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ESSAY

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In 1997, Congress passed the Adoption and Safe Families Act. The Act amends Titles IV-B and IV-E of the Social Security Act, which govern states' federally funded child-protective efforts. Under the terms of the Act, states must conduct a permanency hearing within twelve months after a child enters foster care to determine whether the child will be returned to the family of origin or be "freed" for adoption. In this Essay, Professor Adler argues that this requirement forces courts and state decision-makers to choose between two stark alternatives—termination of parental rights and family reunification—and reflects a limited vision of the ideal family, to which only original and adoptive families conform. Professor Adler argues that this pervasive "ideology of the ideal family" is a pillar of American legal consciousness that throughout the history of American child welfare policy has sidelined nonconforming approaches and profoundly and detrimentally affected the lives of foster children. She brings to the foreground a pattern of legal consciousness and proposes that lawmakers embrace a wider array of permissible family structures to make room for a broader range of possible outcomes.

I. THE PREVAILING FAITH IN PERMANENCE

In 1997, the 105th Congress passed, and President Clinton signed, the Adoption and Safe Families Act ("ASFA").1 ASFA amends Titles IV-B and IV-E of the Social Security Act, which govern federally funded child protective efforts by states.2 These efforts include removal of children from their families of origin, provision of social services, termination of parental rights, and placement of children in foster and adoptive homes.3 ASFA's driving policy is to achieve permanence for children in the foster care system.4

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3 Id.

This Essay critiques ASFA and its driving principle, as well as the ideological framework out of which they grew. It argues that many of the most committed proponents of child welfare reform have been unable to extricate themselves from the limiting terms of American child welfare policy discourse, and that the principle of permanence is a product of that discourse.

The prevailing faith in permanence is misplaced and should be abandoned, not because children do not benefit from living in safe, permanent homes, but because policymakers and reformers are mistaken in their belief that the principle of permanence resolves the terrifying dilemmas associated with child welfare practice.

Child welfare advocates conceived of permanence in the 1970s as a way of tackling the problem of "foster care drift," a term used to describe the shepherding of children through a series of foster homes, sometimes for years, while state agencies attempt to provide the services necessary to enable safe family reunification. Child welfare advocates condemn "foster care drift" as insensitive to children's sense of time and threatening to their future ability to form attachments. The emphasis on permanence was a direct response to this problem.

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5 While this Essay focuses on federal law, ASFA had state forerunners. See generally James M. McCoy, Reunification—Who Knows the Child's Best Interests?, 53 J. MO. BAR. 40 (1997).

6 Cf. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1775 (1976) [hereinafter Form and Substance] (describing the "moment of terror" at which rationality fails to help us choose between contradictory values); Mark Kelman, A Guide to Critical Legal Studies 289 (1987) (explaining how legal discourse suppresses, rather than solves, policy dilemmas). As will become clear in Part II.E, the principle does not help decision-makers choose between preserving and terminating family relationships. Although this Essay addresses a single federal statute in its historical and theoretical context, my goal is to contribute to a larger intellectual project of bringing to the foreground entrenched and largely invisible patterns of thought that limit our ability to generate meaningful reform. See, e.g., Frances Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497, 1498 (1983) [hereinafter The Family and the Market] (arguing that "reforms are limited by their premises, by the unexamined assumptions upon which they are based"); Deborah Stone, Policy Paradox: The Art of Political Decision Making, xi (1997).


10 See Adoption 2002: The President's Initiative on Adoption and Foster Care [hereinafter Adoption 2002] (defining permanency as when "a child has a safe, stable, custodial environment in which to grow up, and a life long relationship with a nurturing caregiver"), at http://www.acf.dhhs.gov/programs/cb (issued Dec. 14, 1996).
In its first effort to address the problem of foster care drift, Congress enacted the Adoption Assistance and Child Welfare Act of 1980 ("CWA"). The central policy goal of the CWA was a version of permanence that emphasized family preservation, meaning that states were encouraged to make reasonable efforts to keep families together or enable their reunification. The CWA discouraged termination of parental rights except where the child’s safety was so imperiled as to make reunification untenable. A dramatic increase in foster care caseloads in the 1980s, however, overwhelmed family preservation resources. Egregious incidents of child abuse, occurring as state agencies made futile attempts to preserve troubled families, urged a rereading of the reasonable efforts requirement to permit expedited termination of parental rights when states were pessimistic about repairing family dysfunction.

ASFA purports to "clarify" the policies embodied in the CWA, largely by amending two important provisions of Title IV-E. First, ASFA amends the reasonable efforts requirement by limiting the circumstances under which states must persevere in their efforts to preserve original families, encouraging expeditious termination of parental rights instead. Second, ASFA requires states to conduct a permanency hearing within twelve months after a child enters foster care to determine whether the child will be returned to the family of origin or be "freed" for adoption.

The cardinal principle of child welfare policy over the last two decades under both CWA and ASFA regimes has been permanence. The aim of this policy is to synthesize the advantages of family preservation and expeditious termination of parental rights. The difficulty is that the

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13 See Shotton, supra note 11, at 223; see also McCoy, supra note 5, at 40.
14 See Levesque, supra note 7, at 8–12.
15 See, e.g., McCoy, supra note 13, at 40–42; Sheldon, supra note 8, at 83–85.
19 Id. § 675(5). This represents a departure from the previous rule under the CWA, which provided for periodic dispositional hearings to consider the child’s future status. Compare id. with Pub. L. No. 96-272, § 475(5) (c), 94 Stat. 500 (1998).
20 See, e.g., Garrison, supra note 7, at 442–55.
21 See, e.g., 42 U.S.C. § 629(b) (1998) (expanding family preservation services while
problem of impermanence itself arises out of decision-makers’ profound ambivalence over which strategy to employ in a given factual circumstance.

Some circumstances are so dire that they demand termination of parental rights, just as some families undoubtedly ought to be provided with appropriate services and preserved. Many cases would garner a powerful consensus about which course of action is the right one. This Essay, however, focuses on the “hard cases,”22 i.e., cases that would be likely to engender official ambivalence, making it difficult, even painful, to decide whether to preserve or coercively terminate a parent-child relationship.

Innovation for children in the hard cases, has been hampered by unexamined premises underlying American child welfare policy.23 These premises are features of what I will call the “ideology of the ideal family.”24 In Part II of the Essay, I argue that this ideology drives ASFA and its immediate predecessor, the CWA. In Part III, I trace this ideology through the history of American child welfare policy and in Part IV, I argue that the ideology appears repeatedly in influential strains of classical and contemporary liberal legal thought. Taken together, these Parts demonstrate that the ideology of the ideal family is a pillar of American legal consciousness25 that has sidelined nonconforming policy proposals26 and has had an untold and profound impact on the lives of foster children. In Part V, I urge that we broaden our vision of family beyond the idyllic and embrace messy and imperfect family structures. I propose that the law change to lend greater support to child welfare innovations that defy the ideology of the ideal family. This change will require renouncing faith in the promise of permanence to save us from the pain of de-

limiting the length of time during which they must be delivered).

22 By “hard cases,” I mean cases that would be likely to cause a court to feel ambivalent and so delay making a final disposition, letting a child remain in foster care “limbo” while periodically revisiting the watered-down question of the child’s “future status.” See infra note 45.

23 See The Family and the Market, supra note 6, at 1498.

24 Frances Olsen has employed similar terminology, describing the “ideology of the family [as] a structure of images and understandings of family life.” Frances Olsen, The Politics of Family Law, 2 LAW & INEQ. 1, 3 (1984) [hereinafter Politics of Family Law]. I use the ideology of the ideal family similarly, but I also want to emphasize that the images and understandings create an ideal, or fantasy, that excludes some possibilities for reform. See The Family and the Market, supra note 6, at 1499 (Part I is entitled The IDEOLOGY OF THE FAMILY AND THE MARKET).


ciding whether to preserve families or terminate the rights of parents whose children’s welfare is uncertain.

II. THE STATUTE

Two sections of ASFA have been viewed as most critical to achieving permanence for children: (1) the amendments to the reasonable efforts requirement; and (2) the hearing requirement. This Part examines those sections in detail, discusses the policy challenges they were designed to address, and argues that they do not achieve their central purposes.

A. Reasonable Efforts

The CWA introduced the reasonable efforts requirement to federal law. Until ASFA was passed in 1997, the relevant statutory provision required that a state’s eligibility for federal foster care funding be contingent upon the creation of a state plan that is approved by the Secretary of Health and Human Services (“HHS”). The state plan must provide that “in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.”

As commentators have noted, the reasonable efforts requirement lacked definition, leaving significant discretion to the states to determine what kinds of efforts were “reasonable.” Furthermore, the CWA stopped short of actually mandating that states “implement a concrete, enforceable plan.” HHS promulgated regulations listing services that states

27 Cf. Stone, supra note 6, at 243 (discussing the pain of making difficult decisions).
29 For a more comprehensive overview of ASFA, including, e.g., addition of the requirement that foster parents be notified of hearings concerning the children in their care, Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5), use of the Federal Parent Locator Service for child welfare services, 42 U.S.C. § 653, and provision of continuing health insurance coverage for children with special needs, 42 U.S.C. §§ 671(a), 673(a)(2), see id.
31 Id. § 671(a).
32 Id.
might include in their plans, such as day care, vocational rehabilitation, homemaker services, and substance abuse counseling. 35 Nothing in the statute or regulations, however, required that states actually provide any of these services. 36

States lacked guidance in other areas as well. Senator Mike DeWine (R-Ohio), one of ASFA’s sponsors, argued that “too often, reasonable efforts, as outlined in the statute, have come to mean unreasonable efforts.” 37 In too many cases, Senator DeWine asserted, the CWA was read to require efforts to reunite families that were “families in name only.” 38 It was clear, Senator DeWine said, that “the Congress of the United States in 1980 did not intend that children should be forced back into the custody of adults who are known to be dangerous and . . . abusive.” 39

To rectify what Senator DeWine described as a “serious[ ] misinterpret[ation] by those responsible for administering our foster care system,” 40 Congress limited the circumstances under which states must make reasonable efforts to preserve troubled families. Reasonable efforts are no longer required if the parent has subjected the child to aggravated abuse, 41 murdered a child, committed injurious felony assault against a child, or had his or her parental rights to another child involuntarily terminated. 42

Prior to 1997, federal law did not specifically require that states deliver any particular services to troubled families; ASFA now goes further by explicitly endorsing denial of reunification services under some cir-

36 Id.
38 Id.
39 Id.
40 Id.
41 Aggravated abuse is defined by state law.

(A) in determining reasonable efforts to be made with respect to a child... the child’s health and safety shall be the paramount concern . . . .
(D) reasonable efforts . . . shall not be required . . . if a court of competent jurisdiction has determined that—
(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);
(ii) the parent has—
(I) committed murder . . . of another child of the parent;
(II) committed voluntary manslaughter . . . of another child of the parent;
(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or
(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent; or
(iii) the parental rights of the parent to a sibling have been terminated involuntarily . . . .

Id.
cumstances. If a state agency determines that it is not reasonable to reunify the family or allow the child to remain with the family, a court may determine that this assessment itself satisfies the reasonable efforts requirement.43

When a state denies reunification services under this amended provision, ASFA specifies that a permanency hearing shall be held within thirty days after the judicial determination that reasonable efforts were not required.44 The next section examines the amended hearing requirement.

B. Permanency Hearings

Prior to the enactment of ASFA, federal law provided that a “dispositional” hearing be held within the first eighteen months and periodically thereafter to consider the “future status” of each child in temporary state custody.45 At each dispositional hearing, the court or administrative tribunal reviewed the child’s case to determine whether continued placement was in the child’s best interest.46

Federal law imposed no limit on the length of time a child might spend in “temporary” state custody.47 Children whose multiple dispositional hearings resulted in neither their return to their families of origin nor termination of parental rights often “aged out” of the foster care system without having their cases finally adjudicated.48

The national average length of stay in foster care under the CWA was three years.49 ASFA supporters such as Senator Chuck Grassley (R-Iowa) lamented that “[t]hat is three birthdays, three Christmases, and that is going through the first, second, and third grades, without having a mom and dad.”50 Senator Grassley argued that “[t]hese children are the most vulnerable of all; their lives begin with abuse and neglect by their own parents and for many, they experience systemic abuse by languishing in long-term foster care.”51

45 Id. § 675(5)(C).
46 Patricia Tate Stewart, Keeping Families Together/Reasonable Efforts, DEL. LAW., Fall 1994, at 9.
48 See Sheldon, supra note 8, at 74.
50 Id.
51 Id.
In an effort to be more “responsive to a child’s sense of time, Congress moved the timing for the ‘dispositional hearing’ [and] renamed it the ‘permanency hearing.’” The permanency hearing must be held within twelve months of the date on which a child enters foster care, or within thirty days of a court determination that reasonable efforts are not required.

The permanency hearing is designed to produce a “permanency plan.” ASFA contemplates four such plans. The child must be: (1) returned to the parent; (2) placed for adoption, in which case the state will petition to terminate parental rights; (3) referred for legal guardianship; or (4) placed in another planned living arrangement. It is not yet clear how often courts will employ the fourth option. Unless the “another planned living arrangement” exception comes to engulf the rule, ASFA effectively requires that within twelve months of the child entering foster care, the state will make a decision as to whether a foster child’s case will end in family reunification or termination of parental rights.

If the family has not satisfactorily demonstrated within twelve months that the family ought to be reunited, the state must endorse one of the other plans, which, given the choices, seems likely to mean termination of parental rights. This is not to say the statute requires that family reunification or termination of parental rights occur within twelve months, nor that family reunification efforts be terminated at that time. Instead, a parent must be complying with the case plan, making “significant measurable progress” towards achieving the goals of the plan, and

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54 Id. § 671(a)(15)(E).
55 Id. § 675(5)(C).
56 Id.
57 Id.
58 Id. Legal guardianship is defined as a “judicially created relationship” that is intended to be “permanent and self-sustaining” as evidenced by the transfer of physical and legal custody of the child to the caretaker. Id. § 675(7). Guardianship under ASFA differs from adoption in three ways: first, the original parents might be required to pay child support to the guardian; second, the child can still draw government benefits associated with his or her relationship with the original parents and inherit from and through the original parents; and third, the original parents may have standing to reassert their rights in the event that a guardian dies or becomes incapacitated. See Adoption 2002, supra note 10, at Chapter II. Notwithstanding these differences, ASFA goes a long way toward making guardianship more like adoption and less like foster care. Most importantly, it is designed to preclude continuing court supervision so as to give the impression of a permanent family relationship. Id.
59 “Another planned living arrangement” is authorized only when a state agency shows a state court a compelling reason that none of the other three options would be in the best interests of the child. See 42 U.S.C. § 675(5)(C).
60 According to Adoption 2002, supra note 10, at Chapter II, only two sets of circumstances justify turning to the fourth option: when there is an older child in a stable foster home with ties to an original family, and when there is a child with a serious disability who would not be guaranteed adequate services and who is in a stable relationship.
“diligently working towards reunification.”61 Under these circumstances, the plan will remain in place at the permanency hearing as long as the state and court expect reunification to occur within a timeframe that is “consistent with the child’s developmental needs.”62 Otherwise, the state will establish an alternative plan at the permanency hearing.63

C. Shifting Emphasis

The goal of permanence is common to both the CWA and ASFA, but while the CWA embodied a preference for family preservation, ASFA favors expeditious termination of parental rights. Permanence encompasses both of these conflicting policy preferences.64 ASFA shifted the balance in favor of expeditious termination in two ways. As discussed, ASFA amended the reasonable efforts requirement, endorsing the denial of reunification services under certain, specified circumstances. This was not, however, the most crucial locus of the shift. Cases in which parents inflicted aggravated abuse against their children or were convicted of homicide of another child—i.e., those circumstances that now serve to exempt states from making reasonable efforts—were not the hard cases65 prior to the 1997 amendments.

To advance the cause of permanency in the hard cases, Congress imposed a kind of “fish or cut bait” discipline on the foster care process by instituting the permanency hearing. The requirement that an ultimate disposition be issued within twelve months of a child’s entering foster care leaves little time for ambivalence. Furthermore, the limited range of options available to courts under ASFA forces courts to choose quickly between stark alternatives, as the next section demonstrates.

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62 Id.
63 Id.
64 Permanence is what political scientists might call a “valence issue” in that it “elicits a single, strong, and fairly uniform emotional response and does not have an adversarial quality.” BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 27 (1984). Who would oppose the proposition that every child ought to have a stable, loving, permanent home? Political scientists use the term “valence issue” to describe the “noncontroversial generalities” used by political candidates such as “national strength” or “better public education,” to avoid arousing a negative reaction from voters. Id. Valence issues are described with a “lack of specificity” and “reeaffirm the ideals of a civic life.” Id. at 28. Nelson contrasts “valence issues” with “position issues,” which “engender alternative and sometimes highly conflictual responses.” Id. at 27. People of wildly different views on child welfare policy might agree in principle on permanence, though that agreement could easily unravel over whether to achieve it by preserving or terminating family relationships. See Stone, supra note 6, at 11–12 (using the term “motherhood issue” to describe this same phenomenon).
65 See supra note 22.
D. Permanence in Action

Judge Francis Foley, presiding over a child protection session of the Superior Court of Connecticut, issued a slew of decisions in the year following the enactment of ASFA in which he cited ASFA in support of his rulings terminating parental rights to children in the Connecticut foster care system.\(^{66}\) One decision involved a six-year-old boy named Luke whose original parents were beset by mental illness, domestic violence, and severely deficient homemaking skills.\(^{67}\) Luke’s mother voluntarily relinquished her parental rights, but his father hoped to retain visitation rights while Luke remained in long-term foster care.\(^{68}\) Judge Foley terminated the legal relationship between Luke and his father on the grounds that ASFA required a “change in focus.”\(^{69}\)

According to Judge Foley, ASFA “seeks to provide States the necessary tools and incentives to achieve the original goals of [the CWA]: safety; permanency; and child and family well-being.”\(^{70}\) To comply with ASFA, Judge Foley concluded, “courts should try to effectuate the declared goals of either returning the child home or placing the child in [sic] adoption.”\(^{71}\)

None of the new exemptions to the reasonable efforts requirement specifically authorized denial of preservation services to Luke and his father.\(^{72}\) It was the permanency hearing that forced the termination in Luke’s case. Luke’s father did not ask that Luke be placed permanently with him,\(^{73}\) and since ASFA effectively provides for only two outcomes—permanent placement with the family of origin or termination of parental rights—termination was all that seemed to be left to Judge Foley at the permanency hearing.\(^{74}\) Under the CWA, Luke might have remained in foster care indefinitely while his father continued to visit, but the strict requirements of ASFA’s permanency hearing foreclosed that outcome.

This is not to say that Luke’s story is necessarily over. Even the strict requirements of the permanency hearing may not always achieve permanence for children in the foster care system.


\(^{68}\) Id.

\(^{69}\) Id. at *3–*6.

\(^{70}\) Id. at *4.

\(^{71}\) Id. at *5.

\(^{72}\) See id. at *1–*2; supra note 42 and accompanying text.


E. Impermanence of the Permanency Plan

The apparent finality of the "fish or cut bait" approach may be misleading. Imagine a case in which the court terminates parental rights and makes the child available for adoption. While the image of a clean break\(^{75}\) may appeal powerfully to policymakers, many children whose parents' rights are terminated do not start life anew as policymakers imagine.

For one thing, the shortage of adoptive homes means that many children will continue to drift among foster care placements.\(^{76}\) This problem is especially acute among older children, children of color, and children with disabilities.\(^{77}\) Without a ready adoptive home, very little permanence results from the decision to terminate parental rights.\(^{78}\)

Even if the child is among the fortunate and is placed with a loving, adoptive family, termination does not always lead to the kind of permanence that policymakers have in mind. This is particularly true for older children. Joyce Pavao, a family therapist who specializes in issues raised by adoption,\(^{79}\) observed that after a child bid farewell to his original family and was adopted by a new family,

\[\text{[t]he same child ... would go out to the telephone booth and call his grandmother the day after the adoption was finalized. The same grandmother he had called every week all of the other years before being adopted. The same grandmother he had visited while he was in foster care.}^{80}\]

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\(^{75}\) See Garrison, supra note 26, at 387–88 (discussing the "legal rebirth" and "fresh start" of adoption); see also Joyce Maguire Pavao, The Family of Adoption 93 (1998) (describing the movement in the 1930s to close adoption records and original birth certificates to create the sense that an adopted child was "reborn").


\(^{77}\) Id. at 134 (discussing placement of children of color); Ira M. Schwartz & Gideon Fishman, Kids Raised by the Government 84 (1999) (explaining that older children are least likely to be adopted and disabled children experience a high rate of adoption disruption).

\(^{78}\) The federal government has made efforts to increase the number of adoptive homes for foster children. See 42 U.S.C. § 673A. At least two obstacles, however, could inhibit progress on this front: (1) the availability of infants from abroad, see, e.g., Michael S. Serrill, Going Abroad to Find a Baby, Time, Oct. 21, 1991, at 86, and (2) improvements in assisted reproductive technologies, see, e.g., Rebecca Mead, Eggs for Sale, New Yorker, Aug. 9, 1999, at 56. On the other hand, decreased availability of infants—due to falling birthrates, increased access to abortion and growing acceptance of non-marital child bearing—has somewhat improved the odds of adoption for older children. See Garrison, supra note 26, at 376; Serrill, supra at 86.

\(^{79}\) See Pavao, supra note 75, at xii.

\(^{80}\) Id. at 97 (criticizing the trend in the 1980s of sealing adoption records and impounding birth certificates of older children).
Somehow, the sense of having had a clean break and being in a permanent, new home has eluded this child. Social workers would tell the adoptive parents that these lingering connections were illegal and would not help the child bond to the new family. According to Pavao, "[t]here was no true understanding of the need that these children had for connection to the people who had been positive and present in their very complicated, and often traumatic, lives."^^2

Next, imagine a family that makes progress on its case plan to the satisfaction of the state agency, leading the court to "fish," i.e., to reunite the original family. Imagine, though, that a few months after reunification, a neighbor or school counselor contacts the agency to report new allegations of abuse. If the allegations are substantiated, the agency must reassess the case, perhaps recommending removal or even termination. The case was adjudicated to finality in name only, because the system must remain available for every child, regardless of whether he or she has been in the system on a prior occasion.^^3

These examples demonstrate that ASFA's promise of permanence is illusory, particularly in the hard cases. The permanency hearing cannot possibly deliver the certainty or finality that it was designed to provide. The potential for disruption of the permanency plan persists as long as: (1) there remains a possibility of renewed cause for concern over the child's safety; (2) we have a shortage of adoptive homes; and (3) children miss their families.

But the larger, more fundamental reason for skepticism is that the principle of permanence contains exactly the dilemma that it sets out to resolve, i.e., between family preservation and termination of parental rights.^^4 In the hard cases, this dilemma gives rise to ambivalence; ambivalence gives rise to indecision; indecision gives rise to foster care drift, which is the very problem that the principle of permanence arose to fix. The goal of the permanency hearing is to hasten decision. In many cases, however, the background truths that engendered the official ambivalence remain and harbor the potential to disrupt the permanency plan at any moment.

As will become clear, I do not profess to resolve the decision-maker's dilemma in the hard cases. Instead, I propose that lawmakers make room for a broader range of outcomes and thereby diminish the

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^^1 Id.

^^2 Id.

^^3 Garrison, supra note 26, at 391 (reporting, prior to ASFA's passage, that "as many as four out of ten foster children who are discharged to their parents simply wind up in foster care again"). Adoptive families face similar risks of impermanence. As Adoption 2002 points out, "all caregivers are subject to existing criminal and civil child abuse and neglect laws." Adoption 2002, supra note 10.

^^4 Cf. Duncan Kennedy, A Semiotics of Legal Argument, 42 SYRACUSE L. REV. 75, 97–103 (1991) [hereinafter Semiotics] (describing "nesting," i.e., "the reproduction, within a doctrinal solution to a problem, of the policy conflict the solution was supposed to settle").
centrality of this dilemma. The seeming irrepressibility of the dilemma results from a limited vision, or ideology, of the ideal family to which only original and adoptive families conform. In Parts III and IV, I highlight homologous conundrums throughout the history of American child welfare policy and in liberal legal thought on child-rearing to establish that the contradiction embodied in the principle of permanence results from a pervasive ideology.

III. A SHORT HISTORY OF AMERICAN CHILD WELFARE POLICY

The rivalry between family preservation and expeditious termination of parental rights is merely the most recent in a constellation of contradictory values that has existed for nearly two centuries. Peel away the contemporary policy terminology and the rivals will begin to seem familiar—just new lyrics to the same old song. The appearance of these values throughout the history of American child welfare policy discourse creates a sense of being trapped in an irresolvable conundrum, where striking a new compromise between old rivals seems like the best that we can do.85

A. From the Colonial Period Through the Progressive Era

The history of American child welfare policy has been traced back to the practice of indentured servitude during the colonial period.86 Children born into families too poor to care for them left their homes to provide labor to more fortunate families.87 This arrangement shed some of its quid pro quo character over time, taking on a more altruistic, charitable appearance, but continued to consist largely of removing children from poor families and placing them with wealthier ones.88 Eventually, "neglect . . . replaced poverty as the legal basis for depriving parents of . . . their children, but for the most part, poverty was simply equated with neglect."89

In the first half of the nineteenth century, fear of social upheaval, moralism toward the poor, and the spirit of charity spurred the founding

85 See Adoption 2002, supra note 10 (explaining that federally issued guidelines "attempt to strike a delicate balance between the child’s urgent need for safety and permanency, and agency and court efforts to help parents overcome the problems that result in child maltreatment or make their home unsafe for their child"); cf. DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 135, 147, 149 (1997) [hereinafter CRITIQUE OF ADJUDICATION] (on the “semioticization” of policy discourse).
86 See Garrison, supra note 7, at 434.
88 See id. at 41–42; Garrison, supra note 7, at 435.
89 Garrison, supra note 7, at 435.
of orphanages of a decidedly sanctimonious and culturally biased character. Administrators of Protestant institutions, for example, sought to rescue Catholic and Jewish children from their parents' presumptively deficient immigrant households. Jewish administrators from Germany thought likewise of Jewish families from Russia.

By the turn of the century, orphanages began to fall from favor. Reformers argued that the oppressive atmosphere and rigid discipline undermined the goals of cultivating good character and individualism in institutionalized children. Further, while reformers maintained the impulse to rescue neglected children, they simultaneously lamented the separation of children from their mothers for both sentimental and economic reasons.

In 1909, President Theodore Roosevelt hosted a national conference on child welfare at the White House, at which participants proclaimed that "[h]ome life ... is the highest and finest product of civilization." Conference participants endorsed the preservation of natural families when it was possible and the approximation of family life when it was not. In the years following the conference, orphanages were displaced by three new approaches to child welfare: mothers' pensions, placing-out, and cottage format institutions.

1. Mothers' Pensions

In the first two decades of the twentieth century, "mothers' pensions"—precursors to contemporary public assistance—were adopted by most states. The idea behind the pension movement was to provide an income sufficient to enable single mothers to stay at home with their children rather than spend long days working in dangerous industrial

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90 See Ashby, supra note 87, at 46–69; see also Linda Gordon, Pitted But Not Entitled 23 (1994) (arguing that "orphanage" is really a misnomer and explaining that "[t]he majority of children in 'orphanages' were actually not orphans, but children whose mothers could not support them"); Joel F. Handler & Yeheskel Hasenfeld, The Moral Construction of Poverty 45–48 (1991) (explaining that orphanages were preceded by poorhouses, which were founded on essentially the same mix of attitudes).
91 See Ashby, supra note 87, at 46–71. Quakers opened an orphanage for African American children; after it was destroyed by a racist mob, they opened another. See id. at 32–33.
92 Id. at 88.
93 Id.; Winifred Bell, Aid to Dependent Children 4 (1965).
94 See Handler & Hasenfeld, supra note 90, at 63–65 (discussing the "sentimental cult of motherhood"); see also Bell, supra note 93, at 3–4 (discussing the turn-of-the-century belief that traditional homes had "clear economic value").
95 Bell, supra note 93, at 4.
96 See Ashby, supra note 87, at 79.
97 See Theda Skocpol, Protecting Soldiers and Mothers 424–79 (1992) (observing inter alia that pensions were adopted in spite of resistance from Catholic and Protestant charities, which tended to favor removal of neglected children from their homes).
While this approach represented a step away from moralism toward the poor by recognizing that economic hardship contributed to neglect, the pensions often came with "suitable home" provisions that excluded mothers who, for example, failed to go to church or used tobacco. Winifred Bell described the suitable home policies as creating a "partnership" between the mother and the state in which the state would grant financial support to mothers who demonstrated that they were "proper and competent custodians of their children." The goal of the partnership was to ensure that "a small group of needy children would remain in their own homes and be so supervised and educated as to become assets, not liabilities, to a democratic society."

Pension administrators wanted to help, but also sought to modify the behavior of, Catholic, Jewish, and African American families. In addition to including "suitable home" provisions, lawmakers required mothers to take classes in cooking, nutrition, and other subjects that often imposed particularist cultural norms. African American families drew lesser financial benefits from the pension systems because reformers were slow to institute pensions in predominantly African American neighborhoods and because many administrators separately maintained smaller budgets for African American recipients.

2. Placing-Out

The first two decades of the twentieth century also witnessed a resurgence of "home-finding," or "placing-out" of children with surrogate families. This practice was reminiscent of indenture and prescient of contemporary foster care. By 1910, home-placing had all but supplanted large orphanages as the placement of choice for children removed from their families of origin.

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98 See id. at 425; Ashby, supra note 87, at 94. Sadly, the income was never really sufficient to achieve the goal of enabling mothers to devote themselves to childcare full-time. See Bell, supra note 93, at 15. As a result, many mothers continued to perform wage work, leaving their children "improperly supervised." Bell, supra note 93, at 16.

99 See Ashby, supra note 87, at 96; Gordon, supra note 90, at 45.

100 Bell, supra note 93, at 5.

101 Id.

102 See Gordon, supra note 90, at 46–48.

103 For example, some of the classes discouraged the use of garlic in cooking. Id.

104 See id.

105 Ashby, supra note 87, at 90.

106 E.g., Gordon, supra note 90, at 24, 45.

107 See Ashby, supra note 87, at 90.
3. Cottage Format Institutions

Finally, the period saw the rise of "anti-institutional institutions" designed to imitate "the features of a true home."108 In these cottage format institutions, "children resided with small groups in cottages, each with a matron or supervisor."109 Children performed household chores while learning "the virtues of democracy and good citizenship," even "electing their own legislature" in one of what came to be called "junior republics."110

B. The New Deal Era

According to one view, child abuse and neglect received little attention between 1920 and 1960.111 During the New Deal Era, many reformers dedicated themselves to what they perceived to be larger social and economic concerns. One advisor to President Franklin D. Roosevelt chided those whose interest was in the treatment of children in their homes, calling them "pantry snoopers who were more interested in meddling in the lives of individual families than in providing a necessary income."112

But child welfare policy was not so much dormant in the years surrounding the New Deal as it was inseparable from welfare policy generally.113 Although child welfare received little attention as an independent field, the "necessary income" provided by public assistance programs continued to be conditioned on "suitable home" requirements that required welfare agencies to promote the interests of dependent children.114 Public assistance during the New Deal era was both an income-maintenance and child welfare measure.115 Policymakers sought to ensure that funds were not spent on families that provided substandard homes for their children.116 Apart from the suitable homes provision, however, child welfare policy developed very little and garnered very little public attention.117

108 Id.
109 Id. at 91.
110 Id.
111 See id. at 101–24.
112 Id. at 91.
113 Some state administrators did not differentiate between identification of neglect (a child welfare concept) and requiring a suitable home (as an eligibility criterion for public assistance). See Bell, supra note 93, at 30–31, 125–30. The conceptual tie between these administrative duties makes it especially ironic that in states with suitable home requirements, children on public assistance were less likely to receive child welfare services than were children in states without such requirements. See id. at 169–70.
114 See id. at 32.
115 Id. at 152.
116 See id. at 31.
117 See Ashby, supra note 87, at 101–24; Nelson, supra note 64, at 11–12 (arguing
C. Child Welfare Policy from 1960 to 1980

With the 1962 publication of pediatrician Dr. C. Henry Kempe’s famous article, *The Battered-Child Syndrome*, in the *Journal of the American Medical Association* ("JAMA"), child abuse achieved national attention, gaining coverage in popular magazines and professional journals. Dr. Kempe suggested that many children who presented as having suffered an “accident” were in fact victims of abuse. The publication of his article is often cited as the moment of the contemporary “discovery” of child abuse.

Dr. Kempe disclaimed the virtual equation of poverty with neglect that drove child welfare policy throughout the New Deal era. Although most published cases of abuse had involved parents with “psychopathic or sociopathic personalities” or from “borderline socioeconomic groups,” Dr. Kempe argued that abusive parents did not necessarily fall into these categories. Dr. Kempe’s rediscovery of child abuse in a medical context has been held responsible for contributing to the “myth of classlessness” that surrounded child welfare policy in the 1960s and 1970s.

Policymakers drew on the work of Dr. Kempe and others to advance an image of abuse as “a problem knowing no barriers of class, race, or culture.” Some politicians invoked this image to divorce efforts against abuse from unpopular poverty programs. Well-intentioned policymakers working to enact child welfare legislation promoted the classless image of abuse in spite of contradictory scholarship suggesting that “poor people actually abused or neglected their children more” and that child abuse was related to stresses associated with poverty, such as joblessness, inadequate housing, and other factors.

Initial governmental responses to the “rediscovered” problem of child abuse consisted of a profusion of state mandatory reporting laws, reporting hotlines, federally funded demonstration projects, and public

that in “the 1950s, public interest in [child] abuse . . . was practically nonexistent, and even social workers did not rate it highly as a professional concern.”

119 NELSON, supra note 64, at 13. Although Kempe wrote the Article credited with bringing child abuse to the attention of the public, “it was the work of radiologists like John Caffey, P.V. Woolley, and W.A. Evans [in the 1950s] which alerted pediatricians [such as Kempe] to the . . . problem of child abuse.” *Id.* at 12.
120 *Battered Child Syndrome*, supra note 118, at 20.
122 *Battered Child Syndrome*, supra note 118, at 18; *see also* Garrison, supra note 7, at 435.
123 *Battered Child Syndrome*, supra note 118, at 24; NELSON, supra note 64, at 13.
124 NELSON, supra note 64, at 15.
125 *Id.*
126 *Id.*
127 *Id.* at 14–15.
awareness campaigns.\textsuperscript{128} Extreme physical abuse received the most attention from lawmakers, though child neglect and the legal limits of parental discipline were in some ways the more difficult issues.\textsuperscript{129} In 1974, Congress overwhelmingly passed the Child Abuse Prevention and Treatment Act ("CAPTA"),\textsuperscript{130} providing federal funds to states that met guidelines for reporting, investigating, and providing treatment.\textsuperscript{131}

The new reporting outlets dramatically increased child abuse reports. In 1967, there were fewer than 10,000 reports of child abuse and neglect nationally.\textsuperscript{132} By 1976, this number had grown to nearly 669,000.\textsuperscript{133} The upsurge led to a dramatic increase in state agency investigations and removal of children from their homes.\textsuperscript{134}

In hard cases, child welfare investigators tended to err on the side of removal.\textsuperscript{135} Most children deemed neglected came from poor families, with children of color disproportionately represented.\textsuperscript{136} Agency staff were reluctant to return children to their families of origin,\textsuperscript{137} yet there was a shortage of adoptive placements, especially for children of color, older children, and children with health problems.\textsuperscript{138} As a result, many children remained in foster care for long periods of time, frequently being dragged through multiple placements and eventually "aging out" of the foster care system and into adulthood.\textsuperscript{139} This phenomenon, called foster care drift,\textsuperscript{140} inspired the next generation of calls for reform.

One such call came from the National Association of Black Social Workers ("NABSW"). NABSW was concerned about the disproportionate number of African American children being removed from family homes, many of whom were placed with white families, which sought to

\textsuperscript{128} See Hagedorn, supra note 121, at 32–34.
\textsuperscript{129} See Nelson, supra note 64, at 108. I agree with Nelson that these issues would have been more difficult, in the sense that neglect and the limits of parental discipline raise tough questions of line-drawing in areas where reasonable people could disagree. Is an empty refrigerator in a poor household evidence of child neglect? Is corporal punishment ever an acceptable form of discipline? Reformers avoided these thorny questions by focusing on extreme physical abuse, a phenomenon likely to garner a powerful consensus of disapproval.
\textsuperscript{131} Ashby, supra note 87, at 135–36.
\textsuperscript{132} Id. at 136.
\textsuperscript{133} Id.
\textsuperscript{134} See Hagedorn, supra note 121, at 32–34.
\textsuperscript{135} See id. at 89.
\textsuperscript{137} Garrison, supra note 7, at 439.
\textsuperscript{138} See id. at 438–39.
\textsuperscript{139} See Sheldon, supra note 8, at 73–74; Shotton, supra note 9, at 224.
\textsuperscript{140} See supra note 7 and accompanying text.
adopt in greater numbers.\textsuperscript{141} Calling transracial placement of African American children a “form of genocide,” NABSW resolved in 1972 that “Black children should be placed only with Black families whether in foster care or for adoption.”\textsuperscript{142} NABSW argued that “Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future.”\textsuperscript{143}

Native Americans, too, criticized the disproportionate removal of tribal children and placement of those children predominantly with white families.\textsuperscript{144} Child welfare agencies were accused of misidentification of neglect due to insensitivity toward Native American culture, one facet of which was shared responsibility for child care within extended families.\textsuperscript{145}

Another critique of the existing child welfare system came from an alliance of liberals and conservatives concerned about state intervention in the family. Professor Michael Wald of Stanford University argued that the state intervened too often in families, particularly in cases of neglect.\textsuperscript{146} In 1975 and 1976, he proposed new standards and procedures to govern child removal and termination of parental rights.\textsuperscript{147} His stance was explicitly anti-interventionist, based on the longstanding American “principle of family autonomy and privacy,”\textsuperscript{148} and the “basic tenet of our laws that parents have broad freedom with regard to childrearing.”\textsuperscript{149}

While Professor Wald’s position was inspired by a commitment to cultural tolerance\textsuperscript{150} and wariness of classism and racism in the removal and termination processes,\textsuperscript{151} his more conservative allies feared an “anti-family climate” and excessive state intrusion into the sphere of patriarchal authority.\textsuperscript{152} One religious conservative wrote that “[s]panking is God’s idea,” and should not be mistaken for abuse.\textsuperscript{153}

Child psychologists also played a significant role in the debate. Doctors Joseph Goldstein, Anna Freud, and Albert J. Solnit wrote two influential books in which they argued that each child has a single psy-

\textsuperscript{141} See Elizabeth Bartholet, Family Bonds 94 (1993).
\textsuperscript{142} Id. at 94–95.
\textsuperscript{143} Id.
\textsuperscript{144} See Ashby, supra note 87, at 142–43.
\textsuperscript{145} See id. at 143 (observing that “[s]ignificantly, no [American] Indian language includes the words orphan or adoption”).
\textsuperscript{147} See generally Standards for Removal, supra note 136; Search for Realistic Standards, supra note 146.
\textsuperscript{148} Search for Realistic Standards, supra note 146, at 987.
\textsuperscript{149} Id. at 989.
\textsuperscript{150} Id. at 992.
\textsuperscript{151} See Standards for Removal, supra note 136, at 629.
\textsuperscript{152} Ashby, supra note 87, at 153.
\textsuperscript{153} Id. at 149.
chological parent and that disrupting the continuity of the relationship with that parent causes severe consequences for the child’s psychological development and ability to form attachments.\textsuperscript{154} While Goldstein, Freud, and Solnit explicitly disclaimed the notion that the psychological parent had to be a biological parent,\textsuperscript{155} opponents of removal except in extreme circumstances relied heavily on their work.\textsuperscript{156}

Against this backdrop, federal child welfare policy shifted dramatically.\textsuperscript{157} Responding to tearful tales of children drifting through multiple foster care placements, growing mistrust of government intruders, and increasing cognizance of the implications that intervention has for the continuity of diverse religious and cultural traditions, Congress passed two important federal statutes. The first was the Indian Child Welfare Act of 1978,\textsuperscript{158} which established federal standards discouraging the removal of children from Native American settings and radically enhanced tribal control over children on reservations.\textsuperscript{159} The second was the Adoption Assistance and Child Welfare Act of 1980 ("CWA").\textsuperscript{160}

\textit{D. Child Welfare Policy Since 1980}

The CWA amended Title IV-B of the Social Security Act, which makes funds available to states for social services, and created Title IV-E of the Social Security Act, which provides federal reimbursement for

\textsuperscript{154} See \textit{Joseph Goldstein et al., Beyond the Best Interests of the Child} (1973) [hereinafter \textit{Beyond}]; \textit{Joseph Goldstein et al., Before the Best Interests of the Child} (1979).

\textsuperscript{155} See \textit{Beyond}, supra note 154, at 17, 19. Interestingly, Goldstein, Freud, and Solnit’s theory also has been used to justify “swift termination of parental rights in order to ‘free’ the child for adoption.” Garrison, supra note 26, at 376.

\textsuperscript{156} See, e.g., Nelson, supra note 64, at 90.

\textsuperscript{157} In the 1960s, when policymakers focused primarily on abuse, the solutions logically included reporting outlets, investigations and removal. In the 1970s, however, reformers came to regard foster care drift as the central policy challenge and permanence became the preferred solution. See Garrison, supra note 26, at 376; Martha Albertson Fineman, \textit{The Illusion of Equality: The Rhetoric and Reality of Divorce Reform} 157–61 (1991) (arguing that the use of narratives to promote specific policy outcomes “operates by presenting simplistic, dichotomous images: negative images, or ‘horror stories,’ . . . and corresponding positive images, or ‘fairy tales,’ of an idealized [solution]”). Since the 1970s, the goal of child welfare policy has been to eradicate foster care drift, and the idealized solution is the permanent family. As Fineman observed, “in describing or illustrating a ‘problem,’ [the narratives] also suggest the ‘solution.’” Fineman, supra; see also Stone, supra note 6, at 245, 248 (discussing how to control which alternatives show up on the list of possible policy choices, and “issue framing”—or choosing what particular dimension of the policy challenge to present as the central issue); \textit{Adoption 2002}, at Chapter I (recounting anecdotes of children in the foster care system designed to demonstrate the value of permanence).


state foster care expenditures.\textsuperscript{161} Largely through the reasonable efforts requirement,\textsuperscript{162} the CWA de-emphasized foster care and encouraged placement of children in permanent homes through either reunification of the original family or adoption.\textsuperscript{163}

At the time of congressional deliberations on the CWA, there was cause for optimism about the prospect of delivering social services that would help preserve troubled families. Several programs were experimenting with innovative strategies for working with families in crisis, such as immediate response and home visits that were available twenty-four hours a day.\textsuperscript{164} These experiments persuaded advocates that "by utilizing the appropriate tools, many families previously thought 'hopeless' could actually provide adequate homes for their children."\textsuperscript{165}

Optimism soon waned in the wake of several high-profile incidents of egregious abuse that were attributed to under-intervention on the part of social services agencies\textsuperscript{166} or to "confusion" over the meaning of the reasonable efforts requirement.\textsuperscript{167} At about this time, sexual abuse also gained recognition.\textsuperscript{168} The dual goals of family preservation and the best interests of children seemed irreconcilable.\textsuperscript{169} Meanwhile, families facing addiction, homelessness, and HIV overwhelmed family preservation resources.\textsuperscript{170} With more than 500,000 children in the foster care system nationally, expenditures skyrocketed.\textsuperscript{171}

President Ronald Reagan launched an attack on federal public assistance programs, decrying "the breakdown of the American family" and popularizing the image of the "welfare queen."\textsuperscript{172} Calls for "individual responsibility" came into vogue.\textsuperscript{173} In the early to mid-1990s, conserva-

\textsuperscript{162} See supra notes 30–35 and accompanying text.
\textsuperscript{163} Sheldon, supra note 8, at 77.
\textsuperscript{164} Shotton, supra note 11, at 224–25. The CWA itself provided for periodic dispositional hearings to evaluate each family's progress under its case plan and consider the child's future status. 42 U.S.C. § 6755(5) (C) (1998). For a discussion of permanency hearings, see supra notes 45–51 and accompanying text.
\textsuperscript{165} Shotton, supra note 11, at 224–25.
\textsuperscript{166} See, e.g., DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (ruling in response to the severe beating that left four-year-old Joshua DeShaney permanently brain-damaged that the due process clause did not provide a private cause of action against the state agency that neglected to intervene aggressively despite evidence of abuse); RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996) (Gelles tells the story of 15-month-old David Edwards, who was murdered by his mother, to demonstrate the over-emphasis on family preservation).
\textsuperscript{168} ASHBY, supra note 87, at 160–61. Almost as quickly, backlash groups, such as the False Memory Syndrome Foundation, formed to take the position that allegations of sexual abuse were often unfounded. See id. at 164.
\textsuperscript{169} See generally Bufkin, supra note 34.
\textsuperscript{170} See id. at 373; Levesque, supra note 7, at 8–9.
\textsuperscript{172} ASHBY, supra note 87, at 166–67.
tive sociologist Professor Charles Murray and Speaker of the House Newt Gingrich named illegitimacy as the primary source of America’s social ills and proposed to address it by eliminating public assistance and bringing back orphanages to care for poor children.\textsuperscript{174} In 1996, Congress eliminated Aid to Families with Dependent Children ("AFDC") and replaced it with "block grants" to states designed to eliminate federal entitlements and reduce federal expenditures.\textsuperscript{175} ASFA passed with overwhelming bipartisan support the following year.\textsuperscript{176}

E. Historical Patterns

The dueling outcomes of family preservation and expeditious termination of parental rights reflect a deeper ambivalence over how best to respond to families in which the safety and welfare of children are in doubt. An examination of reformist discourse at each transition reveals a set of familiar, homologous contradictions that have beleaguered child welfare policy perhaps since its inception as an altruistic, protective enterprise. The three most apparent contradictions are: family privacy (or parental autonomy) versus child rescue; cultural relativism versus transcendent morality (or civic virtue); and social responsibility (for poverty) versus personal responsibility.

Orphanages, for example, faced charges of moralism, cultural bias, and excessive uniformity.\textsuperscript{177} The three approaches that replaced orphanages—mothers’ pensions, placing out, and cottage format institutions—reflected a preference for home life, actual or approximated. This repositioned the fulcrum slightly in favor of family autonomy and moral and cultural diversity. Mothers’ pensions also reflected a sense of social responsibility for poverty. At the same time, however, all three approaches retained some elements of child rescue and moralism. Cottage format institutions, for example, purported to instill civic virtue. Mothers’ pensions came with suitable home provisions designed to ensure child protection, moral uprightness, and social control.

During the New Deal era, when the sense of social responsibility for addressing poverty was at an all-time high, there were few developments in the necessarily intrusive field of child protection aside from the evolution of the suitable home provisions.\textsuperscript{178} Social responsibility and respect for family privacy predominated, but the suitable home provisions ensured that some universal standards for child-rearing were maintained.

\textsuperscript{174} See Ashby, supra note 87, at 176; David Van Biema, The Storm Over Orphanages, Time, Dec. 12, 1994, at 58.


\textsuperscript{176} See Adoption 2002, supra note 10.

\textsuperscript{177} See supra 90–94 and accompanying text.

\textsuperscript{178} See supra notes 111–117 and accompanying text.
In the 1960s and 1970s, following Dr. Kempe’s observation that child abuse was not limited to the poor, policy development in the area of child welfare exploded.\(^{179}\) Extreme abuse was emphasized to justify aggressive new interventions, while tough issues such as the legal limits of parental discipline and the socio-economic facets of child abuse were downplayed.\(^{180}\) A dialogue around these issues might have forced increased cognizance of cultural diversity and poverty as a social concern, but during this period, countervailing values predominated.

The next generation of reformers (including NABSW, Professor Wald, and religious conservatives) targeted the racism, classism, and anti-family posture of the child welfare system, charging the system with over-intervention at the expense of religious and cultural freedom and family privacy.\(^{181}\) As a result, the CWA introduced the requirement that states make reasonable efforts to preserve troubled families.\(^{182}\) This shifted the balance back in favor of cultural diversity and parental autonomy, eschewing the imposition of “universal” standards on religious and cultural subgroups or the poor.

In the Reagan era, however, when issues such as drug abuse and HIV seemed overwhelming, and the poor were blamed for their own circumstances, policymakers grew impatient with cultural tolerance and failing family preservation services.\(^{183}\) Policymakers stressed personal responsibility and devoted little thought to social responsibility or cultural difference. Before long, CWA’s emphasis on family preservation was reversed with the passage of ASFA in 1997.\(^{184}\)

Each development reacted against the last, moving the ball endlessly between irreconcilable poles.\(^{185}\) Reformist efforts alternatively appealed to the values listed in one or the other of the columns below.

\(^{179}\) See supra notes 119–140 and accompanying text.
\(^{180}\) See supra notes 122–127 and accompanying text.
\(^{181}\) See supra notes 141–156 and accompanying text.
\(^{182}\) See supra notes 161–164 and accompanying text.
\(^{183}\) See supra notes 170–177 and accompanying text.
\(^{184}\) This was the year after the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRA”) was enacted. Pub.L. No. 104-93, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). While ostensibly the PRA and ASFA deal with different subject matter, they are discursive complements in that they both flow from the prevailing value cluster of the 1980s and 1990s. Both gained support at a time when calls for personal responsibility, child rescue, and family values predominated. Consider also the Multiethnic Placement Act of 1994 (“MEPA”), Pub.L. No. 103-382, 108 Stat. 3518, and the Interethnic Placement Provisions (“IEP”), Pub.L. No. 104-188, 110 Stat. 1755, together codified at 42 U.S.C. § 671(a)(18) (1998), which prohibit delaying or denying foster or adoptive placement to match for race. These statutes were passed just three and two years prior to ASFA over objections concerning the threat that transracial placement might pose to diverse cultural traditions, embodying instead the values of universality and child rescue.

\(^{185}\) In The Family and the Market, supra note 6, at 1498–99, Frances Olsen associates three dichotomies that she argues structure thought and limit prospects for reform. She explains that her “three dichotomies are distinct: none is logically dependent upon another and none necessarily entails another. Nevertheless, deep ties exist among them . . .” Id. at
family privacy/
parental autonomy

child rescue

universal standards/
civic values

social responsibility
for poverty

personal responsibility

Each policy was born of a critique that the last policy was over-
interventionist (and therefore threatening to the values in column 1) or
under-interventionist (and therefore threatening to the values in column
2). Each, in turn, subjected itself to the contrary critique. The cycle
appears endless and the options seem hopelessly limited.

Forever in search of just the right balance, reformers rely on policy
arguments that invoke one or the other side of each of these contradic-
tions at each transition. In doing so, they have created what feels like a
trap between two things we value deeply but cannot have simultane-
ously.\textsuperscript{186}

IV. CONFLICTING VALUES: CHILD-REARING IN LIBERAL LEGAL THOUGHT

This trap is not unique to policy discourse; theoretical discourse on
child-rearing is strikingly similar.\textsuperscript{187} This Part identifies a handful of in-
stances in liberal theory where the ideology of the ideal family, along
with its attendant conundrums, is in evidence. By climbing to this high
level of abstraction, I hope to illuminate the conundrums where they ap-
pear most starkly and demonstrate the senselessness of trying to resolve
them rationally.\textsuperscript{188}

The liberal tradition includes many writers who historically have
idealized the family as a haven or private realm from which to escape the
individualist brutality of politics and the market.\textsuperscript{189} In the words of

\footnote{1499. The central aim of this historical account has been to demonstrate the appearance
and reappearance of the values I have identified. While none of the values listed logically
entails the others, they seem to turn up in clusters at each phase.}

\footnote{186 See Frances Olsen, Statutory Rape: A Feminist Critique of Rights Analysis, 63 TEX.

\footnote{187 It is difficult to describe the precise nature of the relationship between the theoreti-
cal and policy levels of discourse. I am not prepared to prove that one causes the other, though
I believe that there is a dialogic relationship between them and they arise out of the
same consciousness, cf. From the Will Theory, supra note 25, at 97-98, or out of “a shared
vision of the social universe that . . . shapes [a] society’s view of . . . what social reforms
are possible.” The Family and the Market, supra note 6, at 1498.}

\footnote{188 See Politics of Family Law, supra note 24, at 3-4 (“In family law . . . the literature
tends to rationalize and criticize existing doctrine on a low level of abstraction, and to
focus attention primarily upon some proposed reform . . . . [In this way] their work contrib-
utes to the apologetic project of legitimating the status quo.”). From a higher level of ab-
straction, we can see that some aspects of family that seem natural are, in fact, facets of an
ideology rife with internal contradiction.}

\footnote{189 See CHRISTOPHER LASCH, HAVEN IN A HEARTLESS WORLD: THE FAMILY BESIEGED
Christopher Lasch, "[a]s business, politics, and diplomacy grow more savage and warlike, men seek a haven in private life, personal relations, above all in the family—the last refuge of love and decency." 190 The public sphere is hostile in this view, typified by individualism and self-interest, while family, the site of marriage and child-rearing, is distinguished by love and altruism. 191

Some liberal writers, often identified with the "civic republican" strain of liberalism,192 have taken a more complex view of the private family. These writers focus on the peculiar position of child-rearing at the cusp of the public/private divide.193 Because family life is the sphere in which children are nurtured and prepared to assume the responsibilities of citizenship, the public sphere has a legitimate claim of interest in the proper functioning of families. "Family and home . . . serve not as havens from a dominant culture, but as vehicles for teaching the primacy of the common good."194

One foundational example is Jean-Jacques Rousseau's Emile.195 Emile reads like a highly idealized child-rearing manual, but it is really a work of political theory.196 It urges the cultivation of civic virtue in children so that they might mature into the kind of citizens197 who are dedi-

xix (1979); Wald, supra note 146, at 987. Not all liberal writers consider politics to reside in the same sphere as the market—at least not all levels of politics. Alexis de Tocqueville identified local politics as among the institutions with the potential to promote community as a counter-ideal to individualism, which predominates in the market. Alexis de Tocqueville, DEMOCRACY IN AMERICA, PART II, 103–95 (Henry Reeve trans., Knopf, Inc. 1945) (1840); see also ROBERT N. BELLAH ET AL., HABITS OF THE HEART 85 (1985) (explaining and concurring with de Tocqueville). But see Gerald E. Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057 (1980), for a critical account of this ideal as applied to cities. Frances Olsen argues that although the women's "private" sphere of family and home life has been contrasted with the "public" sphere of the marketplace and government, this characterization can be misleading. It is perhaps more accurate to see two dichotomies: one between the "public" market and the "private" family, and the other between the "public" state and the "private" civil society. The Family and the Market, supra note 6, at 1501.

190 See Lasch, supra note 189, at XIX. Lasch proceeds to lament that "[d]omestic life . . . seems increasingly incapable of providing these comforts." Id.

191 See Form and Substance, supra note 6, at 1717–18 (describing altruism); Politics of Family Law, supra note 24, at 6 (arguing that "[t]he 'liberal' family . . . is thought to be a voluntary collection of individuals held together by bonds of sentiment").


194 Sullivan, supra note 192, at 1720.


196 EMILE is "phenomenology of the mind posing as Dr. Spock." Id. at 3 (statement from Bloom's introduction).

To be precise, Rousseau urged that boys be prepared for citizenship, and that girls be prepared "for their roles as virtuous and noble wives." JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT 160 (2d ed. 1993). "Rousseau's public world . . . is in a fundamental way dependent upon[ ] a virtuous private sphere that serves as a training ground of future citizens [i.e., men] and protectors of private values [i.e., women] alike." Id. at 165. Elshtain concludes that "[w]ithout women to
cated not merely to their private interests, but also to the interests of their community. Rousseau described carefully contrived learning experiences designed to instill a sense of duty and compassion in children, while averting such vices as fear and envy.

What is unmistakable in Rousseau’s presentation, most notably in his choice of form, is his cognizance of the public sphere’s stake in the work of the private sphere, i.e., child-rearing. As Jean Bethke Elshtain has put it: “Rousseau requires that a resonant, vibrant, constant private world be sustained as one of the necessary social preconditions of his ideal polity . . . [W]ithout someone to tend the hearth, the legislative hallways would grow silent and empty, or become noisily corrupt.”

Child-rearing, traditionally regarded in liberal theory as a private activity conducted in the sacrosanct familial domain, has a distinctly public dimension in Rousseau’s thought.

In A Theory of Justice, Rawls addresses the crucial role of child-rearing in the assurance of continued reproduction of a citizenry with the “sense of justice [that] makes [our] secure association together possible.” His idealized process is elaborate. First, a child must learn to respect authority by adhering to the injunctions of his or her parents. Then, the child must learn the value of association and begin to appreciate familial roles such as son, daughter, husband and wife. Eventually, the child must abstract from the lessons of a small-scale cooperative association and develop a sense of the principles of justice that govern social relations generally.

Rawls ascribes to child-rearing enormous import to the larger community. Like Rousseau, Rawls sees families as the primary locus of the moral maturation necessary for adult association, i.e., good families breed good citizens. Appreciation of the centrality of family life coupled with a view that secure political association requires more than a collection of individuals engaged in the unhampered pursuit of their various

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198 See id. at 39–40.
199 See id. at 51.
200 See id. at 223–26.
201 See id. at 63.
202 See id. at 223–26.
203 Id. at 165. Elshtain, whose inquiry primarily concerned gender under the public/private distinction, also put it this way: “the basis of male public citizenship would disintegrate if his private world collapsed, as the citizen is also, necessarily, a husband-father, the head of a household.” Id. at 162.
204 JOHN RAWLS, A THEORY OF JUSTICE (1971).
205 Id. at 463.
206 Id.
207 Id. at 467.
208 Id. at 468–79. Rawls draws on theories of moral development written by Piaget, Kohlberg, Rousseau, and others to make this point. See id. at 461–63.
self-interests leads to the conclusion that the public has an interest in child development and is justified in intervening in family life.\textsuperscript{209} This theme has found contemporary expression in the work of legal scholar Anne Dailey.\textsuperscript{210} Dailey has elaborated on the republican vision of family, going so far as to reconceptualize family as a public institution.\textsuperscript{211} Dailey points to \textit{Bellotti v. Baird},\textsuperscript{212} in which the Supreme Court upheld the constitutionality of a state law requiring parental notification before a minor may obtain an abortion.\textsuperscript{213} The \textit{Bellotti} Court acknowledged the importance of parental authority not only for its own sake, but also because it “is necessary to prepare children for their ‘eventual participation in a free society.’”\textsuperscript{214} As Dailey points out, the Court declined to rest solely on the principle of family privacy, instead attributing a “political meaning” to the “‘private’ family” that is necessary to the “development of future citizens and the maintenance of a liberal democratic order.”\textsuperscript{215} 

Like her predecessors, Dailey appreciates the state’s interest in the family and, in particular, in the necessity of “the loving authority of the parental role . . . [in] the promotion and encouragement of a responsible citizenry.”\textsuperscript{216} Nevertheless, Dailey also appreciates the need for limits on the state’s claim and the need for some range of family autonomy, arguing that “[t]he family’s role in nourishing and sustaining diverse moral traditions is what in part distinguishes our liberal democracy from totalitarian political regimes committed to the elimination of the ‘private’ spheres of social life.”\textsuperscript{217} Dailey does not, therefore, abandon the private family altogether.

Although family privacy is necessary to reproduce the diversity that a liberal democracy requires, Dailey urges “limits [on] the degree of family diversity a liberal democracy may tolerate.”\textsuperscript{218} She explains, “[c]hildren raised in the shadow of domestic tyranny will be ill-equipped to assume the obligations of political liberty.”\textsuperscript{219} She questions whether a liberal society should tolerate child-rearing that is “incompatible with the child’s future ability to participate in the broader political or civil community. In extreme cases of course the state justifies intolerance of such family values by labelling [sic] the behavior ‘child abuse’ and removing children from the home.”\textsuperscript{220} Viewed from this perspective, the label “child

\textsuperscript{209} Cf. \textit{Beyond}, supra note 154, at 7.
\textsuperscript{211} Id.
\textsuperscript{213} Dailey, \textit{ supra} note 210, at 957.
\textsuperscript{214} Id. at 957.
\textsuperscript{215} Id. at 957–58.
\textsuperscript{216} Id. at 958.
\textsuperscript{217} Id. at 959.
\textsuperscript{218} Id.
\textsuperscript{219} Id. at 1024.
\textsuperscript{220} Id. at 959 n.7.
abuse" represents the point at which the sphere of parental autonomy bumps up against the needs of the community; it is the boundary around the acceptable range of family diversity.221

Family, according to Dailey, has two roles in a liberal democracy. On the one hand, family fosters diverse values, but on the other hand, it is responsible for instilling a set of uniform, civic values. Family is responsible for both diversity and universality in a liberal democracy.222 Overstatement of the state’s interest in family threatens the diverse moral traditions that family autonomy preserves, but unfettered family autonomy threatens the development of those civic values that enable our “secure association.”223

In an effort to resolve this contradiction, Dailey proposes a theory of “family justice”224 in which the family reflects values consistent with those of the political structure and helps sustain “a healthy democratic order.”225 The family is held to a standard of justice that is not based merely on “political justice writ small” but instead reflects “a vision of the particular role that the family and parental authority play in a liberal democracy.”226

Dailey’s theory of family justice provides scant guidance as to exactly how much diversity a liberal democracy can tolerate.227 What Dailey does tell us is that family law should not interfere with diverse community traditions as long as those traditions are consistent with “our broader political ideals.”228 She argues that family law ought to “promote the development of individuals who possess diverse community values,” but who also “share a broader conception of political justice.”229

Dailey’s formulation is less than satisfying because it contains exactly the contradiction that it sets out to resolve.230 The problem she pres-


222 Dailey appears to recognize the tension between these two goals—she uses the word “yet” to transition between her two points. See Dailey, supra note 210, at 959, 1023.

223 See supra notes 204–208 and accompanying text.

224 Dailey, supra note 210, at 1021–30. I suspect that the name of her theory intentionally recalls Rawls’s A Theory of Justice.

225 Id. at 1024. Dailey is frank that her theory “is not a determinative legal concept or doctrine [and] cannot be reduced to a simple formula with great predictive power.” Id. at 1027. Dailey does, however, give us a sense of how her theory would bear on judicial review of a statute requiring parental notification before a minor may obtain an abortion. See id. at 1027–30.

226 Id. at 1024.

227 See id. at 1026 (“[T]here can be no hard and fast rules governing the limits of family authority, as each case will turn on the degree to which the particular family life frustrates the broader political goals.”).

228 Id.

229 Id.

230 See Semiotics, supra note 84, at 361 (arguing that a reconstructive theory (such as Dailey’s) “looks . . . like the reification or fetishism of theory”).
ents consists of conflicting urges between preserving diverse moral traditions and assuring the continuation of common civic values. Restated in the form of one insofar as it does not jeopardize the other, this opposition also stands as her solution. Dailey argues that “there can be no hard and fast rules,” and that “each case will turn on the degree to which the particular . . . frustrates the broader.”231 This disclaimer, however, does little to forestall the inevitable: it must be one or the other. In each case, the moment of decision will be upon us. Dailey’s contribution is her identification and articulation of conflicting urges, but her theory of family justice provides no more than a pretense to their resolution.232

The problem with the theory of family justice is not unlike the problem with the principle of permanence, the reasonable efforts requirement, and even the label “child abuse.” Each term embodies contradictory values, but none “indicate[s] which of the two values . . . the decisionmaker should choose in a given case.”233 A unifying theory like the theory of family justice might appear to “strike a balance” or “harmonize a tension” at a high level of abstraction, but the contradiction between the values embedded in Dailey’s theory becomes inescapable when the time comes to choose between them.

Dailey may incorporate both diversity and uniformity, or autonomy and its limits, in her theory, just as Congress and HHS may call for “reasonable efforts”—that is, preservation of the parent-child relationship unless an assessment by the state agency indicates that the parent-child relationship should be terminated—but in the end, there is no harmonizing the conflicting desires to rescue the child and preserve her family. It must be one or the other, and we still don’t know how to choose.

V. TRANSCENDING THE IDEOLOGY OF THE IDEAL FAMILY

Up to this point, I have tried to highlight the coexistence of conflicting values or impulses in child welfare policy and in liberal legal thought on child-rearing. The series of contradictions that I have attempted to bring to the fore are pervasive and deeply related features of an ideology of the ideal family.

At this point I will amend the list to account for the theoretical discourse and the terms of the contemporary debate.

231 Dailey, supra note 210, at 1026.
232 Cf. Statutory Rape, supra note 186, at 387 (arguing within the context of rights theory that “[the right to privacy and the right to protection exist in fundamental conflict”).
233 Id. at 388.
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<th>family preservation</th>
<th>termination of parental rights</th>
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<td>cultural relativism/diversity</td>
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<td>family autonomy/privacy</td>
<td>interests of the community</td>
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<td>social responsibility for poverty</td>
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Cultural relativism and diversity compete with universal and civic values; family autonomy and privacy compete with the interests of the community as well as with the value of rescuing children; social responsibility for poverty vies against personal responsibility.

Academic writers reproduce these contradictions in their efforts to resolve them. From nearly the colonial period, critics of prevailing child welfare practices have drawn their arguments from one column, only to prompt reforms that invite critiques from the other. The CWA was born of one set of critiques; ASFA arose out of the contrary set.

The solution is not to choose one side over the other. I am not arguing that child welfare policy ought to do more to promote family preservation or more to promote expeditious termination of parental rights; more to respect family autonomy or more to secure the safety of children; more to sustain diverse cultures or more to ensure that certain universal standards are upheld. Instead, I write out of conviction that the painful decision between risking harm to a child and coercively terminating a family relationship can be made neither by reference to the principle of permanence nor by reliance on one or the other of a pair of co-existing yet contradictory values. The best these value sets can do is justify a decision post hoc.²³⁴ Legal and policy arguments that invoke rationales from one cluster of values or the other merely enable us to avert our eyes temporarily from the agonizing choice that awaits decision-makers every time the legal system identifies a family in which the safety and welfare of a child is in doubt.²³⁵

I make no claim to having discovered a new resolution to the terrible dilemmas associated with child welfare practice. Child welfare policy cannot be perfected by “fiddling with the location of the boundary between” family preservation and termination of parental rights, or diversity and universality.²³⁶ Rather than continuing to fiddle, I propose that we diminish the importance of these dilemmas by expanding the field of options available to decision-makers and treating family preservation and termination of parental rights as two choices among many, rather than as two exclusive alternatives. To do so, we must expand our understanding of family as well.

²³⁴ Cf. Form and Substance, supra note 6, at 1723, 1762, 1776.
²³⁵ Cf. STONE, supra note 6, at 243.
²³⁶ Cf. Statutory Rape, supra note 186, at 430.
The related field of juvenile delinquency provides some useful insights. In the 1970s, Massachusetts closed its reform schools for juvenile offenders. According to his own account, then-Commissioner of the Massachusetts Department of Youth Services, Jerry Miller, fought funding battles, political patronage, and entrenched (if unsubstantiated) notions of reform to shut down what he called “warehouses” and replace them with a range of “community-based alternatives.” Massachusetts placed youths in universities, prep schools, Outward Bound programs, specialized foster care, group homes, art schools, military schools, therapeutic community drug programs, and, in some cases, in their own homes with supportive family services.

A study comparing implementation across the state found lower rates of recidivism in regions that had drawn from a diversity of programs when placing individual youths. As Miller concluded, “[a] diversity of good alternative programs lowers recidivism. A narrow choice of poor programs does not.”

Miller went on to work in the juvenile justice system in Pennsylvania, where he found hundreds of juvenile offenders living in an adult prison called Camp Hill. About a year prior to Miller’s arrival, the governor had assembled a group of probation officers, youth workers, judges, psychologists, and psychiatrists to reclassify the inmates and devise a way to get the juveniles out of the adult prison environment. Although about a dozen inmates were returned to the community, 95 percent were classified as needing maximum or medium security institutionalization.

Miller proposed that he and the governor take a second look at the problem before implementing the plan. He assembled a new team of diagnosticians and provided them with a wide range of possible program placements.

The full spectrum of real and possible options was described, from Outward Bound and wilderness camping programs to group homes; from halfway houses to hiring advocates for youth; from foster care to specialized monitoring, where the

237 See Jerome G. Miller, Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools (2d ed. 1998).
238 See id.
239 Id. at 61.
240 Id. at 177.
241 Id. at 190.
242 Id. at 221-22.
243 Id. at 222.
244 Id. at 230.
245 Id. at 230-31.
246 Id.
247 See id. at 231.
monitor would be paid a full salary to look after an individual youth; from vocational and educational programs to residential and nonresidential drug treatment programs; from house arrest to small residential treatment programs for emotionally disturbed youngsters; from day treatment to small, locked, secure programs for juveniles who were at risk of committing violence . . . . Whereas earlier diagnosticians had been left only the choice to institutionalize or to parole, the new group had a wide range of options to consider.\textsuperscript{248}

The orientation had a startling effect. The new group of experts concluded that 90\% (360) of the boys were fit for some form of community placement.\textsuperscript{249} Only 10\% (40) of the boys were deemed so dangerous that institutionalization was necessary.\textsuperscript{250} By providing the experts with "an array of options between the extremes," Miller encouraged them to approach the inmates in a "thoughtful, graduated manner."\textsuperscript{251} The experts "felt at less risk if they recommended something other than prison."\textsuperscript{252} As Miller concluded, "[t]he treatment options in the mind of the diagnostican determined the diagnosis of the person being evaluated.\textsuperscript{253}

Miller's experiences resulted in three key lessons for my purposes. First, when everything seemed to ride on a choice between two lousy alternatives, lock-up or parole, juveniles re-offended at a higher rate than they did when decision-makers had a broad field of placement options from which to choose. Fewer options were less effective than more options.

By analogy, the choice between family preservation and termination of parental rights cannot possibly accommodate the breadth of needs in the foster care population, any more than the choice between lock-up and parole accommodated the circumstances among juvenile offenders. More options will accommodate more children.

\textsuperscript{248} Id. at 231–32.
\textsuperscript{249} Id. at 232.
\textsuperscript{250} Id.
\textsuperscript{251} Id.
\textsuperscript{252} Id.
\textsuperscript{253} Id.

This is the reverse of what we commonly assume happens in diagnosis and classification of offenders. We assume that we measure the delinquent against medical, psychological, and sociological criteria and prescribe treatment accordingly. In fact, the theory-diagnosis-treatment flow runs backward. The diagnostican looks first to the means available for handling the client, then labels the client, and finally justifies the label with psychiatric or sociological theory. Diagnosis virtually never determines treatment; treatment dictates diagnosis. The task of the diagnostican is to validate the means of handling already available. The implications are overwhelming.

\textit{Id.}
Second, when faced with two poor choices, the first group of diagnosticians in Pennsylvania chose the one that appeared to them less risky, i.e., lock-up, because the prospect of a violent re-offense worried the diagnosticians more than the harm that could result from imprisonment. In the context of child welfare, the more risk-averse choice is termination of parental rights because the prospect of child abuse, according to prevailing instincts, is more severe than the harm done by termination of parental rights. Termination, therefore, is likely to emerge as the privileged alternative.254

Finally, Miller’s experience suggests that the range of placement options known to the diagnosticians drove the diagnoses of juveniles in the Pennsylvania system. When lock-up and parole were the only options and alternative forms of treatment or care were invisible, diagnoses that implicitly would have called for these alternatives were also inconceivable. As Miller observed, “the task of the diagnostician is to validate the means of handling already available.”255

Likewise, the limited range of permanency plans available under ASFA limits our ability to see the need for more placement options. ASFA tries to cure the ambivalence that decision-makers experience in the hard cases by forcing a prompt decision between two choices that cannot possibly be appropriate for all foster children. It would be preferable to regard official ambivalence as dissatisfaction with either of the existing options—dissatisfaction that might be alleviated by a broader field of alternatives.

The range of fact-patterns in the foster care system is endless, but a few examples will suffice to demonstrate. Joyce Pavao tells of a sister and brother, ages eight and four respectively, who had been in foster care for four years with a couple in their sixties.256 The couple’s biological and adopted children were grown, and the couple did not feel they could adopt two more young children.257 Further, the children were especially close with one of their social workers, who had been one of the most consistent adults in their lives.258 It was possible that the children might sabotage any placement plan because it would cut them off from the social workers and foster parents whom they loved and were the only adults they had ever trusted.259 Nevertheless, the children were freed for adoption and were to be placed in a permanent home.260 Taking all this into

254 Cf. Stone, supra note 6, at 242–56 (arguing that we should “always be on the lookout for Hobson’s choices. Whenever you are presented with an either/or choice, you should be tipped off to a trap. You can disengage it by imagining different alternatives . . . and by expanding the range of consequences you bring into the analysis.”)
255 Miller, supra note 237, at 232.
256 See Pavao, supra note 75, at 98–99.
257 Id. at 99.
258 Id.
259 Id.
260 Id.
consideration, Pavao and her colleagues determined that the only way the children could be adopted would be in a kind of "open adoption" in which the adoptive parents allowed the children to view the current foster parents as a kind of grandparents and the social worker as a kind of aunt.\textsuperscript{261}

The family structure necessary to meet the needs of these children was not discrete, impenetrable, or ideal. It would involve a tangle of relationships. Rigid adherence to the ideology of the ideal family might have condemned these children to another round of loss, but Pavao and her associates thought broadly.

Marsha Garrison tells a less satisfying story of two children, aged sixteen and seventeen, who had been living as foster children for four years with their paternal aunt.\textsuperscript{262} Their father regularly visited them but made it clear that he was not prepared to undertake full custodial responsibility.\textsuperscript{263} When the agency petitioned the court to terminate the father's rights, the trial court refused on the grounds that termination would provide no real benefit to the children and would unjustly relieve the father of his obligation to pay child support.\textsuperscript{264} The appellate court reversed, declaring that these children should have stability in their lives and "know the security of being wanted, loved, and cared for by adoptive parents."\textsuperscript{265} This case cries out for a kinship guardianship, but, as Garrison observes, "abstractions, permanence and adoption, determine[d] the result . . . [imped[ing]] recognition of messy, individual realities."\textsuperscript{266}

Recall also the stories of Luke\textsuperscript{267} and the children who sneak out of their adoptive homes to telephone the grandmothers to whom they are no longer legally related.\textsuperscript{268} Empirical studies uniformly suggest that children benefit from continued contact with their original parents after being removed from their custody\textsuperscript{269} and these anecdotes bolster those findings.

\begin{footnotes}
\item[261] Id. at 100.
\item[262] See Garrison, supra note 26, at 391–92 (citing In re Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).
\item[263] Id. (citing In re Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).
\item[264] Id. at 392 (citing In re Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).
\item[265] See id. (citing In re Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)).
\item[266] See id. (citing In re Shamell J., 609 N.Y.S.2d 185 (App. Div. 1994)). A kinship guardianship would have been possible under two provisions of federal law. First, as noted in Part II.B, guardianship is one of the permanency plans contemplated in ASFA. See supra note 58 and accompanying text. Second, federal law requires that in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months . . . the State shall file a petition to terminate parental rights . . . unless . . . at the option of the State, the child is being cared for by a relative.
\item[268] See supra notes 67–73 and accompanying text.
\item[269] See supra note 80 and accompanying text.
\item[269] See Garrison, supra note 7, at 461–69.
\end{footnotes}
My point is not that every adoption should be an open adoption, nor should kinship guardianship replace termination and adoption in every case. Rather, the goal should be to think broadly and seek the best arrangement for a situation that begins in anguish.

Notwithstanding the main thrust of ASFA, innovative programs around the country, such as the Massachusetts Families for Kids in Roxbury, Massachusetts, are taking steps along this path. Child welfare advocates on the cutting edge are making greater use of extended family kinship networks and more flexible formulations of guardianship than the one envisioned in ASFA; they are experimenting with joint decision-making with families of origin, foster families, and other members of the child’s community (such as clergy); and they are arranging for visitation by original and foster parents.

Furthermore, there is evidence that federal lawmakers have some inkling that this might be a useful direction. Adoption 2002: The President’s Initiative on Adoption and Foster Care (“Adoption 2002”) acknowledges that “traditional adoption does not meet the needs of all children in public foster care. Legal options for permanent and legally secure placement should be broad enough to serve the needs of all children who are not able to return to their home of origin . . . .” This document goes on to suggest that state laws contemplate post-adoption contact between original family members and adopted children, as well as between foster family members and adopted children, noting that these sorts of contacts “may prevent the child from running away or disrupting a new placement.” Adoption 2002 also recommends that states provide for non-adversarial case resolution. For example, it may useful to provide mediation to settle the terms of placement for children in the child welfare system, or to provide Family Group Conferencing, in which family (including extended family) and others, such as the family’s clergy, collectively make decisions for children whose interests they have in common. That the President has embraced these procedural mechanisms is encouraging because of the broad range of outcomes that implicitly must be available when multiple parties are given license to negotiate their varied interests.

I do not offer any one of these options as my own. Rather, my proposal is that we broaden our vision so these proposals and perhaps unknown others begin to appear centrally on our national radar.

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270 See generally McElroy & Goodsoe, supra note 12.
271 Id.
272 Adoption 2002, supra note 10, at Chapter II.
273 Id.
274 See id. at ch. 5.
VI. CONCLUSION

As Frances Olsen has observed, "family law makes our present forms of family life seem 'natural.' In this way, family law encourages minor reforms and individual adjustments, while discouraging imaginative speculation or creative changes in family structure."\(^{275}\) Child welfare reform has been stymied in precisely this manner. Reformist thinking has taken place within the confines of an unspoken ideology fraught with contradictory premises. Unconsciously devoted to an ideal vision of family, reformers of each age have been trapped between conflicting impulses, balancing them as best they could, but subjecting each arrangement to the demon of the impulse accorded less weight.

Permanence is the latest manifestation of the ideology of the ideal family. It sets up a duel between preserving and terminating family relationships. ASFA advantages termination for the time being, but history suggests that the impulse to preserve families and the diverse cultures they have been credited with sustaining will not go quietly.

The proposals in Part V were drawn from somewhere other than the "fiddling arsenal," but they seem awkward in national policy debate. This is because none of them speaks directly to how we ought to balance family preservation against termination of parental rights, diversity against civic values, or social against personal responsibility. None of the proposals discussed in Part V resolves the terrible conundrum between preserving or coercively terminating family relationships in hard cases, but central to my thesis is that the search for resolution replicates or perhaps even exacerbates the problem. Instead of continuing the quest for resolution, we should broaden our frame and diminish the dilemma's importance.

The dilemma is a creature of our own ideology and we can change it—and we should change it—for the sake of children in the hard cases, for whom neither of the two conflicting options seems right. Rather than sanctioning only two foster care outcomes with the imprimatur *permanent*, we should stretch our field of vision and embrace a broad range of family structures, even if they seem to us now to be imperfect.

\(^{275}\) *Politics of Family Law*, supra note 24, at 2 (citations omitted).