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Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997

Robert M. Gordon†

Over little opposition, Congress last session enacted the first overhaul of federal child welfare law since 1980, the Adoption and Safe Families Act of 1997 (ASFA).¹ Lead sponsors in the Senate included conservative Republican Mike DeWine, moderate Republican John Chafee, and liberal Democrat Jay Rockefeller.² Both the conservative Heritage Foundation and the liberal Children's Defense Fund endorsed ASFA.³ The House approved the bill in its final form by a vote of 406 to 7.⁴ The Senate did not even call the roll.⁵

ASFA's supporters praised the law for putting "the safety and health of the child first."⁶ Signing it, President Clinton de-

† Law Clerk to The Honorable Pierre N. Leval, United States Court of Appeals, Second Circuit. This Article originated in a course on social insurance taught by Michael Graetz and Jerry Mashaw. On reading a draft, Professors Graetz and Mashaw were kind enough to give me helpful comments (and credit) even though the topic had little to do with the class. I also wish to thank Jill Duerr-Berrick, Peter Edelman, Abbe Gluck, Joseph Goldstein, Jennifer Klein, and Carol Williams for discussing various aspects of the child welfare system with me. Finally, I am grateful to Jean Koh Peters for enriching my understanding of the needs of children in foster care more than I can say. Arguments and errors are my responsibility.

1. Pub. L. No. 105-89, 111 Stat. 2115 (1997).

2. See 143 CONG. REC. S12,668 (daily ed. Nov. 13, 1997) (statement of Sen. Craig). In the House, the lead sponsors were Representatives Dave Camp (R-Mich.) and Barbara Kennelly (D-Conn.). See *id.* at S12,669 (daily ed. Nov. 13, 1997) (statement of Rep. DeWine).

3. See *id.* at H2022 (daily ed. April 30, 1997) (statement of Rep. Kennelly).

4. See *id.* at H10,776 (daily ed. Nov. 13, 1997).

5. See *id.* at S12,198 (daily ed. Nov. 8, 1997).

6. *Id.* at S12,526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee) (stating that the law "will put the safety and health of the child first" and reject "the current system of always putting the needs and rights of the biological parents first"); *id.* at S12,673 (statement of Sen. Craig) ("While the reforms in the bill respect the rights of others—such as birth parents, relatives,

clared that ASFA would "fundamentally . . . improve the well-being of hundreds of thousands of our most vulnerable children."⁷ A few newspaper columnists went further, heralding a children's "revolution"⁸ that would be "to the abused and neglected children in our nation's foster-care system what the Voting Rights Act was to black Americans in 1965."⁹

There is little question that America's abused and neglected children could use a revolution. "[M]ost people who know about the child welfare and child protective system in this country know that this system is in crisis."¹⁰ Children often spend years in care, bouncing from foster home to biological home and back, repeatedly suffering abuse, and finally drifting toward adulthood as orphans in fact if not in law.¹¹ The National Commission on Children concluded that "[i]f the nation had deliberately designed a system that would . . . abandon the children who depend on it, it could not have done a better job than the present child welfare system."¹²

Though most of ASFA's supporters did not promise revolution, they did pledge three important reforms. First, ASFA

foster families, and adoptive parents—it makes clear that the focus must always be on the child's health and safety"); see also H.R. REP. NO. 105-77, at 8 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2740 ("[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."); 143 CONG. REC. S3947 (daily ed. May 5, 1997) (statement of Sen. DeWine) ("[W]e have to start worrying about the children's rights and less about the rights of the natural parents."); *id.* at H2021 (daily ed. Apr. 30, 1997) (statement of Rep. Hoyer) ("Our child welfare system too often protects parents' rights rather than children's rights.").

7. Remarks on Signing the Adoption and Safe Families Act of 1997, 33 WEEKLY COMP. PRES. DOC. 1863, 1864 (Nov. 19, 1997).

8. R. Bruce Dold, *Giving Kids a Little More 'Wiggle Room'*, CHI. TRIB., Dec. 12, 1997, at 27.

9. Jeff Katz, *Finally the Law Puts These Kids' Interests First*, MILWAUKEE J. SENTINEL, Dec. 28, 1997, at 1.

10. *Improving the Well-Being of Abused and Neglected Children: Hearing Before the Senate Comm. on Labor & Human Resources*, 104th Cong. 9 (1996) [hereinafter *Improving the Well-Being of Abused and Neglected Children*] (testimony of Dr. Richard J. Gelles); see also 143 CONG. REC. S12,672 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley) (stating that the system is in "crisis"); *id.* at S9652 (daily ed. Sept. 18, 1997) (statement of Sen. Rockefeller) (same); Child Welfare Waiver Demonstrations, 60 Fed. Reg. 31,478, 31,478 (1995) (same); GENERAL ACCOUNTING OFFICE, CHILD PROTECTIVE SERVICES: COMPLEX NEEDS REQUIRE NEW STRATEGIES 2 (1997) (same).

11. See *infra* Parts I.A-B.

12. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 293 (1991).

would protect children's health and safety by ensuring that states do not make so-called "reasonable efforts" to return foster children to dangerous households.¹³ Second, the Act would reduce "foster care drift," enabling children to return to their homes or move to other permanent placements more quickly.¹⁴ Third, ASFA would increase the number of children moving from foster care to adoption.¹⁵ ASFA's advances toward these goals constituted a "historic change" in federal law.¹⁶

Because the child welfare system is so troubled, and because Congress's goals are generally good ones, it is sad that ASFA cannot begin to fulfill most of these promises. Specifically, though ASFA may stop inappropriate "reasonable efforts" to the extent they occur, it will not do much to reduce foster care drift or increase adoptions. This Article offers a detailed analysis of ASFA's shortcomings and a proposal for reform.

ASFA's incapacity to reduce drift or promote adoptions has two sources. For all their rhetorical commitment to child welfare, supporters of ASFA ultimately did not tailor key provisions of the law to children's interests. At critical junctures, ASFA either places adult interests first deliberately, or ignores children's needs carelessly. Parts of ASFA that could have induced states to move children toward permanent placement instead send an ambiguous message that may have few positive effects.

Beyond these errors in design, ASFA also reflects a broader failure of nerve: the failure to seek structural reform. The child welfare system is a federal-state partnership, and the state agencies that implement ASFA retain great discretion in that implementation. Yet state agencies have few in-

13. See 143 CONG. REC. S12,670 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine) (stating that ASFA would "save lives"); *id.* at S12,673 (statement of Sen. Craig) (same). For a definition and discussion of "reasonable efforts," see *infra* Parts I.A., II.A.

14. See 143 CONG. REC. H10,787 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly) ("This legislation we can all agree on is putting children on a fast track from foster care to safe and loving and permanent homes."); *id.* at H10,788 (statement of Rep. Camp) ("This bill will ensure that a permanent, loving home is within the reach of every child."); *id.* at S12,671 (statement of Sen. Rockefeller) (saying that the bill would "move children out of foster care and into adoptive and other permanent homes more quickly and more safely than ever before").

15. See *id.* at S12,670 (statement of Sen. DeWine) (stating that the bill will "increase adoptions"); *id.* at S12,673 (statement of Sen. Craig) (same).

16. *Id.* at S12,670 (statement of Sen. DeWine).

centives to improve their current practices under ASFA. Some of these incentives to retain the status quo are matters of institutional culture and competence that federal law can change only gradually. But one of the incentives to inaction, and one that discourages positive change, is largely a product of federal law: a nonsensical financial system that rewards states for leaving children in foster care. Because ASFA says one thing but the funding says another, the implementation of ASFA's flawed provisions is not likely to correct ASFA's flaws.

Although ASFA's effects will not be clear for years,¹⁷ a Congress committed to the law's goals will likely have to consider further reforms soon.¹⁸ To reduce foster care drift and increase adoptions, Congress must correct both of ASFA's failings, reforming substantive provisions and underlying incentives. The former task involves several seemingly technical but highly significant changes. The latter task requires a major shift in the flow of money from Washington.

It is possible, of course, that Congress will not return to the child welfare system in the near future. Maybe ASFA's flaws and silences are not oversights, but calculated reflections of a philosophy that does not "put children first" after all. Perhaps Congress is still more concerned about protecting biological ties between parents and children, whatever the impact on children's well-being. Or perhaps Congress simply refuses to use federal law to reform state bureaucratic practice. Parental rights and state sovereignty are honorable commitments with deep roots in American law; if they are Congress's commitments, then ASFA has not failed to achieve its real goals at all.

Without engaging the vast and vexed questions of how to balance state and federal power or parents' and children's rights, this Article takes Congress at its word, asking how federal law could best protect society's most vulnerable children.¹⁹

17. See *infra* notes 90-92 and accompanying text (discussing the limits of current data collection and analysis).

18. Members of Congress on the left and right acknowledged this during the debate over ASFA. See 143 CONG. REC. S12,673 (daily ed. Nov. 13, 1997) (statement of Sen. Grassley); *id.* at S5808 (daily ed. June 17, 1997) (statement of Sen. Wyden).

19. For the most part, I approach these issues in the spirit of Joseph Goldstein and his coauthors in their seminal work. They state as a premise their belief that the interests of children are paramount, but they do not mount a theoretical defense of that position. See JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 7, 81-82, 250 n.14 (1996). The preference for children's interests is widely

Part I places ASFA in context by describing the child welfare system prior to 1997, then analyzing the new law's aims, requirements, and theoretical rationale. Parts II and III argue that ASFA will not achieve two of its stated ends: reducing drift and increasing adoptions. Part II focuses on the failure of ASFA's substantive provisions consistently to put children's interests first, while Part III describes the incentives at the state level, including federal financial incentives, to maintain the status quo. Part IV offers a battery of reform proposals that might better align the everyday demands of federal law with its ideals.

I. CHILDREN FIRST: THE PROMISE OF ASFA

It may be helpful to begin by identifying the "child welfare services" affected by ASFA. Designed to prevent or address the consequences of child maltreatment, such services include investigations of alleged abuse, removals of children from homes, placements in substitute care, services to prevent abuse or bring about reunification, and efforts to find alternative permanent placements such as adoptions.²⁰ Child welfare services are by their nature residual, serving only those children suffering or at great risk of suffering the gravest mistreatment, rather than the whole population of families in which children experience serious deprivation.²¹

shared in American society. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 CHI. L. REV. 1, 5 (1987); Robert Pear, *Greasy Kid Stuff: Washington Kidnaps Dick and Jane*, N.Y. TIMES, June 15, 1997, § 4 (Week in Review), at 1. Defending that preference is a philosophical project beyond the scope of this Article, although Part V *infra* does offer a brief analysis of ASFA from the perspective of parents.

20. See STAFF OF HOUSE COMM. ON WAYS & MEANS, 104TH CONG., 1996 GREEN BOOK 692 (Comm. Print 1996) [hereinafter 1996 GREEN BOOK]; ROB GEEN & SHELLEY WATERS, *THE IMPACT OF WELFARE REFORM ON CHILD WELFARE FINANCING 1* (1997).

21. Many scholars argue that the residual approach is doomed to fail absent vast new investments in anti-poverty programs. See MARK E. COURTNEY, *THE FOSTER CARE CRISIS* 16 (1994); DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 4-5 (1994); LEROY H. PELTON, *FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES* (1989). Whether or not this is correct, vast new investments in fighting poverty are not now forthcoming. See Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (cutting \$55 billion over 6 years from federal spending on the poor). As long as the choice is between better and worse residual approaches, and especially as long as the inferior approaches are so poor, the perfect should not become the enemy of the barely adequate.

ASFA primarily affects the child welfare services designed to prevent children from entering state care, to protect them while in care, and to move them out of care. Congress comprehensively addressed these matters for the first time with the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act).²² ASFA has little impact on investigations of abuse and neglect, which are addressed federally by a law that ASFA does not amend.²³ The following discussion first describes the framework established by the Child Welfare Act and its amendments, then details the goals, policies, and rationale of ASFA.

A. BACKGROUND

Federal intervention in state child welfare policy prior to 1980 was surprisingly sparse.²⁴ Well into the twentieth century, states, localities, and private organizations shared responsibility for funding and directing the child welfare system.²⁵ Congress became financially involved through the Social Security Act of 1935, which funded some social work for destitute families.²⁶ Later amendments of the Social Security Act in the 1960s and 1970s added federal support for payments to families of children in foster care²⁷ and for additional social services.²⁸ Even as federal funding increased, however, states

22. Pub. L. No. 96-272, 94 Stat. 500 (1980) (amending sections 420-27 and 471-79(a) of the Social Security Act) (codified as amended in scattered sections of 42 U.S.C.).

23. See Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-07 (1994).

24. See LEROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT AND ABUSE IN AMERICAN HISTORY* 101-24 (1997); LELA B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* 82, 97-99 (1996).

25. See ASHBY, *supra* note 24, at 117; COSTIN ET AL., *supra* note 24, at 108.

26. See Social Security Act § 521, Pub. L. No. 74-271, 49 Stat. 620, 633 (1935); COSTIN ET AL., *supra* note 24, at 108.

27. See Social Security Act Amendments, Pub. L. No. 87-31, §§ 2-7, 75 Stat. 75, 76-78 (1961); COSTIN ET AL., *supra* note 24, at 110.

28. See 1996 GREEN BOOK, *supra* note 20, at 688-89. These funds were eventually consolidated in Title XX of the Social Security Act, which became the Social Services Block Grant in 1981. See *id.* at 679; Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 357, 511-19 (1981). Because Title XX is a fairly unrestricted block grant whose uses states need not report, limited information is available about the proportion of funds spent on child welfare. See 1996 GREEN BOOK, *supra* note 20, at 684. According to a 1990 federal survey, however, approximately 29% of program funds are used for protective services for children, preventive services for children and their

retained tremendous discretion over child welfare policy through the 1970s.²⁹

The controls on federal funding imposed by the Child Welfare Act of 1980 attempted to address the burgeoning problem of "foster care drift."³⁰ Congress had learned that record numbers of children—more than 500,000—were in foster or other state care.³¹ Many of these children lacked any prospect of going to a permanent home any time soon, and were instead "drifting" among multiple foster homes for long periods of time.³² In order to reduce both the number and the length of foster care stays, the Child Welfare Act sought to "(1) keep families together whenever possible by providing them with the services and supports they need, and (2) find permanent adoptive homes for children who could not be reunited with their parents."³³

families, or substitute care and placement services for children. *See id.* at 686. In addition, 15 to 25% of funds were used for homemaker services or counseling, both of which may be geared in large part to the at-risk populations served by child welfare programs. *See id.*

29. *See* H.R. REP. NO. 96-136, at 20-36 (1979), reprinted in 1980 U.S.C.C.A.N. 1448, 1469-85; MaryLee Allen et al., *A Guide to the Adoption Assistance and Child Welfare Act of 1980*, in FOSTER CHILDREN IN THE COURTS 575, 576-77 (Mark Hardin ed., 1983).

30. *See* David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 158-59 (1992); Edith Fein & Anthony N. Maluccio, *Permanency Planning: Another Remedy in Jeopardy*, 66 SOC. SERV. REV. 335, 337 (1992).

31. *See* S. REP. NO. 96-336, at 10, 11 (1980), reprinted in 1980 U.S.C.C.A.N. 1459, 1460. The 500,000 figure included all children in substitute care, including institutions and emergency shelters. *See id.*; ASHBY, *supra* note 24, at 216 n.40. Like other numbers in the field, this figure should be viewed with considerable caution. *See infra* note 91.

32. *See* S. REP. NO. 96-336, at 10, 11 (1980), reprinted in 1980 U.S.C.C.A.N. 1459, 1460 (citing study showing that two-and-one-half years was the median length of time all children in foster care had spent in care); COSTIN ET AL., *supra* note 24, at 122-23 (citing studies from late 1970s and early 1980s showing that 70% of children in foster care had been there for longer than a year, that 34% had been there for four years or more, and that 53% had had multiple placements).

33. Walter F. Mondale, *Foreword* to THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT OF 1980: THE FIRST TEN YEARS 3-4 (N. Am. Council on Adoptable Children ed., 1990) [hereinafter THE FIRST TEN YEARS]; *see also* S. REP. NO. 96-336, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 1459, 1459 (agreeing with the view that the law should "move children out of foster care and into more permanent arrangements by reuniting them with their own families when this is feasible, or by placing them in adoptive homes").

To reduce foster care drift, the Child Welfare Act required states receiving federal child welfare funds to take several steps. Before receiving reimbursements for foster care maintenance payments, states had to make "reasonable efforts . . . to prevent or eliminate the need for removal of the child from his home, and . . . to make it possible for the child to return to his home."³⁴ These provisions sought to ensure that foster care was a "last resort."³⁵ In addition, states had to maintain individualized "case plans" for all children in their care to assure appropriate placement and services.³⁶ Finally, states had to set up a "case review system" that among other things guaranteed court or administrative reviews at least every six months, and required a judicial "dispositional hearing" no more than eighteen months after entry into care.³⁷ Congress envisioned that the dispositional hearing would generally produce a final decision about the permanent placement for the child³⁸—reunification, adoption, or some form of guardianship—and that foster care would therefore cease to be a "long-term holding situation" for most children.³⁹

For states that complied with these requirements, the Child Welfare Act offered more money for efforts to reduce stays in foster care. Supporters of the Act secured a large increase in appropriations for the Child Welfare Services program under Title IV-B of the Social Security Act.⁴⁰ Because states were then spending most of their Title IV-B money on foster care,⁴¹ the law required that new funds be spent on preventive services.⁴² In addition, the Act established a new adop-

34. See Child Welfare Act § 101, 42 U.S.C. §§ 671(a)(15), 672(a)(1) (1994). The "reasonable efforts" requirement applies only to children whose foster care payments are federally reimbursed, i.e., children who would have been eligible for Aid to Families with Dependent Children. See *id.* § 622.

35. 126 CONG. REC. S6942 (daily ed. June 13, 1980) (statement of Sen. Cranston).

36. See 42 U.S.C. § 675(1).

37. See *id.* §§ 671(a)(16), 675(1).

38. See H.R. REP. NO. 96-136, at 50 (1979), reprinted in 1980 U.S.C.C.A.N. 1460, 1467.

39. See *id.*

40. Compare *id.* (noting that as of 1980, appropriation for Title IV-B had never exceeded \$56.5 million and calling for increased funding) with STAFF OF HOUSE COMM. ON WAYS & MEANS, 101ST CONG., 1993 GREEN BOOK 886 (Comm. Print 1993) (showing that appropriation for Title IV-B was \$163.5 million in 1981).

41. See H.R. REP. NO. 96-136, at 11 (1979).

42. See Child Welfare Act § 103, 42 U.S.C. § 622 (1994).

tion assistance entitlement, reimbursing states for payments to adoptive parents of children eligible for Aid to Families with Dependent Children (AFDC) who have "special needs" that make adoption difficult.⁴³ The Act combined this new program with the existing entitlement reimbursing payments to the foster families of AFDC-eligible children.⁴⁴ Congress expected that the adoption assistance and child welfare services programs together would provide an impetus to reduce drift.

Within a decade, the foster care population had again exploded,⁴⁵ and spending on services to stop such placements had not begun to keep pace with the growth in caseloads.⁴⁶ At the same time, a new "family preservation" model—brief, intensive, and individualized social work—had become immensely popular politically, promising to serve families and save money at the same time.⁴⁷ In 1993, with the beginning of the new Clinton Administration, this combination of rising caseloads and a new services model came together in the one major change in the framework of the Child Welfare Act prior to 1997:⁴⁸ the new Family Preservation and Support Program within Title IV-B.⁴⁹ The program provided matching funds for states to develop these family preservation programs as well as broader and less-targeted "family support" services, including

43. See *id.* § 101, 42 U.S.C. §§ 673-74.

44. See *id.* § 674(a)(3).

45. See Toshio Tatara, *The Recent Rise in the U.S. Child Substitute Care Population: An Analysis of National Child Substitute Care Flow Data*, in 1 CHILD WELFARE RES. REV. 126, 130 tbl.6.1 (Richard P. Barth et al. eds., 1994) (showing that the foster care population increased from 273,000 at the beginning of fiscal year 1986 to 429,000 at the end of fiscal year 1991).

46. See COURTNEY, *supra* note 21, at 8 (noting that in real terms, federal foster care spending grew by more than 400% between 1981 and 1993, while Title IV-B services spending grew by only 14% and funds available under the Title XX Social Services Block Grant declined); see also GENERAL ACCOUNTING OFFICE, CHILD WELFARE: STATES' PROGRESS IN IMPLEMENTING FAMILY PRESERVATION AND SUPPORT SERVICES 3 (1997) ("By the early 1990s, over half the [child services] programs we surveyed reported that they were not able to serve all families who needed services primarily due to the lack of funds and staff.").

47. See COSTIN ET AL., *supra* note 24, at 119-22, 126-29; Paul Adams, *Marketing Social Change: The Case of Family Preservation*, 16 CHILD. & YOUTH SERVS. REV. 417, 423-37 (1994).

48. Minor modifications of the federal legislative structure include the Social Security Act Amendments, Pub. L. No. 103-432, §§ 201-10, 108 Stat. 4398, 4453-60 (1994), and the Omnibus Budget Reconciliation Act, Pub. L. No. 101-508, § 5052, 104 Stat. 1388, 1388 (1990).

49. See Omnibus Budget Reconciliation Act § 13711, 42 U.S.C. §§ 629-29(e) (1994).

health, education, and child care programs.⁵⁰ The Family Preservation and Support Program thus attempted to renew the emphasis of the 1980 Congress on preventive services.

B. AIMS

Four years after the passage of the family preservation and support legislation, Congress and the Clinton Administration again moved to alter federal child welfare law.⁵¹ They expressed three broad concerns. First, "reasonable efforts" had become "unreasonable efforts."⁵² Congress was told that without regulations clarifying the concept,⁵³ states believed they could not remove a child from her home without first offering her family services, even if that delay endangered the child's

50. *See id.*

51. Both the Clinton Administration and the President were involved in the development of ASFA. In late 1996, the President announced his goal of doubling the number of adoptions from foster care by 2002 and assuring for every child a "strong and stable home." President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 2512, 2512 (Dec. 14, 1996). At his direction, the U.S. Department of Health and Human Services issued a report recommending many of the measures later incorporated in ASFA. *See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION 2002: A RESPONSE TO THE PRESIDENTIAL EXECUTIVE MEMORANDUM ON ADOPTION ISSUED DECEMBER 14, 1996, at 1 (1997) [hereinafter ADOPTION 2002].*

For their parts, the House and Senate held several hearings on aspects of the child welfare system between 1995 and 1997. *See, e.g., Adoption and Support of Abused Children: Hearing Before the Senate Comm. on Fin., 105th Cong. (1997) [hereinafter Adoption and Support of Abused Children]; Child Welfare Revision: Hearing Before the Subcomm. on Soc. Sec. and Family Policy of the Senate Fin. Comm., 104th Cong. 43-44, 47-49, 68-74, 82-91 (1997) [hereinafter Child Welfare Revision]; Barriers to Adoption: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways & Means, 104th Cong. 2-64 (1996) [hereinafter Barriers to Adoption]; Improving the Well-Being of Abused and Neglected Children, supra note 10; Federal Adoption Policy: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways & Means, 104th Cong. 1-3 (1995) [hereinafter Federal Adoption Policy]; Streamlining Child Welfare Programs: Hearing Before the Subcomm. on Oversight of the House Comm. on Ways & Means, 104th Cong. 2-96 (1995).*

52. 143 CONG. REC. S12,669 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine); *see also id.* at H10,788 (statement of Rep. Kennelly) (charging that reasonable efforts had become "every effort, [effectively] putting a child at risk").

53. *See Improving the Well-Being of Abused and Neglected Children, supra note 10, at 10* (statement of the Child Welfare League of America) ("A great deal of confusion and lack of clarity have occurred because the U.S. Department of Health and Human Services has never issued formal regulations and guidance."); ADOPTION 2002, supra note 51, at 20 ("The Federal 'reasonable efforts' [requirement] has been . . . criticized for being unclear and a barrier to child safety and permanence.").

life.⁵⁴ Experts, activists, and journalists told horror stories of state agencies that had sent children home to parents who had savagely beaten,⁵⁵ prostituted,⁵⁶ or tried to kill⁵⁷ them or their siblings. In publicized cases like that of Eliza Izquierdo in New York City, parents murdered children whom state agencies had known were subject to abuse.⁵⁸ Some commentators treated these cases as indicia of the larger failure of family preservation programs to achieve measurable results.⁵⁹ The more common view was that family preservation could still be useful in some circumstances, but not when parents had crossed a line that made them dangerous to their children.⁶⁰

54. See *Barriers to Adoption*, *supra* note 51, at 32 (statement of Connie Binsfield, Lieutenant Governor of Michigan) ("Children are entering foster care more damaged because they are left in their abusive homes while workers attempt to prove the unprovable to the federal government—that the undefined, nebulous 'reasonable efforts' have been made to prevent the removal of the children from their home[s]."); *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 11-12 (statement of Dr. Richard Gelles) (describing professionals who believed they could not remove a child from an abusive home "because we had to make reasonable efforts to reunify [him] with his [abusive] mother"); see also Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223, 225 (1990).

55. See *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 11 (statement of Dr. Richard Gelles) (describing the case of "David," a slightly fictionalized boy whom the state left with a mother who killed him after having broken his sister's skull, ribs, arms, and legs).

56. See Douglas J. Besharov, *When Home Is Hell: We Are Too Reluctant to Take Children From Bad Parents*, WASH. POST, Dec. 1, 1996, at C1 (describing a caseworker's efforts to return a child to a parent who "had repeatedly beaten [her children] so badly that they had been hospitalized a number of times for their injuries").

57. See Mary McGrory, *Adopt a Sense of Outrage*, WASH. POST, May 12, 1996, at C1 (describing the District of Columbia's efforts to reunite a girl with the mother who had tried to smother her to death with a pillow).

58. See Rita Kramer, *In Foster Care, Children Come Last*, CITY J., Autumn 1994, at 63 (noting that in New York City in 1992, 21 children were killed by a parent or mother's boyfriend after the child welfare agency had intervened). Two authorities stated that among children who died in circumstances suggestive of abuse, "about half . . . died after the family was reported to a child protective agency." Besharov, *supra* note 56; see also *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 10 (statement of Dr. Richard Gelles) (same statistic).

59. See, e.g., RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* 115-43 (1996) (chapter-length indictment of family preservation). Gelles assisted Republican leaders in drafting ASFA. See McGrory, *supra* note 57, at C1.

60. See, e.g., PATRICK T. MURPHY, *WASTED: THE PLIGHT OF AMERICA'S UNWANTED CHILDREN* 73 (1997) ("The child welfare system has failed children because it refuses to distinguish between parents who are ill-equipped to raise

A second major concern was foster care drift. Caseloads had risen further since 1993, reaching a record of 502,000 in 1996.⁶¹ The median stay in foster care had also grown from fifteen months in 1987 to more than two years in 1994.⁶² Children in long-term foster care were still moving from one home to another: in 1990, most foster children experienced multiple placements,⁶³ and according to a California study, "[forty-six percent] of infants living in nonkinship care will have four or more homes in six years."⁶⁴ Foster care drift appeared to be as much of a problem as it had been in 1980.

While learning about the special contributions of the crack epidemic and concentrated urban poverty to rising foster care caseloads,⁶⁵ Congress also blamed that increase on two other

their children adequately without help, and parents who are too immature or thuggish to raise children even with help."); *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 5 (prepared statement of Olivia A. Golden, Acting Assistant Secretary for Children and Families, Department of Health and Human Services) ("[Reunification] services are clearly not appropriate when children cannot be safe in their own homes."); *id.* at 26 (statement of Peter Digre, Director of Los Angeles Department of Child and Youth Services) (identifying circumstances in which "it is futile and unreasonable to endanger children [by making] efforts to preserve or reunify their families"); Besharov, *supra* note 56 (calling on the public to accept that "many severely abused and neglected children need a permanent place to live away from their parents").

61. See Dale Rusakoff, *One Child's Chaotic Bounce in Mother Government's Lap*, WASH. POST, Jan. 18, 1998, at A1. But see *infra* note 92 (discussing limitations of such data).

62. See Dale Rusakoff, *1997 Law Redefines Child-Protection Policies in Place Since 1980*, WASH. POST, Jan. 18, 1998, at A23.

63. See 1996 GREEN BOOK, *supra* note 20, at 751 (showing that the share of foster children experiencing multiple placements had risen from 43% in 1982 to 57% in 1990).

64. See Richard P. Barth & Barbara Needell, *Using Performance Indicators with Child Welfare Policy Makers and Managers 7* (1997) (unpublished manuscript, on file with the *Minnesota Law Review*). For citation in Congress of different but equally disturbing data, see *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 54 (prepared statement of Peter Digre) ("[Eighty-three percent] of toddlers (ages 1-2 years) entering non-relative foster care had a change in foster parents within six years, and 62% had three or more foster homes Almost one out of three had five or more foster homes.").

65. See *Impact of Substance Abuse on Families Receiving Welfare: Hearing Before the Subcomm. on Human Resources of the House Ways & Means Comm.*, 105th Cong. 1-3 (1997) [hereinafter *Substance Abuse in Welfare Families*] (testimony of Richard P. Barth); *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 44 (testimony of the Child Welfare League of America); see also Mark F. Testa, *Conditions for Risk for Substitute Care*, 14 CHILD. & YOUTH SERVS. REV. 27, 35 (1992) (identifying five "risk fac-

factors. First, notwithstanding the mandatory processes under the Child Welfare Act, the child welfare system continued to move at a "glacial pace."⁶⁶ Second, the same reunification-at-all-costs mentality reflected in the prevailing interpretation of "reasonable efforts" was also contributing to drift.⁶⁷ States were leaving children in foster care for years while attempting to rehabilitate chronically abusive parents,⁶⁸ or sending children back into dangerous homes to be reabused and then placed with different foster families.⁶⁹ Drift was thus partly a policy failure.

Congress's third aim was to increase adoptions of foster children unable to return to their parents. Much as family preservation had united liberals and conservatives in the late 1970s, so adoption now enjoyed fervent bipartisan support. With the President's help, Republicans had already pushed through Congress an adoption tax credit and a tightening of the Multi-Ethnic Placement Act, banning delays in the adoption process that result from race-based matching of parents and children.⁷⁰ President Clinton had also announced a national goal of doubling the number of children adopted from foster care to 54,000 by the year 2002.⁷¹ Yet both sides agreed they could do more. Although new data showed an increase in

tors" for caseload growth: single and teen parenting, child poverty, child abuse, substance abuse, and AIDS).

66. See *Adoption and Support of Abused Children*, *supra* note 51 (testimony of Rep. Camp); see also ADOPTION 2002, *supra* note 51, at 5-6 (noting the harmful impact of delays throughout the child welfare system on permanency planning).

67. See 143 CONG. REC. S12,673 (daily ed. Nov. 13, 1997) (statement of Sen. Craig) (criticizing "the culture of foster care" in the system for causing foster care drift).

68. See ADOPTION 2002, *supra* note 51, at 5; GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATE EFFORTS TO IMPROVE THE PERMANENCY PLANNING PROCESS SHOW SOME PROMISE 15 (1997).

69. See 143 CONG. REC. H10,788 (daily ed. Nov. 13, 1997) (statement of Rep. Kennelly); *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 53-54 (testimony of Peter Digre, Dir., Los Angeles Dep't of Child and Youth Servs.); *Promoting Adoption: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. (Apr. 6, 1997) [hereinafter *Promoting Adoption*] (testimony of MaryLee Allen, Children's Defense Fund).

70. See Small Business Job Protection Act, Pub. L. No. 104-88, §§ 1807-08, 110 Stat. 1755 (1996).

71. See President's Radio Address, 32 WEEKLY COMP. PRES. DOC. 2512 (Dec. 14, 1996); ADOPTION 2002, *supra* note 51, at 2.

the number of public sector adoptions,⁷² such adoptions had not kept pace with the dramatic growth in the foster care population over the last decade.⁷³ Congress hoped to reduce foster care drift largely by increasing adoptions.

C. POLICIES

ASFA addresses the three major concerns of Congress and the Administration with a series of interlocking measures. First, to protect child safety, the Act clarifies the "reasonable efforts" requirement in three notable ways. In making reasonable efforts, the law states that "the child's health and safety shall be the paramount concern."⁷⁴ States are not required to make reasonable efforts where a court determines that the parent has committed specified violent crimes against any child of hers.⁷⁵ And reasonable efforts also are not required if a court determines that the parent has subjected a particular child to certain "aggravating circumstances" defined by state law.⁷⁶ Together, these provisions aim to prevent the dangerous reunification efforts that Congress perceived were occurring.

Second, ASFA contains three sets of provisions specifically designed to reduce foster care drift.⁷⁷ If a court determines that "reasonable efforts" to reunify the family are not required, the state must hold a "permanency hearing"—the rechristened "dispositional hearing" under prior law—within 30 days and make "reasonable efforts" to find another permanent placement for the child.⁷⁸ The Act also speeds up and modifies permanency hearings. Permanency hearings must now be held every twelve months; can no longer produce temporary foster

72. See Richard Willing, *Foster Care Adoptions Up Sharply*, USA TODAY, Oct. 8, 1997, at 1A.

73. In 1984, there were 276,000 children in foster care and 20,000 adoptions. See 1996 GREEN BOOK, *supra* note 20, at 754 tbl.12-28. In 1996, there were 502,000 in foster care, see Rusakoff, *supra* note 61, at A1, and 27,000 adoptions, see ADOPTION 2002, *supra* note 51, at 1.

74. 42 U.S.C. § 671(a)(15)(A) (1994).

75. See *id.* § 671(a)(15)(D). These crimes are murder, voluntary manslaughter, attempted murder or manslaughter, or felony assault resulting in serious bodily harm. See *id.*

76. *Id.* While leaving definition of these circumstances to states, ASFA provides "abandonment, torture, chronic abuse, and sexual abuse" as examples. *Id.*

77. See H.R. REP. NO. 105-77, at 13 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2745-46; ADOPTION 2002, *supra* note 51, at 18.

78. 42 U.S.C. § 671(a)(15)(E).

care as a formal disposition; and can now only result in long-term foster care based on a "compelling reason," not "special needs or circumstances."⁷⁹ To reduce delays in placements following unexpected shifts in parental conduct, ASFA formally endorses the practice of "concurrent planning," or efforts to find an alternative placement while also attempting reunification prior to the permanency hearing.⁸⁰ As a result of these reforms, Congress expected that "final permanency decisions" would be made at permanency hearings.⁸¹

ASFA's third measure to reduce foster care drift is its most striking. The Act mandates that after a child has spent fifteen of twenty-two months in foster care, the state must file a termination of parental rights petition unless one of three exceptions applies: (1) the child is in the care of a relative; (2) there is a "compelling reason" to maintain parental rights based on the interests of the child; or (3) the state has failed to provide mandatory "reasonable efforts."⁸² Members of Congress hoped that this provision would create a "clear expectation . . . that the biological parents have a fixed period of time to improve."⁸³

Finally, ASFA promotes adoption in several ways. Each state must document efforts to search for an adoptive parent through adoption exchanges whenever the permanency plan is not reunification.⁸⁴ When a mandatory termination of parental rights is instituted after fifteen months in foster care, the state must seek "to identify, recruit, process, and approve a qualified family for an adoption."⁸⁵ States can no longer allow interjurisdictional barriers to delay adoptions.⁸⁶ And in the one modification to funding flows under the new Act, ASFA creates an incentive program designed to increase adoptions of foster children. Under the program, states receive an additional \$4,000 per child for the increase in the number of foster children adopted per year over the average number prior to the

79. *Id.* § 675(5)(C).

80. *Id.* § 671(a)(15)(F).

81. See H.R. REP. NO. 105-77, at 13.

82. See 42 U.S.C. § 675(5)(E). Besides the 15-month rule, ASFA also requires termination, subject to the exceptions, if the child is an abandoned infant or the parent has committed the same violent crimes that justify denial of reasonable efforts. See *id.*; *supra* note 75.

83. *Adoption and Support of Abused Children*, *supra* note 51 (statement of Rep. Camp).

84. See 42 U.S.C. § 675(1)(E).

85. *Id.* § 675(5)(E).

86. See *id.* §§ 622(b), 674(e).

passage of the Act, and an additional \$6,000 per additional foster child with special needs.⁸⁷ Congress authorized \$100 million over five years for the program, or enough for incentive payments for between 16,500 and 25,000 children over five years.⁸⁸

D. RATIONALE

Although the sponsors of ASFA claimed that these provisions would benefit children, they did not state in any detail the support for this proposition. It is not difficult, however, to uncover the principled case for ASFA. The argument draws on the immensely influential *Best Interests of the Child* trilogy by Joseph Goldstein, Anna Freud, Albert Solnit, and Sonja Goldstein.⁸⁹ The *Best Interests* framework has been harshly criticized for its lack of empirical support, among other things.⁹⁰ This criticism is perhaps unfair in a field where all contributors must cope with a scarcity of careful outcome-oriented studies,⁹¹ and a total absence of good aggregate data.⁹² As the

87. See *id.* §§ 673b(d)(1)(A)-(B).

88. See *id.*

89. JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986); JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973). Recently, the trilogy reappeared in one revised, updated volume. See GOLDSTEIN ET AL., *supra* note 19. For a discussion and critique of these works' great influence, see generally Peggy C. Davis, *There Is A Book Out . . . : An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539 (1987).

90. See, e.g., Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1762 (1987).

91. See RICHARD P. BARTH ET AL., *FROM CHILD ABUSE TO PERMANENCY PLANNING: CHILD WELFARE SERVICES PATHWAYS AND PLACEMENTS 9-11, 13-14* (1994). The most widely cited studies of child welfare come largely from two sources: the Child Welfare Research Center at the University of California at Berkeley and the Chapin Hall Center for Children at the University of Chicago. See, e.g., BARTH ET AL., *supra*; ROBERT M. GOERGE ET AL., *A REPORT FROM THE MULTISTATE FOSTER CARE DATA ARCHIVE 1983-1992* (1994). Researchers and advocates involved with both child welfare policy and welfare policy caution that they know much less about the former than the latter. Interview with Jill Duerr Berrick, Director, Child Welfare Research Center, School of Social Welfare, University of California at Berkeley (Apr. 27, 1998). Based on these limitations and the conflicts among certain studies, some have concluded that the data offer no meaningful guidance for policy. See James Donald Moorehead, *Of Family Values and Child Welfare: What Is in the "Best" Interests of the Child?*, 79 MARQ. L. REV. 517 (1996). But the researchers themselves believe that cautious conclusions can be drawn with help from the data. See, e.g., BARTH ET AL., *supra*, at 255-74; Fred H. Wulczyn & Robert M. Goerge, *Foster Care in New York and Illinois: The Challenge of Rapid*

following discussion attempts to show, these authors' work is nonetheless compelling in view of what is now known. With modifications, it represents the sensible foundation on which ASFA attempts to build.

The "reasonable efforts" requirement, which ASFA modifies but retains, serves children by minimizing the likelihood that they will suffer harmful separation from their parents. At a theoretical level, Goldstein and his co-authors forcefully argued that disrupting the parent-child relationship seriously hurts children of all ages, causing psychological difficulties, antisocial behavior, and low achievement.⁹³ These claims about the harms of separation from parents gathered support from other theoretical perspectives⁹⁴ and empirical work.⁹⁵ Some more recent studies have suggested that foster children fare better over short periods than similarly situated children left in their homes.⁹⁶ But these studies have generally not considered the likelihood that once in foster care, a child will remain

Change, 66 SOC. SERV. REV. 278, 291-93 (1992). In any event, as the need for child welfare policy will remain whether or not the data are decisive, the policymaker finally must choose between taking some cues from the research and relying on supposition and anecdote alone.

92. States now report aggregate data on child "abuse" and "neglect," but comparative use of these data is limited by the fact that different states define these terms very differently. See DEP'T OF HEALTH AND HUMAN SERVS., NAT'L CTR. ON CHILD ABUSE AND NEGLECT, CHILD MALTREATMENT 1995: REPORTS FROM THE STATES TO THE NAT'L CHILD ABUSE AND NEGLECT DATA SYSTEM 2-1 (1997). In theory, aggregate-level data for foster care caseloads by state are also now available, but many states do not contribute data, and those that do again report very different things. See, e.g., Dep't of Health and Human Servs., *Current Placement Setting of Children Entering Foster Care* 1-3 (visited Apr. 2, 1998) <<http://www.acf.dhhs.gov/programs/stats/afcars/cpsed96b.html>> (showing latest data on foster care placements for children in only 22 states, and describing data anomalies in 11 of those states).

93. See GOLDSTEIN ET AL., *supra* note 19, at 19-20.

94. See, e.g., JOHN BOWLBY, ATTACHMENT AND LOSS (1969) (describing harms of separation from perspective of attachment theory); Robert M. Gerge, *The Reunification Process in Substitute Care*, 64 SOC. SERV. REV. 422, 424 (1990) (describing theoretical bases for opposing separation).

95. See, e.g., Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 669-72 (1976) (and sources cited therein).

96. See, e.g., MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 185 (1988) (finding that children in foster care fared slightly better than children left at home in controlled study over two-year period); Garrison, *supra* note 90, at 1777-87 (discussing other studies and concluding that foster care benefits many children).

there for a long time and experience multiple placements,⁹⁷ which in turn cause grave harms.⁹⁸ Moreover, there is considerable evidence that children in foster care often face harsh conditions while in care⁹⁹ and dismal futures in their adult lives.¹⁰⁰ To the extent that a reasonable efforts policy minimizes the likelihood that children will experience these harms, it is justified for the sake of children.¹⁰¹

Though the reasonable efforts requirement in the Child Welfare Act served children's need for permanency, this need is not paramount at all times, and ASFA recognizes this fact. It is common sense that physical well-being is as much a prerequisite to child development as psychological well-being.¹⁰² Indeed, Goldstein and his co-authors argued that the two are deeply intertwined: an abusive parent assaults psychological as well as physical health, ultimately destroying the child's

97. See Douglas J. Besharov, *The Misuse of Foster Care: When the Desire to Help Children Outruns the Ability to Improve Parental Functioning*, in PROTECTING CHILDREN FROM ABUSE AND NEGLECT: POLICY AND PRACTICE 185, 192 (Douglas J. Besharov ed., 1988) ("Research shows positive results in foster care because, for many children, foster care is an extremely beneficial experience. But for a large subset (generally children who cannot be quickly returned home or freed for adoption), foster care is very harmful."); see also WALD ET AL., *supra* note 96, at 185-90 (1988) (finding that children in foster care fared relatively well, but only over two-year period of stable placement). For data on the likelihood of long-term placement, see *supra* notes 61-62 and accompanying text.

98. See *infra* notes 105-12 and accompanying text.

99. See Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 208-12 (1988); Rachel L. Swarns, *Judge Approves City's Foster Care Efforts*, N.Y. TIMES, May 12, 1998, at B3 (describing how city "bed shortage" left 2,000 foster children sleeping in municipal offices).

100. See, e.g., JENNIFER TOTH, ORPHANS OF THE LIVING: STORIES OF AMERICA'S CHILDREN IN FOSTER CARE 17 (1997) (stating that up to 30 or 40% of the shelter population in major American cities has passed through foster care); Richard P. Barth & Marianne Berry, *Implications of Research on the Welfare of Children Under Permanency Planning*, in 1 CHILD WELFARE RES. REV. 323, 345-46 (Richard P. Barth et al. eds., 1994) (showing that among children leaving foster care between 1980 and 1988, almost one-third had periods of homelessness or weekly movement among homes, and one-third used drugs or had four alcoholic drinks each day); Fred Bayles & Sharon Cohen, *Chaos Often the Only Parent for Abused and Neglected Children*, L.A. TIMES, Apr. 30, 1995, at 1 (stating that 75% of youths in Connecticut's criminal justice system were once in foster care).

101. In addition, reasonable efforts may also gather support from a variety of perspectives besides the child's welfare, including family autonomy, parental rights, social diversity, and distrust of state power. See WALD ET AL., *supra* note 96, at 190.

102. See GOLDSTEIN ET AL., *supra* note 19, at 5.

ability to feel safe, wanted, and loved.¹⁰³ Provisions that bypass reunification efforts where parents have subjected a child to "aggravated circumstances" can protect that child's safety without sacrificing valuable relationships. More generally, provisions that bypass reunification where parents have committed terrible crimes against any children protect children's physical safety from dangerous parents.¹⁰⁴

Stopping foster care drift is also critical for children. Goldstein and his co-authors argued that because children have a "sense of time" much shorter than that of adults, they can suffer grievously from brief periods of uncertainty and loss.¹⁰⁵ Recent empirical work confirms their worry that long periods of multiple placements or "drift" will be seriously harmful. Even in a loving, long-term foster home,¹⁰⁶ the uncertainty of the foster care status may cause hardship.¹⁰⁷ More importantly, multiple placement is the norm in long-term placement,¹⁰⁸ and it has been proven to have "a variety of negative consequences for children and adolescents."¹⁰⁹ Perhaps worst of all, long-term care is self-perpetuating: as a child ages, her chances of both

103. See *id.* at 112.

104. See *Federal Adoption Policy*, *supra* note 51, at 98 (testimony of Dr. Albert J. Solnit) (rejecting efforts at family preservation "if the child is not wanted, is abandoned, or is severely abused to the point where the child's life is endangered or the child may be permanently injured"); Wald, *supra* note 95, at 694-95 (advocating immediate termination if parents are "untreatable").

105. GOLDSTEIN ET AL., *supra* note 19, at 41-42.

106. See generally Barth & Needell, *supra* note 64, at 6 (noting that long-term foster care is not per se destructive).

107. See JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 46 (1994); see also Michael Bohman & Soren Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, in THE PSYCHOLOGY OF ADOPTION 93 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (finding that children in foster care have greater psychological difficulties than children with adoptive or biological parents, and recommending that "any unnecessary prolongation of the socially, legally, and psychologically insecure limbo-situation of foster care should be avoided"); John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in THE PSYCHOLOGY OF ADOPTION 107, 113 ("Foster children are left largely in limbo searching for ways to cement their attachments to those who care for them.").

108. See *supra* notes 63-64 and accompanying text.

109. Robert Goerge et al., *A Foster Care Research Agenda for the '90s*, 73 CHILD WELFARE 525, 537 (1994); see also Barth & Needell, *supra* note 64, at 7 (describing the harm caused by multiple placement as "self-explanatory").

reunification¹¹⁰ and adoption¹¹¹ decline precipitously. The longer children remain in foster care, therefore, the more likely they are to reach adulthood there, and children who do so face grim prospects.¹¹² The provisions in ASFA that seek to reduce drift reflect the growing harms that result from lengthy stays in foster care.

Finally, much evidence also suggests that children who cannot be promptly reunified with their parents would benefit from the adoptions that Congress seeks to encourage. Goldstein and his co-authors argued that children benefit when their upbringing is guided by loving adults rather than the state.¹¹³ Parental autonomy provides a foundation for children's trust and love, and parents are more likely than the state to make good decisions.¹¹⁴ Recent empirical data powerfully confirm that adoption is generally a very positive experience for children.¹¹⁵ There is thus good reason to believe that ASFA's adoption promotion policy, like the other aspects of the Act, could help abused and neglected children.

110. See Mark E. Courtney, *Factors Associated with the Reunification of Foster Children with Their Families*, 68 SOC. SERV. REV. 81, 91 (1994); Gorge, *supra* note 94, at 439-40.

111. See Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 296 (1997); Ada Schmidt-Tieszen & Thomas P. McDonald, *Children Who Wait: Long Term Foster Care or Adoption*, 20 CHILD. & YOUTH SERVS. REV. 13, 20 (1998).

112. See GENERAL ACCOUNTING OFFICE, FOSTER CARE OVERVIEW, COMPLEX NEEDS STRAIN CAPACITY TO PROVIDE SERVICES 14-15 (1995).

A study conducted 2.5 to 4 years after youths left foster care found that 46% had not completed high school, 38% had not held a job for more than 1 year, 25% had been homeless for at least one night, and 60% of young women had given birth to a child. [Forty percent] had been on public assistance, incarcerated, or a cost to the community in some other way.

Id.; see also *Barriers to Adoption*, *supra* note 51, at 79 (statement of Peter Di-gre) (citing studies showing that 45% of 18-year-olds "emancipated" from foster care are homeless at some point in the next year).

113. See GOLDSTEIN ET AL., *supra* note 19, at 90-91.

114. See *id.*

115. See *Federal Adoption Policy*, *supra* note 51, at 103 (statement of Dr. Nicholas Zill) (describing research comparing the well-being of children in adoptive homes, two-parent homes, single-parent, and grandparent-homes, and stating that the impact of adoption on children is "overwhelmingly a positive one"); Richard P. Barth, *Adoption Research: Building Blocks for the Next Decade*, 73 CHILD WELFARE 625, 630 (1994) (noting the "remarkable . . . degree of consistency in favorable outcome in widely differing types of adoption") (citation omitted); Barth & Berry, *supra* note 100, at 342-45 (summarizing studies showing benefits of adoption for children).

II. HOW ASFA HAS FAILED CHILDREN IN PRINCIPLE

Even when it is possible to prioritize children in a general way, putting them first in specific situations is often “difficult and painful.”¹¹⁶ It is difficult because adults do not have children’s needs and cannot easily see what they are. It is painful because what is good for children may be unfair to adults.

Although ASFA’s general principles make sense for children, its specific provisions fail to protect children’s interests. In some instances, Congress appears to have been unable to see important distinctions among children. In other cases, Congress may have seen children’s interests but preferred, notwithstanding its rhetoric, to favor certain parental needs or cultural ideologies. Whatever the causes of these failures, their effect on children is negative.

This part examines the two distinct failures of ASFA to put children first: the self-contradictory reforms of the “reasonable efforts” requirement and the disregard of age-based differences. Because of these failures, ASFA is not the blueprint it might have been for achieving two of Congress’s three major goals: reducing foster care drift and increasing adoptions. The mistreatment of “reasonable efforts” would needlessly leave children in foster care and limit the number of adoptions. The age-insensitivity would heighten these effects among young children, and make the “drift” of older children in foster care only more painful.

A. CONFUSION OVER “REASONABLE EFFORTS”

Previous discussion suggests a plausible “children-first” explanation of the reasonable efforts and mandatory termination provisions in current federal law. When a child is first placed into care, her strongest bonds are to her parents, and so the state should generally make “reasonable efforts” to reunify the family.¹¹⁷ After a time in foster care, however, the balance of harms shifts, with reunification becoming less likely or beneficial and permanent placement more urgent.¹¹⁸ The state should therefore generally stop “reasonable efforts” and, since adoption is the preferred permanent placement after reunification, seek to find an adoptive home for the child.¹¹⁹ The man-

116. GOLDSTEIN ET AL., *supra* note 19, at 81.

117. See 42 U.S.C. § 671(a)(15)(B) (1994).

118. See *supra* notes 93-101, 105-12.

119. See 42 U.S.C. § 675(5)(E).

datory termination provision balances the child's interest in reunification in the short-term with her need for permanency over the long-term.

Yet it is also easy to describe the reasonable efforts requirement in terms that reflect an adult-oriented sense of justice. For example, parents can now claim preventive or reunification services only if they have not committed a crime or subjected their children to "aggravating" circumstances¹²⁰—a term familiar from criminal law.¹²¹ Whatever else it does, this provision punishes parents who commit especially grievous wrongs by cutting off assistance and threatening their families' integrity. In this case, however, the provision also likely serves children by protecting them from dangerous adults.¹²² The adult and child interests appear to coincide.

At three other points, however, ASFA favors the interests of adults in ways that clearly harm children. Two of these problems derive from exceptions to the mandatory termination requirements. The first exception applies when "at the option of the State, the child is being cared for by a relative."¹²³ This provision exempts from the mandatory termination and adoption provision the large and growing number of children in the care of relatives: so-called "kinship care."¹²⁴ This policy has some child-oriented justification: children in "kinship care" can fare better than children in foster care along numerous axes. Although kinship placements often provide fewer resources than nonkin placements and occasionally endanger children,¹²⁵ in general they offer children less trauma at separation,¹²⁶ more regular parental visitation,¹²⁷ and most importantly, less likelihood of harmful multiple placements.¹²⁸ Given the vast

120. See *id.* § 671(a)(15)(D).

121. See, e.g., 18 U.S.C. § 3592(c) (1994) (aggravating factors in federal death penalty law); *Zant v. Stephens*, 462 U.S. 862, 878 (1983) (requiring a court to find at least one "aggravating factor" in order to sentence a defendant to death).

122. See *supra* notes 54-60 and accompanying text.

123. 42 U.S.C. § 675(E)(i).

124. See MICHAEL R. PETIT & PATRICK A. CURTIS, *CHILD ABUSE AND NEGLECT: A LOOK AT THE STATES* 77 (1997) (stating that 23% of children in out-of-home care are now in kinship care, up 29% from 1990).

125. See BARTH ET AL., *supra* note 91, at 214.

126. See Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 *CHILD WELFARE* 550, 552 (1996).

127. See BARTH ET AL., *supra* note 91, at 216; Howard Dubowitz et al., *A Profile of Kinship Care*, 72 *CHILD WELFARE* 153, 154 (1993).

128. See BARTH ET AL., *supra* note 91, at 209.

gap between the number of children in foster care and the number adopted each year, not moving all children in kinship care toward adoption makes good sense for mistreated children generally.

But children do not benefit from failure to pursue adoption when a kinship caregiver wishes to adopt. Kin generally resist adopting because they see themselves as family and do not wish to upset biological parents.¹²⁹ Some relative caregivers do adopt, however, and many more might if they were not often discouraged by caseworkers.¹³⁰ When a kinship caregiver does wish to adopt, there is no danger of needlessly depleting the supply of adoptive parents; the caregiver who is "already family" has a unique bond to the child. And the fact that the relative caregiver—the daily caregiver—wishes to adopt provides powerful *prima facie* evidence that reunification is not likely or would not be beneficial.¹³¹ To be sure, some kinship caregivers might inappropriately wish to adopt children who remain tightly bonded to their parents.¹³² In those circumstances, however, kinship adoption is not in the child's best interests, and a separate exception to the reasonable efforts requirement would apply.¹³³ The rationale for the exception in current law is preserving the biological family—both the biological parent-child bond and the broader biological bonds of the kinship unit.¹³⁴ These goals may be important, but they are not the same as the child's interest in permanent placement.

129. See *id.* at 213; Jesse L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593, 597 (1991).

130. See James P. Gleeson et al., *Understanding the Complexity of Practice in Kinship Foster Care*, 76 CHILD WELFARE 801, 812 (1997); Interview with Jill Duerr Berrick, *supra* note 91.

131. Cf. Thornton, *supra* note 129, at 597-98 (showing that kinship caregivers may decline to adopt because they believe that adoption would harm their children).

132. Cf. Dubowitz et al., *supra* note 127, at 165-66 (discussing "tensions and hostilities that placement of a child might generate").

133. See 42 U.S.C. § 675(5)(E)(ii) (allowing states not to pursue terminations that are not in the child's best interests).

134. See, e.g., NATIONAL ASS'N OF BLACK SOCIAL WORKERS, PRESERVING AFRICAN AMERICAN FAMILIES: RESEARCH AND ACTION BEYOND THE RHETORIC (1991) (supporting kinship placements as a means to preserve African-American cultural heritage); Dubowitz et al., *supra* note 127, at 154 (discussing the view that "blood is thicker than water"). Some defenses of kinship care draw on the notions of cultural self-determination that also support a preference for race-matching in adoption. See Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1179-81 (1991). Congress has decisively rejected

A second problematic exception declares that the state need not seek to terminate parental rights after fifteen months if it has failed to make required reasonable efforts.¹³⁵ Like the kinship rule, this exception might be read only to mean that states need not seek to terminate parental rights absent reasonable efforts. But the congressional report expresses a broader view, stating that "the termination of parental rights is such a serious intervention that it should not be undertaken without some effort to offer services to the family."¹³⁶ Because this perspective is widely shared in the states, this statement is likely to reflect the prevailing interpretation of ASFA.¹³⁷ In that case, the federal provision effectively endorses many states' readings of the reasonable efforts requirement to preclude decrees of termination absent reasonable efforts as a matter of law.¹³⁸

Once again, the rule fair to adults is harmful to children. The fairness to parents is evident: the state cannot destroy legal bonds to children without first offering services. But the exception also discourages terminations at a time when they are often the best option for children. Indeed, the provision often operates to prevent adoption when a child has a high probability of adoption that is likely to diminish quickly¹³⁹—and even when the child is already being cared for by a potential adoptive parent. The child who loses such an adoption gains very little. Children generally have a low probability of re-

these ideas through the Multi-Ethnic Placement Act. See 42 U.S.C. §§ 671(a)(18), 1996(b).

135. See 42 U.S.C. § 475(5)(E)(iii).

136. H.R. REP. NO. 105-77, at 12 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2740, 2744.

137. As a textual matter, the proper interpretation of the provision depends upon the meaning of the requirement that "the State shall" file a termination petition "unless" the State has not made reasonable efforts. 42 U.S.C. § 675(E). The law does not say what happens if the "unless" condition holds and the State has not made reasonable efforts; there is no "in which case" provision. The narrowest reading is that the mandatory termination provision simply does not apply. But this would mean that a state could, on its own, negate the federal provision by enacting a statute categorically requiring termination even in the absence of reasonable efforts. This would defy the congressional statement of intent.

138. See, e.g., ARIZ. REV. STAT. ANN. § 8-533 (West 1998); CAL. CIV. CODE § 232 (repealed 1992) (West 1998); FLA. STAT. ANN. § 39.464 (West 1998); N.Y. SOC. SERV. LAW § 384-b(8) (McKinney 1998).

139. See *infra* note 145 and accompanying text.

turning home after fifteen months in foster care.¹⁴⁰ Reunification becomes even less likely when the state has failed to provide adequate assistance: without social services, the parental home is likely to have become only less suitable;¹⁴¹ without assisted visitation, the parent-child bond is likely to have attenuated further.¹⁴² Services much beyond the fifteen-month period are not likely to increase the odds of reunification.¹⁴³ This provision therefore precludes permanent placement of children who are not likely to return home or to benefit if they do.

Not just a theoretical concern, this exception threatens to prolong the uncertain status of many children. According to a report by the Inspector General of the Department of Health and Human Services, state failures to make reasonable efforts that satisfy state termination of parental rights statutes are already "the primary barrier to implementing permanent plans of adoption."¹⁴⁴ This exception only reinforces that barrier. As the exception is applied, children who cannot return home will languish in foster care.¹⁴⁵

It is no defense of the rule to point out that the failure to provide services may indicate that the state is ignorant of the child's best interests.¹⁴⁶ A court should always consider

140. See Courtney, *supra* note 110, at 90-98 (showing that the likelihood of reunification after one to three years in foster care is less than 15%); *id.* at 91-92 & 108 n.20 (documenting other studies with similar findings); Goerge, *supra* note 94, at 452 (noting that the probability of reunification drops below 50% after about 10 weeks in foster care).

141. See *infra* notes 150-57 and accompanying text (discussing the role of social services in fostering reunification).

142. See RUTH HUBBELL, FOSTER CARE AND FAMILIES: CONFLICTING VALUES AND POLICIES 104-06 (1981); Inger P. Davis et al., *Parental Visiting and Foster Care Reunification*, 18 CHILD. & YOUTH SERVS. REV. 363, 363 (1996).

143. See Goerge, *supra* note 94, at 452.

144. OFFICE OF THE INSPECTOR GENERAL, DEP'T OF HEALTH AND HUMAN SERVS., BARRIERS TO FREEING CHILDREN FOR ADOPTION 11 (1991); cf. 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, 1280-81 (1996).

145. See MURPHY, *supra* note 60, at 76-77 (describing how states "often fail to provide what courts interpret as 'adequate services' for the parent" and how as a result "kids stay in the system, floating amongst foster homes, ultimately becoming unadoptable"); Herring, *supra* note 30, at 181-94 (citing examples of drift due to reasonable efforts requirement). Herring's article reaches conclusions parallel to those here.

146. See *Talk of the Nation: Adoption for Abused and Neglected Children* (NPR radio broadcast, Nov. 18, 1997) (available at 1997 WL 15382360) (comment of David Liederman, Exec. Dir., Child Welfare League of America)

whether termination is in the child's best interests. For example, if a child remains deeply attached to her parents, or if her parents are within a few weeks of assistance from reunification, rigid adherence to a timetable would be foolish. But ASFA already permits states to make those forward-looking judgments about the child's welfare under the exception based on the child's best interests.¹⁴⁷ ASFA's backward-looking addition to that provision only discourages termination proceedings that would serve the child's interests.

In another social context and statutory scheme, this provision would be defensible as an incentive for states that wish to terminate parental rights to make reasonable efforts first. Today, however, the exception cannot so function, for two reasons. First, it is not at all clear that most social workers or attorneys are overwilling to terminate parental rights.¹⁴⁸ If officials generally prefer reunification, the provision will operate not as an incentive to make reasonable efforts, but as an opportunity to avoid termination.¹⁴⁹

More fundamentally, even when they want to provide the reasonable efforts required by law, states frequently lack the resources to do so. Child welfare services of every kind are now not available to many families who need them.¹⁵⁰ Data consistently show that most families do not receive intensive family preservation services designed to stop child placement,¹⁵¹ even

(describing reasonable efforts provision as saying "don't come to us with a TPR petition unless you've really figured out what the heck is really going on, and you're ready and prepared to introduce a termination of parental rights petition").

147. See 42 U.S.C. § 675(5)(E)(ii).

148. This argument is fully developed *infra* Part III.B.1.

149. In fact, because ASFA does not define "reasonable efforts," officials can retrospectively identify the services that should have been provided, and thereby avoid pursuing termination. See 42 U.S.C. § 675(5)(E)(iii) (stating that termination need not be pursued when parents have not received "such services as the State deems necessary for the safe return of the child to the child's home").

150. See SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. DOC NO. 101-395, at 45-48 (1990) [hereinafter NO PLACE TO CALL HOME]; GENERAL ACCOUNTING OFFICE, *supra* note 46, at 5; OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 11.

151. See, e.g., Barth & Berry, *supra* note 100, at 325 ("[F]amily preservation services are still not available for the vast majority of families in need."); Courtney, *supra* note 110, at 88 (noting that in sample of children entering foster care between 1988 and 1991, 70% received only "emergency response" services, 20% received no services, and only 10% received extensive services);

after the 1993 expansion of federal funding for such programs.¹⁵² Although one-fifth to one-third of all children reunified with their parents return to foster care,¹⁵³ most families do not receive the reunification services that could prevent some of those recurrent failures.¹⁵⁴ Drug abuse is a major contributor to the foster care crisis,¹⁵⁵ but drug treatment programs for women with children and small infants are scarce.¹⁵⁶ Finally,

Fein & Maluccio, *supra* note 30, at 339 (noting that funding to implement permanency planning "has been insufficient," and stating that as a result "solutions remain short-term, crisis-oriented, and stopgap and lack ongoing support for families").

152. See PETT & CURTIS, *supra* note 124, at 184 (noting that the 25,000 families in 21 states receiving intensive preservation efforts were "but a fraction of the families needing [them]"); see also COURTNEY, *supra* note 21, at 16 (describing impact of additional funding as a "drop in the bucket"); Goerge et al., *supra* note 109, at 533 ("The pool of money is not particularly large relative to the magnitude of the problems . . ."); Telephone Interview with Anthony N. Maluccio, Professor, Boston College School of Social Work (Apr. 27, 1998).

153. See, e.g., Barth & Berry, *supra* note 100, at 336 (reporting various studies showing that between 20% and 32% of children returned to foster care after reunification); Mark E. Courtney, *Reentry to Foster Care of Children Returned to Their Families*, 70 SOC. SERV. REV. 226, 233 (1995) (finding that 19% of reunified children returned to care within three years).

154. See, e.g., Mark W. Fraser et al., *An Experiment in Family Reunification: Correlates of Outcomes At One-Year Follow-Up*, 18 CHILD. & YOUTH SERVS. REV. 335, 336 (1996) (noting that "few agencies have clearly articulated reunification services for children in out-of-home care"); Fein & Maluccio, *supra* note 30, at 339 ("The lack of family maintenance programs is an unfortunate correlate of the increasing number of children reentering foster care each year."); see also *Promoting Adoption: Hearing Before the Subcomm. on Human Resources of the House Comm. on Ways and Means*, 105th Cong. (1997) (statement of Dr. Fred C. Wulczyn, Chapin Hall Center for Children) ("[M]ost child welfare providers will acknowledge that the services used to support families prior to and just after reunification are probably the weakest link in the continuum of child welfare services.") [hereinafter *Promoting Adoption*]; Tatara, *supra* note 45, at 140 (arguing that emphasis on family preservation in the 1980s led to underdevelopment of family reunification programs). Unlike family preservation, reunification efforts received no additional federal funding from the 1993 budget agreement. See *supra* notes 49-50.

155. See Stephen Magura & Alexandre B. Laudet, *Parental Substance Abuse and Child Maltreatment: Review and Implications for Intervention*, 18 CHILD. & YOUTH SERVS. REV. 193, 194 (1996) ("Illicit drug abuse, particularly the introduction of crack cocaine in urban areas since 1985, has contributed to increases in both the incidence and severity of child abuse and neglect.").

156. See *Substance Abuse in Welfare Families*, *supra* note 65, at 23 (testimony of Richard P. Barth) (describing underdevelopment and scarcity of drug treatment programs for women); Magura & Laudet, *supra* note 155, at 202 (citing numerous sources describing the "shortage of drug treatment programs for pregnant women and women with infants" as a "serious national

long-term, low-intensity services, which could prevent children who have been sent home from returning to foster care, have sharply diminished in numbers since the 1970s.¹⁵⁷ The reasonable efforts requirement cannot make states offer services they do not have. The immense mismatch between the scope of the reasonable efforts provision and the capacities of state bureaucracies has been heightened by legal interpretation of the reasonable efforts requirement. In the absence of federal regulations defining reasonable efforts,¹⁵⁸ many states have established a broad definition, seeking "evidence that they have exhausted all conceivable possibilities for keeping families together."¹⁵⁹ As a result of this combination of high standards and limited resources, the reasonable efforts requirement often cannot spur proper state conduct. If anything, in fact, it may discourage social workers who cannot possibly meet the legal standard for termination from even attempting to find an adoptive placement.¹⁶⁰

In addition to the two needless exceptions to the termination requirement, the third error in ASFA's treatment of services is its failure to address this shortage of preventive services. Title IV-E of the Social Security Act, which ASFA retains, does not reimburse services designed to prevent foster placement.¹⁶¹ In spite of the efforts of the 1980 and 1993 Congresses, the capped program that does support services, Title IV-B, provides about one-seventh of the funding available under Title IV-E.¹⁶² A substantial share of this limited funding

problem"). Most drug treatment programs were developed for men and now serve them. *See id.* at 205.

157. *See* Douglas J. Besharov, *Looking Beyond 30, 60, and 90 Days*, 16 CHILD & YOUTH SERVICES REV. 445, 448 (1994) (noting that programs for "long-term family supervision" have "shrunk considerably" and "homemaker services . . . [have] all but withered away"); *see also* Barth & Berry, *supra* note 100, at 354 ("Available data suggests that preplacement services are often inappropriately brief . . .").

158. *See supra* note 53 and accompanying text.

159. OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 12; *see also* MURPHY, *supra* note 60, at 76-77 (noting arbitrariness of court definitions of "reasonable efforts").

160. *See* Herring, *supra* note 30, at 180.

161. *See* 45 C.F.R. § 1356.60(c) (1997) (listing reimbursable expenditures under Title IV-E and including matters such as "case reviews" and "case management," but not preventive services); Foster Care Maintenance Assistance, 47 Fed. Reg. 30,922, 30,923 (1982) ("[F]unds for treatment-oriented services [are] inconsistent with the statutory concept of maintenance expenditures").

162. *See* 1996 GREEN BOOK, *supra* note 20, at 695 tbl.12-2.

assists family support programs that do not primarily serve children at risk of foster care placement.¹⁶³

Net federal funding for services is only likely to decline in coming years. Although ASFA reauthorizes family preservation and support services at nominally higher levels,¹⁶⁴ the expansion in the uses of those funds to include adoption services will further disperse resources and limit core preventive services.¹⁶⁵ With the much greater 1996 reduction of fifteen percent in the Social Services Block Grant, the total federal funding available for reasonable efforts will decline.¹⁶⁶

Congress considered and rejected proposals to expand both reunification and drug treatment services in 1997,¹⁶⁷ apparently perceiving that these services do not work.¹⁶⁸ But this position was misguided on two accounts. First, as an analytic matter, if the services are ineffective, then it is right not to fund them, but wrong to require them in the first place—and even more wrong to leave children in foster care because of their absence. Having affirmed the importance of reunification services as a prerequisite to termination of parental rights,¹⁶⁹ Congress should have provided for these services to avoid stranding children in foster care. Second, although experts

163. See generally GENERAL ACCOUNTING OFFICE, *supra* note 112, at 5-7 (stating that “family support” programs have received most funding under the 1993 Act).

164. See 42 U.S.C. § 629(b) (1994) (authorizing a 20% increase in funding from 1998 to 2001).

165. See *id.* § 629(a). Adoption groups are exhorting their members to seek set-asides of this money for post-adoption services from state governments. See Joe Kroll, *Adoption and Safe Families Act of 1997 Signed into Law*, ADOPTALK (Minneapolis), Winter 1998, at 4.

166. The Personal Responsibility and Work Opportunity Reconciliation Act reduced SSBG funding by 15%, or \$420 million per year. See Peter T. Kilborn, *Little-Noticed Cut Imperils Safety Net for the Poor*, N.Y. TIMES, Sept. 22, 1996, at A1. By comparison, ASFA increases the authorization for family support and preservation by \$10 million to \$20 million per year. See ASFA §§ 305, 430(b) (codified at 42 U.S.C. § 629(b)).

167. See Safe Adoptions and Family Environments Act of 1997, S. 511, 105th Cong. § 202 (1997) (giving priority in drug treatment in federally funded programs to persons referred by child protection agencies); see *id.* § 304 (reimbursing under Title IV-E program one year of reunification services).

168. See *Adoption and Support of Abused Children*, *supra* note 51 (statement of Rep. Camp).

169. See H.R. REP. NO. 105-77, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740 (“The bipartisan group that wrote this legislation recognized the importance and essential fairness of the reasonable efforts criterion.”).

caution that the data are not conclusive,¹⁷⁰ a variety of services programs have produced lower levels of maltreatment and higher rates of reunification. The evidence is least promising for family preservation services, which have to date failed to reduce out-of-home placement rates,¹⁷¹ though they have improved some indicia of child welfare and merit further testing.¹⁷² Even analysts critical of family preservation have recognized that targeted reunification efforts have greater promise,¹⁷³ and recent studies confirm their effectiveness.¹⁷⁴ Though relatively new, drug treatment programs geared to women with children have also proven effective,¹⁷⁵ as have traditional long-term services programs.¹⁷⁶ The failure to fund family services is thus inconsistent with both the theory underlying ASFA and with the known facts about most of those services.

ASFA's treatment of reasonable efforts punishes children twice. Early on, when services could still prevent or shorten placements in ways that benefit children, the Act does not assure those services. Later, when services are not likely to lead to safe reunification, ASFA discourages the state from finding a permanent home for children. Stated otherwise, too many terminations of parental rights are likely to become necessary

170. See *supra* notes 90-91 and accompanying text.

171. See Julia H. Littell & John R. Schuerman, *A Synthesis of Research on Family Preservation and Family Reunification Programs* (visited Dec. 1, 1998) <<http://aspe.os.dhhs.gov/hsp/cyp/fplitrev.htm>>.

172. See Kristine E. Nelson, *Family Preservation—What Is It?*, 19 CHILD. & YOUTH SERVS. REV. 101, 107-11 (1997).

173. See Littell & Schuerman, *supra* note 171, at 15.

174. See Fraser et al., *supra* note 154, at 345-50 (showing that in experimental study, 97% of children receiving reunification services returned home within 90 days, compared to only 32% of children in control group; at the end of one year, 70% of children receiving reunification services were living at home, compared to only 47% of the control group); Brian Thomlison et al., *Protecting Children by Preserving Their Families: A Selective Research Perspective on Family Reunification*, 2 INT'L J. CHILD & FAM. WELFARE 127, 129-30 (1996) (finding that intensive and brief family services positively affect reunification rates).

175. See Magura & Laudet, *supra* note 155, at 210 (showing, in programs combining drug treatment and services for substance-abusing mothers, that cases were successfully closed or risks of foster care placement reduced for 55% of children, and that 93% of children judged at "imminent risk" of foster care placement remained at home); *Substance Abuse in Welfare Families*, *supra* note 65, at 24 (testimony of Richard P. Barth) (describing early successes of various programs).

176. See Besharov, *supra* note 157, at 445-50.

because of the funding shortfall, yet too few terminations are likely to occur as a result of the exception to the mandatory termination provision. Children will lose too many parents, and they will be found too few.

B. LACK OF AGE SENSITIVITY

These dangers are deepened by ASFA's timelines, which do not distinguish among children based on age. Every child receives an administrative case hearing after six months, a permanency hearing after one year, and a presumptive termination of parental rights after fifteen months. Like the reasonable efforts provisions, this uniform treatment of all children secures a due process value for parents. If fairness requires that parents receive help regaining custody of their child as long as they are not too blameworthy for the child's maltreatment,¹⁷⁷ then the age of the child is irrelevant. It is surely as bad to neglect or abuse a one year-old as an eight year-old or a fourteen year-old.¹⁷⁸ As a matter of fairness to parents, disregarding age treats like persons alike.

With respect to children's needs, however, ASFA treats different children identically. Consider again the provision for termination of parental rights after fifteen months of foster care. For the youngest children, especially infants, that wait will often be too long. Infants are already a growing segment of the foster care population that spends surprisingly long periods in foster care.¹⁷⁹ With the most telescoped "sense of time," infants are least likely to have strong bonds to their biological parents,¹⁸⁰ and they are most likely to suffer from even brief periods in temporary care.¹⁸¹ Infants also have the greatest opportunities for adoption, but these opportunities diminish quickly with age: according to an exhaustive California study, thirty-two percent of children who came into foster care before their first birthday were adopted within six years of placement into nonkinship care, compared to only twelve per-

177. See *supra* notes 120-22 and accompanying text (discussing "aggravating factors").

178. Of course, the content of abuse may vary by age, but its blameworthiness does not.

179. See BARTH ET AL., *supra* note 91, at 131.

180. See GOLDSTEIN ET AL., *supra* note 19, at 41, 105-06 (theory); Wald, *supra* note 95, at 695 (empirical support).

181. See GOLDSTEIN ET AL., *supra* note 19, at 41; Wald, *supra* note 95, at 695.

cent of children entering care between the ages of one and two.¹⁸² Although state agency practices contribute to this gap, one of its central causes is a dearth of parents available to adopt older children.¹⁸³ Children will become older in foster care because of the delays in the statute: an infant will be nearly one-and-a-half years old before ASFA requires the state even to begin the process of terminating parental rights, and a fourteen month-old toddler may be nearly three.¹⁸⁴ These delays will cost young children adoption opportunities.¹⁸⁵

If ASFA moves too slowly with regard to young children, it threatens to move too often for older ones. Significant numbers of these children are strongly attached to biological parents, and do not want to be adopted.¹⁸⁶ When they do move toward adoption, they tend to experience disruption—removal from the prospective adoptive home prior to finalization—at significantly higher rates than other children.¹⁸⁷ Moreover, older children are not adopted with anywhere near the frequency of younger children: children over age ten constituted forty percent of the children in out-of-home care in the United States in 1995, but less than twenty percent of the children adopted that year.¹⁸⁸ If parental rights are terminated for large numbers of older children, they risk joining the large and growing ranks of

182. See Barth, *supra* note 111, at 290 fig.1.

183. See *id.* at 297; Bartholet, *supra* note 134, at 1203.

184. The fifteen-month delay will often be seventeen months in practice. See *infra* notes 195-97 and accompanying text.

185. Cf. Charlotte B. McCullough, *The Child Welfare Response*, 1 FUTURE OF CHILDREN 61, 69 (1991) (noting as "barrier to adoption" the fact that during the lengthy period in which termination occurs, "[t]he infants become toddlers or older and the prospective parents become frustrated").

186. See Malcolm Bush & A.C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, 27 SOC. WORK 309, 309-10 (1982) (finding that half of 111 foster children over age nine judged unlikely to return home did not want to be adopted because it would signal an end to ties with family of origin); see also GOLDSTEIN ET AL., *supra* note 19, at 106 ("Some older children may hold on to emotional attachments to absent parents fiercely and possessively; their early, long-standing psychological ties may interfere with the formation of new psychological attachments . . .").

187. See Susan Livingston Smith & Jeanne A. Howard, *A Comparative Study of Successful and Disrupted Adoptions*, 65 SOC. SERV. REV. 248, 250, 255 (1991).

188. See PETIT & CURTIS, *supra* note 124, at 135 fig.4.6. In the California study, among children placed in non-kinship care between the ages of three and five, only 8% were adopted within 6 years. See Barth, *supra* note 111, at 291 fig.1.

"legal orphans."¹⁸⁹ That is a real loss; children often benefit from ongoing contact with biological parents, however meager.¹⁹⁰ Moving swiftly to terminate parental rights is thus much less advisable for older children than younger ones.

State laws governing termination of parental rights can mitigate some of these problems, but ASFA's age-insensitivity still threatens to misallocate scarce resources. In particular, the widespread state practice of conditioning final termination of parental rights on a finding that the child is "adoptable" will limit the danger of pointless terminations for older children.¹⁹¹ But that legal determination occurs only at the end of the termination process, a procedure that is far longer and more arduous than typical hearings in the child welfare system.¹⁹² With so many state courts already so overburdened that they cannot carefully handle their existing dockets,¹⁹³ the addition of compulsory terminations for older children is likely to limit courts' time for the most urgent cases involving the youngest children.

Many of these problems with the uniform termination requirement also mar the twelve-month timeline for permanency hearings. For example, states often delay returning children home until after permanency hearings.¹⁹⁴ Although older chil-

189. 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. 121, 132 (1995); Elizabeth Bartholet, *In Foster-Care Limbo*, BOSTON GLOBE, Mar. 17, 1992, at 17.

190. See Barth & Berry, *supra* note 100, at 348; Guggenheim, *supra* note 189, at 135.

191. See OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 16; Barth, *supra* note 115, at 632. States determine adoptability based on a variety of factors, including age, special-needs matters, and presence of a potential adoptive parent in a child's life. Because older children are more often labeled "not adoptable," the parental rights of their parents often may not be terminated in spite of the timeline.

192. Compare *Promoting Adoption*, *supra* note 69 (statement of Mark Hardin, American Bar Association) (stating that "emergency removal hearings, foster care review hearings, and other pertinent court reviews [often] last no longer than 5 or 10 minutes"), and John Gibeaut, *Nobody's Child*, A.B.A. J., Dec. 1997, at 2 (visited Feb. 19, 1998) <<http://www.abanet.org/journal/dec97/12FCHILD.HTML>> (noting the "cattle call" nature of such hearings, many of which last just five minutes), with OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 8 (stating that the median period for termination of parental rights is seven-and-a-half months), and Herring, *supra* note 30, at 180 (describing the difficulty of obtaining termination of parental rights).

193. See *Promoting Adoption*, *supra* note 69 (statements of Kathi T. Grasso and Mark Hardin, American Bar Association); Gibeaut, *supra* note 192, at 2.

194. See Courtney, *supra* note 110, at 90 fig.1.

dren can perhaps more comfortably wait a full year for their permanency hearing, younger children will more often suffer through the delay. And the requirement that all children proceed through state processes at the same speed threatens to delay the most pressing permanency hearings and diminish them all in quality. Uniformity of treatment thus disserves children again.

If the uniformity rule seems to reflect more concern for justice toward parents than permanency for children, a striking detail of the uniform timeline reinforces that appearance. ASFA does not begin to run its timetables until the earlier of "the date of the first judicial finding that the child has been subjected to child abuse or neglect; or the date that is 60 days after the date on which the child is removed from the home."¹⁹⁵ Because a finding of abuse or neglect need not accompany removal and in some states seldom occurs within that two-month window,¹⁹⁶ this section effectively pushes out the timetable in many cases by two months. Fifteen months is then really seventeen months. Waiting for a judicial determination serves the parent's interests in fairness, since her legal rights often have not been prejudiced until a finding of abuse or neglect.¹⁹⁷ But the critical fact for the child is the foster care, not the hearing schedule. This provision assures more uniform process for parents at the expense of more arbitrary treatment of children's psychological needs.

Congress may have considered and rejected proposals to recognize age differences for two inadequate reasons.¹⁹⁸ First, members may have felt that the relevant line is simply too difficult to draw. But this is an argument against the exercise of prudence anywhere in the law. It discounts the greater costs of

195. 42 U.S.C. § 675(5)(F).

196. *See, e.g.*, Pamela B. v. Ment, 709 A.2d 1089, 1095 (Conn. 1998) (denying a motion to dismiss in a class action suit alleging that Connecticut regularly fails to hold an evidentiary hearing on an order of temporary custody within the legally mandated ten-day period).

197. Prior to a finding of neglect, a judge's only decision is often *ex parte* and temporary. *See id.* at 1095.

198. The original version of the bill passed by the House did distinguish older and younger children, applying the mandatory termination provision only to children under age 10. *See* H.R. REP. NO. 105-77, at 12 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2744; *see also* Adoption Promotion Act of 1997, S. 827, 105th Cong. § 3 (1997) (same provision). Other versions of the proposed legislation set a deadline of 12 months, rather than 15. *See* Promotion of Adoption, Safety, and Support for Abused and Neglected Children (PASS) Act, S. 1195, 105th Cong. § 302 (1997).

uniformity—not merely for a miscategorized margin, but for all children whose cases do not move at an appropriate pace.

Regarding the adoption timetable, Congress may also have resisted age-based distinctions in an effort to reform the way that agencies treat older children. Many state agencies now do not even seek to find adoptive placements for many older children.¹⁹⁹ That practice has been harshly criticized by adoption advocates who emphasize that “[n]o child is unadoptable.”²⁰⁰ It is possible that if states follow ASFA’s mandates for improved interstate adoption practices and more advance planning, more older children will be adopted.²⁰¹ Others pin their hopes on the Multi-Ethnic Placement Act (MEPA).²⁰² From these perspectives, any distinction among children by age would only reinforce bad practices.

The argument based on MEPA is not persuasive. It is unclear how many white adults would adopt American children of different races even if they had the opportunity.²⁰³ More to the point, even if MEPA is enforced,²⁰⁴ and even if there is great interest among whites in adopting minority children, the “huge and independent” effect of age on adoption rates would remain.²⁰⁵ Relying on MEPA to justify ASFA ignores the distinct role of age in adoption decisionmaking.

A more general response is that the goals of reforming agency practices and respecting children’s needs are not mutually exclusive. ASFA could have encouraged vast reforms in agency adoption practices even if it had treated younger and older children differently. Though President Clinton’s stated goal is to increase the number of annual agency adoptions by

199. See, e.g., Conna Craig, “What I Need Is a Mom”: *The Welfare State Denies Homes to Thousands of Foster Children*, 73 POL’Y REV. 41 (1995).

200. See *id.*; Charmaine Crouse Yoest, “No Child Is Unadoptable”, 75 POL’Y REV. 13 (1997).

201. Interview with Richard P. Barth, Professor, University of California at Berkeley School of Social Work (Apr. 20, 1997).

202. Cf. Bartholet, *supra* note 134, at 1203. For a description of MEPA, see *supra* note 70 and accompanying text (describing the passage of MEPA which sought to ban delays of adoption resulting from race-matching efforts).

203. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents’ Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 881 n.20 (1998) (“The overwhelming majority of adults seeking to adopt are white and few of these adults would consider adopting a black child.”).

204. *But see* Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2356 (1998).

205. Barth, *supra* note 111, at 296.

27,000 between 1997 and 2002,²⁰⁶ adoptions doubled to this level would not even equal the surplus of terminations over adoptions in 1996 (more than 30,000).²⁰⁷ In addition, there are tens or hundreds of thousands of children now not free for adoption who have been in foster care for more than fifteen months.²⁰⁸ Any acceleration of processes would have sent a powerful signal that encouraged states to act, and a vast pool of children could have benefited. A more targeted acceleration could also have encouraged states to act sensibly and helped the children who most need help.

Ironically, while making a symbolic gesture toward finding adoptive families for older children, Congress failed to take a practical step in the same direction. Researchers have found that post-adoption placement services like education and support can help adoptive parents adjust to raising older children and children with emotional problems.²⁰⁹ But federal law reimburses post-adoptive services in the same parsimonious way as assistance with reunification.²¹⁰ Beyond allowing states to dip into their very limited funding for family preservation,²¹¹ Congress did nothing to expand reimbursement of adoption services. Adoption of older children thus remains a significant challenge.

C. SUMMARY

The confused treatment of services and the disregard for age-based distinctions seriously undermine ASFA's ability to guide states toward two of Congress's major goals. Because of ASFA's inadequate supportive services, children are needlessly at risk of experiencing foster care drift, either remaining in foster care unnecessarily or returning home and then to care after episodes of reabuse. Because ASFA encourages the denial of

206. See ADOPTION 2002, *supra* note 51, at 1.

207. See Conna Craig & Derek Herbert, *The State of the Children: An Examination of Government-Run Foster Care* (visited Apr. 20, 1998) <<http://www.public-policy.org/ncpa/studies/s210/s210.html>>.

208. At the end of 1996, 500,000 children were in foster care. See Rusakoff, *supra* note 61, at A22. The median stay of children in foster care in 1996 was two years. See Rusakoff, *supra* note 62, at A23. It is difficult to estimate the number of children in care more than 15 months because of the biases of cross-sectional data like the median figure. See BARTH ET AL., *supra* note 91, at 81-82.

209. See Barth & Berry, *supra* note 100, at 338-39.

210. See 45 C.F.R. § 1356.60(c) (1997).

211. See 42 U.S.C. § 629(a)(8) (1994).

adoptive homes based on services shortages, moves young children through the system too slowly, and seeks quick dispositions for older children with less to gain from them, young children who could be adopted will also be denied the opportunity. Too many children of all ages drifting through foster care and too few being adopted was not the promise of this "children first" legislation.

III. HOW ASFA WILL FAIL CHILDREN IN PRACTICE

Part II made several assumptions about state implementation of ASFA. It assumed that states would read the exceptions to the mandatory termination provisions to discourage or preclude adoptions in the excepted circumstances. It assumed that states would not substantially make up for the shortfall of funding for social services. And it assumed that states would move children through the termination process at the same uniform rate as Congress prescribed.

But states have tremendous discretion in implementing the new law. It is possible that they will administer ASFA in a manner that helps children by limiting the impact of ASFA's mistakes—declining to terminate parental rights for children who are likely never to be adopted, for example, or increasing funding for preventive services. But it is also possible that state practice will exacerbate ASFA's flaws.

This part argues that three factors—state ideologies, interests, and incentives—will all generate a minimalist interpretation of ASFA that alters current practice as little as possible. Although attitudes are now changing, state agencies have long had strong ideologies of family preservation.²¹² These views cannot conjure up services for which support does not exist, but they can motivate aggressive uses of the exceptions to the mandatory termination provision in ASFA. In addition, agencies have an interest in preserving the status quo because implementing ASFA aggressively would require staff time and money that do not exist.²¹³ Finally, agencies have a structural interest in preserving current practices in order to maintain the flow of funds on which the agencies rely.²¹⁴

The forces favoring minimalism are likely to have both costs and benefits. The benefit is that states do not have rea-

212. See *infra* Part III.B.1.

213. See *infra* Part III.B.2.

214. See *infra* Part III.B.3.

sons to create increasing numbers of older legal orphans. The costs are continued failure to provide services to prevent family breakdown or to place adoptable children for adoption.

A. STATE DISCRETION TO MINIMIZE ASFA'S EFFECTS

State power to minimize ASFA's effects derives from two sources. First, for several critical outcomes seemingly mandated by ASFA, there exist significant exceptions. Although the exceptions may be helpful in allowing states to do justice to unusual cases, they also empower states to evade congressional intent. Second, even where ASFA mandates processes aimed at certain outcomes, it does not mandate the outcomes in question. States can use the new processes to achieve the old outcomes. The combination of exceptions to rules and limits on processes leaves ASFA powerless to achieve its basic goals of reducing drift and promoting adoption.

Although not the focus of this Article, the limitations on reasonable efforts in ASFA offer an instructive introduction to the statute's slipperiness. The law states that reasonable efforts "shall not be *required* to be made" in violent and aggravating circumstances, not that such efforts *may* not be made.²¹⁵ Though an agency now cannot be statutorily compelled to provide reasonable efforts in these cases, it still has the discretion to make those efforts. An agency acting by choice would not be "required" to do anything. Moreover, once an agency has begun to make reasonable efforts, it can bypass the permanency hearing that is required within thirty days when reasonable efforts are not made.²¹⁶ Agencies can thus continue to make efforts to reunify, and continue to bypass expedited permanency hearings, for as many children as they wish.

Similarly, the three sets of procedural reforms in permanency planning need not improve state efforts to prevent multiple long-term placements. Exceptions to the mandatory timetable render it toothless, even when potential adoptive parents are already caring for a child. After fifteen months, states can expansively define the reasonable efforts that should have been

215. 42 U.S.C. § 671(a)(15)(D) (emphasis added).

216. *See id.* § 671(a)(15)(E). There is even an argument that if agencies can offer reasonable efforts and bypass the expedited hearing on a case-by-case basis, *courts* can also order agencies to make such efforts. On this interpretation, reasonable efforts "shall not be required" only as a matter of state law, not as a matter of court order.

made and not pursue terminations in their absence,²¹⁷ or they can utilize their infinite latitude not to terminate based on “a compelling reason” related to the child’s best interests.²¹⁸ Although the case plan documenting such a reason must be “available for court review,” there is no requirement of a judicial hearing or finding.²¹⁹ Much like the reasonable efforts provision, the mandatory termination clause necessarily applies to no one at all.

The reform of the “permanency hearing” can be emptied of meaning. Although the statute no longer explicitly authorizes short-term foster care, i.e., that the child “should be continued in foster care for a specified period,”²²⁰ it effectively allows just the same. States must determine a permanency “plan” for the child, but both the date and the fact of permanency are left entirely to state discretion.²²¹ If the date is far in the future and the specified goal is unlikely to be realized, then short-term foster care will have effectively been authorized. Similarly, although the statute no longer authorizes “foster care on a permanent or long-term basis” because of the child’s “special needs or circumstances,”²²² it still allows “another planned permanent living arrangement” besides reunification, adoption, kinship care, or guardianship if there is a “compelling reason.”²²³ The most familiar example of “another planned permanent living arrangement” is long-term foster care. Judges can surely believe that the “special needs or circumstances” formerly justifying long-term foster care also furnish a “compelling reason” for such care. Hence the “permanency hearing” can produce all of the same outcomes as the “dispositional hearing” of the past.

With regard to other dimensions of the permanency planning reforms, the potential for minimization comes less from the statutory language than from the inherently limited nature of the procedural changes. For example, the Act requires

217. *See id.* § 675(E)(iii).

218. *Id.* § 675(E)(ii).

219. *Id.* For evidence that even a mandatory finding process can become a rote exercise, see *infra* note 229 and accompanying text.

220. 42 U.S.C. § 675(5)(C).

221. *See id.* (requiring “permanency plan . . . that includes whether, and if applicable when” permanent disposition will occur).

222. *Id.*

223. *Id.*

states to speed up "permanency hearings."²²⁴ Though hastening these hearings may be helpful when agencies have the commitment and capacity to find permanent placements, it has not historically hastened permanency. By mid-1996, twenty-six states had already reduced the deadline for the dispositional hearing below eighteen months, yet studies reported that the level of foster care drift had not palpably declined.²²⁵ When agencies do not have permanent placements or do not want to make them, faster may not mean better.

In like fashion, states can formally take the steps to adoption mandated by ASFA without actually increasing adoptions. For example, states can bring necessary terminations of parental rights, but unless attorneys and caseworkers are superbly prepared, these terminations will take a long time and fail in large numbers.²²⁶ In addition, the fact that states must make efforts to place children for adoption offers no guarantee that children will find adoptive parents.²²⁷ Thus, even if the state does initiate terminations and attempt to find adoptive placements, the result can still be extended judicial hearings, failure to terminate, or failure to adopt—all of which will reproduce the drift under current law.

To elaborate upon these opportunities to minimize ASFA's effects is not necessarily to criticize ASFA. For one thing, some of the possibilities are byproducts of the discretion necessary to do justice in individual cases. If correctly used, this discretion could temper ASFA's mistakes. Most importantly, even where the discretion is not so useful, the fact that states can evade ASFA's intentions does not mean that they will. That depends on incentives and interests at the state level.

B. STATE INCENTIVES TO MINIMIZE ASFA'S EFFECTS

Recent history suggests that states often do minimize the impact of federal child welfare statutes. The Child Welfare Act conditioned federal reimbursement of foster care expenditures on judges' approval of reunification efforts at early hearings on placement, not only at a termination of parental rights hear-

224. *See id.*

225. *See* GENERAL ACCOUNTING OFFICE, *supra* note 68, at 10, 22-23; Congressional Budget Office, *Pay-As-You-Go Estimate: H.R. 867, Adoption & Safe Families Act of 1997* (visited Nov. 24, 1997) <<http://www.cbo.gov/showdoc.cfm?index=340&from=2&sequence=0>>.

226. *See supra* note 192 and accompanying text.

227. *See supra* notes 183-87 and accompanying text.

ing.²²⁸ Yet in order to assure continued federal funding, courts regularly rubber stamp agency efforts as "reasonable," sometimes on preprinted court order forms.²²⁹ Similarly, in 1980, Congress intended that courts would make final decisions regarding most children at the scheduled dispositional hearing.²³⁰ State agencies, however, have regularly proposed, and courts have approved, the continuation of temporary foster care from one hearing to the next.²³¹ On the basis of this history, one need not be a cynic to worry about state implementation of ASFA.

Recent history suggests three distinct reasons that explain why implementation of ASFA is likely to lag behind intention: ideologies of family preservation, short-term interests in avoiding the additional work that vigorous implementation would require, and structural interests in maintaining the flow of funds derived from current practices.

1. Ideology of Family Preservation

State agencies already have a proven record of undermining the Child Welfare Act because of their unyielding, one-sided belief in reunification. The drafters of the Act clearly stated that agencies should not make reasonable efforts that endanger children's health or well-being.²³² After advocates

228. See 42 U.S.C. § 672(a)(1); Allen et al., *supra* note 29, at 585. Because the Child Welfare Act did not envision terminations of parental rights for all children in federally subsidized foster care, see *supra* notes 34-39 and accompanying text, the Act necessarily contemplated that the "judicial determination" concerning reasonable efforts would be made at a hearing prior to termination.

229. See NO PLACE TO CALL HOME, *supra* note 150, at 55; Mark Hardin, *Ten Years Later: Implementation of Public Law 96-272 by the Courts, in THE FIRST TEN YEARS*, *supra* note 33, at 51, 54; Shotton, *supra* note 54, at 227.

It is important to emphasize that the rote review occurs in custody, neglect, and permanency hearings *prior to* the termination proceeding. At that proceeding—but only at that proceeding—courts do take the reasonable efforts requirement seriously. See *supra* notes 117-20 and accompanying text. This behavior is the expression of a family reunification ideology trapped inside a system without resources to support serious efforts to reunify families. See *infra* Part III.B.1.

230. See *supra* text accompanying note 38.

231. See Hardin, *supra* note 229, at 56; *Improving the Well-Being of Abused and Neglected Children*, *supra* note 10, at 29.

232. See H.R. REP. NO. 96-136, at 47 (1979), *reprinted in* 1997 U.S.C.C.A.N. 1448 ("[The Committee recognizes that the preventive services requirement would be inappropriate in certain specific circumstances. This would be the case where the home situation presents a substantial and imme-

expressed concerns about state compliance with this mandate, federal regulations under the Act stated unequivocally: "The safety and well-being of children and of all family members is paramount."²³³ In spite of these injunctions, in 1997 Congress learned that states still sometimes sent children back into households that no amount of family preservation could help.²³⁴ Because funding for family preservation is so often paltry, this record can only reflect commitment to family reunification regardless of circumstance.

Corresponding to this belief is a widely shared view that adoption represents failure. The Child Welfare Act allowed states to engage in concurrent planning, or planning for adoption while also attempting reunification.²³⁵ Though such advance planning has been a cornerstone of proper efforts to find permanent placements for some time, only a few states engage in it.²³⁶ Numerous studies confirm that social workers and judges often strain mightily to avoid severing a child's bonds to her parents, even when doing so would ultimately benefit a child.²³⁷

diate danger to a child which would not be mitigated by the provision of preventive services."). The earliest comprehensive analysis of the Child Welfare Act, by a family advocate, did not neglect this point. See Allen et al., *supra* note 29, at 589-90; see also Shotton, *supra* note 54, at 227-28.

233. 45 C.F.R. 1355.25(a) (1997); see also Foster Care Maintenance Payments, 61 Fed. Reg. 58,632, 58,636 (1996) ("[W]e reiterate that 'family preservation' does NOT mean that the family must stay together or 'be preserved' under all circumstances, or at the expense of the safety and well-being of the child."); Family Preservation and Support Services Program: Proposed Rule, 59 Fed. Reg. 50,646, 50,647 (1994) ("If a child cannot be protected from harm without placement, family preservation services are not appropriate.").

234. See *supra* notes 55-60 and accompanying text.

235. See 42 U.S.C. §§ 675(1)(A)-(B) (1994) (elaborating requirements for "case plan" and nowhere requiring that plans be pursued only sequentially).

236. See GENERAL ACCOUNTING OFFICE, *supra* note 68, at 10; GENERAL ACCOUNTING OFFICE, *supra* note 46, at 23 n.14.

237. See, e.g., BARTH ET AL., *supra* note 91, at 263 ("[S]ocial workers and judges have never really believed in sufficient numbers that having a lifetime family was really important. . . . [They] find a hundred excuses for denying children adoptive homes."); OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 16 (stating that "judicial biases" against termination of parental rights "often result in delays"); GENERAL ACCOUNTING OFFICE, *supra* note 68, at 15 (noting that caseworkers "viewed terminating parental rights as a failure on their part because they were not able to reunify the family"); Herring, *supra* note 30, at 181-82 (noting social workers' "aversion to the conflict involved in a termination proceeding" and the "natural leaning of juvenile court judges to give the parents 'one more chance'"); Wald, *supra* note 95, at 693 ("Many judges, and child care workers, appear to be unwilling, on emotional grounds,

To be sure, these attitudes have been changing,²³⁸ and ASFA will shift priorities further. But given the status quo inclination of bureaucracies²³⁹ and the bias of social workers as a professional group,²⁴⁰ such change can only come slowly. In fact, in the absence of new support for services, ASFA's effort to promote permanency through adoption may only steel professionals' resolve to resist rules apparently unconcerned about parental needs. Although its force is diminishing with time, this ideology of reunification creates one important barrier to ASFA's efforts to limit reasonable efforts and promote adoption.

2. Short-Term Interest in Avoiding Workload Increases

Every facet of the child welfare system is now overburdened. Social workers and their supervisors regularly handle more cases than recommended by licensing organizations:²⁴¹ in some jurisdictions, more than four times more.²⁴² Legal professionals face similar conditions;²⁴³ reporters have compared hearings in the overwhelmed juvenile courts to cattle calls.²⁴⁴

Federal law has contributed to this state system overload. The Child Welfare Act tripled the number of issues to which lawyers and judges must attend in juvenile court proceedings.²⁴⁵ As the quality of judicial hearings ultimately depends on the quality of casework, the expansion of hearings has required considerably more paperwork from social workers,²⁴⁶ who now must know and document far more about children

to permanently sever parental ties, even when it is clear that reunion will not occur.").

238. See Louise A. Leduc, Note, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195, 1195-97 (1996) (discussing changes in Connecticut); 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, 85-88 (1997) (discussing trend nationwide).

239. See ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 71 (1993).

240. See *id.* at 70-81.

241. See PETT & CURTIS, *supra* note 124, at 172-74 tbls. 5.7 & 5.8.

242. See GENERAL ACCOUNTING OFFICE, *supra* note 112, at 19.

243. See *supra* note 192 and accompanying text.

244. See Gibeaut, *supra* note 192, at 2.

245. See MARK HARDIN, *JUDICIAL IMPLEMENTATION OF PERMANENCY PLANNING REFORM: ONE COURT THAT WORKS* 9-10 (1992).

246. Cf. Herring, *supra* note 30, at 179-81 (describing social workers' deep involvement in court proceedings).

than previously.²⁴⁷ These burdens limit the capacity of the child welfare system to absorb new demands.²⁴⁸

Child welfare officials have a practical interest in minimizing the impact of a new law that further increases their workloads. Under ASFA, states categorically must do certain things, such as speeding up permanency hearings.²⁴⁹ Such requirements will expend more legal resources regardless of whether they improve child outcomes. With the diminished capacity that remains, states will have to choose whether to vigorously implement discretionary provisions of ASFA.

More vigor means more work. For example, if states attempt to avoid offering parents "reasonable efforts" under an exception for special crimes or aggravating circumstances, parents can demand a judicial determination that such services be provided.²⁵⁰ If the parents lose, then the state must hold an expedited "permanency hearing" and make reasonable efforts to place the child in adoptive care.²⁵¹ Although the nature of the latter work will vary, it may be just as demanding as reunification services, and it will also be relatively new to agencies.²⁵² Maintaining current practice will always be easier, avoiding a messy court issue, more hearings, and unfamiliar work.

247. See, e.g., 42 U.S.C. 675(1) (1994) (requiring "case plan" for each child and setting forth extensive list of required components of such plans).

248. Cf. JOHN M. HAGEDORN, FORSAKING OUR CHILDREN: BUREAUCRACY AND REFORM IN THE CHILD WELFARE SYSTEM 25-31 (1995) (describing extent to which "paperwork and courtwork" dominate social workers' routines and prevent innovative service delivery).

249. See 42 U.S.C. § 675(5)(C). Other new mandates in ASFA include criminal records checks for adoptive and foster parents, see *id.* § 671(a)(20), and new standards for the health and safety of foster placements. See *id.* § 671(a)(22).

250. When exceptions do not apply, the state still has discretion not to provide reasonable efforts to serve the child's health and safety. See 42 U.S.C. § 678 ("Nothing in this part shall be construed as precluding State courts from exercising their discretion to protect the health and safety of children in individual cases, including cases other than those described in [the exceptions]."). But given the requirement that exceptions to the reasonable efforts requirement be made pursuant to a determination by a "court of competent jurisdiction," see *id.* § 675(a)(15)(D), a parent can demand that a court ultimately endorse a decision not to provide services.

251. See *id.* § 671(a)(E)(i).

252. The requirement of reasonable efforts to find an adoptive placement is new, see 42 U.S.C. § 671(a)(15), and the services needed to make those efforts are relatively underdeveloped. See *supra* notes 208-10 and accompanying text.

Vigorously implementing ASFA's measures to promote adoption would similarly tax state legal systems. While the decision to leave a child in foster care requires five or ten minutes of court time, the effort to terminate parental rights is exponentially more intensive.²⁵³ Lawyers and social workers simply looking to stay afloat may be forced to let children continue drifting through foster care.

To be sure, vigorously implementing ASFA might ultimately limit state workloads by reducing the number of children in foster care. That benefit, however, is for now a speculative long-term possibility of which state officials are deeply dubious. It would require either significant expansion in reunification efforts, for which agencies lack resources,²⁵⁴ or major expansion of adoption efforts, to which officials are ideologically resistant.²⁵⁵ Given both the long history of failed attempts to reduce caseloads and the lack of service support for permanent placements, state officials reasonably focus on the immediate burden of more hearings and paperwork, not the possibility of caseload reductions in the future.²⁵⁶ The perception that ASFA will further burden already overburdened professionals is a second barrier to implementation.

3. Structural Interest in Maintaining Foster Care Caseloads

Even if reducing the number of children in costly foster care would reduce financial burdens at the state level,²⁵⁷ it would also limit the funding on which state agencies rely. A very large share of state agencies' funding—sometimes three-quarters—typically depends on the number of children in foster care.²⁵⁸ The main reason for this reliance is the disparity in

253. See *supra* note 192 and accompanying text.

254. See *supra* notes 158-60 and accompanying text.

255. See *supra* Part III.A.

256. See Letter from Nancy Miller, Court Improvement Grant Administrator, State of Oregon, to Robert M. Gordon (Apr. 21, 1998) (stating, in response to the claim that ASFA will save money, that "[w]e are always VERY hesitant to use the term 'savings' because . . . we always see our docket time back fill with something immediately when something else clears") (on file with author).

257. The disparity between foster care and adoption costs should not be overemphasized. Many foster adoptions are subsidized, and the costs of home studies and termination hearings prior to adoption are substantial. See BARTH ET AL., *supra* note 91, at 263.

258. See *Promoting Adoption*, *supra* note 154, at 68 (statement of Dr. Fred C. Wulczyn).

the federal funding scheme between capped, paltry funding for services and uncapped, unlimited reimbursement of foster care expenses.²⁵⁹ By limiting both support for caseload reduction and financial exposure for long-term foster care, this funding mechanism reduces the incentive that state governments would otherwise have to move children out of costly state care. A handful of state governments still encourage agencies to pursue adoption and reunification by supporting services more richly than does the federal government,²⁶⁰ or by capitating payments to agencies under a federal waiver.²⁶¹ But these practices are anomalies: the vast majority of states provide inadequate resources for child welfare services²⁶² and still pay for foster care on a per diem basis.²⁶³ Because state agencies thus must rely on foster care to fund themselves, they would suffer financially from concerted efforts to reduce the number of children in foster care through either reunifications or adoptions.

ASFA attempts to shift the incentives facing state agencies through adoption bonus payments, but these bonuses are too small to have a significant impact. The law offers \$20 million

259. See *infra* notes 271-76 and accompanying text. The reimbursement rate for foster care administrative expenses is 50%; for foster care maintenance payments it is the Medicaid matching rate. See 42 U.S.C. § 674(a) (1994). The latter rate ranges from 50% in most large states to 77% in a few states. See 62 Fed. Reg. 62,613, 62,614 (1997).

260. Telephone Interview with Rob Geen, Policy Analyst, the Urban Institute (May 5, 1998).

261. See DEPT OF HEALTH AND HUMAN SERVS., CHILD WELFARE DEMONSTRATION PROJECTS app. III, at 1 (1998) (listing only five states that capitate payments). As Part IV.A *infra* discusses in detail, capitation means payment per child, rather than payment per service. Because adoption and reunification are less costly per child than foster care, capitation encourages long-term placements. It also has serious pitfalls, especially the promotion of low-cost, dangerous treatment of children.

262. See GEEN & WATERS, *supra* note 20. For data from one state bearing out this view, see Fred H. Wulczyn, *Child Welfare Reform, Managed Care, and Community Reinvestment*, in CHILDREN AND THEIR FAMILIES IN BIG CITIES: STRATEGIES FOR SERVICE REFORM 199, 211 (Alfred J. Kahn & Sheila B. Kamerman eds., 1996) (showing that "[t]he disparity in spending on foster care versus in-home services found in New York reflects the same approximate spending pattern found in the way the federal government finances child welfare services"). State budgets for child welfare services seriously suffered during the budgetary crises of the early 1990s. See Douglas J. Besharov, *Epilogue to WHEN DRUG ADDICTS HAVE CHILDREN, REORIENTING CHILD WELFARE'S RESPONSE* 249, 249-50 (Douglas J. Besharov ed., 1994) (reporting that more than 30 states had frozen child welfare spending, and that cuts of 20 and 30% were common).

263. See *Promoting Adoption*, *supra* note 154 (statements of Dr. Fred C. Wulczyn and Maureen K. Hogan).

per year in incentive payments²⁶⁴—two-tenths of one percent of the \$10 billion that governments spend on foster care alone each year.²⁶⁵ For the average state that earns the average level of reimbursement, the subsidy promises to increase the federal share of the state child welfare budget by less than one-half of one percent.²⁶⁶ Even if such a state makes a big push and raises its adoption rate by the stunning amount of fifty percent, and even if other states do not make similar efforts that disperse the incentive pool, the state would still add less than one-and-a-half percent to its federal child welfare budget.²⁶⁷

Notwithstanding the adoption incentive, therefore, most state agencies continue to rely heavily on large foster care caseloads for their budgets. Though vigorous implementation of ASFA might reduce those caseloads, it would diminish agencies' already limited resources. In fact, to the extent that family preservation advocates can often hope only to preserve parental rights, not to reunify families, the funding regime makes this downsized agenda financially advantageous. Agency funding would seriously suffer if states permanently moved children out of foster care. Federal funding thus supplies a further reason that states are not likely to implement ASFA vigorously.

C. SUMMARY

Given the opportunities, ideologies, and interests described in this part, states are likely to implement ASFA in a way that minimizes its effects. The results will be mixed. The state response will reduce the risk that Congress has "gone too far." Older children in particular will not suffer terminations of parental rights without adoptions in the numbers that Congress's careless drafting might have generated. But the lax implementation of ASFA will also limit the rewards of Congress's having gone as far as it did. States do not have incentives even to move as fast as Congress suggested in placing young children for adoption. Rather, they have every reason to maintain the high levels of drift and low levels of adoption that motivated ASFA in the first place.

264. See 42 U.S.C. § 673b(h) (1994).

265. See GELLES, *supra* note 59, at 131.

266. Calculation from PETIT & CURTIS, *supra* note 124, at 160-61.

267. See *id.*

ASFA's limited impact may help explain its broad support. On its face, ASFA is a controversial step: a micromanagerial federal intervention in a domain of traditional state sovereignty that aims to impose strict limits on state aid to troubled families. ASFA's structural weakness may have palliated both political groups that would ordinarily oppose such a measure. Conservatives who ordinarily guard state sovereignty could console themselves that ASFA really requires very little.²⁶⁸ And liberals who usually decry punishing the poor could hope that most states would never accomplish the terminations of parental rights apparently mandated by the law.²⁶⁹ ASFA's weakness might then be the secret of both its political success and its programmatic failure.

IV. RENEWING ASFA'S PROMISE

In their landmark work, Goldstein and his co-authors cautioned that professionals who seek to serve children must be "softhearted and hardheaded."²⁷⁰ The Congress that passed ASFA had some of both qualities. It had the decency to recognize that children suffer from shifting placements and the courage to encourage tougher timetables. Yet ASFA is greatly diminished by the insensitivity of its specific provisions toward children's developmental needs and the indifference of its funding structure to the incentives of state agencies. Congress finally proved too hardhearted toward children and too soft-headed toward agencies.

This part suggests several measures to improve the responsiveness of federal law to children's developmental needs and agencies' structural interests. As Part III suggested, state interests and incentives can thwart even the best-designed procedural changes, so the discussion begins with financial reform. It then moves to procedural measures. In tandem, these changes would help achieve two of ASFA's central goals: sending more children home more quickly and placing more children for adoption.

268. *But see* Toby Eckert & Dori Meinert, *LaHood: Adoption Law Infringes on States*, ST. J. REG., Jan. 2, 1998, at 13 (quoting Rep. Ray LaHood, one of seven House members to vote against the adoption act, as saying "I do not believe in federalizing the adoption system").

269. *But see* 143 CONG. REC. H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Mink) (opposing the Act because it makes "poverty and lack of work . . . the sole basis for the termination of parental rights").

270. GOLDSTEIN ET AL., *supra* note 19, at 218.

A. REFORMING FEDERAL FINANCING

Unlike the supporters of ASFA, the Congress that enacted the Child Welfare Act of 1980 acutely understood the importance of incentives in the child welfare system.²⁷¹ The Child Welfare Act contained a clumsy but well-intentioned mechanism that limited increases in state foster care maintenance payments to ten percent per year and allowed states to transfer unused funds below the caps to services programs.²⁷² The caps only became operative, however, if federal child welfare services were funded at the full authorization level.²⁷³ These services were never so funded after 1981,²⁷⁴ and Congress eliminated the incentive provisions altogether in 1994.²⁷⁵ Although mistaken in critical details, these provisions reflect an insight that remains valid: reform of federal financing is essential to improving child welfare outcomes.

The combination of too little money for services and too much for foster care suggests that a solution might not require new funding, a welcome possibility in today's political climate.²⁷⁶ Yet realignment of funding must also negotiate several obstacles. First, if support for foster care, services, or both together is limited, funds must be allocated to states and among them in a way that protects against uncontrollable growth in foster care caseloads. Federal policy should discourage states from leaving children in foster care too long, not from taking endangered children into care in the first instance. Second, the allocation of funds under a cap should not reproduce the incentives under current law to leave children in foster care or, worse, create new incentives to put children in care. Third, a realignment should offer states the appropriate amount of flexibility: enough to provide various kinds of services, but not so much as to allow diversion of funds to more po-

271. See H.R. REP. NO. 96-136, at 1 (1980), *reprinted in* 1997 U.S.C.C.A.N. 1448, 1450 (stating, in first sentence describing purpose of Child Welfare Act, that "the incentive structure of present law is modified to lessen the emphasis on foster care placement").

272. See Child Welfare Act of 1980 § 101, 42 U.S.C. § 674(b)(4)(B) (Supp. 1981)).

273. See *id.* § 674(b)(2)(A).

274. See 1996 GREEN BOOK, *supra* note 20, at 699 tbl.12-5.

275. See Social Security Act Amendments, Pub L. 103-432, § 207, 108 Stat. 4398, 4457 (1994).

276. The discussion that follows assumes Congress would keep overall child welfare funding at its currently projected levels.

litically popular programs. The following discussion explores ways to reform the system within these constraints.

1. The Risks of Global Solutions

The most obvious way to realign incentives would be to combine funding for services and foster care in a single stream of money that states can use as they please. Although not ordinarily presented as such, a decategorized funding system could in principle maintain generous spending levels and preserve federal substantive guarantees for case planning, case review, and so on.²⁷⁷ Such a system would eliminate the disproportional federal support for foster care, and reduce the costs of administrative compliance for both state and federal governments.

In 1995, the House of Representatives passed a problematic bill that would have consolidated federal funding for child welfare into a block grant, a lump sum of funding available for services as well as foster care.²⁷⁸ By eliminating any matching mechanism, that proposal would have forced states to bear the full marginal cost of any expenditures on child welfare.²⁷⁹ Relative to the current regime, that would discourage not only excessive foster care expenditures, but also foster care and social services expenditures of any kind, reducing child safety as well as drift.

A marginally better prospect would be a matching grant system under which states receive the same level of federal reimbursement for their expenditures on both services and foster care up to a limit. By eliminating the advantage of foster care over preventive services in the federal funding scheme, such a system might encourage states to shift efforts toward

277. See Jerry L. Mashaw & Dylan S. Calsyn, *Block Grants, Entitlements, and Federalism: A Conceptual Map of Contested Terrain*, 14 *YALE J. ON REG.* 297, 301-04 (1996); William A. Morrill, *Getting Beyond the Micro "Gee Whiz": Can Innovative Service Change the Service System?*, in *CHILDREN AND THEIR FAMILIES IN BIG CITIES*, *supra* note 262, at 185, 195.

278. See GENERAL ACCOUNTING OFFICE, *supra* note 112, at 23.

279. See Mashaw & Calsyn, *supra* note 277, at 299. Maintenance-of-effort provisions can force states to spend their money within the block grant framework, but these provisions typically do not require states to maintain all of their current spending levels or to keep up with inflation. See Steven D. Gold, *Issues Raised by the New Federalism*, 49 *NAT'L TAX J.* 273, 275 (1996). If the maintenance-of-effort provisions are stringent, then the program in effect becomes a capped entitlement with matching. That more appealing prospect is discussed below.

services. However, by preserving the rich and constant level of reimbursement for foster care, such a system would not necessarily disrupt state practices of letting children linger in care. States uninterested in reform would not have to do so.

More fundamentally, a matching system would also create intolerable dangers. Because a matching program requires limitation on total funding (as in a block grant), states would likely face severe adequacy and equity problems. Historically, Congress has used the consolidation of funding streams as an opportunity for cost-cutting.²⁸⁰ If that happened here, states would be left without adequate funding for services or foster care, much as under the block grant proposal.²⁸¹

Furthermore, even if Congress were prepared to create an adequate global ceiling, there would be no sensible way to limit total funding over time or to allocate funds equitably under the cap. The ideal variable to which to tie both the global funding level and each state's share would be demand for foster care and related services. A policy based on attempted measurement of that demand, however, would both destroy the integrity of the measurement and introduce perverse new incentives. For example, foster care caseloads might model demand for services quite well, but tying overall funding to those caseloads would encourage states to keep children in care. That is the undesirable situation under current law, and it would be exacerbated by a decategorized funding system that allowed states to obtain per diem reimbursements for services as well as foster care. Using admissions to foster care as the proxy for demand would eliminate the incentive to keep children in care, but it would introduce a vast new inducement to take children into foster care in the first instance. Another seemingly plausible proxy is the number of substantiated child

280. See generally Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996); Morrill, *supra* note 277, at 195.

281. See Audrey Burnam & Elan Melamid, *Child Protection and Welfare Reform* (visited Apr. 20, 1998) <<http://www.rand.org/publications/CF/CF123/burnam/index.html>> (noting that under H.R. 4, funding for child protection was not likely "to keep pace with growth in demand for child protective services if the trends of the last decade continue"); S. REP. NO. 96-336, at 155-56 (1980), *reprinted in* 1980 U.S.C.C.A.N. 1448, 1559-61 (additional views of Sens. Heinz and Danforth) (criticizing proposed cap because, among other things "a 'cap' on foster care is simply not flexible enough to take into account increased costs in food, heating, and clothing due to inflation; additional numbers eligible for AFDC because of voluntary placements . . . and increased demand resulting from success in locating and helping abused children").

abuse reports. That number does not correlate strongly with demand for services,²⁸² however, and as a basis for policy it would create a perverse incentive for states to intervene aggressively but offensively in more families.²⁸³ One California researcher has identified some factors beyond the control of state child welfare agencies (though not of states as wholes) that do correlate with the number of children who are mistreated or in foster care.²⁸⁴ Even if her results held nationwide, two powerful variables, number of births and number of drug arrests,²⁸⁵ offer politically untenable grounds for increasing funding.²⁸⁶ The only workable bases for funding, therefore, would be the kinds now used, such as past expenditures and poverty rates,²⁸⁷ and these do not predict caseload growth with much accuracy.²⁸⁸

An inadequate global cap would create risks greater than those accepted by Congress in the 1996 welfare law. Whatever the merits of the cap in that law at that time, a similar cap for child welfare today would be much more dangerous precisely because of the welfare reform. Child welfare is now all that remains of the safety net for poor children whose parents cannot cope in the new regime.²⁸⁹ With diminished resources and increasing needs under a capped grant, cash-strapped states would be forced to choose between leaving more endangered

282. Even when abuse or neglect is substantiated, the state may not provide services because the problem is too small or already resolved. Such judgments are products of conditions and policies that vary greatly among states. See Jeanne Giovannoni & William Meezan, *Rethinking Supply and Demand in Child Welfare*, 17 CHILD. & YOUTH SERVS. REV. 465, 465-67 (1995); Sheila B. Kamerman & Alfred J. Kahn, *If CPS Is Driving Child Welfare—Where Do We Go From Here?*, 48 PUB. WELFARE 9, 9-11 (1990).

283. See *supra* note 92 and accompanying text.

284. See Vicky Albert, *Explaining the Growing Number of Child Abuse and Neglect Reports and the Growing Foster Care Caseload*, in 1 CHILD WELFARE RESEARCH REVIEW, *supra* note 45, at 218, 235-38.

285. See *id.*

286. It is inconceivable that Congress would give a state more money because its citizens had more babies or more drug problems. Moreover, correct prediction of caseloads depends on complex mathematical formulas. See *id.* at 233. On inclusion of variables such as the number of female-headed families and number of births to persons of color, see *id.* at 235-36. These factors do not add to the plausibility of using such data as a basis for forecasting.

287. See 42 U.S.C. § 629c(c) (1994).

288. See *id.*; Tatar, *supra* note 45, at 139-42.

289. See COURTNEY, *supra* note 21, at 17 (noting that children whose parents are "unable or unwilling to find work" are "likely to end up in foster family care or group care").

children with increasingly desperate parents²⁹⁰ and focusing on child safety to the exclusion of reunification or adoption.²⁹¹ Protecting child safety and promoting permanency were both goals of ASFA, and forcing states to choose between them makes no sense.

The federal government has granted five states waivers to operate child welfare systems using global budgets.²⁹² These waivers create negotiated, revocable, three to five year caps.²⁹³ Policies crafted by Congress for all fifty states are much tougher to revise than these temporary demonstrations negotiated by an executive agency for five states. While studying the experience in these demonstrations, Congress should pursue other, less risky approaches.

2. Limiting Reimbursement for Long-Term Foster Care

The preceding emphasis on unpredictable increases in demand suggests a different approach to limiting foster care expenditures: retaining the entitlement to foster care, but reducing the reimbursement rate as a child spends more time in state care. This approach would preserve current protection for entries into foster care, but reduce protection as stays in foster care continue. The rationale is twofold. First, although public policy properly seeks to minimize unnecessary entries into foster care and protracted stays in such care, entries more often benefit children than protracted stays in such care. Entries often prevent serious harm; in fact, they most often become harmful only when they grow into the prolonged stays that so often involve multiple placements.²⁹⁴ Reducing entries would therefore be a much more ambiguous achievement than reducing the length of stays. Second, states have greater control over the duration of care. In order to prevent entry, the child welfare system has one major tool: family preservation. Family preservation, however, is the child welfare service that

290. See Giovannoni & Meezan, *supra* note 282, at 467 (discussing how states already often leave children in homes not regarded as safe by community members).

291. See Burnam & Melamid, *supra* note 281, at 18 (predicting that as a result of combined welfare and child welfare reforms, "the ability of the child protective system to prevent out-of-home placement, triage children into least-restrictive settings, and arrange for permanent placements will decline").

292. See DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 261, app. III.

293. See *id.*

294. See *supra* notes 93-101, 105-12 and accompanying text.

has been proven least effective. It is not appropriate for many families; and given the suddenness of many entries into care, it is a service that not even the best system could make universally available.²⁹⁵ Once a child is in foster care, by contrast, the state can carefully plan multiple permanent options, including reunification, adoption, and guardianship. In response to a cap on all costs or foster care costs, a state may have no choice but to dangerously limit intakes to care. In response to a cap on long-term stays, a state could move children out of care safely and quickly. In short, unlike a poorly structured global cap, a cap on long-term costs encourages attainable reforms and limits uncontrollable risks.

By requiring funding of long-term stays in foster care, but shifting their costs to states, a system with limited reimbursement for long-term foster care would spur reform of state financing systems. Because states would bear a much larger burden for long-term care, they would have much greater incentives to provide the funding for preventive services that they do not now offer.²⁹⁶ States might respond by accelerating the shift from per diem reimbursement toward capitated payments and from reliance on state agencies to nonprofit providers.²⁹⁷ Although publicly funded foster care must of course remain available, the proposed funding shift would encourage state legislatures to provide state and nonprofit agencies with both the resources and the incentives to move children from long-term foster care.

A declining reimbursement system faces two difficult design issues, but neither is intractable. One question is whether reimbursements for all children should decline over time. There are two good arguments that states should be allowed, at least for the foreseeable future, to exclude a limited share of their caseloads from a declining reimbursement system. First, such an exclusion would create a margin of error as reforms proceed. Second, it would allow states to continue providing

295. See *supra* note 171 and accompanying text.

296. See *supra* notes 262-63 and accompanying text.

297. For a description of some early moves in this direction, see *Promoting Adoption*, *supra* note 154 (testimony of Dr. Fred Wulczyn) (describing success of Home ReBuilder program in New York City in increasing discharge rates); *id.* (testimony of Teresa Markowitz, Kansas Department of Social and Rehabilitation Services) (showing the early success of a similar program in Kansas at achieving high reunification and low recidivism rates); *id.* (statement of Richard E. Hoekstra, Michigan Family Independence Agency) (describing a similar program in Michigan).

long-term care and services to the small group of children for whom reunification, adoption, and guardianship are not currently realistic options.²⁹⁸ The law should not discourage states from continuing to care for these children.

It is a closer question whether to exclude children in kinship care from a declining reimbursement scheme. These children do appear to face fewer risks than children in nonkinship care.²⁹⁹ Standing almost alone as an exclusion within a declining rate system, however, the special treatment of kinship care would create a powerful incentive for states to place children in kinship homes, regardless of their suitability or permanency.³⁰⁰ There is, therefore, an argument for treating kinship care like any other placement.

An exclusion for a form of subsidized guardianship would protect the soundest kinship care providers. Legal guardianship is a complex status, often utilized and subsidized among kinship caregivers. In this situation, the guardian has authority to act in loco parentis, but the biological parent retains rights to visitation and to petition for custody.³⁰¹ Though less secure both legally and psychologically than adoption, guardianship is far more permanent than foster care. For example, the guardian must assume legal liability for the child and can only lose custody on a "best interests" showing.³⁰² The full reimbursement of guardianship rather than kinship care would thus help assure the permanency of the kinship placement. Such reimbursement would not, however, assure suitability, especially since guardians typically do not have access to the same range of services as foster parents.³⁰³ Full reimbursement of guardianship would therefore require the in-

298. These are generally children with severe emotional problems on whom the state now spends large amounts of money for "specialized foster care" or, where that is not available, group care. See BARTH ET AL., *supra* note 91, at 179-92; Ramona L. Foley, *The Insufficiency of Statutory Protections, in WHEN DRUG ADDICTS HAVE CHILDREN*, *supra* note 262, at 157-60.

299. See *supra* notes 125-28 and accompanying text.

300. See *supra* note 119 and accompanying text.

301. See Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 457-59 (1996); Carol W. Williams, *Legal Guardianship, in WHEN DRUG ADDICTS HAVE CHILDREN*, *supra* note 262, at 229, 231, 233-36.

302. See Schwartz, *supra* note 301, at 463.

303. See BARTH ET AL., *supra* note 91, at 265; Williams, *supra* note 301, at 237. It is worth noting, though, that as a practical matter most kinship caregivers do not receive many services either. See BARTH ET AL., *supra* note 91, at 210-11.

creased support and monitoring that some commentators have already proposed.³⁰⁴ With that shift accomplished, exclusion of guardianship from a declining rate system would appropriately tailor a kinship exception.

For the great majority of children, reunification, adoption, or guardianship (subsidized or not) should be a real possibility, and federal reimbursements should decline if states fail to solidify one such option within a reasonable period of time. The issue then is the rate of decline, over which three principles should govern. First, rates of decline should be sensitive to variations in children's sense of time: just as timetables for hearings and termination of parental rights should vary with age, timetables for reimbursement should also vary. Second, because premature reunification is dangerous³⁰⁵ and finding an adoptive placement takes time, rates should remain stable for a sufficient period of time to assure that children are not rushed home prematurely. After that time, rates might regularly decline to a much lower reimbursement rate than present law provides. Finally, there must be lifetime per-child limits on foster care reimbursement at the maximum rate, in order to prevent states from returning children home for intentionally brief and highly disruptive periods of time.³⁰⁶

Such a system is not without risks. It is possible that states would not manage to lower long-term foster care use. This would expose them to greater costs, which in turn would produce political pressure for agencies to remove children from care without regard to their welfare. At least four forces, however, would limit these risks. First, the exclusion of some children from the scheme would provide a margin for error. Second, judicial review of permanency decisions could provide a check against some bad decisions. Third, precipitous reunifications are short-lived and ultimately save very little money. Fourth, and most importantly, the second part of the new financial mechanism, greater funding for services, would help assure that agencies have not only the incentives to reduce long-term care, but also the means to do so.

304. See Williams, *supra* note 301, at 237. It would also require an additional change in federal law, since guardianship is not now federally reimbursed. See Schwartz, *supra* note 301, at 456.

305. See, e.g., Barth & Berry, *supra* note 100, at 337; *infra* note 320.

306. Cf. 42 U.S.C. § 675(5)(E) (Supp. 1998) (requiring a state to file a petition for termination of parental rights if a child spends 15 out of 22 months in foster care).

3. Increasing Support for Services

With the savings from reductions in reimbursements for long-term foster care, Congress could finance a major expansion of child welfare services. To prevent an explosion of costs, such an expansion would have to be capped, and the need for a cap presents the difficulties highlighted earlier. Keying payments to the number of children entering foster care would best approximate state services needs and, unlike using the total number of children in foster care, would not encourage states to retain children in care. On the other hand, keying funding to entries would create an incentive for states to take children into care. Because intake itself is costly³⁰⁷ and the payment contingent on entries would be only a limited bonus, however, this perverse incentive would be weaker than when the total budget turns on the caseload size. If this perverse incentive remains a concern, however, the bonus payment could be limited and combined with an increase in funding for child welfare services under the two subparts of Title IV-B.³⁰⁸

Several technical modifications in the Title IV-B services program would be necessary to improve services. First, the two subparts of that title, Child Welfare Services and Family Preservation and Support, should be combined in a single services grant. This would reduce compliance costs and improve program quality nationwide. Within the second subpart, half of the program—family preservation—has proven less successful than other interventions³⁰⁹ and should not receive special federal aid. The other half—family support—does not attempt to assist children at greatest risk of foster placement.³¹⁰ Such services may be very valuable socially, but they do not reduce foster care drift, an especially urgent goal in a reformed system. With half of the second subpart no longer favored and the other half either funded separately or not at all, the two parts of Title IV-B could be combined to form a single program supporting the full range of preservation, reunification, treatment, long-term homemaking, and adoption services for at-risk children. Because of the close link between destitution and child

307. See Giovannoni & Meezan, *supra* note 282, at 465-67; Kamerman & Kahn, *supra* note 282, at 9-10.

308. See 42 U.S.C. §§ 621-629 (1991 & Supp. 1998) (child welfare services and payment to states).

309. See *supra* note 171 and accompanying text.

310. See *supra* note 161 and accompanying text.

maltreatment,³¹¹ the allocation principle within that grant program should be a measure of poverty, such as the percentage of children receiving food stamps used in the family support and preservation program,³¹² not the per capita income measure that is used in the general services program.³¹³ Finally, for all proposed funding increases, the law should contain maintenance-of-effort provisions to ensure that states do not simply substitute federal funding for state funding.

If the risks of reduced foster care funding appear too great, then some of these services funds might also be made available for foster care. Such a measure has serious costs, however. States would be at less risk, but they would also have less incentive to move away from their current misallocation of resources. The result would approximate the current reimbursement of foster care for long periods of time, with some flexibility to transfer some funds into services. That would be an advance, but it would be much smaller than the effect of requiring services funding to be spent on services. The one risk of the proposed system—that it will disrupt state reliance on long-term foster care—also offers its greatest rewards.

B. OVERHAULING PROCEDURAL REQUIREMENTS

Financial reforms would give states concrete incentives to follow the timetables in ASFA. Bearing more of the costs of long-term care, state officials could not so easily allow temporary foster care to continue from hearing to hearing. Nor could they use the exceptions to the termination provision to strand children in care. Because states are more likely to implement the mandatory timetables, correcting the errors contained within them becomes imperative. Timetables remain sound ideas, and the following discussion suggests four ways to improve them.

1. Respecting the Child's Sense of Time

One minor change would set the tone for enforcement. To help child welfare workers focus on the child's sense of time, the law should run the period prior to permanency hearing and termination petition from the date of the child's removal from

311. See COSTIN ET AL., *supra* note 24, at 149-51.

312. See 42 U.S.C. § 629c(c)(2) (Supp. 1998).

313. See *id.* § 621(b) (1991).

the home, not from the hearing on neglect.³¹⁴ Reunification efforts should generally begin prior to a neglect hearing. The child's difficulty with separation and need for permanency begin with her removal from the home, not with the hearing. The law should focus on the removal.

2. Taking Age into Account

The law should treat children differently at different ages. This differential treatment would help assure that young children do not suffer psychologically or lose adoption opportunities due to needless delays, and that older children do not suffer terminations for which they are not ready and from which they may not benefit. Beyond these immediate results, age-sensitive timetables would signal to child welfare workers that children's different developmental timelines matter. Both the termination timeline and the schedule of permanency hearings should take age into account.

The more complex issue is termination timetables. With regard to age distinctions, child development experts suggest that age three is often a critical point at which children become more able to handle longer periods of separation from their parents.³¹⁵ The evidence of a precipitous decline in adoption rates for children entering foster care after age one might seem to suggest that terminations of even younger children should not be expedited. That collapse occurs, however, notwithstanding current delays of months or years while state agencies decide on an adoptive placement, seek to terminate parental rights, and obtain the termination and adoption decrees.³¹⁶ Even with those delays, children between ages one and four are still adopted substantially faster than older children.³¹⁷ Children who enter care before age three could be adopted in considerably larger numbers if their termination processes were accelerated.

314. For discussion of the current rule, see *supra* notes 195-97 and accompanying text.

315. See GOLDSTEIN ET AL., *supra* note 19, at 105-06; Wald, *supra* note 95, at 689-92. This discussion is generally indebted to these authors, especially Wald.

316. See OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 7 fig.3 (showing that the time from entry to care until adoption ranges from 30 to 108 months, and that the time from the identification of adoption as the permanency plan to adoption ranges from 24 to 54 months).

317. See BARTH ET AL., *supra* note 91, at 159-60 tbls.7.1-7.2.

As to the appropriate time periods, a sensible deadline for very young children would be one year after entry into care. Two factors counsel a very short timetable: the harm to infants after very brief periods of loss³¹⁸ and the precipitous drop in reunification rates after even four months in foster care.³¹⁹ But the increased rate of return into foster care after reunifications from foster care stays of less than ninety days suggests that the timeline should not push reunification too quickly.³²⁰ One year is an adequate period to protect children and provide services to parents.³²¹ For older children, a sensible period would be eighteen months. That timetable incorporates the lesser harms from foster care and the greater tenacity of the older child's bonds to her parents. The longer delay would also prevent states from wasting limited legal resources on addressing inessential termination petitions.

As the law accelerates deadlines to termination for younger children, it should also accelerate their permanency hearings. With increased pressure to find permanent placements quickly, such hearings would become more critical so that agencies understand parents' needs and parents understand agencies' expectations. It would make sense to hold the hearings after six months in care for children under three years of age. Occurring three or six months before the decision

318. See GOLDSTEIN ET AL., *supra* note 19, at 105; Wald, *supra* note 95, at 689-92.

319. See Courtney, *supra* note 110, at 90 fig.1.

320. Many studies, but not all, show that three months is both a minimum safe period in foster care and the maximum period needed to minimize the risk of recidivism. See Courtney, *supra* note 110, at 236 (showing that children who had stays in care less than three months had higher rates of reentry than other children, but that after a few months in care, additional time had no effect on recidivism); Fred Wulczyn, *Caseload Dynamics and Foster Care Reentry*, 65 SOC. SERV. REV. 133, 147 (1991) (showing a similarly high recidivism rate among children returned home after less than 90 days and much lower rates for children returned home in any period later). *But see* Barth & Berry, *supra* note 100, at 337 (showing higher recidivism rates for children returned home after 3-to-6 months than among those returned after 6 to 12 months). Although troubling, the difference in the last study was a 29% recidivism rate for the faster group and 19% for the slower group, and as there was no disaggregation of the groups by months in care, the actual difference in rates between the groups with nine- and twelve-month stays may have been quite small. See *id.* The studies show no increase in safety from more than a year in foster care. See *id.*

321. See also *infra* note 323 (discussing possibility of one-time extension for parents of infants).

on a termination petition, such a hearing would provide clearer notice to all parties of the state's plans for the child.

3. Scrutinizing Permanency Decisions

Although financial reform would limit the temptation for state agencies to minimize their workloads by unthinkingly finding an exception to the mandatory termination provision, two additional reforms would further curtail such arbitrary discretion. First, though state agencies should be allowed not to seek termination of parental rights based on the child's best interests, these agencies should be required to identify specific conditions justifying that decision. Given the state-specificity and complexity of many issues in the termination process, Congress cannot dictate a complete list of criteria to states.³²² However, to assure that agencies' discretion is channeled, the federal government should, as Michael Wald has suggested, establish a broad list of acceptable criteria for declining to terminate parental rights from which states could choose.³²³

322. The debate over an "adoptability" criterion is a good example of an issue both too contested and too complex for federal law to handle. Even advocates who join in favoring adoption disagree about its merits. Compare Wald, *supra* note 95, at 699 (advocating adoptability criterion in order to avoid needless terminations) with Barth, *supra* note 111, at 304 (arguing that the risk of creating "legal orphans" through terminations absent an adoptability criterion is outweighed by the risk of creating "de facto orphans" by refusing to terminate parental rights).

Adoptability inquiries can also be structured in very different ways. See OFFICE OF THE INSPECTOR GENERAL, *supra* note 144, at 16-17. For example, some states grant terminations of parental rights that are conditional upon the finding of an adoptive placement. See *id.* at 16. Along similar lines, a mandatory filing system could require states to demonstrate that they have vigorously sought to identify an adoptive home *prior* to the decision not to terminate parental rights. The law would need to specify the elements of the vigorous search and the minimum time period in which they must occur, and the proof of such search would have to be reviewable by the child's advocate and by the court. To assure that states did engage in such search efforts in advance through "concurrent planning," the statute would have to require that states failing to make such efforts prior to the deadline proceed with a termination petition while those efforts occur, and that the adoptability determination be made later on. As these reflections suggest, the issue is too complex to be handled in a one-size-fits-all fashion by federal law.

323. See Wald, *supra* note 95, at 696-99 (listing as criteria for avoiding mandatory timetable strength of parent-child relationship, placement with kin who do not wish to adopt, children's need for special treatment, child's desires, and availability of adoptive parent). To this list should be added placement with a permanent guardian and, in view of the short period proposed for services prior to termination, in the case of infants a strong likelihood that

In a second reform of the mandatory termination process, state agencies should be required to do more than make the basis of their decision "available for court review."³²⁴ That availability provides little assurance of meaningful judicial scrutiny.³²⁵ Rather, at the permanency hearing prior to the termination deadline (for an infant, after six months in care prior to the nine-month deadline, and for an older child after twelve months in care prior to eighteen months), all parties should be able to demand a judicial ruling on whether to proceed with termination. That ruling would not anticipate the termination decree any more than a probable cause determination in a criminal case establishes guilt.³²⁶ In both instances, the rule simply means that the executive branch must submit to judicial review before depriving an individual of a presumptive right—whether freedom from seizure, or a permanent home after some time in care.

4. Limiting the "Reasonable Efforts" Exception to the Termination Timetable

With the expansion of funding for reunification efforts, the argument for the reasonable efforts requirement in the termination process would become stronger. As states increase funding for supportive services, social workers would become more able to provide these services and more tractable if they did not. Moreover, with a limited timetable for full foster care reimbursement, agencies might otherwise have a new incentive to find the first available permanent placement, even if it were an improper adoption for an easily adopted child. For these reasons, a reasonable efforts prerequisite to termination would have a more useful incentive effect.

At the same time, federal law should cabin the reasonable efforts exception to achieve its purpose. Each state should be required to define the reasonable efforts that every state agency can plausibly offer. State judges should then be required to use early permanency or neglect hearings to identify the reasonable efforts that agencies must supply. An exception

reunification can occur within a fixed period of approximately sixty days (with an extension to be available only once).

324. 42 U.S.C. § 675(5)(E)(ii) (Supp. 1998).

325. See *supra* notes 219, 221, 231 and accompanying text.

326. See *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (requiring a prompt "determination of probable cause as a prerequisite to [pretrial] detention" following a warrantless arrest).

to the termination timetable should only be available when an agency has failed to provide services that it could have supplied and knew it should have supplied. Even when the exception applies, the timeline for these efforts should automatically begin to run again with the provision of those efforts. These narrowing steps would assure that the reasonable efforts requirement operates as a meaningful incentive, not an unattainable standard.

C. SUMMARY

These reforms seek to be softhearted and hardheaded. They would realign federal procedures with children's needs in a way that respects children's different senses of time and different opportunities. At the same time, the proposals would reconnect federal funding with federal goals, breaking down the financial and ideological barriers to giving children more permanent homes. The reforms certainly involve risks. But they might fulfill ASFA's promise.

CONCLUSION

This Article has argued that the framers of the Adoption and Safe Families Act had the right goals but produced the wrong vehicle for achieving them. In a system seized by so much inertia, ASFA's procedural reforms are too poorly drafted and narrowly focused to encourage the right systemic change. Reforms that are financially bolder yet substantively more precise promise permanency for more children in a more timely manner.

Because these proposed reforms would alter the system more dramatically, they invite rethinking of a question deflected at the beginning of this Article: did Congress really mean to put "children's rights" ahead of "parents' rights?"³²⁷ An adult-oriented sense of justice does stand behind ASFA's procedural failures to protect children's interests, especially the overly broad exceptions to the termination provision and

327. A large literature questions the utility of this distinction. See, e.g., RENNY GOLDEN, *DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM* 153 (1997); Anthony N. Maluccio et al., *Protecting Children by Preserving Their Families*, 16 *CHILD. & YOUTH SERVS. REV.* 295 (1994). As the following paragraphs show, these perspectives in my view exaggerate the overlap between parents' and children's needs, at least in the cases that enter the child welfare system. For a balanced approach, see GOLDSTEIN ET AL., *supra* note 19, at 87-88.

the insensitivity to children's ages. But ASFA's other mistake, its failure to reform system financing, actually works against parents by reducing the services available to them. Only a portion of ASFA's failure to serve children thus reflects enduring concern for parental rights.

To the extent that justice toward parents is still a value in ASFA, this Article may appear unfaithful to the Act's purposes. However, it is worth considering the effects of the proposed child-oriented reforms for parents. In some important ways, these reforms would better serve adults than does ASFA. Current law tacitly reflects a nonsensical compromise: the children do not go home, the state does not terminate parental rights, and long-term foster care results. This outcome does not serve anyone's best interests. Children do not achieve permanency, and parents do not regain custody. The proposed reforms would offer both parents and children better results. Children would have more hope of permanency, ideally with their parents but otherwise elsewhere, and parents would have more help regaining custody of their children. In some measure, therefore, this Article advances children's interests and parents' interests in tandem.

Yet the scope of this confluence should not be overstated. When parents cannot use available assistance to regain custody, then under the proposed reform they would lose their rights more quickly than under ASFA. The availability of supportive services may satisfy some observers that parents' failures are "their fault" and hence no longer the law's legitimate concern. But that is a facile response. The parental failures may also reflect systemic injustices—especially the pressures of poverty—which the services do nothing to reduce.³²⁸ The child-oriented proposals in this Article are thus in some tension with ASFA's quiet steps to safeguard parental interests.

That objection ultimately goes beyond the scope of this discussion, though. This Article has examined child welfare law from the perspective of Congress's stated goals, not its ambiguous actions.³²⁹ And what Congress has said—that the child's interests are paramount—has deep roots in our politics, our culture, and our private lives.³³⁰ Congress's deeds would be

328. See *supra* note 21 and sources cited therein (discussing limits of residual approach).

329. See *supra* note 19 and accompanying text.

330. See *supra* note 19 and accompanying text.

true to its words if the child welfare system actually put children first. This Article has suggested some modest steps toward that goal.

