



February 2014

Permanency at What Cost - Five Years of Imprudence under the Adoption and Safe Families Act of 1997

Paul Anthony Wilhelm

Follow this and additional works at: <http://scholarship.law.nd.edu/ndjlepp>

Recommended Citation

Paul A. Wilhelm, *Permanency at What Cost - Five Years of Imprudence under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617 (2002).

Available at: <http://scholarship.law.nd.edu/ndjlepp/vol16/iss2/15>

This Note is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

**PERMANENCY AT WHAT COST?
FIVE YEARS OF IMPRUDENCE UNDER THE
ADOPTION AND SAFE FAMILIES ACT OF 1997**

PAUL ANTHONY WILHELM*

INTRODUCTION

*The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.*¹

Societies take very seriously the unity of the family as an institution. Societies recently have taken broader steps toward addressing the needs of their children. In the United States, policy has recently shifted attention away from the rights of families to stay together, with incentives and mandates toward reunification. Now family law policy focuses on terminating parental rights more quickly, in order to move children out of the foster system and into permanent new homes without needless delay. The Adoption and Safe Families Act of 1997² [hereinafter ASFA] signaled a shift in focus in the federal mandates concerning child foster care and permanency determinations. The previous federal policy on this matter was embodied in the Adoption Assistance and Child Welfare Act of 1980³ [hereinafter AACWA]. This statute required that in order to receive federal funding, state agencies were to use “reasonable efforts” to reunite families before a permanency determination was made.⁴ It was an approach that favored reunification of original families over

* B.A., 1997, University of Michigan; M.A., 1999, Vanderbilt University; J.D. candidate, 2002, Notre Dame Law School. Thomas J. White Scholar, 2000-2002. I would like to thank Professor J. Eric Smithburn for his guidance in the formational stages of this Note.

1. Troxel v. Granville, 530 U.S. 57, 79 (2000) (Souter, J., concurring) (quoting Pierce v. Soc’y of Sisters, 268 U.S. 510, 535 (1925)).

2. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in 42 U.S.C.A. §§ 671-679 (West Supp. 1998)).

3. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in various sections of 42 U.S.C.).

4. See Christine H. Kim, Note, *Putting Reason Back into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 288 (1999).

mere expedition of the adoption process.⁵ The ASFA supplants the AACWA in the federal code.

In a response to the growing conviction that the law was leaving children in foster care too long and that children were unreasonably being pushed back into families that were abusive, Congress passed the ASFA in November 1997 with overwhelming bi-partisan support, from both conservative and liberal groups.⁶ Advocates stressed four chief reforms that the Act would bring: (1) removal of the "reasonable efforts" requirement, (2) a new emphasis on the health and safety of the child, (3) an increase in the speed at which children move out of foster care and back to their families or to adoption, and (4) an increase in the number of adoptions from the pool of children in foster care.⁷

This radical shift in our foster care and adoption policy signifies our nation's focus on efficiency at the expense of a proper respect for the original family. This Note argues that the ASFA of 1997 went too far in reversing the trends of the AACWA and in doing so wrongly discriminated against parents who, due to poverty, have lost their children to the foster care system. This is true because cases of violence and abuse are, under the ASFA, treated absolutely the same as cases of neglect as far as the new time guidelines are concerned. The new expedited process may be efficient, but it fails to account for the time that it takes to re-establish housing, income, and a stable home in this society. Therefore, more low-income children now face being permanently severed from their families than ever before. In addition to the imprudence of some of ASFA's sanctions against parents, some of the sanctions may be subject to constitutional challenge

5. See Madelyn Freundlich, *Expediting Termination of Parental Rights Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U. L. REV. 97, 98 (1999) (Freundlich notes that the goals of the AACWA were three-fold: "to prevent the unnecessary placement of children in foster care; reunify families whenever possible; and reduce the time that children spend in foster care by encouraging adoption when reunification was not possible.") (citing 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, 122 (1995)).

6. See Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 637 (1999) (noting that "[b]oth the conservative Heritage Foundation and the liberal Children's Defense Fund endorsed ASFA. The House approved the bill in its final form by a vote of 406 to 7. The Senate did not even call the roll."). See, e.g., CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN* 66 (1998) (cited in Dorothy E. Roberts, *Access to Justice: Poverty, Race and New Directions in Child Welfare Policy*, 1 WASH. U. J. L. & POL'Y 63, 63 (1999) (noting the "alarming" fact that "half a million children are in foster care in America").

7. See Gordon, *supra* note 6, at 638-39; see also Kim, *supra* note 4, at 288.

on the basis of procedural due process in light of *M.L.B. v. S.L.J.*⁸ and other Supreme Court case law. An Illinois case, *In re H.G.*,⁹ may have a ripple effect on other states, invalidating some provisions on substantive due process grounds.

Both legal and religious principles oppose this public policy effected by AFSA insofar as it contributes to the break-up of poor families. First, as a matter of legal policy, the ASFA is deeply flawed because it fails to distinguish between abuse, on the one hand, and neglect on the other in its determination of time limits within foster care. Second, the ASFA's increased severance of poor families is deeply flawed as a matter of social ethics and public policy because of the generally recognized policy in favor of keeping families together. More powerfully, however, is the critique of the ASFA from the perspective of Christian social thought. The Christian principles of both subsidiarity and covenant theology, when applied to the institution of the family, stand in opposition to the methods and the results of the ASFA.

This Note will examine the ASFA in terms of its effect on families in America, particularly those of lower socio-economic standing, and then will examine the legal and ethical (especially Christian-based) critiques of the ASFA and its effects. Part I will focus on the difference in theory and law between neglect and abuse. Part II will discuss the policy under ASFA's predecessor, the AACWA. Part III will focus on the goals and content of the ASFA, including an analysis of the history behind similar government policy in America since the Progressive Era. Part IV will discuss case law that demonstrates the new challenges within family law under the ASFA, including racial and class disparities. This section also will comment on the possibility of a procedural due process challenge to ASFA. Part V will discuss the ethics of permanency determinations from both Catholic and Reformed theological perspectives. Finally, Part VI will discuss solutions to the ASFA structure. Ultimately, this Note concludes that the ASFA's goals are misplaced, the Act has created a colossal mess in the courts, and it is needlessly breaking up poor families prematurely. Further, this Note argues that Congress should implement an amendment to the ASFA for those families who are at or below the poverty level. This amendment should extend the fifteen-month provision for poor families, giving them a longer time to correct financial conditions which contributed to "neg-

8. 519 U.S. 102 (1996).

9. 757 N.E.2d 864 (Ill. 2001) (holding that the fifteen-month provision of the Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D)(m-1)(2001), was unconstitutional under the Fourteenth Amendment and the Illinois Constitution, as it violated substantive due process).

lect,” and it should change “reasonable efforts” to “diligent efforts” or the substantial equivalent of such standard.

I. NEGLIGENCE VERSUS ABUSE

The ASFA imposes federal mandates only insofar as states wish to have federal money supplement their foster care programs. The Act provides federal money only where states develop a plan that complies with a minimum set of requirements outlined in the Act.¹⁰ The Act’s funding is thus contingent on the State developing standards with regard to time in foster care, efforts toward reunification, and parental behavior leading to more expeditious termination of rights. States ultimately still use their own definitions of abuse or neglect, but the Act combines throughout its concept of abuse and neglect, for example, in determining when foster care begins, which is when the State has found abuse *or* neglect.¹¹ Termination procedures can start as early as fifteen months after such a finding by a state court.

The state has an interest in protecting the health and safety of its children. But this state interest is traditionally balanced against the fundamental right of parents to rear their children.¹²

10. See 42 U.S.C.A. §§ 671(a), 674 (West Supp. 1998).

11. See 42 U.S.C.A. §§ 675 (5)(F) (West Supp. 1998).

12. This right was found as a fundamental liberty interest subject to substantive due process first in *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding a fundamental liberty interest in, *inter alia*, the right to “establish a home and bring up children”). This right has been recently affirmed in *Troxel v. Granville*, 530 U.S. 57 (2000) and in *In re R.C.*, 745 N.E.2d 1223, 1241 (Ill. 2001), where the Illinois Supreme Court summarized *Troxel*:

[T]he Court reiterated that a parent’s right to control the upbringing of his or her children is a fundamental constitutional right. See *Troxel* (plurality opinion) (“the interest of parents in the care, custody, and control of their children-is perhaps the oldest of the fundamental liberty interests recognized by this Court”); (Souter, J., concurring) (“a parent’s interests in the nurture, upbringing, companionship, care, and custody of children are generally protected by the Due Process Clause of the Fourteenth Amendment”); (Thomas, J., concurring) (recognizing that the Court’s prior case law establishes that “parents have a fundamental constitutional right to rear their children”); (Stevens, J., dissenting) (“our cases leave no doubt that parents have a FUNDAMENTAL liberty interest in caring for and guiding their children”); (Kennedy, J., dissenting) (“there is a beginning point that commands general, perhaps unanimous, agreement in our separate opinions: As our case law has developed, the custodial parent has a constitutional right to determine, without undue interference by the state, how best to raise, nurture, and educate the child[, which] stems from the liberty protected by the Due Process Clause of the Fourteenth Amendment”). Accordingly, we must employ strict scrutiny,

Family law has developed a distinction between abuse and neglect. Even the general definitions in Black's Law Dictionary are helpful in showing the legal distinction between the two concepts. *Child abuse* is defined as: "An intentional or neglectful physical or emotional injury imposed on a child, including sexual molestation."¹³ *Child neglect* is defined as: "The failure of a person responsible for a minor to care for the minor's emotional or physical needs."¹⁴ Black's seems to draw distinctions as to the effect as well as the intent. Abuse denotes an "intentional or neglectful injury," while neglect denotes "failure to care." The former subsumes intentional injury, while the latter includes only mere breach of one's duty of care. The former seems to require actual damages, while the latter includes no mention of actual damages.

Family law statutory definitions show a mixed analysis. Child abuse and neglect are defined at both the federal and state levels.¹⁵ Although either abuse or neglect may result in termination of parental rights, some states have traditionally treated them differently, at least in theory, respecting the above distinctions.¹⁶ This policy of differentiation makes sense insofar as

and determine whether section 1(D)(p) is necessary to a compelling state interest and narrowly tailored thereto.

(internal citations omitted). See also *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Wallcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).

13. BLACK'S LAW DICTIONARY 10 (7th ed. 1999).

14. *Id.* at 233.

15. See NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO., "What is Child Maltreatment" (July, 2000), at <http://www.calib.com/nccanch/pubs/factsheets/childmal.cfm> (last visited Apr. 22, 2001).

16. See, e.g., MICH. COMP. LAWS ANN. § 722.622(2)(e), (f) (2000).

(e) "Child abuse" means harm or threatened harm to a child's health or welfare by a parent, a legal guardian, or any other person responsible for the child's health or welfare, or by a teacher or teacher's aide, that occurs through *nonaccidental* physical or mental injury; sexual abuse; sexual exploitation; or maltreatment. (f) "Child neglect" means harm or threatened harm to a child's health or welfare by a parent, legal guardian, or any other person responsible for the child's health or welfare that occurs through either of the following: (i) Negligent treatment, including the failure to provide adequate food, clothing, shelter, or medical care. (ii) Placing a child at an unreasonable risk to the child's health or welfare by failure of the parent, legal guardian, or other person responsible for the child's health or welfare to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk.

states decide to be in the business of treating degrees of intent differently.¹⁷ Other states decide to have a more outcome or result-based approach to parental unfitness, imposing a sort of strict liability.¹⁸ The federal statute governing child abuse and neglect combines the two concepts: "The term 'child abuse and neglect' means, at a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm . . . or . . . which presents an imminent risk of serious harm."¹⁹ In light of the fundamental rights of parents,²⁰ however, as will be discussed below, states should be slow to ignore intent-based distinctions in their termination proceedings and determinations of unfitness.

The ASFA has a mixed approach to this question. On one hand, the Act has removed any requirement of reasonable efforts toward reunification where "aggravated circumstances" exist or where the parent has committed murder, voluntary manslaughter, conspiracy to commit murder or attempted murder, or felony assault.²¹ On the other hand, the ASFA fails to distinguish neglect versus abuse in the time limitations in foster care (and in the definition of when foster care has begun).²² If the child has spent fifteen of the previous twenty-two months in foster care, the state "shall file a petition to terminate the parental rights of the child's parents."²³ The petition is mandatory here except where the state creates exceptions by placing the child with a relative, or the case plan suggests another route, or the state has not

(emphasis added); N.D. CENT. CODE § 27-20-44 (2000) (applying the distinction between an "abandoned" versus a "deprived" child); but see KY. REV. STAT. ANN. § 600.020(1) (2000) (treating "abused or neglected child" as a single category).

17. See MICH. COMP. LAWS ANN. § 722.622(2)(e), (f) (2000).

18. See KY. REV. STAT. ANN. § 600.020(1) (2000).

19. See The Federal Child Abuse Prevention and Treatment Act (CAPTA), as amended and reauthorized in October 1996, Pub. L. No. 104-235 (codified as amended at 42 U.S.C. § 5106(g)(2) (2001)). See also NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFO, "What is Child Maltreatment" (July, 2000), at http://www.calib.com/nccanch/pubs/factsheets/child_mal.cfm (last visited Apr. 22, 2001).

20. See Mary O'Flynn, Comment, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 250 (1999) (citing Santosky v. Kramer, 455 U.S. 745, 756 (1982) as authority that parents have a "fundamental liberty interest in the family and the care of the children").

21. See 42 U.S.C.A. § 671(a)(15)(D)(i), (ii)(I-IV) (West Supp. 1998); see also 42 U.S.C.A. § 671(a)(15)(D)(iii) (West Supp. 1998) (concluding sadly that prior termination of rights to a sibling removes any "reasonable efforts" requirement); see Celeste Pagano, *Recent Legislation: Adoption and Foster Care*, 36 HARV. J. ON LEGIS. 242, 245 (1999).

22. See 42 U.S.C.A. § 675(5)(F) (West Supp. 1998).

23. 42 U.S.C.A. § 675(5)(E) (West Supp. 1998).

yet provided services that the case plan has outlined, in cases where reasonable efforts are required.²⁴

This mandatory petition is a major flaw in the ASFA with regard to poor parents, who, without regard to intent, have failed to provide their children with services or such things as the state deems essential. Indeed, the federal government has set the deadline, leaving it up to the states' goodwill, in the form of state welfare programs and other social services, to meet that deadline. This heavy-handed and one-sided approach to termination was brought about in the name of bringing more children out of "bad homes" and out of "legal limbo."²⁵ However, expediting the process has led to premature terminations. One commentator notes, "By specifying the point at which efforts should end instead of requiring specific services, the new time limits may in some circumstances split up families who would have had a chance."²⁶ As this Note argues, poor families are especially being left behind by ASFA.

II. PERMANENCY POLICY UNDER THE AACWA

Under the prior statute, AACWA, which established uniform state guidelines for foster care and permanency plans (in order to receive federal money), state agencies who received federal foster care funding were required to make "reasonable efforts" in all cases without regard to time limits. The policy of the AACWA had the clear policy goal of reunification, with termination as a sure possibility for those cases in which the "reasonable efforts" failed.²⁷ The policy was clearly tilted in favor of parental rights generally, over and above the state interest in "health and safety" of the child, as determined by statutes and "experts." The policy was one that erred on the side of keeping families, although unstable, together rather than erring on the side of breaking up questionable families so children could be adopted.

When passed, the AACWA was a major change for its time. It was the first attempt at providing federal funds to reduce the time children would spend in foster care. The government provided financial incentives in the form of government grants to states to conduct permanency hearings for foster children after eighteen months in foster care.

24. *Id.*

25. See Pagano, *supra* note 21, at 246 (citing *Hearings on H.R. 867 Before the Human Resources Subcomm. of the House Ways and Means Comm.*, 98th Cong. (1997) (statement of Senator Mike Dewine (R-Ohio))).

26. *Id.* at 246.

27. See Kim, *supra* note 4, at 289-98; see O'Flynn, *supra* note 20, at 250-55.

The "psychological parent" theory in part influenced this policy. The theory held that emotional damage was caused in a child when the parent-child relationship was disrupted.²⁸ Therefore, state agencies and courts preferred permanent placement with a family, either biological or adoptive, over long periods of drift in a middle ground such as foster care. The plan would remove children "trapped in the system."²⁹

Under the AACWA, states were to use "reasonable efforts" to reunify families. Such efforts were to include various social services provided by the states. In hindsight, the nearly universally accepted failure of the AACWA was in not defining what "reasonable efforts" meant. In *Del A. v. Roemer*, a federal district court held that the "reasonable efforts" requirement was unenforceable due to vagueness.³⁰ Further, the Supreme Court held that under 42 U.S.C. § 1983, the requirement did not confer to individual parents a private right of action where it was alleged that the state did not make reasonable efforts.³¹

In the end, states were left with little guidance as to the federal policy of "reasonable efforts." This troubled many observers when difficult cases became publicized and when the number of foster children increased as more children entered the system than left it each year.³² Highly publicized child deaths led federal lawmakers to seek clarification of, and, for some types of cases, removal of the "reasonable efforts" requirement.³³ Thus, under the Clinton administration, the ASFA passed both houses of Congress with significant bi-partisan support.³⁴

III. PERMANENCY POLICY UNDER THE ASFA

The changes in policy under ASFA are significant, discriminating against poor families by unnecessarily limiting the time in which children may stay in foster care before the state must file a

28. See O'Flynn, *supra* note 20, at 251.

29. *Id.* at 250.

30. 777 F. Supp. 1297, 1308 (E.D. La. 1991).

31. See *Suter v. Artist M.*, 503 U.S. 347, 363-64 (1992). See Kim, *supra* note 4, at 296-97; see also *Charlie H. v. Whitman*, 83 F. Supp. 2d 476, 483 (2000) (holding "[42 U.S.C.] § 671(a)(15) [does] not unambiguously confer an enforceable right on individual children within the child welfare system because only 'a rather generalized duty' [is] imposed upon the state, 'to be enforced not by private individuals but by the Secretary of [Health and Human Services]'").

32. See O'Flynn, *supra* note 20, at 254.

33. See *id.* at 253 n.71.

34. See Gordon, *supra* note 6; see also Pagano, *supra* note 21, at 242 (noting the possible influence of, among other sources, HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US* (1996)).

petition for termination. A review of the history of state intervention into matters of the family shows that the ASFA's threat to poor families is not unique to American social welfare policy. But the threat to break up poor families prematurely is nonetheless alarming when we look at the implications of such a structure.

A. *A History of Parental Rights in the United States*

The story of the relationship between parents, children, and society is one that, when followed, tells much of the story of American social theory. This is largely true because these matters are so fundamental to who we are as a culture. In the colonial period, there was a general sense in law and culture that fathers and children were analogous to masters and slaves, respectively. Indeed the father had legal right to the children as his property, and the wife occupied a secondary position, concentrating her efforts on "reverence and respect"³⁵ after the Pauline Biblical model.³⁶

A second phase in American family law policy was the transfer to custody law centered on the mother. As the nineteenth century moved forward, this was the controlling legal norm. American society concentrated on moral and educational development, and the prevailing view was that women, specifically mothers, were responsible for their children's growth in this regard. Therefore, the best interests of the child became a judicially recognized concept,³⁷ as did a preference for the mother in custodial cases because she was the nurturing agent.³⁸ Parental unfitness was usually a determination made, however, only upon showing of moral unfitness rather than financial limitations, which now leads to what may constitute neglect in some states.³⁹ This was a time in which Jacksonian Democracy gave way to Whig values of economic and social progress through national, benevolent societies for moral reform, such as temperance societies,

35. See generally MARY ANNE MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1-47 (1994).

36. See EPHESIANS 6:1-9.

37. See MASON, *supra* note 35, at 62 n.65 (citing *State v. Baird and Torrey*, 21 N.J. Eq. 384 (1869); and *Gishwiler v. Dodez*, 4 Ohio St. 615 (1855)).

38. See MASON, *supra* note 35, at 49-83.

39. See *id.* at 63 n.67 (citing *Lindsay v. Lindsay*, 14 Ga. 657, *1 (1854); *Kremelberg v. Kremelberg*, 52 Md. 553, *7 (1879); *Crimmins v. Crimmins*, 64 How. Pr. 103, *1 (N.Y. 1882); *Jackson v. Jackson*, 80 Or. 402, 402-03 (1880); *Helden v. Helden*, 7 Wis. 256, *4 (1858)).

abolition movements, insane asylums, orphanages, and the like.⁴⁰ These efforts were especially targeted at Catholic immigrants, who were seen as especially given to wine. Some benevolence and political groups, for example, warned of the twin evils of "Rum and Romanism."⁴¹ Anti-Masonry in the 1830s and 1840s and Anti-Catholic efforts with the rise of the Know-Nothings (American Party) in the early 1850s also paralleled movements toward social engineering, as white Protestants sought to maintain an orderly culture.

A third phase in American family law incorporated a set of principles consistent with the trends of the Progressive Era. The age of the American industrial revolution brought a division of labor and management that came with the rise of the corporation and brought an increased division of labor (along with much of society) into groups of specialization. Along with these trends, American culture, including the courts and legislatures, came to rely increasingly on the advice and counsel of experts, who would develop enlightened and efficient plans with which to engineer the complex society toward increased productivity and collective wealth. These trends entered the world of family law through cases and statutes that signified a phenomenon that one scholar calls "The State as Superparent."⁴² The Progressive Era cannot be overemphasized as the signal of change toward the modern period wherein American society has removed morality from conceptions of child welfare and now concentrate on bureaucrats and local experts and caseworkers to tell us where to draw the line. As one scholar summarizes:

Beginning in the Progressive era the new social science theory that poverty was not a symptom of a corrupt or criminal character encouraged the state to provide financial support to poor parents to maintain their children rather than removing them. At the same time scientific concepts of proper child raising provided the state with authority to remove children from their homes when parental behavior fell below acceptable standards.⁴³

40. See HARRY L. WATSON, *LIBERTY AND POWER: THE POLITICS OF JACKSONIAN AMERICA* 132-71 (1990); Paul Anthony Wilhelm, *A Victim of Sectional Theologies: Parochial Schools of the Presbyterian Church in the Crossfire between Charles Hodge and James Henley Thornwell* 40-45 (1999) (unpublished M.A. Thesis, Vanderbilt University) (on file with the Vanderbilt Divinity Library and the author).

41. See generally RONALD G. WALTERS, *AMERICAN REFORMERS: 1815-1860*, at 21-38 (1978).

42. See generally MASON, *supra* note 35, at 85-119.

43. *Id.* at 161.

It was during this period that social work and other careers devoted to the scientific study of poverty and other social conditions, along with the rise of anthropology, psychology, and sociology in the university created a new set of institutions upon which modern welfare and family policies were based.

The 1960s saw the rise of the child-based legal concepts as the concepts of feminism and children's rights arose in opposition to long accepted patriarchal norms. The numbers of divorce and the numbers of families determined to be in poverty rose sharply in the 1960s to the 1990s, bringing about custody battles and termination proceedings.⁴⁴ Governments at the state and local levels have developed complex frameworks for determining whether children are in danger at home, whether parents may retain rights to their children, and how long and how diligently the state must act in efforts to reunify families on the brink of permanent separation.

B. *Modern Welfare Law and Federalization*

Under the broad reach of the Commerce Clause, the federal interest in welfare programs since the late 1960s has translated into statutory guidelines for family law, including termination proceedings, as reflected first in the AAWCA and now in the ASFA. Some authors have noted that the nationalization of family law has brought increased invasion of privacy and has at times codified political stigmatization. From attacks on "welfare queens" to "deadbeat dads," national welfare and family law has reflected crusades against popular political monsters.⁴⁵ One scholar highlights the growing intrusions on privacy that are now associated with modern federal welfare policy:

In the welfare realm, realization of the right of parental autonomy is not automatic. Unlike the rest of the community, welfare parents are not afforded broad authority over their children's upbringing. For them, there is no assumption of parental fitness; to the contrary, there is a presumption that children in welfare families are in need of state supervision. Governmental oversight is accomplished in

44. See *id.* at 121.

45. See Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 263-64 (2000). Historians have commonly noted the American search for political monsters, beginning with Andrew Jackson's crusade against the Bank of the United States, and then Masonry, Roman Catholicism, slavery, immigrant ignorance, child labor, nuclear weapons, and abortion/lack of reproductive choice. For the antebellum period and the origins of these crusades, see generally WALTERS, *supra* note 41; WATSON, *supra* note 40, and J. MILLS THORNTON III, *POLITICS AND POWER IN A SLAVE SOCIETY: ALABAMA 1800-1860* (1978).

part through the use of Individual Responsibility Agreements (IRAs), which are perhaps the most striking evidence of state intrusiveness in the parenting domain. IRAs are documents used by welfare agencies to set forth the family-life obligations that the state requires welfare parents to fulfill. The Personal Responsibility Act identifies a list of family obligations that may be included on the form, "includ[ing] a requirement that the individual . . . keep school age children in school, immunize children, and attend parenting and money management classes."⁴⁶

This trend is especially troubling insofar as it affects involuntary termination proceedings, where a family is torn apart permanently so a child may be freely moved to an adoptive home. Some attention also has been given to the idea of federal intrusion into any matters of family law. In *United States v. Lopez*,⁴⁷ the Supreme Court struck down the Gun-Free School Zones Act of 1990 as unconstitutional in part on the grounds that the federal government may not interfere with matters of the family.⁴⁸

Nevertheless, the federal government has had increased influence over state family and welfare policy through federal grants conditioned on state plans that follow federal guidelines.⁴⁹ Congress has provided significant financial incentives for states to fall into line with whatever policy is politically expedient. In a one-size-fits-all approach, the federal government, in the name of uniformity, has now exercised its will on a matter traditionally held by the states, by making federal money contingent on case workers lowering their diligence efforts, or at least persisting in those efforts for less time. When a child's health or safety is in danger, states are closer to the scene of events that may lead up to termination and should be given maximum leeway when it comes to guidelines for the ultimate remedy of termination. States should also be more empowered to determine their interpretation of the proper balance between parental rights and the health and safety of children.

C. *New Guidelines Under the ASFA*

The ASFA clarified the "reasonable efforts" requirement under the AACWA, a requirement which had been seriously

46. Brito, *supra* note 45, at 246 (footnote omitted).

47. 514 U.S. 549, 564 (1995).

48. See Laura W. Morgan, *The Federalization of Child Support—A Shift in the Ruling Paradigm: Child Support as Outside the Contours of "Family Law,"* 16 J. AM. ACAD. MATRIMONIAL LAW 195, 195 (1999).

49. See generally Brito, *supra* note 45; Morgan, *supra* note 48.

maligned by the time the ASFA was passed.⁵⁰ Stories of violence perpetrated upon children who returned home from foster care under the AACWA policies lent fuel to those who sought an overhaul of the foster care system, which many felt was already a holding tank for too many children with no hope of becoming less crowded.⁵¹ One scholar recalls: "The congressional testimony and newspaper articles during the pre-ASFA hearings emphasized cases of children who were returned home and killed,"⁵² noting also the influence of a book by Richard Gelles of the University of Pennsylvania, which detailed how a child reunited with his mother was thereafter suffocated.⁵³

The ASFA provides that the state need not always use reasonable efforts, namely in cases wherein violence is attributed against the parent.⁵⁴ While this provision generally is not controversial and has made useful clarification in the law, one provision of this section of the Act gives moment to pause. The Act creates an exception to reasonable efforts wherever the parent has previously had his or her parental rights terminated with regard to a sibling.⁵⁵ In other words, the statute has a built-in partial adjudication against a parent with regard to one child based on a prior adjudication with regard to a sibling of that child. This exception has, as a youth expert noted early on, the effect that "a parent whose rights to another child were terminated when the parent was a teenager, for example, would be deprived of services even though, when the parent was older and more mature, reunification efforts might be appropriate."⁵⁶

As far as poor families are concerned, the most significant piece of the ASFA structure is the time limits imposed on foster care before a state must file a petition for termination. Under the ASFA, federal law imposes a requirement upon states that want to receive federal funds for foster care. In order to receive such funds, the state's plan must provide that if the child has

50. See generally Kim, *supra* note 4, at 296-309.

51. See Roberts, *supra* note 6, at 66.

52. *Id.*

53. *Id.* (citing RICHARD GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES* (1996)).

54. See 42 U.S.C.A. § 671(a)(15)(D) (West Supp. 1998); see also Pagano, *supra* note 21, at 245.

55. See 42 U.S.C.A. § 671(a)(15)(D)(iii) (West Supp. 1998); see also Pagano, *supra* note 21, at 245.

56. Bill Grimm, *ASFA Brings Big Changes*, *YOUTH LAW NEWS*, Nov./Dec. 1997, at 3 (cited by Pagano, *supra* note 21, at 245 n.28); but see Kathleen Haggard, Note, *Treating Prior Terminations of Parental Rights as Grounds for Present Terminations*, 73 WASH. L. REV. 1051 (1998) (arguing that the current protections for parents are sufficient, at least in the State of Washington).

spent fifteen of the most recent twenty-two months in foster care, the state shall file a petition for termination.⁵⁷

This guideline is most troublesome in light of the fact that from the outset, the AAWCA envisioned providing states with money toward foster care and other services. It encouraged states to make up the services with their own welfare policies to handle cases of neglect due to poverty. The new guidelines make sense only where the history of violence does not compel the state to make reasonable efforts. Parents should not be given unlimited chances, and children should not be exposed to imminent danger. However, the time provision is very troublesome because of its effects on poor families who have had their children placed into foster care, voluntarily or otherwise, due to inability to provide for the children or due to allegations of neglect. To the extent that welfare programs or a minimum-wage income of a single parent provides inadequate resources, poor single mothers, once children are taken into foster care, may not be able to provide a proper home and proper supervision to the satisfaction of local caseworkers and judges within a mere fifteen months.

D. *Implications: the Cases of Neglect*

Inadequate food, shelter, clothing, and hygiene are among the types of things for which a state, without regard to the intent/willfulness of the parents, may remove a child on the grounds of neglect, pursuant to its termination statutes.⁵⁸ These are all symptoms of poverty. While states have nearly universally held that more than a mere showing of poverty is needed when a state seeks termination,⁵⁹ the reality may indeed be otherwise.⁶⁰ Indeed, North Dakota, for example, appears to require only a three-part test showing that the child is deprived and that such deprivation is likely to continue causing serious harm.⁶¹

57. See 42 U.S.C. § 675(5)(E) (2001); see also N.D. CENT. CODE § 27-20-44 (2001) (measuring this time limit in terms of days rather than months (450 of the last 660 days)).

58. See generally, *supra* note 16 and statutes cited therein.

59. See, e.g., KY. REV. STAT. ANN. § 625.090(2)(g); Department of Human Resources v. Moore, 552 S.W.2d 672 (Ky. Ct. App. 1977) (holding that for a state agency to succeed in termination of parental rights it must show more than the existence of poverty).

60. See generally Theresa D. Legere, Note, *Preventing Judicially Mandated Orphans*, 38 FAM. & CONCILIATION CTS. REV. 260 (2000).

61. N.D. CENT. CODE § 27-20-44(1)(b) (2000); Interest of S.F., 615 N.W.2d 511 (N.D. 2000) (holding that in determining the likelihood of continuing deprivation, a court may consider parental cooperation with social service agen-

Neglect is the primary reason children enter the foster care system.⁶² One commentator estimates that as few as "ten percent of the children in foster care are there because of serious abuse."⁶³ But the ASFA targeted the relatively few cases of violence and abuse, rather than addressing the problems of families entrenched in poverty. Several authors have touted the ASFA for its clarification of the reasonable efforts requirements.⁶⁴ Many more, however, have rightly noted that its shortcomings include lack of concern for the special circumstances of poor families accused of neglect.⁶⁵ With the rise in divorce, single parenting, and homelessness, there is an increase in situations in which, what the state recognizes as "neglect" occurs on the basis of, in large part, poverty.⁶⁶

Authors have also analyzed the combined racial and class implications of the new policy under ASFA.⁶⁷ While a half a million children are in foster care,⁶⁸ this number is composed of a large percentage of Black and poor children.⁶⁹ One scholar strongly asserts: "If an outsider looked at the American child welfare system, she would likely conclude that this is not a system designed to promote the welfare of America's children. Rather, it is a system designed to regulate, monitor, and punish poor families, especially poor Black families."⁷⁰ Since poor Black families compose a portion of the child foster care and child welfare systems, one can readily see the disparate impact ASFA's fifteen-

cies); Interest of D.F.G., 602 N.W.2d 697 (N.D. 1999) (state must prove factors by clear and convincing evidence).

62. See O'Flynn, *supra* note 20, at 243 (citing U.S. GENERAL ACCOUNTING OFFICE, GAO/HEHS 9840, PARENTAL SUBSTANCE ABUSE IMPLICATIONS FOR CHILDREN, THE CHILD WELFARE SYSTEM, AND FOSTER CARE OUTCOMES 4 (1997)); see also Roberts, *supra* note 6, at 68-69 (citing Duncan Lindsey, THE WELFARE OF CHILDREN 139-56 (1994)); Alex Morales, *Seeking a Cure for Child Abuse*, USA TODAY, Sept. 1998, at 34).

63. Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 147 (1999) (citing Kathleen A. Bailie, Note, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2317 (1998)).

64. See generally Haggard, *supra* note 56; Kim, *supra* note 4.

65. See generally Legere, *supra* note 60; Gordon, *supra* note 6; Roberts, *supra* note 6; O'Flynn, *supra* note 20.

66. See generally CHRISTOPHER JENCKS, THE HOMELESS (1994).

67. See generally Roberts, *supra* note 6.

68. See generally *id.*

69. See RENNY GOLDEN, DISPOSABLE CHILDREN: AMERICA'S CHILD WELFARE SYSTEM 17 (1997) (cited in Roberts, *supra* note 6, n.6).

70. Roberts, *supra* note 6, at 64.

month provision has effected on Blacks.⁷¹ Public policy should not allow children to keep being fed into the foster care system at alarming rates, with efforts centered on expediting them out into new families rather than on reunification. As an old Georgia case noted:

The rich can not say to the lowly, "You are poor and have many children. I am rich and have none. You are unlearned and live in a cabin. I am learned and live in a mansion. Let the State take one of your children and give it a better home with me. I will rear it better than you can." The hovel has its rights as well as the palace. The ties of motherhood too are not to be lightly disregarded. . . . [T]he deepest, the tenderest, the most unswerving and unfaltering thing on earth is the love of a mother for her child. The love of a good mother is the holiest thing this side of heaven.⁷²

Some recent cases and legislation allow us to see some actual and presumed effects of ASFA's fifteen-month provision on poor families who are facing termination for neglect associated with poverty.

IV. RECENT CASES

A. *Procedural Due Process—A Viable Challenge?*

One of the most significant constitutional cases touching the termination of parental rights has been *M.L.B. v. S.L.J.*⁷³ In this case appealed from the Mississippi Supreme Court, the United States Supreme Court held that the Fourteenth Amendment does not allow a state to condition appeal from a termination proceeding on an indigent parent's inability to pay for transcript fees where the transcript is necessary for the appeal.⁷⁴ In a rare grant of certiorari in this area of law, the Court took the opportunity to recount the string of cases in which the Court had upheld family rights as among the most sacred rights receiving constitutional protection. The Supreme Court recognized in *M.L.B.* that the parent-child bond is among the most sacred relationships recognized by our society. The Court summarized: "Choices

71. This may or may not cause ASFA to be unconstitutional, as applied to indigent individuals. See *Washington v. Davis*, 426 U.S. 229 (1976) (holding that, under purposeful discrimination doctrine, if disparate impact along racial lines is explainable on non-racial grounds then the law is not unconstitutional).

72. *Moore v. Dozier*, 128 Ga. 90, 92-93, 57 S.E. 110, 111 (1907) (quoted in MASON, *supra* note 35, at 86).

73. 519 U.S. 102 (1996).

74. *Id.* at 128.

about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society' . . . rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."⁷⁵

In striking down the provision that only allowed indigent criminal defendants to obtain a free transcript, the Court noted that the gravity of the sanction in a termination case is similar to that of a criminal one, calling the process "quasi criminal in nature."⁷⁶ The Court equated termination to a criminal punishment because, unlike loss of custody, termination is an irrevocable and total separation of one of the most fundamental relationships and "it leaves the parent with no right to visit or communicate with the child."⁷⁷

As noted above, *Washington v. Davis* likely does not permit ASFA to be held unconstitutional on the basis of racial criteria.⁷⁸ But the Court in *M.L.B.* held that statutes may be unconstitutional where the sanctions treat indigents differently than non-indigents and the sanctions apply to "all indigents and do not reach anyone outside that class."⁷⁹ If it is found that parents facing termination cannot meet ASFA's mandated state requirements imposed by caseworkers and family courts because of poverty, the Court's holding in *M.L.B.* holding may reach some provisions of ASFA, particularly the fifteen month provision.

Published case law on terminations is rare. Looking at the relatively few published cases at the state level, one can see the fragility of the indigent parent's position in termination proceedings. The potential lack of procedural due process, the increased power of the individual caseworker (need for compliance with a caseworker's plan), and the vague concepts of "substantial progress" toward a case plan and "reasonable expectation" that the parent will provide "proper care and custody" all illustrate the legal difficulties faced by poor parents. Judges rely increasingly on the determinations made by caseworkers. At the same time,

75. *Id.* at 116 (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971); *Turner v. Safley*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (raising children)).

76. 519 U.S. at 124 (citing *Mayer v. Chicago*, 404 U.S. 189, 196 (1971)).

77. *Id.* at 118 (citing *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting)).

78. See Roberts, *supra* note 6, at 64.

79. 519 U.S. at 126-27 (citing *Williams v. Illinois*, 399 U.S. 235, 242 (1970)).

caseworkers are being told under ASFA that "reasonable efforts" toward reunification are not to exceed fifteen months before they *shall* file a petition for termination. In light of *M.L.B.*, these problems, and their particular application to the poor, call into question the constitutionality of the fifteen-month provision and perhaps other provisions of ASFA on the basis of procedural due process.

A recent challenge to the premature termination of parental rights has been that of procedural due process. This claim arises from the Supreme Court's holding in *Santosky v. Kramer*, which involved a State of New York termination after a parent was found neglectful.⁸⁰ New York had required that only a "fair preponderance of the evidence" support the finding that a child is permanently neglected. The Court held: "[b]efore a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence."⁸¹ Another case recognizing the severity of the termination proceeding was *Lassiter v. Dep't of Soc. Servs.*,⁸² decided one year before *Santosky*. This case held that appointed counsel would be required depending on the severity of the case, but the Court noted that the parent's interest was very powerful against the government's.⁸³ A decision against the parent is "not simply to infringe" on his interest, "but to end it."⁸⁴ It is in following this reasoning that the Supreme Court in *Lassiter*, *Santosky*, and *M.L.B.* agreed—even the dissenters—that the parent-child relationship deserves Fourteenth Amendment protection.⁸⁵

Various claims by parents have alleged that termination was in violation of procedural due process or that termination was ordered because of poverty.⁸⁶ These claims are almost always unsuccessful, as in *In Re Michael M.S.*, a recent Wisconsin case. There, the court applied the standard that the mother had ample notice of termination and after "diligent efforts" by the state, the mother had failed to make substantial progress toward the fulfillment of a case plan. The court's reasoning was based in

80. 455 U.S. 745 (1982).

81. *Id.* at 747.

82. 452 U.S. 18 (1981).

83. *See id.* at 27.

84. *M.L.B.*, 519 U.S. at 118.

85. *See id.* at 119; (citing *Santosky*, 455 U.S. at 774 (Rehnquist, J., dissenting)).

86. *See, e.g., In re Michael M.S.*, 608 N.W.2d 438 (Wis. Ct. App. 1999) (unpublished opinion) (order for termination upheld despite claims of due process violations and claims that poverty was the reason for termination).

large part on the fact that the mother did not choose the cheapest housing available and did not demonstrate substantial progress toward the case plan of achieving suitable housing, attaining a telephone, and attending counseling. While the facts of this case were not entirely on the side of the mother, the reasoning of the court reveals the micro-managing into which caseworkers and courts together engage in engineering socially acceptable outcomes. Families are thus permanently severed in the name of the child's best interest because a judge or jury was not convinced that the case plan has been met (or in this case, "substantial progress" made toward it).

In Michigan, the recent case of *In re Trejo* also raises a number of concerns.⁸⁷ The mother in this case also asserted a procedural due process challenge, here, to the MCL 712A.19b(5), which makes termination mandatory (unless in the child's best interest) if the petitioner demonstrates a ground for termination under § 19b(3). This statute justifies termination where the petitioner shows that the parent has failed to remedy conditions for which the child was removed into foster care or shows that "the parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age."⁸⁸ While the court upheld the constitutionality of this statute, the dissent points out how thin the thread is that separates maintenance of the family from permanent break-up by termination of rights. The dissent points out that "she complied with most of these steps [as required by the Department of Social Services]." The court further found that the termination at the probate court level was based on incomplete evidence supplied by a single caseworker who had "indicated" that the housing was still unsuitable, while she had not even seen the mother's housing situation at the time of the termination hearing.⁸⁹ The dissent concluded by noting that "the fundamental liberty interest of natural parents in the care, custody, and management of their children does not evaporate simply because they have not been model parents or have lost temporary custody of their children to the State."⁹⁰

The outcome in *Trejo* illustrates the thin ice upon which poor parents skate when faced with termination. The new

87. *In re Trejo*, 612 N.W.2d 407 (Mich. 2000).

88. MICH. COMP. LAWS ANN. § 712A.19b(3)(g) (cited in *In re Trejo*, 612 N.W.2d at 416-17).

89. *In re Trejo*, 612 N.W.2d at 421 (Cavanagh, C.J., concurring in part and dissenting in part).

90. *Id.* at 422 (quoting *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)).

requirements of ASFA had not even been relevant to this determination, but would have placed the mother in even greater jeopardy by requiring her to defend another petition, assuming her children remained in foster care—for any reason—for fifteen out of twenty-two months. Poor parents, whose decisions on which apartment to take can affect their rights to their children forever, do not need this extra intrusion into their lives. It is unlikely that it serves the interests of the children any more than previous law; ASFA merely expedites more children's termination to free them up for another family to take them through adoption.

Some hope is presented by courts, as the dissent in *Trejo* did, attributing high value to parental rights and looking at the totality of the circumstances in termination cases. In a bold statement, a Louisiana appellate court has declared that:

'Environmental neglect' such as lack of adequate food, shelter or clothing and inadequate supervision is a resource problem and not indicia of abusive or neglectful parents These problems could be readily addressed by increasing the financial resources available to the family. The Department did not provide guidance to Ms. Walters in securing the resources she apparently lacked. Instead, the Department demanded that she improve her station in life by conforming to their lofty expectations in a vast array of areas.⁹¹

The court went on to note that, "[t]here is a strong correlation between a family's poverty and allegations of abuse and neglect foreshadowing a petition to terminate parental rights."⁹² In this case, the court noted that the Department did not provide services necessary to meet the goals they had established for the parent. The court rightly criticized the double standard imposed by the state here.

If there is hope for the ASFA, it is in the action of courts such as these, who place parental rights among the most fundamental, and do not see a compelling state interest (in removal of the child) around every corner. Relying heavily on the Supreme Court's holding in *Santosky*, the Louisiana court here noted, "Removing children from their parents and family because of poverty creates socio-economic bias vis-à-vis parental rights. With

91. *State ex rel. S.M.W.*, 771 So.2d 160, 170 (La. Ct. App. 2000), *rev'd*, 781 So.2d 1223 (La. 2001) (citing Naomi R. Cahn, *Welfare Reform and the Juvenile Courts: Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L. J. 1189 (1999)).

92. *Id.* at 171 (citing Cahn, *supra* note 91; Bailie, *supra* note 63).

increasing frequency, termination proceedings are subject to cultural and class biases because the parents subject to termination proceedings are often poor, uneducated, or members of minority groups.⁹³ While the court is not suggesting that children are being removed for poverty *alone*, it is suggesting that the factors concomitant to poverty often cause state agencies to step in unnecessarily and perform social engineering at the expense of the natural, or original, family. The court here mirrors criticisms levied by many family law observers.⁹⁴ Legislators would be well advised to listen to these warnings in the refining of family law policy. In this case, however, the Louisiana Supreme Court reversed the lower court, finding that according to the experts consulted, the mother had demonstrated an inability to reform her conduct in the near future. The Louisiana Supreme Court rejected the poverty argument made by the appellate court.⁹⁵

B. *A Breakthrough in Illinois—Substantive Due Process*

The Illinois Supreme Court has recently invalidated a portion of the state's adoption law. The invalidated provision provided that a parent would be presumed unfit for purposes of terminating parental rights if the child has been in foster care for fifteen out of any twenty-two successive months.⁹⁶ Illinois, like most states, had incorporated such a provision pursuant to the ASFA guidelines required for federal funds. The court held in *In re H.G.*,⁹⁷ that the fifteen-month provision of the Illinois Adoption Act was unconstitutional under the Fourteenth Amendment and the Illinois Constitution, as it violated substantive due process. The court focused on the inability of parents with substance abuse problems to meet the requirements of the caseworkers and to achieve reunification before the end of fifteen months. Due to the fundamental liberty interest, the court applied strict scrutiny and narrow tailoring analysis. Ultimately, the court held that the fifteen-month presumption of unfitness was not narrowly tailored to the purpose of identifying parents who posed a risk of health or safety to their children: "[i]n many cases, the length of a child's stay in foster care has nothing to do with the parent's ability or inability to safely care for the child

93. *Id.* at 168 (citing *Santosky*, 455 U.S. 745 (1982)).

94. See generally *Roberts*, *supra* note 6.

95. *State ex rel. S.M.W.*, 781 So.2d 1223, 1234–35 (La. 2001).

96. See 750 ILL. COMP. STAT. 50/1(D)(m-1)(2001).

97. *In re H.G.*, 757 N.E.2d 864 (Ill. 2001) (holding that the fifteen-month provision of the Illinois Adoption Act, 750 ILL. COMP. STAT. 50/1(D)(m-1)(2001), was unconstitutional under the Fourteenth Amendment and the Illinois Constitution, as it violated substantive due process).

but, instead, is due to circumstances beyond the parent's control."⁹⁸ Thus, the court struck down the provision as a violation of substantive due process.

The Illinois court vindicated the arguments of O'Flynn, calling for reform due to the unfair impact of ASFA provisions on parents in recovery from substance abuse problems.⁹⁹ But the court's holding may not be limited to claims of substantive due process based on substance abuse. Indeed, the court cited the facts of the case, in which a parent was in recovery, as merely one example of the types of "circumstances beyond the parent's control," noting that the facts of this case "illustrate[d]" the court's general point that the fifteen-month unfitness presumption failed narrow tailoring.¹⁰⁰ The court found that it is unfair to presume the parents "unfit" simply because they are not reunited with the subject child within the time constraints, because many reasons having nothing to do with fitness or unfitness can keep a parent from reunification. Since the court recognized that many neutral circumstances can prevent reunification, this case may provide grounds for a challenge by indigent parents. On either procedural or substantive due process grounds, poor parents who are failing to meet caseworker requirements for reunification within the fifteen months may now have solid ground on which to challenge the constitutionality of this portion of the ASFA.

C. Other Observations

The ASFA created a vastly increased set of demands on state courts that the Act simply did not address.¹⁰¹ Some argue that the ASFA has "the potential for increasing the number of 'legal orphans,' and the unintended consequence of leaving even more children 'drifting' in foster care."¹⁰²

98. 757 N.E.2d at 872.

99. See generally O'Flynn, *supra* note 20.

100. See 757 N.E.2d at 872.

101. *Prepared Testimony by the Honorable Robert C. Leuba, Chief Court Administrator, Supreme Court of Connecticut on Behalf of the Conference of State Court Administrators: Before the House Comm. on Ways and Means Subcomm. on Human Resources, 106th Cong. (2000)* (statement of Hon. Robert C. Leuba before House Subcomm. on Human Resources).

102. Jan L. Hagen, *Critical Perspectives on Social Welfare: Challenges and Controversies*, FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY HUMAN SERVICES, Nov. 1, 2000, no. 6, vol. 81, at 555 (citing Theodore J. Stein, *The Adoption and Safe Families Act: Creating a False Dichotomy Between Parents' and Children's Rights*, FAMILIES IN SOCIETY: THE JOURNAL OF CONTEMPORARY HUMAN SERVICES, Nov. 1, 2000, no. 6, vol. 81, at 586).

In response to requests for additional training and technical assistance to deal with increased caseloads, Congress recently enacted legislation, shoring up the court system to provide for the number of children in the foster care system.¹⁰³ The purpose of the Strengthening Abuse and Neglect Courts Act of 2000 is "to improve the administrative efficiency and effectiveness of the Nation's abuse and neglect courts and for other purposes consistent with the Adoption and Safe Families Act of 1997."¹⁰⁴ The statute posits that, *inter alia*:

Improved computerized case-tracking systems, comprehensive training, and development of, and education on, model abuse and neglect court systems, particularly with respect to underserved areas, would significantly further the purposes of the Adoption and Safe Families Act of 1997 by reducing the average length of an abused and neglected child's stay in foster care, improving the quality of decision-making and court services provided to children and families, and increasing the number of adoptions.¹⁰⁵

Congress has now provided the technological assistance to make the permanency determinations occur more quickly in the backlogged system. This goal of efficiency is not at all objectionable, but this new statute warns us that the process will be more expeditious and the effects of ASFA will soon be felt in some areas as yet untouched. Congress appears not to have responded to the legal community's criticism of the ASFA, but instead Congress has gone forward to streamline the process even further with the goal to move children along as fast as possible. This streamlining is certainly needed, because ASFA has imposed a heavy burden on family courts and lawyers, especially with the quicker and more numerous filing of termination petitions.¹⁰⁶ This approach is laudable for those who buy into the reasoning, goals, and methods of the ASFA, and is frightening to those who see the ASFA as contributing to the premature break-up of families.

The ASFA structure has its good points. When determining child placement, the state is to give preference "to an adult relative over a non-related caregiver."¹⁰⁷ The Act also provides incentives to states where parental rights have been terminated in order to expedite children out of the foster care system when it is

103. See Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-314 (2000), 114 Stat. 1266 (2000).

104. See S. 2272, 106th Cong. (2000).

105. Pub. L. No. 106-314, at 2 (¶ 12) (2000).

106. See John Caher, *Lawyers Adjust to New Burdens of Adoption Law*, N.Y. L.J., July 21, 2000.

107. 42 U.S.C.A. § 671(a)(19) (West Supp. 1998).

determined that they may leave.¹⁰⁸ But the main problem with the ASFA, as noted above, is its time limits on foster care (the fifteen-month provision) before a termination petition must be filed. This provision puts poor families, who are already on their heels, even more on the defensive. Moreover, the provision subjects them to additional state intrusion, unnecessarily threatening poor families with the possibility of losing their children forever.

There has been some doubt about ASFA's efficiency and its effectiveness in permanently placing significantly more foster children in adoptive homes. Health and Human Services Secretary (HHS) Donna E. Shalala proudly announced in September 2000 that 46,000 foster care children had been legally adopted in 1999 (over the target of 41,000 and sixty-four percent increase over the 28,000 adoptions legalized in 1996—the year before ASFA).¹⁰⁹ However, the average increase since ASFA's adoption "equals fewer than 1.1% of the total number of children in foster care on any given day."¹¹⁰ One report criticized ASFA: "[e]ven as it encouraged adoption, ASFA made it easier than ever before to take children from their parents just because their parents are poor."¹¹¹ Richard Wexler, Executive Director of the National Coalition for Child Protection Reform, charged HHS with telling only half the story. He alleged that ASFA "is creating a generation of legal orphans. Though HHS is quick to tell us how many children have been adopted, they don't say how many more children had all legal rights to their parents severed with no hope of ever finding an adoptive home. State figures suggest that number is alarming."¹¹²

In the end, ASFA structure has created a number of practical problems, and it may well be infringing on the procedural and substantive due process rights of poor parents. In light of *M.L.B.* and *In re H.G.*, the constitutionality of some of the ASFA provisions is in doubt. Do the ASFA's shortcomings reach the required level announced in *M.L.B.*, that the sanctions apply solely to indigents?¹¹³ As noted above, this question applied to neglect and not to abuse cases. Where "neglect" is based in large part on poverty, the fifteen-month sanction may qualify as reach-

108. See 42 U.S.C.A. § 670 (West Supp. 1998).

109. See *HHS Awards Adoption Bonuses and Grants*, U.S. NEWSWIRE, Sept. 20, 2000.

110. See *NCCPR: New Numbers Show Failure of Federal Adoption Law*, PR NEWSWIRE, Sept. 21, 2000.

111. See *id.*

112. See *id.*

113. See *supra* note 77 and accompanying text.

ing indigents only. Indeed, to remedy a neglect situation, it takes money. When the single parent must work a job paying too little or one that is unstable, he may not be able to satisfy the caseworker within fifteen months. Thus, on the basis of his poverty, the parent-child relationship will have been placed into permanent jeopardy. The effect of ASFA's fifteen-month provision as applied to poor parents in cases of neglect deserves a harder look under *M.L.B.* Perhaps a more promising approach arises from *In re H.G.*¹¹⁴ In declaring the fifteen-month provision unconstitutional on substantive due process grounds, the Illinois court has cast itself forward, in a sense bidding other states to follow. In light of the similarity among state provisions, which are based on the ASFA guidelines, many states can follow the Illinois high court without much innovation. *In re H.G.* may be the best hope in vindicating the claims of this Note.

V. THEOLOGICAL PERSPECTIVES

The idea that parents have a fundamental liberty interest in rearing their biological children is neither new, nor did the Supreme Court validate the idea out of thin air. First, there are sociological and psychological benefits to keeping a child a part of his or her biological lineage—namely, a sense of belonging and pride. There is also the notion that biological parents, especially mothers, have a natural bond with their children, having participated in the creation of the life and, in the case of the mother, having gone through the pains of childbirth. Thus, all other things being equal, biological parents have a greater stake in the child's development. In addition to psychological and sociological justifications, religious conviction and principles also may be instructive to the questions of family law that are raised by the ASFA, especially termination of parental rights. Two traditions within Christianity, the Roman Catholic, and Reformed traditions, contain distinct but parallel teachings regarding the family that may help refine our views on the degree of the fundamental right discussed in cases like *Santosky* and *M.L.B.* Both traditions conclude that parental rights are among the most fundamental and sacred, and that the termination of parental rights is to be a last resort if ever used by the state.

A. *The Catholic Notion of Subsidiarity*

The notion of subsidiarity, a concept not exclusive to the Catholic tradition, but well-advanced by that tradition, has stood

114. 757 N.E.2d 864 (Ill. 2001).

in opposition to the claims of the Progressive Era that the creation of bureaucracies and social engineering by experts are the means to decrease social unrest and increase general happiness in society. Beginning with Leo XIII in *Rerum Novarum*, the Church spoke out amidst the Industrial Revolution and the Progressive Era, saying, in sum, that although the state may better society, the notion that the family is prior to the state is one of the most central themes of a Christian world-view. Thus, the family should be the first source of social betterment, followed by institutions most local to the problem being targeted, as they are able to solve such problems.¹¹⁵

This teaching was clarified in Pope John Paul II's encyclical, *Centesimus Annus*, in which he explained:

If Pope Leo XIII calls upon the State to remedy the condition of the poor in accordance with justice, he does so because of his timely awareness that the State has the duty of watching over the common good and of ensuring that every sector of social life, not excluding the economic one, contributes to achieving that good, while respecting the rightful autonomy of each sector. This should not however lead us to think that Pope Leo expected the State to solve every social problem. On the contrary, he frequently insists on necessary limits to the State's intervention and on its instrumental character, inasmuch as the individual, the family and society are prior to the State, and inasmuch as the State exists in order to protect their rights and not stifle them.¹¹⁶

Pope John Paul II noted a few years later: "[i]t is necessary to go back to seeing the family as the *sanctuary of life*. The family is indeed sacred: it is the place in which life—the gift of God—can be properly welcomed and protected against the many attacks to which it is exposed, and can develop in accordance with what constitutes authentic human growth."¹¹⁷

In his proclamation of 1994, "The Year of the Family," Pope John Paul II again underscored a concept of the family as informed by Christianity:

Every effort should be made so that the family will be recognized as the primordial and, in a certain sense 'sovereign' society! The 'sovereignty' of the family is essential for the good of society. A truly sovereign and spiritually vigor-

115. LEO XIII, *RERUM NOVARUM* (1891).

116. JOHN PAUL II, *CENTESIMUS ANNUS* ¶ 11 (1991).

117. JOHN PAUL II, *CENTESIMUS ANNUS* ¶ 39 (1991) (emphasis in original).

ous nation is always made up of strong families who are aware of their vocation and mission in history. The family is at the heart of all these problems and tasks. To relegate it to a subordinate or secondary role, excluding it from its rightful position in society, would be to inflict grave harm on the authentic growth of society as a whole.¹¹⁸

Subsidiarity has driven Catholic social teaching over the last 150 years, as the rise of the social sciences and other ways of engineering human interaction have ascended.¹¹⁹ This very high view of the family as being “prior to the state” and “sacred” supports the argument that the state should take extreme measures before breaking apart families permanently upon allegations of neglect due to circumstances related to poverty. In addition, it does not require citation to note that the Church has spoken out consistently in favor of justice for the poor (through teachings such as the preferential option for the poor), consistent with Scripture: “[d]o not rob the poor because he is poor, Or crush the afflicted at the gate; For the LORD will plead their case, And take the life of those who rob them.”¹²⁰

B. *The Reformed Theological View of Covenant*

The Presbyterian and Reformed traditions are also instructive with regard to family law policy. This collective tradition, perhaps more than any other Christian tradition, is the one that most emphasizes family unity under God. The Westminster Confession of Faith of 1647, the widely respected Presbyterian declaration of Christian faith and practice, encourages the practice of praying and worshipping together as a family, which unit the Confession describes as a sort of church in itself.¹²¹ Further, Reformed churches strongly hold to the practice of infant baptism.¹²² The practice of infant baptism is central to Reformed theology, distinguishing this tradition from Anabaptists and most modern Baptists. This practice is supported by the notion that God works in families, distributing grace (similar to the Catholic view of families as “sacred,” as expressed by the Pope).¹²³ The Hebrew practice of circumcision carried similar implications and

118. JOHN PAUL II, LETTER TO FAMILIES FROM POPE ¶ 17 (1994).

119. See MASON, *supra* note 35, at 161–85 (noting the rise of social sciences with reference to family law).

120. PROVERBS 22:22–23.

121. THE WESTMINSTER CONFESSION OF FAITH XXI § 6 (1647), at http://www.opc.org/documents/WCF_frames.html.

122. *Id.* at XXVIII § 4.

123. *Id.* The annotated version of the Confession reads, in the note to XXVIII § 4, n.533:

made a similar statement about the importance of family in ancient Israelite religion.

In the realm of education, the Reformed tradition was quick to develop its own theories on the role of the church and the state. The tradition highly valued education as one of the most central functions of some combination of the church, family, and the state. However, in the Presbyterian Church in nineteenth century America, churchmen on both sides of the debate held that the position of the family was the indispensable component.¹²⁴ In these ways, the Reformed tradition has shown an

Genesis 17:7, 9. And I will establish my covenant between me and thee and thy seed after thee in their generations for an everlasting covenant, to be a God unto thee, and to thy seed after thee. . . . And God said unto Abraham, Thou shalt keep my covenant therefore, thou, and thy seed after thee in their generations. Galatians 3:9, 14. So then they which be of faith are blessed with faithful Abraham. . . . That the blessing of Abraham might come on the Gentiles through Jesus Christ; that we might receive the promise of the Spirit through faith. Colossians 2:11–12. In whom also ye are circumcised with the circumcision made without hands, in putting off the body of the sins of the flesh by the circumcision of Christ: Buried with him in baptism, wherein also ye are risen with him through the faith of the operation of God, who hath raised him from the dead. Acts 2:38–39. Then Peter said unto them, Repent, and be baptized every one of you in the name of Jesus Christ for the remission of sins, and ye shall receive the gift of the Holy Ghost. For the promise is unto you, and to your children, and to all that are afar off, even as many as the Lord our God shall call. Romans 4:11–12. And he received the sign of circumcision, a seal of the righteousness of the faith which he had yet being uncircumcised: that he might be the father of all them that believe, though they be not circumcised; that righteousness might be imputed unto them also: And the father of circumcision to them who are not of the circumcision only, but who also walk in the steps of that faith of our father Abraham, which he had being yet uncircumcised. 1 Corinthians 7:14. For the unbelieving husband is sanctified by the wife, and the unbelieving wife is sanctified by the husband: else were your children unclean; but now are they holy. Matthew 28:19. Go ye therefore, and teach all nations, baptizing them in the name of the Father, and of the Son, and of the Holy Ghost. Mark 10:13–16. And they brought young children to him, that he should touch them: and his disciples rebuked those that brought them. But when Jesus saw it, he was much displeased, and said unto them, Suffer the little children to come unto me, and forbid them not: for of such is the kingdom of God. Verily I say unto you, Whosoever shall not receive the kingdom of God as a little child, he shall not enter therein. And he took them up in his arms, put his hands upon them, and blessed them. Luke 18:15. And they brought unto him also infants, that he would touch them: but when his disciples saw it, they rebuked them.

THE WESTMINSTER CONFSSION, at http://www.opc.org/documents/WCF_frames.html.

124. See Wilhelm, *supra* note 40, at 55, 62.

agreement with the essentials of the Catholic doctrine of subsidiarity. Implications on family law are numerous, but most relevant to this discussion is that the Reformed tradition holds families as the sacred conduit through which God works; this institution was created by God and should be dissolved only under the most extreme circumstances. This tradition would, when the case is a close one, err on the side of the poverty-stricken family facing termination of parental rights due to negligent rather than abusive conduct.

VI. SOLUTIONS TO THE ASFA STRUCTURE

If the federal government is to fix the mess it has created, it can begin by mandating greater state assistance toward case plans before termination may be adjudged. Some services are still badly lacking around the country. Indeed, for example, parents with substance-abuse problems are not being treated by the states with sufficient speed as they face termination of rights. One scholar notes that in the wake of ASFA, “[d]espite the increasing number of families needing support services, resources for treatment have not increased.”¹²⁵ This was the chief concern that the Illinois Supreme Court noted in *In re H.G.*, holding the fifteen-month provision invalid because it violated substantive due process as applied to parents with problems such as substance abuse.¹²⁶

Other approaches may entail turning to churches, extended family, and other charitable organizations to meet the needs of parents facing termination of their rights. President Bush’s proposed measures to aid faith-based charitable initiatives may aid along this vein.¹²⁷ Admittedly, the statute does provide some exceptions to the fifteen-month provision when a family member is caring for the child in foster care, but in order to qualify under an exception, the family member must be “approved” or certified by the state as an acceptable care-giver.¹²⁸ Repairs to the system could come by the state giving extended relatives an automatic grant of certification (or at least a rebuttable presumption of certification), pending a complaint to the contrary. Under the cur-

125. O’Flynn, *supra* note 20, at 246.

126. See generally 757 N.E.2d 864 (Ill. 2001).

127. See generally Carl H. Esbeck, *Senior Counsel to the Deputy Attorney General, Statement Before the Subcomm. on the Constitution, House Comm. on the Judiciary, Concerning Section 1994A (Charitable Choice) of H.R. 7, The Community Solutions Act*, 107th Cong. (June 7, 2001), reprinted in 16 NOTRE DAME J.L. ETHICS & PUB. POL’Y (forthcoming 2002) (defending the constitutionality of charitable choice and answering many of its critics).

128. See 42 U.S.C.A. § 675(1)(E) (West Supp. 1998).

rent system, it appears that a guilt by association complex is operating within ASFA with regard to poor families (as well as abusive parents).

Another solution would be to simply remove the fifteen-month provision from the statute, but only with regard to parents whose children were removed into foster care because of reasons substantially related to poverty, usually classified under neglect. This alteration would give states a better chance to provide the services needed to bring parents back on their feet. It is true that parents do not universally express a desire to be reunited with their children. This will still affect state determinations of termination. But in all cases, the state should find ways to provide or encourage families, churches, and other charitable organizations to provide services needed to bring children back into an acceptable environment.

In addition, the Act could be amended to tie federal funds to states' use of "diligent efforts" rather than "reasonable efforts." States could be encouraged to try harder with reunification in neglect cases. While this extra effort is not justified in cases where a parent has seriously abused the child or where reunification would bring a continued threat of serious abuse, the extra effort is certainly warranted in neglect cases where poverty is a major factor in the parent's behavior.

In all of these matters, the expectations under ASFA should be curtailed and the government should trust parents and extended families more. Sound legal policy (noting the difference between abuse and neglect), as well as theological insight, both point us to these types of solutions.

CONCLUSION

The ASFA has brought teeth into the system of federally directed foster care, opening the door for children to be adopted. But in doing so, it has not significantly reduced the number of children in foster care. Many children are now legally forever separated from biological parents but are still floating around in the foster care system with no guarantee of adoption. And in encouraging termination of the rights of parents, the federal policy engaged in assumptions that have taken the law too far. Indeed, in light of *M.L.B.*, *Santosky*, and *Lassiter*, some provisions of ASFA may be unconstitutional as applied to poor parents on procedural due process grounds. In light of *In re H.G.*, the fifteen-month provision and perhaps other provisions may be vulnerable to constitutional challenge in other states on substantive due process grounds due to failing the narrow tailoring test.

Abusive parents, especially those that commit or threaten severe abuse, should be treated harshly and not given continual chances. In those cases, the children suffer. But the cases of extreme abuse are not the ones supplying the foster care population—it is the cases of neglect, where often poverty is a major factor, that supply the foster care system.

Under the current structure of ASFA, federal law creates a presumption of mistrust of poor parents once the child has been removed into foster care. The federal law encourages states to treat abuse and neglect as the same offense, either one subjecting parents to grave danger of permanently losing their children. ASFA has placed many poor families on the defensive more than ever before. The federal policy has encouraged states to reach permanency goals that disproportionately break up the families of poor, lower class Americans. This sanction affecting the poor may call for a constitutional challenge in light of *M.L.B.* and *In re H.G.*, as discussed above.¹²⁹ If, however, a constitutional challenge is ineffective, the ASFA should nevertheless be opposed as a matter of social policy based on sound legal and theological principles that respect the family and respect legal distinctions between neglect largely due to poverty on the one hand and abuse and violence on the other hand. Congress' social engineering under the ASFA has, intentionally or not, left poor families behind.

Proper federal solutions by way of amendment or repeal of the ASFA include: (1) restoring the distinction between abuse and neglect, (2) making petition for termination permissive rather than mandatory after fifteen months in cases of neglect, (3) changing "reasonable efforts" to "diligent efforts" in cases of neglect, (4) removing the time limits on such "diligent efforts," and (5) working with state and community-based social initiatives to ensure that poor parents are getting all services available before they are subject to terminations based on neglect. With these changes, the means employed to achieve the compelling government interest of protecting children will be more narrowly tailored. Under these proposed changes, society can continue to protect children subjected to serious and violent abuse, and move them toward adoption as quickly as possible, while ensuring that poor families are not legally and permanently severed unjustly.

129. *M.L.B.* may be the strongest support for a procedural due process claim against the ASFA. The Illinois Supreme Court in *In re H.G.* invalidated a portion of the ASFA under substantive due process.

