,000 children spend at least some time in foster care each year. A study by the Institute for Children found that at the end of fiscal year 1996, 526,000 children were in state-run substitute care. See *id.*

34. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q.

in foster care spend an average of three years in the system,³⁵ and one in ten will spend more than seven years in foster care.³⁶ Children who eventually leave the foster care system through adoption typically wait 3.5-5.5 years.³⁷ Not only do children frequently spend extended periods of time in foster care, but the system does not provide consistency in the child's foster care situation, with the majority of children having more than one placement.³⁸ Further, 15,000 foster children "age-out" of the system each year.³⁹

These numbers demonstrate that the system is inadequate for too many children. Although the AACWA was designed "to prevent unnecessary foster care placements, to reunify families when possible, and to limit time spent in foster care by encouraging adoption when return to a natural parent is not possible,"⁴⁰ this law has been largely unsuccessful in achieving these goals.⁴¹ Indeed, Jennifer Toth, a foster care expert, summarized the views of many people concerned

121, 138 (1995) (citing figures reported by the American Public Welfare Association). Between 1987 and 1992, the foster care population rose from 280,000 to 460,000. *See id.*

35. *See* 143 CONG. REC. S12,673 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley). Senator Grassley was a chief advocate for reducing the time period a child may spend in foster care before termination of parental rights. Driving home his concern about the three year average, he stated, "That is three birthdays, three Christmases, and that is going through the first, second, and third grades, without having a mom and a dad." *Id.* A 1993 report by the American Civil Liberties Union revealed that one in four children who enter the system live in foster care for more than four years.

36. *See* du Pont, *supra* note 33.

37. *See* *Adoption and Support of Abused Children: Testimony Before the Senate Comm. on Finance*, 105th Cong., available in 1997 WL 14151914 (statement of Valora Washington, program director for the Families for Kids Initiative of the W.K. Kellogg Foundation) [hereinafter Washington testimony].

38. *See* Jill Sheldon, Note, *50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 77 (1997) (referring to the Supreme Court's findings in *Smith v. Organization of Foster Families*, 431 U.S. 816, 836-37 (1977)). Sixty percent of children in foster care will have more than one placement, and 28 percent will have three or more. *See id.*

39. *See* du Pont, *supra* note 33, at 15. A child "ages-out" when he or she achieves legal adult status.

40. Guggenheim, *supra* note 34, at 122-23.

41. Guggenheim noted:

Any study of foster care in the United States over the past twenty years unavoidably must grapple with a paradox: the national foster care population gained its greatest increase in the decade immediately following the most dramatic overhaul of federal foster care laws and policy in history, even though those changes were the result of a consensus that too many children were being removed from their families.

Id. at 138. In the 1960s and 1970s, roughly one-third to one-half of foster kids returned home soon after the initial removal, despite fewer state reunification efforts. *See* Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 375 (1996) [hereinafter *Parents' Rights*] (discussing termination of parental rights and the history of the foster care system).

with child welfare when she stated that if a child survives foster care, "it's not because of the system, it's despite the system."⁴²

C. The AACWA and "Reasonable Efforts"

Congress intended foster care to be a last resort. In enacting the AACWA, Congress attempted to remedy premature removal of a child from his family.⁴³ The AACWA focused on preventive and reunification efforts, setting forth that before states spend federal funds on foster care, they should provide services that could make placement unnecessary and a return to home feasible.⁴⁴ The AACWA, however, did not define "reasonable efforts" and therefore the states had the responsibility of interpreting this federal policy.⁴⁵ Critics of the AACWA argue that many states interpreted "reasonable efforts" to mean *every* effort.⁴⁶

One of the AACWA's main problems was that it created a tension as agencies committed to reunification discouraged bonding between foster parents and foster children⁴⁷ while at the same time, out of concern for child safety, discouraged contact with the child's biological parents.⁴⁸ Indeed, despite the "reasonable efforts" requirement for reunification, communication between the child welfare agency and the child's biological parents decreases after the first year.⁴⁹ Moreover, the longer a child remains in foster care, the

42. Cheryl Wetzstein, *Case Studies Expose Failings of Foster Care; Writer Champions Better Chance for 'Orphans of Living'*, WASH. TIMES, May 13, 1997, at A2 (quoting Jennifer Toth).

43. See RATTERMAN ET AL., *supra* note 20, at 1 (discussing the "reasonable efforts" requirement and its purpose).

44. *See id.*

45. *See id.* at 3. Examples of state definitions are "the exercise of ordinary diligence and care" (Missouri), "the exercise of reasonable diligence and care" (Florida), and "the exercise of reasonable diligence and care . . . to utilize all available services related to meeting the needs of the juvenile and the family" (Arkansas). *Id.*

46. *See* 143 CONG. REC. H10,788 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) (noting that "reasonable efforts became every effort, [thus] putting a child at risk").

47. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 856, 861-62 (1997) (Stewart, J., concurring). Justice Stewart bluntly stated that any case in which a foster parent assumes the emotional role of a child's biological parent is a *failure* of the foster care system, which is intended to be temporary care. *See id.* at 861-67.

48. "Foster children have been caught in the middle: As a result of the system's conflicting aims, they have been left to drift in long term temporary placements with little hope of any stable parental relationship." Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 441-42 (1983) [hereinafter *Why Terminate?*].

49. *See id.* at 428 (noting that this lack of contact is one of many factors contributing to foster care drift).

greater the possibility that the child will lose all contact with his or her biological parents.⁵⁰

At the same time that the biological parents' contact with the child decreases, the child often moves from one foster care home to another.⁵¹ Often, states remove children from the foster home *because* the foster family becomes attached to the child.⁵² Thus, the AACWA resulted in a *de facto* policy that created a situation in which children spent many years detached from their biological parents and were prevented from forming any new attachments to their (multiple sets of) foster parents.

This system should trouble society. Despite data indicating that many families do not receive the services that could enable foster children to return safely to their biological parents,⁵³ public attention has focused on the cases involving children who return to abusive homes. The public expresses outrage about cases in which a child dies as a result of abuse *after* child welfare authorities have intervened. Indeed, estimates show that child welfare authorities have investigated or received reports on half of all children eventually murdered by a parent or other family member.⁵⁴ Although nothing could or should lessen concern for such an alarming situation, when formulating child welfare policy, we must also recognize that such cases "[a]lthough highly publicized, . . . are in a distinct minority."⁵⁵ The vast majority of children are in foster care because of neglect, not

50. See *id.* at 426 (noting that once a child enters the foster care system there is a 50 percent chance that the child will remain there for at least two years).

51. See Sheldon, *supra* note 38, at 77 (discussing the Supreme Court's statistical data in *Smith v. Organization of Foster Families*, 431 U.S. 816, 836-37 (1997)).

52. See *Why Terminate?*, *supra* note 48, at 430.

53. Because of the large volume of cases, most child welfare agencies are overworked, underfunded, and understaffed. As a result, "child welfare workers too often mete out a blanket prescription of parenting classes and counseling instead of developing a customized service plan based on a comprehensive assessment of the family's strengths and needs." Goldhill, *supra* note 10, at 307.

54. See Mona Charen, *A Chance to Give Children a Childhood*, BALTIMORE SUN, Oct. 7, 1997, at 11A (discussing the House bill advocating adoption and deeming child safety the main concern of child welfare agencies).

55. MNOOKIN & WEISBERG, *supra* note 13, at 459. This Note does not argue that because severe physical abuse cases represent a small portion of all foster care cases, foster care law should assume reunification is in the best interests of all children. Rather, this Note argues that assuming termination is in the best interests of all children who have been in the foster care system for a given time period (12 months under the ASFA) is the major problem. Foster care law must contain the tools for differentiating between families that can and cannot be reunited. This Note endorses the sections of the ASFA that clarify that a child's safety should be the paramount concern and allow termination to be based upon severe abuse.

abuse,⁵⁶ and therefore state-provided services could help many families better care for their children.⁵⁷ The law has recently responded not with increased services in support of reunification,⁵⁸ but with an emphasis on creating permanency for children through speedier termination of parental rights and increased support for adoption.

D. Congress Responds: The Adoption and Safe Families Act of 1997

The purpose behind the ASFA is to provide "safe, loving, and permanent homes" for foster children.⁵⁹ Congress sought to effectuate this goal through a number of provisions. The ASFA amended the Social Security Act to "clarify" the AACWA's "reasonable efforts" requirement,⁶⁰ by providing several examples of when reasonable reunification efforts are not required,⁶¹ including when the parent has "subjected the child to aggravated circumstances," committed any one of the enumerated violent crimes upon any of the parent's children, or had his or her parental rights involuntarily terminated with respect to any other child.⁶² The ASFA also mandates that in determining

56. See Gail Vida Hamburg, *An Act of Compassion May Require Some Decisive Actions to Make It Work*, CHI. TRIB., Jan. 4, 1998, at Womanews 1 (reporting on ASFA and noting that critics of the law point out that many children are in foster care because of a lack of supervision).

57. See 143 CONG. REC. S12,670 (daily ed. Nov. 13, 1997) (statement of Sen. Dewine) ("We need to make sure that the families who are in trouble, but who can be saved, do get help, and that they get good help, and that they get it before it is too late.").

58. Perhaps one of the reasons that the law has not increased funding for reunification services is the difficulty in determining their effect. As Martin Guggenheim noted, "[u]nfortunately, it is easier to determine what happens to children after entering foster care than to study the more qualitative assessments involved in evaluating the effectiveness of preventive services before children enter foster care." Guggenheim, *supra* note 34, at 125.

59. 143 CONG. REC. H10,787 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly). Representative Kennelly further stated, "this legislation we can all agree on is putting children on a fast track from foster care to safe and loving and permanent homes. This is what this is all about." *Id.* Many of her colleagues echoed this sentiment. Representative Camp stated, "this bill will ensure that a permanent, loving home is within the reach of every child." 143 CONG. REC. H10,788 (daily ed. Nov. 13, 1997). Senator Devine stated, "I see an America and want an America . . . where every child has the opportunity to live in a safe, a stable, a loving and a permanent home." 143 CONG. REC. S12,670 (daily ed. Nov. 13, 1997).

60. Under the ASFA, the state is required to make "reasonable efforts" to "preserve and reunify" the family before foster care is necessary and to make it possible for the child to return home safely after removal. ASFA, Pub. L. No. 105-89, § 101(a)(A)-(B), 111 Stat. 2115, 2116 (1997) (amending 42 U.S.C. § 671(a)(15) (1994)).

61. See *id.* § 101(a)(D), 111 Stat. at 2116-17. If "reasonable efforts" are not required, the state must hold a permanency hearing for the child within thirty days.

62. *Id.*

“reasonable efforts,” “the child’s health and safety shall be the paramount concern.”⁶³

In addition to ensuring a child’s safety, the ASFA offers adoption as the solution for the skyrocketing foster care population. Section 201 of the ASFA authorizes adoption incentives to states, providing as much as six thousand dollars per child adopted.⁶⁴ Further, the ASFA tightens two important timelines for children in foster care, those regarding permanency hearings and termination of parental rights. Section 302 of the ASFA requires a permanency hearing to be held within twelve months of the child entering foster care.⁶⁵ Section 103(a) requires that the state file or join a petition to terminate the parental rights of any child if he or she has been in foster care for fifteen of the twenty-two most recent months, unless a relative is caring for the child, a compelling reason exists why termination would not be in the best interests of the child, or the state did not provide “reasonable efforts” for reunification if necessary.⁶⁶

III. THE PENDULUM SWINGS: THE RENEWED EMPHASIS ON TERMINATION OF PARENTAL RIGHTS BY THE ASFA

Although the ASFA’s stricter parental termination provisions appear to be consistent with the statute’s purpose, the termination standard will likely harm more children than it will help. This Part

63. *Id.* § 101(a)(A), 111 Stat. at 2116. Representative Kennelly recognized that: [t]his might sound like common sense, but we told the States about 15 years ago to make reasonable efforts to reunify families, without telling them exactly what we meant by reasonable. Unfortunately, in practice, reasonable efforts became every effort, putting a child at risk. So we are now telling States there are times when returning a child home presents too great a risk to that child’s safety

143 CONG. REC. H10,788 (daily ed. Nov. 13, 1997).

64. ASFA, Pub. L. No. 105-89 § 201(d), 111 Stat. 2115, 2123 (1997) (amending 42 U.S.C. §§ 670-679 (1994)). States in which the number of foster children adopted exceeds the average number of foster children adopted in the state in 1995, 1996, and 1997 receive \$4000 per child adopted above the average, and an extra \$2000 per “special needs” child. *Id.* “Special needs” refers to children who are traditionally difficult to place, including children with disabilities, minority children, and older children. For a critique of the overuse of “special needs,” see Sheldon, *supra* note 38, at 94 (noting that “this term has been used to encompass so many groups, that children who actually do require special care are being lumped together with other children who do not have special needs.”).

65. ASFA, Pub. L. No. 105-89 § 302, 111 Stat. 2115, 2128 (1997) (amending 42 U.S.C. § 675(5)(C) (1994)). Under the AACWA, the state was required to hold a “dispositional” hearing within 18 months. The ASFA now requires a hearing to establish a “permanency plan” for each child establishing when a child is to be returned to his or her biological parent, placed for adoption, or placed with a legal guardian or in any other “planned permanent living arrangement.” *Id.* § 302(4), 111 Stat. at 2128-29.

66. *Id.* § 103(a)(3), 111 Stat. at 2118 (amending 42 U.S.C. § 675(5)).

discusses why adoption is a politically attractive policy choice but shows that because the termination standard assumes rather than requires a showing that termination would be in the *child's best interests*, this standard is inconsistent with a child-centered legal approach.

A. *The Appeal of Adoption*

The emotional appeal of successful adoption has motivated the policy that encourages parental rights termination. During debate prior to the passage of the ASFA, one congresswoman told the story of a three-year old girl. When the child met her adoptive family, her first comment, standing in front of them with her hands on her hips, was, "Where have you been? Where have you been?"⁶⁷ It is difficult to think of a more compelling image or a better rallying cry for reform. In comparison to the sobering image of the average foster child, who spends his childhood bouncing from foster home to foster home, this three-year-old is presented as a vision of hope, a child who escaped the system and was placed in a loving home.

Indeed, it is precisely these images of foster children, one of hope, the other of hopelessness, that have swung the pendulum to termination in order to "free" children for adoption. As a result, many believe, as columnist Mona Charen stated, that "[d]enying adoption to many of these kids means denying them a childhood."⁶⁸ Professor Marsha Garrison, a vocal critic of timeline termination as the solution to the foster care problem, argues that although it is understandable that children's advocates encourage adoption because it provides benefits such as "a sense of belonging" and "the right to feel part of a family," the pro-termination policy has gone too far.⁶⁹ For example, even the terminology commonly associated with foster care, such as describing a child as being in "limbo," furthers the pro-termination policy.⁷⁰ According to Garrison, "[t]he implication is clear: Adoption promises salvation; foster care ensures suffering."⁷¹

67. 143 CONG. REC. H10,790 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly).

68. Mona Charen, *Adoption—Children Deserve House Bill*, DAYTON DAILY NEWS, Oct. 18, 1997, at 11A.

69. *Parents' Rights*, *supra* note 41, at 389.

70. *See id.* at 390.

71. *Id.*

B. Termination and the Best Interests of the Child

A "best interests of the child" analysis does not automatically support the emphasis on termination of parental rights in favor of adoption.⁷² Indeed, the concept of "best interests of the child" contemplates that the adjudicator consider what is best for *each individual child*.⁷³ Timeline termination standards, on the other hand, presume that termination is in the best interests of every child and require proof of a *compelling reason* that it is not.⁷⁴ Thus, this provision of the ASFA is inconsistent with the contemporary child custody legal framework.⁷⁵

The "best interests of the child" analysis is the primary factor when determining whether or not to terminate parental rights of parents whose children are in the foster care system.⁷⁶ The inquiry does not focus on whether the foster parent can provide a better home for the child than the birth parent.⁷⁷ Rather, "the State's interest in finding the child an alternative permanent home arises only 'when it is clear that the natural parent cannot or will not provide a normal

72. See Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 401 (1996) (stating that termination may not provide children with a stable home life).

73. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 268-72 (1975), reprinted in MNOOKIN & WEISBERG, *supra* note 13, at 721 (discussing consequences on children of coercive removal from parents).

74. See ASFA, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (1997) (amending 42 U.S.C. § 675(5) (1994)).

75. Judge Cardozo is credited first with enunciating the "best interests of the child" doctrine. See LeAnn Larson LaFave, *Origins and Evolution of the "Best Interest of the Child" Standard*, 34 SAN DIEGO L. REV. 459, 467 (1989). In *Finlay v. Finlay*, Judge Cardozo wrote that a judge must exercise the *parens patriae* power as a "wise, affectionate, and careful parent." 148 N.E. 624, 626 (N.Y. 1925) (quoting *Queen v. Gyngall*, 2 Eng. Rep. 232, 238 (Q.B. 1893)). Although the "best interests of the child" standard has been criticized as vague and value-laden, it continues to be used by courts determining custody. The standard typically requires an examination of factors relating to a child's safety, happiness, and physical, mental, and moral welfare. See Harvey R. Sorkow, *Best Interests Of The Child: By Whose Definition?*, 18 PEPP. L. REV. 383, 384 (1991).

76. See, e.g., *In re J.J.B.*, 390 N.W.2d 274, 279 (Minn. 1986) (adopting the "best interests of the child" standard as a "paramount consideration in termination of parental rights proceedings").

77. See *In re Michael B.*, 604 N.E.2d 122, 130-32 (N.Y. 1992) (examining interests of long-term foster parents attempting to keep child from birth father). In *Smith v. Organization of Foster Families*, 431 U.S. 816, 847 (1977), the Supreme Court recognized that although foster parents have an interest in dispositional proceedings, "that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents."

family home for the child."⁷⁸ Until the state has proven that the parent is unfit, both the parent and the child have an interest in preventing wrongful termination of this relationship.⁷⁹

Instead, the "best interests of the child" standard requires "a balancing of the child's interest in preserving the parent-child relationship, an interest shared by the parents, against any competing interests of the child."⁸⁰ Although the child's stability, of which length of time in foster care is certainly an important factor, is a "competing [interest] of the child,"⁸¹ it should not be the only factor in the equation. For example, an adjudicator should also consider the child's preferences when evaluating which placement alternative is better for the child.⁸² Other factors used to determine whether termination of parental rights is in the child's best interests include the child's age, the risk of harm to the child, the child's attachment to his or her parents and to his or her potential adoptive parents, and the likelihood that the child will be adopted. The timeline termination standard of the ASFA, however, does not include a balancing test. Instead, it mandates that the state terminate parental rights after a statutorily-prescribed time period.⁸³

The ASFA's use of the timeline termination standard risks unfairly biasing decisions against the biological parents. For example, in *In re J.M., J.M., and M.M.*, the Supreme Court of Minnesota rejected a mother's argument that timeline termination was not in her children's best interests, reasoning that because the plain language of the Minnesota statute required termination after a prescribed time period, long-term foster care was never in a child's best interests.⁸⁴ The court held that the "best interests" inquiry required only a determination that the statutory time frame had expired, even though one of the children's therapists believed that continued contact with the mother was in the child's best interests.⁸⁵

78. *Santosky v. Kramer*, 455 U.S. 745, 767 (1982) (quoting N.Y. SOC. SERV. LAW § 384-b.1(a)(iv) (McKinney 1992)). In *Santosky*, the Supreme Court addressed the burden of proof a state must carry before termination and held that the proper standard is "clear and convincing evidence." *Id.* at 747-48.

79. *See id.* at 760-61. The state must demonstrate unfitness because the parents' liberty interest in the custody and care of their child "does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the state." *Id.* at 753.

80. *In re M.G.*, 407 N.W.2d 118, 121 (Minn. Ct. App. 1987).

81. *Id.*

82. *See id.*

83. Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (1997) (amending 42 U.S.C. § 675(5) (1994)).

84. 574 N.W.2d 717, 722 (Minn. 1998).

85. *See id.* at 721 (noting that the child's guardian ad litem did recommend termination, despite the therapist's opinion).

The court also did not require an inquiry into the “adoptability” of the children prior to termination of their parents’ parental rights.⁸⁶ This case illustrates how timeline termination standards severely constrict the “best interests of the child” analysis because courts assume that termination is necessary for permanency.

C. *The Effects of Parental Rights Termination on the Child*

Placing children up for adoption who cannot quickly return home improperly “measure[s] permanency by the legal label attached to their situation.”⁸⁷ Favoring adoption over reunification ignores evidence that parental capacity does not affect the strength of the parent-child bond.⁸⁸ For the majority of foster children, adoption by a new family does not lessen the child’s their attachment to her biological parents.⁸⁹

The psychological effects of termination can be devastating to a child. For example, the adoption may result in lower self-esteem and lack of identity, or a child may have a loyalty conflict between her adoptive and biological families.⁹⁰ Additional problems can also result. Because a child’s identity is typically intertwined with his or her biological family,⁹¹ terminations can splinter a child. Finally, “the child’s knowledge that the parent lives, but is unavailable, also hinders his ability to effectively mourn his loss.”⁹²

86. See *id.* at 724.

87. Goldhill, *supra* note 10, at 303.

88. See *Parents’ Rights*, *supra* note 41, at 379.

89. Many people assume that the younger a child is when he or she is placed in foster care, the less likely the child will be “permanently” attached to his or her biological parents. See Hamburg, *supra* note 56 (arguing that termination standards should allow the needs of individual children to be weighed and that the child’s age should be considered). Professor Garrison, however, believes that the phenomenon of adopted children searching for their biological parents supports the argument that an absent parent will always remain important to the child. See *Parents’ Rights*, *supra* note 41, at 382 (noting the “extraordinary lengths” some take to obtain information about their origins).

90. According to psychologist Matthew B. Johnson:

[W]hen children are adopted as a result of some perceived inadequacy in their parents . . . a significant risk of a negative impact on the child’s identity and self-esteem results. When the message is that the parents were inadequate to provide care and the child cannot visit or even see the family of origin, the child must either disconnect psychologically from the family of origin, with the resultant loyalty conflict, or accept some injury to their self-esteem for maintaining some identification with the ‘defective’ family.

Johnson, *supra* note 72, at 415.

91. See Goldhill, *supra* note 10, at 300 (discussing other writers who advocate this position).

92. *Why Terminate?*, *supra* note 48, at 466.

In contrast, studies have revealed that children who continue to have contact with their biological parents after removal to a foster home are more secure than children who have no contact.⁹³ These children are also more likely to be content with their foster parents,⁹⁴ and score higher on emotional and intellectual development tests.⁹⁵ Further, parental visitation has no effect on whether the children view their foster homes as permanent or temporary.⁹⁶ Studies also challenge the theory that allowing parents to visit their children removes any incentive for the parents to take the steps necessary to change the home environment so that the children can return.⁹⁷

Still, the ASFA disregards evidence that suggests children are generally more stable with continuing parental contact and assumes that termination of parental rights and traditional adoption are in the best interests of foster children who cannot return home quickly.

D. Adoption Not Guaranteed

Another problem with the ASFA is its inability to guarantee that children "freed" for adoption *will be* adopted. Perhaps most striking, ASFA's timeline termination implicitly assumes that the *possibility* of adoption is in the best interests of most children in long-term foster care. Although the ASFA mandates that states petition to terminate parental rights after a child spends a certain amount of time in child welfare custody,⁹⁸ the law cannot guarantee that another family will adopt the child.

A 1996 study revealed that 22,491 children were adopted from foster care.⁹⁹ Roughly ten percent of the entire foster care population were legally "free" for adoption but not adopted.¹⁰⁰ Although adoptions of foster care children are increasing¹⁰¹ (and were increasing

93. *See id.* at 461 (summarizing the results of one such study).

94. *See id.* at 462 (noting that "being loved by their own mothers evidently helped in their relationship with their foster parents").

95. *See id.* at 463 (summarizing the results of a Columbia University study).

96. *See id.* at 464 (noting that none of these studies showed such an effect).

97. *See id.* at 483 (noting that the research instead emphasizes that "a nonpunitive working alliance with the natural parent is necessary to help him change his behavior").

98. Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (1997) (amending 42 U.S.C. § 675(5) (1994)) (requiring petition if child spent 15 of last 22 months in custody).

99. *See du Pont, supra* note 33, at 15 (citing a study by the Institute for Children).

100. *See id.*

101. Since 1994, adoptions of foster children have increased by 74 percent in New York City and 72 percent in Philadelphia. *See id.* President Clinton's "Adoption 2002" program aspires to double the number of children either adopted or permanently placed from the foster care system by the year 2002. *See HHS Awards Grants to Increase Adoptions*, M2 PRESSWIRE, Oct. 20, 1997, available in 1997 WL 14467466.

even *before* the ASFA's tighter timelines for termination became effective), the number of adoptable children greatly exceeded the number of foster children adopted.

Psychologist Martin Guggenheim studied the effects of two states' policies that favored termination of parental rights and adoption for foster children. His study revealed that the number of children adopted from foster care lagged behind the number of children entering the system¹⁰² and that such a policy left a significant number of children without either adoptive or biological parents.¹⁰³ He concluded that even under the AACWA, which supposedly emphasized reunification over adoption, child welfare policy "resulted in creating the highest number of unnatural orphans in the history of the United States."¹⁰⁴ One can only guess the effect of a welfare policy openly advocating timeline termination.

E. A System Failing Families

Although the ASFA imposes stringent time limits, it fails to increase preventive and reunification services. Without these services, the shortened timeline could harm a child because an agency may either prematurely send the child home or unnecessarily "free" him or her for adoption.¹⁰⁵ The Child Welfare League of America contends that the "government is abandoning its responsibility to help troubled families solve the problems that lead to child abuse and neglect" by reducing the termination time line without offering increased services.¹⁰⁶ The organization argues that the government

102. See Guggenheim, *supra* note 34, at 127.

103. See *id.* at 130. Guggenheim argued:

Termination of parental rights obviously should play a role in the effort to reduce the amount of time children spend in foster care. However, the increase in terminations of parental rights should have been the last step to be implemented as part of reform, not the first. Unfortunately, it is understandably easier to develop timelines and standards for when termination actions should be filed once children have entered foster care than to enforce rigorously strict compliance with preventive and reunification efforts.

Id. at 139.

104. *Id.* at 140.

105. See *Adoption and Support of Abused Children: Testimony Submitted to the Senate Finance Comm. for the Hearing on the Pass Act, S.1195*, 105th Cong., available in 1997 WL 141519110 (testimony by the Child Welfare League of America) [hereinafter CWLA Testimony].

106. *Id.* This testimony was submitted about an earlier Senate version of the ASFA, the Promotion of Adoption, Safety, and Support for Abused and Neglected Children Act.

Sister Rose Legan fears that "[t]here is a danger that the very strong emphasis on adoption . . . will be a signal to state and local officials that they don't have to do anything to reunite families or keep them together, even when the abuse or neglect is not chronic or severe." Logan testimony, *supra* note 1.

can best ensure child safety and permanency by providing families with supportive services.¹⁰⁷

Indeed, some commentators believe that the ASFA falsely assumes that child welfare agencies do not make mistakes.¹⁰⁸ In addition, the slow pace in which cases move through the complex foster care system may result in premature parental termination.¹⁰⁹ Thus, the ASFA creates a substantial risk that families who could remain intact with state assistance will be destroyed.¹¹⁰

F. The Politics of Termination

The ASFA's determination that timeline termination is in the best interests of the child without giving courts the latitude to conduct a "best interests of the child" inquiry disproportionately affects the most socially and politically impotent segments of the population, as these groups are disproportionately represented among foster children.

In order to increase the number of children available for adoption, Congress enacted strict parental termination provisions in the ASFA.¹¹¹ Arguably, the lobbying of potential adoptive parents persuaded Congress to adopt this policy. Adoption was not heralded as a potential solution to the foster care problem until the pool of potential adoptive parents *outnumbered* the supply of babies.¹¹²

107. See *Child Welfare Revision: Testimony Submitted to the Senate Finance Subcomm. on Social Security and Family Policy for the Hearing, "Child Welfare Reform,"* 105th Cong., available in 1997 WL 10572022 (testimony of the Child Welfare League of America).

108. See Hamhurg, *supra* note 56 (noting that "[a]ggressively pursuing the termination of parental rights without recognizing the frequency of mistakes or that most parents in the system are negligent but not abusive will hurt families").

109. See *id.*

110. Even before the ASFA, these problems existed:

[C]hild welfare agencies generally lack[ed] the resources necessary to assess whether a family might be kept intact if provided with supportive services, let alone to provide those services. Government policy supports the removal of children, termination of parental rights, and adoption because they are politically expedient and less costly in the short run. In short, government has turned its back on poor families and children.

Goldhill, *supra* note 10, at 310.

111. See Johnson, *supra* note 72, at 402. One commentator notes:

Parental rights termination hearings are chiefly concerned with the facts and specific circumstances of the instant case. The ultimate legal question, that is, the decision to terminate or maintain parental rights, is not a decision based solely upon empirical findings. Rather, it is a value-laden decision based on social policy, competing priorities, and law.

Id.

112. See *Parents' Rights*, *supra* note 41, at 376. Many couples seek to adopt because of infertility and are looking for a child of their own. See *id.* at 387. A recent survey revealed that although 50 percent of people would rather adopt than remain childless, they believed that having their own children is preferable. More troubling, a quarter of respondents believed that

The politics of foster care are the politics of social classes.¹¹³ Although only twenty percent of children who do not live with their biological parents are in the foster care system, the biological families of between sixty and eighty percent of foster children receive some kind of public welfare.¹¹⁴ Further, most children in foster care come from poor, single-parent homes. In contrast, the majority of adoptive couples are middle-class and married.¹¹⁵ Thus, foster children adopted by middle-class parents are often advantaged socially and economically.¹¹⁶

The foster care system also disproportionately affects African-Americans. In 1994, African-American children accounted for forty-seven percent of foster children, although they consisted of only fifteen percent of the general population under eighteen.¹¹⁷ Thirty-two percent of the foster care population and sixty-seven percent of the general population were Caucasian children.¹¹⁸ African-American children also disproportionately remain in the system: of those children leaving the system, fifty percent are Caucasian and only twenty-nine percent are African-American.¹¹⁹

Perhaps most telling about the relationship between foster care and class is the fact that foster care payments are frequently two to four times greater than the amount of welfare a state will allocate to the biological parent for care of the same child.¹²⁰ Foster care is

it is unlikely that a child would love his or her adoptive parents as much as his or her biological parents. The survey revealed that women were most likely to consider adoption, but that men, minorities, and the less-educated viewed adoption less favorably. See Hamburg, *supra* note 56.

113. See *Smith v. Organization of Foster Families*, 431 U.S. 816, 833 (1977) (recognizing that "foster care has been condemned as a class-based intrusion into the life of the poor" and that "the poor resort to foster care more often than other citizens.").

114. See *Why Terminate?*, *supra* note 43, at 432. Garrison posits that most middle-class families in crisis can afford services that would prevent the need for foster care. See *id.* at 433.

115. See *Parents' Rights*, *supra* note 41, at 387.

116. See *id.*

117. See Washington testimony, *supra* note 37 (discussing findings based on data from twenty-one states).

118. See *id.*

119. See *id.*

120. See Randi Mandelbaum, *Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 *FORDHAM URB. L.J.* 907, 915 (1995).

In 1996, Congress repealed the Aid to Families with Dependent Children ("AFDC") program and replaced it with Temporary Assistance to Needy Families ("TANF"). See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996). TANF makes clear that welfare benefits are not entitlements and poses strict requirements on who may receive TANF payments and for how long. See Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 *TEMP. L. REV.* 447, 447 (1997). Braveman and Ramsey note that the "welfare benefit reductions are expected to result in an additional 1.3 million children falling below the poverty line in the United States, which already has a higher percentage of its children living in poverty than other

expensive. Indeed, the single largest block of federal funding for child welfare programs finances low-income foster care children.¹²¹

Economics may also contribute to an increased emphasis on adoption rather than reunification. A goal of reunification in foster care leaves the federal and state governments with a fiscal crisis: on top of the expense of foster care, long-term preventive and reunification efforts are also costly.¹²² In comparison to foster care, even subsidized adoption is relatively inexpensive for states.¹²³

Although Congress passed the ASFA to increase permanency in the lives of children, common sense suggests that Congress also wanted to decrease the amount of federal funds spent on foster care.¹²⁴ Discussing the ASFA, Senator Rockefeller noted that “[a]t the heart of the recent debate about the best policy for adoption and child welfare” are questions regarding how Congress will allocate federal funds.¹²⁵ Economics, however, cannot be the sole reason for termination of parental rights. Other options, such as open adoption, in which the biological parent(s) retains visitation rights, and foster guardianship are inexpensive.¹²⁶

A timeline termination policy implicitly assumes that a child needs a permanent home with a single set of parents¹²⁷ without con-

high-income countries.” *Id.* Although welfare is being slashed for parents raising their children, there has been no corresponding decrease in the payments that foster care parents receive. Foster care payments typically are higher than TANF payments. *See MICKENS & BAKER, supra note 23, at 30.*

121. *See* 143 CONG. REC. S12,672 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley).

122. *See Parents' Rights, supra note 41, at 391.* Garrison notes that although these services are necessary, most states only provide “meager, brief, and cheap” services. Professor Goldhill argues that:

[T]he *de facto* decision not to invest more in supporting poor families simply ignores the tragic consequences of this decision for innocent children. The short-sightedness of this approach is clear. Although the service approaches . . . seem time-consuming and costly . . . in the long-run, customized family support will prove less time-consuming—and less costly—than business as usual.

Goldhill, *supra note 10, at 309.*

123. *See Parents' Rights, supra note 41, at 386.*

124. Almost in prophecy, Jill Sheldon wrote that some “politicians believe that when welfare reform begins, adoptions will be relied on to save the child welfare system. If increasing adoptions is the solution to cutting child welfare, adoptions will not only have to be made easier, but will also have to be emphasized.” Sheldon, *supra note 38, at 92.*

125. 143 CONG. REC. S12,671 (daily ed. Nov. 13, 1997).

126. *See Parents' Rights, supra note 41, at 386.* Professor Garrison argues that one reason the state favors traditional adoption is because it attracts potential adoptive parents looking for a child of their own. *See id. at 387.* Thus, “[t]ermination of parental rights followed by adoption thus meets both the fiscal needs of the state and the desires of a well-organized and sympathetic adult interest group.” *Id.*

127. Several authors have noted that there is a divide in custody theory between divorce and foster care cases. In cases of divorce, there is almost universal agreement that continued contact with the noncustodial parent benefits the child. For foster children, however, there is a belief that if the child cannot return home quickly, termination of parental rights and adoption

sidering the harm that may result. This ASFA provision therefore replaces the contemporary "best interests of the child" analysis with an artificial one that assumes termination is in the child's best interests.

IV. THE NEED FOR A BALANCED APPROACH: THE PROMISE OF KINSHIP FOSTER CARE

This Note has demonstrated that neither the AACWA's emphasis on reunification nor the ASFA's emphasis on termination is consistent with the "best interests of the child" legal framework. The AACWA failed because the statute did not give states adequate guidance in determining what reunification efforts should be made. The AACWA resulted in a dramatic increase in the foster child population. In an attempt to ameliorate this problem, Congress passed the ASFA. Unfortunately, Congress unnecessarily favored parental termination, which will likely lead to a dramatic increase in the legal orphan population. This Note argues that the development of kinship care policies may provide a middle ground between reunification at all costs and timeline termination.

A. Understanding Kinship Foster Care

The American Bar Association defines kinship care as "any form of residential caregiving provided to children by kin, whether full-time or part-time, temporary or permanent, and whether initiated by private family agreement or under custodial supervision of a state child welfare agency."¹²⁸ Beyond the legalese is a simple concept: family members helping each other care for children. Kinship caregivers may prevent the need for state intervention by providing advice, helping with everyday responsibilities, such as babysitting or providing transportation, caring for the children overnight or longer to relieve a parent, or combining households.¹²⁹

is in the child's best interests. See *Parents' Rights*, *supra* note 41, at 373; see also Goldhill, *supra* note 10, at 297. But see JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (2d ed. 1981) (applying the psychological parent theory to *both* cases and favoring complete control by the custodial parent).

128. TAKAS, *supra* note 15, at 3.

129. See MIOKENS & BAKER, *supra* note 23, at 7.

Most kinship care arrangements result from private family arrangements without state involvement.¹³⁰ Roughly four million children under the age of eighteen live with a family member other than a parent.¹³¹ One in ten grandparents raise a grandchild for at least six months, with one-fifth of them raising a grandchild for more than ten years.¹³²

In some population segments, kinship care is a revival of an informal child welfare system.¹³³ This type of care has also become an integral part of state child welfare policy.¹³⁴ As a result, kinship care is "by far the fastest-growing foster care initiative."¹³⁵

B. Kinship Foster Care and Current Law

Currently, states must incorporate kinship foster caregivers into the traditional foster care system in order to qualify them for federal funding.¹³⁶ States, however, must give preference to kinship caregivers over non-relatives if the relatives meet the relevant state

130. *See id.*

131. See Beth Witrogen McLeod, *The Second Time Around: The Number of Grandparents Raising Grandchildren Is Exploding—But Kinship Foster Care Is Gaining A Voice*, S.F. EXAMINER, Aug. 12, 1997, at C1. Given that child welfare resources are already strained with the half-million foster children, without kinship care, the system would likely collapse. The reasons behind the growth in kinship care are "a mix of modern sociocultural sorrows: teen pregnancy, abandonment, alcohol and drug abuse, homicide, neglect, poverty, AIDS, incarceration, [and] unemployment." *Id.* Eighty-five percent of kinship care arrangements are the result of parental substance abuse. See Catherine Darnell, *Grand Parents*, TENNESSEAN, Oct. 26, 1997, at 1F.

132. See McLeod, *supra* note 131. Between 1980 and 1990, it is estimated that the number of grandparents raising grandchildren increased between 44 and 300 percent. *See id.*; see also 143 CONG. REC. E812 (daily ed. Apr. 30, 1997) (statement of Rep. Stekes).

133. See Jon Jeter, *Foster Care's Relative Solution: As States Nurture an Old Custom, Extended Families Fill a Larger Role in Helping Children from Broken Homes*, WASH. POST, Apr. 16, 1997, at A01. Kinship care is especially prevalent in African-American families. In New York City, 90 percent of kinship care children are African-American. In Philadelphia and Maryland, the numbers are 88 and 89 percent, respectively. According to social policy analysts, this trend is a return to the informal child welfare system of African-American families prior to the civil rights movement: "Because they were unaware or suspicious of the local child welfare agencies, or simply excluded, black families often were left to their own devices in dealing with relatives incapacitated by mental illness or alcohol. Relatives took up the slack." *Id.*

134. Kinship foster care is "kinship care provided for a child who is in the legal custody of the state child welfare agency." TAKAS, *supra* note 15, at 3.

135. Jeter, *supra* note 133. About a third of foster care children now live with relatives. *See id.* One child welfare advocate predicts that "over the next three to five years, kinship care will become the model for foster care." *Id.* Kinship care placements increased 29 percent between 1990 and 1995. *See* Washington testimony, *supra* note 37.

136. *See* Washington testimony, *supra* note 37. States may not exclude relative caregivers from federal foster care funds if the relative otherwise qualifies. *See* *Miller v. Youakim*, 440 U.S. 125, 137 (1979). States may, however, exclude relative caregivers from state funds. *See* *Lipscomb v. Simmons*, 962 F.2d 1374, 1380 (9th Cir. 1992).

child protection standards.¹³⁷ Because of these two federal requirements for receipt of Title IV-E funds, states can choose among three options to develop kinship foster care laws. First, states may require kinship caregivers to meet the exact same licensing requirements as traditional foster parents.¹³⁸ This option is used by a majority of states, either because of an express policy choice or because of a failure to consider kinship caregivers separately.¹³⁹ Although equitable, this option excludes some willing relatives from providing care because of economic considerations.¹⁴⁰

A second option is to lessen the standards for becoming a kinship caregiver by waiving criteria that do not directly relate to child safety and to provide the same benefits to kin and non-kin foster care providers.¹⁴¹ This approach provides the greatest incentive for family members to become kinship caregivers.¹⁴² Critics of this option contend that it creates a disincentive for poor parents to seek reunification¹⁴³ because a parent may recognize that the relative can better provide for the child with the larger foster care payment than the parent can.¹⁴⁴

The third option allows the kinship caregiver to choose between being treated the same as a traditional foster parent and being treated differently with regard to both license requirements and payments.¹⁴⁵ If a kinship caregiver selects the latter, the state may waive some licensing requirements and also reduce the foster care payment.¹⁴⁶ This flexible approach recognizes that kinship caregivers may have different needs than traditional foster care parents and does not force them into a system ill-designed to meet their needs.¹⁴⁷

In addition to determining what standards to apply to kinship caregivers, states must also define who qualifies as a kinship caregiver. Some states require that a kinship caregiver be closely

137. See 42 U.S.C.A. § 671(a)(19) (West Supp. 1998).

138. See TAKAS, *supra* note 15, at 37; see also Mandelbaum, *supra* note 120, at 922-23.

139. Only seven states (Arkansas, Louisiana, Maryland, New York, Oklahoma, Tennessee, and Wisconsin) have enacted statutes concerning kinship care. See TAKAS, *supra* note 15, at 37.

140. See *id.*

141. See *id.* at 38.

142. The states that have adopted this option have had the most dramatic increase in their kinship care populations. See *id.*

143. See *id.*; see also Naomi Karp, *Kinship Care: Legal Problems of Grandparents and Other Relative Caregivers*, NAT'L B. ASS'N MAG., Jan./Feb. 1994, at 10.

144. See TAKAS, *supra* note 15, at 38.

145. See *id.* at 39.

146. See *id.*

147. See *id.*

related to the child's parent by blood, marriage, or adoption.¹⁴⁸ Other states extend the definition by including close friends of the family and godparents.¹⁴⁹

These differences among the states demonstrate the need for a federal standard for kinship care, not just a statutory preference. Although states create their own foster care standards, they first look to federal guidance. Because the ASFA contemplates kinship foster care in three different sections, the government may soon create a federal standard. First, ASFA section 303 requires that the Secretary of Health and Human Services convene a kinship care advisory panel¹⁵⁰ to review and comment upon a report detailing states' kinship care policies.¹⁵¹ The Secretary is then required to submit the report and make policy recommendations about kinship care by June 1, 1999.¹⁵²

Congress also authorized demonstration projects for alternatives to foster care.¹⁵³ Among the types of demonstration projects the secretary is *required* to consider "[i]f an appropriate application . . . is submitted"¹⁵⁴ is a project "designed to address kinship care."¹⁵⁵

148. See, e.g., MD. CODE ANN. FAM. LAW § 5-534(a) (Supp. 1997) ("[K]inship parent' means an individual who is related by blood or marriage within five degrees of consanguinity or affinity under the civil law rule to a child who is in the care, custody, or guardianship of the local department and with whom the child may be placed for temporary or long-term care other than adoption."); TENN. CODE ANN. § 37-2-414(3)(A) (Supp. 1997) ("Relatives within the first, second or third degree to the parent or step-parent of a child who may be related through blood, marriage or adoption may be eligible for approval as a kinship foster parent.").

149. See, e.g., OKLA. STAT. ANN. tit. 10, § 7004-1.5(D) (West 1998) ("A person related by blood, marriage, adoption and by emotional tie or bond to a child may be eligible for approval as a kinship parent.").

150. The panel "shall include parents, foster parents, relative caregivers, former foster children, State and local public officials responsible for administering child welfare programs, private persons involved in the delivery of child welfare services, representatives of tribal governments and tribal courts, judges, and academic experts." ASFA, Pub. L. No. 105-89, § 303(b)(1), 111 Stat. 2115, 2129-30 (1997).

151. In addition to the states' policies, the report must contain the characteristics of kinship caregivers and their households, the extent of parental contact with the child, the cost of kinship care, and the services provided by the state to the caregiver and to the parent. See *id.* § 303(a)(2)(A), 111 Stat. at 2129.

152. See *id.* § 303(a)(1)(B), 111 Stat. at 2129.

153. See 42 U.S.C.A. § 1320a-9 (West Supp. 1998).

154. *Id.* § 1320a-9(3)(C).

155. *Id.* The other two proposals required to be considered are projects "designed to identify and address barriers that result in delays to adoptive placements for children in foster care," *id.* § 1320a-9(3)(A), and projects

designed to identify and address parental substance abuse problems that endanger children and result in the placement of children in foster care, including through the placement of children with their parents in residential treatment facilities . . . that are specifically designed to serve parents and children together in order to promote family reunification and that can ensure the health and safety of the children in such placements.

Finally, and perhaps most importantly, the ASFA allows states to exempt a child in the care of relatives from the provision requiring the states to file or join termination of parental rights after the child has been in foster care for fifteen months.¹⁵⁶ By including these three provisions, Congress has recognized that kinship foster care should be included as part of federal child welfare policy.

C. *The Benefits of Kinship Foster Care*

Kinship care should be an integral part of federal foster care law for numerous reasons. First, children placed in kinship care usually do not experience multiple placements, unlike their counterparts in traditional foster care.¹⁵⁷ Second, kinship foster parents can more likely provide a home for all of the children in a family,¹⁵⁸ thus preventing the division of siblings. Third, because children generally have relationships with their kinship foster parents before placement, such a placement often lessens the trauma typically involved when the state takes custody of the child.¹⁵⁹ Many children who are in kinship foster care arrangements may also avoid the stigma associated with foster care.¹⁶⁰ Instead, the child remains a part of the family he or she has known and continues the relationships that define him or her: sister, brother, grandchild, cousin, nephew, niece. Further, these children are also more likely to remain in contact with their biological parents. These psychological benefits of kinship foster care¹⁶¹ contrast with many of the psychological dangers associated with termination of parental rights.¹⁶²

Kinship foster care not only offers these psychological benefits to children, but it also has the potential to benefit state child welfare policy. Because most kinship caregivers are willing to care for sibling groups, the burden on agencies to find multiple foster homes for children and to recruit foster families is lessened.¹⁶³ Further, because most kinship foster caregivers must be licensed, they are qualified to

Id. § 1320a-9(3)(B).

156. *Id.* § 103(a)(3), 111 Stat. 2115, 2118 (1997) (amending 42 U.S.C. § 675(5) (1994)).

157. See MICKENS & BAKER, *supra* note 23, at 1.

158. See Marla Gottlieb Zwas, Note, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 354 (1993). It is estimated that 44 percent of foster children are placed in the same kinship foster care family with all their siblings. See *id.* at 354-55.

159. See MICKENS & BAKER, *supra* note 23, at 1.

160. See Zwas, *supra* note 158, at 354.

161. Some of the dangers of kinship foster care will be discussed *infra* notes 166-70 and accompanying text.

162. See *supra* notes 90-92 and accompanying text.

163. See Zwas, *supra* note 158, at 354-55.

be traditional foster parents to other children as well.¹⁶⁴ As a result of both the benefit to the child and to the state, at least one commentator has argued that absent evidence to the contrary, "placement with a relative caregiver should be considered the best initial, temporary and permanent option for a child if the child cannot be placed with his or her parents."¹⁶⁵

D. A Cautious Approach

Despite the above benefits, Congress should not implement a kinship care standard until it carefully studies the benefits and risks involved. First, studies have shown that intergenerational cycles of abuse exist, and therefore some potential kinship foster care providers will pose a risk to children that generally is not present in traditional foster care arrangements.¹⁶⁶ Many child welfare agencies neither carefully scrutinize kinship caregivers before the placement nor conduct thorough follow-ups after placement.¹⁶⁷ Instead, some agencies assume that the placement is in the child's best interests.¹⁶⁸ Second, some kinship caregivers resist child welfare services and resent state intrusion in family matters.¹⁶⁹ Third, kinship foster care parents may allow unsupervised contact with the child's parents, which puts the child at risk.¹⁷⁰

Although these are sound reasons to exercise caution, other criticisms of kinship foster care prove unconvincing. Many criticize kinship foster care as a way for parents to milk the government of more money, because foster care payments are typically much larger than Temporary Assistance to Needy Families ("TANF") payments.¹⁷¹ Indeed, one critic stated that kinship care "only marginally changes

164. *See id.* States, however, have the option of relaxing requirements for kinship foster care providers. *See TAKAS, supra* note 15, at 38. Kinship caregivers may therefore not be able to provide traditional foster care without being relicensed.

165. Mandelbaum, *supra* note 120, at 927-28.

166. *See Zwas, supra* note 158, at 359 n.123.

167. *See, e.g., Wilder v. Bernstein*, No. 78 Civ. 957 (RJW), 1998 WL 355413, at *6 (S.D.N.Y. July 1, 1998) (citing a study that indicates a majority of children are placed in kinship foster homes without regard for their safety or without following state-mandated placement procedures).

168. *See Zwas, supra* note 158, at 361-62.

169. *See id.* at 363.

170. *See id.* at 360.

171. *See* Bruce Chapman, 'Kinship Care' the Latest Way to Game the Social Welfare System—And it is the Children Who Will Pay the Price, SEATTLE POST-INTELLIGENCER, Oct. 10, 1997, at A13.

the child's real situation but qualifies for subsidies."¹⁷² While the fact that foster care payments greatly exceed other types of welfare is disturbing, the proper target for the criticism is the policy of providing more money to a foster parent than a biological one. The funds are intended to pay for the *child's* living expenses, not to reward or punish the caregivers.

Another criticism of kinship foster care is that it fails to provide permanency for children because kinship foster care parents are less likely to adopt the child.¹⁷³ Many kinship caregivers believe adoption is not necessary.¹⁷⁴ Others "fear becoming embroiled in an adversarial process that pits parents against sons and daughters, siblings against sisters and brothers."¹⁷⁵ Although it is true that kinship foster children generally spend more time in state custody than traditional foster children,¹⁷⁶ this is only a legitimate criticism if children truly value their legal label.¹⁷⁷ One suspects, however, that a child living with a relative either temporarily, or permanently without ever being legally adopted, does not focus on his or her legal status.

E. Kinship Foster Care and Keeping Families Together

The foster care system seeks to preserve families that can remain intact.¹⁷⁸ This fundamental principle underlies kinship foster care and other community-based programs that support troubled parents.

172. *Id.* Chapman argues that "[s]ome kinship care . . . makes sense, but too often it means returning de facto control to parents whose custody was so dangerous as to have had them removed in the first place. Too often it provokes scams in which children can be passed around from relative to relative and the foster care payments enjoyed as a kind of super-welfare benefit—for the relatives." *Id.*

173. More kinship foster care parents are willing to consider adoption than previously assumed, but "significant proportions still are uncomfortable with [adoption]." *Child Welfare Revision: Testimony before the Subcomm. on Social Security and Family Policy of the Senate Comm. on Finance, 105th Cong., available in 1997 WL 10572021* (statement of Gary J. Stangler, Director of the Missouri Department of Social Services).

174. *See id.* "They feel that their relationship to the children already is permanently sealed by the virtue of their blood ties." *Id.*

175. *Id.*

176. *See Zwas, supra* note 158, at 364.

177. *See Goldhill, supra* note 10, at 302 (stating that "the permanent loss of ties to their family of origin may be far more significant than anything a legal label can offer.").

178. In discussing the ASFA, Senator Dewine noted that "we need to make sure that the families who are in trouble, but who can be saved, do get help, and that they get good help, and that they get it before it is too late." 143 CONG. REC. S12,670 (daily ed. Nov. 13, 1997).

As demonstrated by the story of Tammy Hawkins, kinship care encourages family preservation.¹⁷⁹ In her case, care of Hawkins' children by relatives allowed her to eventually regain custody. In May 1993, the state removed Hawkins' two children from her custody and placed them in a kinship care home with her sister.¹⁸⁰ In January 1997, after gaining employment, finding an affordable apartment, and enrolling her children in school, she regained custody of her children, almost four years after they entered the foster care system.¹⁸¹ A year later, Hawkins remains clean, off welfare, and works two jobs to support her children.¹⁸² Hawkins' children also express a desire for reunification with their mother.¹⁸³

A comparison of kinship care and traditional care shows the value of the former in many cases. Under the ASFA, Hawkins' parental rights would have been terminated by timeline termination, without a true "best interests of the child" inquiry. Under the AACWA, the children would likely have experienced the instability of multiple placements during their four years in foster care and might have lost contact with each other. In both scenarios, it is unlikely that the children would have visited their mother on a frequent basis. Because kinship foster care was available to these children, however, the children lived with relatives unseparated from each other until their mother was ready and able to resume care for them. Although kinship care will not be available or advisable for all children, federal foster care law should include a kinship foster care policy.

V. IMPLEMENTING A FEDERAL KINSHIP FOSTER CARE STANDARD: A PROPOSAL

The AACWA and its emphasis on reunification increased the state ward population, as many children spent their childhoods in the system. By swinging the pendulum from "reasonable efforts" reunification to timeline termination of parental rights, the ASFA has

179. Dale Russakoff, *Against the Odds, a Failed Mother Returns to Her Children*, WASH. POST, Jan. 20, 1998, at A1.

180. *See id.* In June 1995, after she was arrested for violating her parole, the social services department determined that reunification could no longer be the goal for her children and that long-term foster care with their aunt was the proper disposition.

181. *See id.*

182. *See id.*

183. Her sixteen-old-daughter greets her mother when she comes home from work with "I love you to infinity." When her children visited her new apartment for the first time, before she regained custody, it snowed, prompting her ten-year-old son to say, "I want to get snowed in and stay forever." *Id.*

the potential to create a population of engineered orphans whose ties to their biological parents are permanently severed without a guarantee of adoption.¹⁸⁴ In between these two extremes, there exists a more moderate approach: kinship foster care.

By encouraging family contact and support, kinship foster care may avoid some of the psychological harm that termination causes children. Because of some of the problems associated with it, however, Congress should wait until it receives sufficient information before including kinship foster care formally within federal foster care policy. After acquiring adequate information, Congress eventually should adopt a federal standard that includes a consideration of the following factors.

First and most importantly, Congress should mandate that the primary consideration in determining whether kinship foster care is appropriate in a given situation is a true "best interests of the child" analysis. The adjudicator should carefully balance factors relating to the child's safety, mental health, and emotional health in each individual case. These factors should include: the child's relationship with the potential kinship caregiver; the potential caregiver's relationship with the parent; the child's need to maintain family and cultural connections; the potential caregiver's attitude toward working with state social services; the extent and type of contact the parent will have with the child while he or she is in foster care; whether the potential caregiver is willing to provide care for the child's siblings; and whether the potential caregiver is willing to provide long-term care for the child if necessary.¹⁸⁵

Second, the federal standard should give the states guidance on implementing licensing criteria for kinship caregivers. Willing kinship foster parents should not be denied custody of a child, if the placement is found to be in the child's best interests, on the basis that they are unable to satisfy statutory requirements that do not relate directly to child safety. For example, states often have very specific requirements regarding the size and furnishings of a licensed foster care home.¹⁸⁶ These requirements can easily be substituted with a

184. This is worrisome because children who "age-out" of the system generally have difficulty in becoming successful adults. Only 17 percent become completely self-supporting. Only about half graduate high school and a little less than half gain employment. Almost 60 percent of girls who "age-out" have children within a few years. 143 CONG. REC. S12,211 (daily ed. Nov. 8, 1997) (statement of Sen. Grassley).

185. See MICKENS & BAKER, *supra* note 23, at 11-12.

186. See TAKAS, *supra* note 15, at 43.

less demanding standard for kinship care homes without risking child safety.¹⁸⁷

Although states should relax standards for kinship caregivers, states should not assume that kinship arrangements require less supervision than traditional foster care arrangements. Kinship care homes must receive the same attention and support as traditional foster care homes.

Third, the federal standard should define kinship caregivers broadly enough to include any adult with whom the child has an established relationship. No evidence suggests that the benefits of kinship care are tied to blood or marriage. A close family friend or godparent whom the child trusts would be equally able to provide stability for the child.

Finally, a federal kinship care policy should not be limited to foster care. Rather, "reasonable efforts" to prevent the placement of a child in foster care should include a kinship care plan. This policy would encourage parents, before removal is necessary, to ask friends and family members for advice and assistance in caring for their children.

These suggestions outline an anticipated federal standard for kinship care. Because state-structured kinship foster care is a relatively new policy, it will take further study to determine what other considerations are important in determining the advisability of kinship care. Until we know more, however, we can implement a standard that protects the child and supports the family by refocusing on the best interests of the child.

VI. CONCLUSION

This Note has argued that both the AACWA and the ASFA embody the extremes of the pendulum-swing between reunification and termination. Recognition of middle ground is the only way to stop the pendulum. Kinship care is a unique arrangement that can provide a more moderate approach to foster care.

187. *See id.*

Congress will likely incorporate kinship care into federal foster care law policy within the next few years. Skillfully crafted, this could provide stability for children and ensure that families that can be saved get the necessary help to remain whole, which would be in the best interests of the child, the parent, and the state.

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