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## The Tyranny of Time: Vulnerable Children, Bad Mothers, and Statutory Deadlines in Parental Termination Proceedings

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**THE TYRANNY OF TIME:  
VULNERABLE CHILDREN, “BAD” MOTHERS, AND STATUTORY  
DEADLINES IN PARENTAL TERMINATION PROCEEDINGS**

Catherine J. Ross<sup>s</sup>

In child welfare disputes, protections accorded to one party—parent, state, child or foster parent—almost inevitably diminish the substantive interests of another.<sup>1</sup> Once a child is placed in foster care, the inexorable progress of the case will presumably lead to only one of two options: return to the family of origin or termination of parental rights followed by permanent placement in another family. Thus, from the time a child enters foster care the

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- The author is Associate Professor at George Washington University Law School. The author thanks Dean Michael Young of the George Washington University Law School for institutional research support. Earlier drafts of this article were presented at the Law and Society conference in Pittsburgh, PA on June 7, 2003 and at a conference on “Feminism and Child Protection: Tensions and Possibilities,” co-sponsored by the Baldy Center for Law and Social Policy, Buffalo School of Law and the Cornell Law School Feminism and Legal Theory Workshop, at the University of Buffalo on May 3-4, 2002. The author thanks the participants in those meetings especially commentators Susan Mezey and Tonya Brito, as well as Naomi Cahn, Martin Guggenheim and David Meyer for comments on earlier versions. The author also thanks Todd Melnick for reference assistance and Supama Banerjee and Sowmia Nair for research assistance.

The consultations by the author referred to in this article are based on her affiliation with the Center for Children’s Policy, Practice and Research at the University of Pennsylvania (currently, The Field Center for Children’s Policy, Practice and Research (“The Field Center”) as a Visiting Senior Scholar (2001-2002) and Senior Legal Consultant (2002-2003)).

<sup>1</sup> *Smith v. Org. of Foster Families for Equality and Reform*, 431 U.S. 816, 846 (1977) (Brennan, J.) (“[O]rdinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty interest of another. Here, [disputes over removal of children from foster families] such a tension is virtually unavoidable.”).

potential exists for the interests of child and parent to diverge dramatically. The conflicting interests of child and parent are often transparent from the day the case file is opened. In other instances, however, where the state plans simultaneously for reunification or termination of parental rights,<sup>2</sup> the conflicting interests of child and parent are balanced against their potential mutual interests as the case progresses.

The conflicting interests and resulting tensions that can arise among parents, children and the state are particularly pronounced when the state seeks to terminate parental rights. These tensions have long been aggravated by the inability of the child welfare system to find the proper balance between two competing imperatives. The first requires the state to protect children who are the victims of serious abuse or neglect and who, it is widely understood, may suffer repeated trauma, and even death, if the state fails to intervene appropriately. The second imperative is to minimize the psychological and social trauma that children often suffer when the state intervenes to remove them from the families that have failed to meet their basic needs.

No one disputes that the stakes in parental termination cases are high. Every current member of the Supreme Court agrees that “[f]ew consequences of judicial action are so grave as the severance of natural family ties.”<sup>3</sup> Although the cases before the Court have focused primarily on the legal significance and emotional devastation of termination for

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<sup>2</sup> Federal legislation requires that child welfare agencies engage in “concurrent planning” in which they develop plans for both the contingency that a child returns home after foster care and the contingency that the rights of the child’s biological parents will be terminated and the child will be free to enter a permanent placement with another family. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §101 (a), 111 Stat. 2115 (codified in scattered sections of 42 U.S.C. (1997)).

<sup>3</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 119 (1996) (Ginsburg, J.) (quoting *Santosky v. Kramer*, 455 U.S. 745, 787 (1982) (Rehnquist, J., dissenting); 519 U.S. at 144 (Thomas, J., dissenting) (“[F]or many – if not most – parents, the termination of the right to raise their children would be an exaction more dear than any other.”). *See also Santosky*, 455 U.S. at 759 (Blackmun, J.) (“Few forms of state action are both so severe and so irreversible.”).

parents, separation from a parent is at least as grievous and traumatic for the children involved.<sup>4</sup> However, the interest that a child may have in preserving a relationship with a neglectful parent has received short shrift in the wake of recent federal reforms intended to ensure permanent placements for all children within a short time after their entry into the foster care system.

Historically, when the state has chosen to respond to the plight of neglected children, it has done so paternalistically. The traditional patriarchal ideal of family life did not accord children either autonomy or independent legal rights. Modern rights theory, however, has recognized that minors may have legal claims independent of their parents that extend beyond their need for nurturance as members of an intimate association of family members. The Adoption and Safe Families Act of 1997 (ASFA) states “explicitly for the first time in Federal law that a child’s health and safety must be the paramount consideration when any decision is made regarding a child in the Nation’s child welfare system.”<sup>5</sup> In doing so, ASFA places the potential conflicts of interest between children and their parents (in most instances their mothers) in stark relief.<sup>6</sup> ASFA makes permanency “in a safe and stable home, whether it be returning home, adoption, legal guardianship, or another permanent

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<sup>4</sup> *See generally* JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & THE LATE ANNA FREUD, IN THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996) (applying psychoanalytic theory to the problem of state intervention in child placement and emphasizing the child’s psychological need for continuity in a relationship with a primary caretaker); JOHN BOWLBY, ATTACHMENT AND LOSS (1969) (examining the importance of a warm, intimate and continuous relationship with a mother figure to a child’s positive development.).

<sup>5</sup> Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. 106-314, 114 Stat. 1266, (2000) § 2 (2); *See also* Pub. L. 105-89 § 101 (a), 42 U.S.C.S. § 671 (a) (15) (A) (“[T]he child’s health and safety shall be the paramount concern[.]”).

<sup>6</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C. (1998)).

placement” the goal for all of the children who enter foster care.<sup>7</sup> In keeping with its laudatory goal of moving children quickly out of the child welfare system to some form of stability, ASFA imposed an innovative federal time line, intended to insure that no child lingered in foster care for a period of years. By making the child’s safety and development the priority, ASFA weighs the child’s security more heavily than the mother’s emotional needs and legal rights. Looking at ASFA from the perspective of children’s rights, it is hard to see any drawbacks to ASFA’s categorical approach as applied to the bright line cases. Like ASFA, this paper is not concerned with the life circumstances that may have led the “abusive” mother to her predicament or her actions.<sup>8</sup> This article is instead concerned with those cases that lie outside bright-line labels and examines a paradox at the heart of recent efforts to improve the child welfare system: in their zeal to focus on the child in parental termination hearings, lawmakers imposed a categorical formula that unwittingly harms some children and mothers who are labeled “unfit” because of neglect.

In the cases at the margins, those involving mothers who may or may not be neglectful, or who are victims in their own right, ASFA’s categorical treatment of mothers and children may not serve all children equally well. Unfortunately, the marginal cases are not rare.<sup>9</sup> In this paper, I aim to highlight a dilemma central to the child welfare system: it may not be possible to devise a legal principle that equitably addresses the interests of all neglected children and their mothers. Attempts to impose such a categorical legal principle

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<sup>7</sup> Executive Memorandum on Adoption and Alternate Permanent Placement of Children in the Public Child Welfare System, 32 Weekly Comp. Pres. Doc. 2513 (Dec. 14, 1996).

<sup>8</sup> In using the term “abusive,” I refer to the abusers whose label raises no questions - - those who torture, drown, or fail even to note that a child has disappeared.

<sup>9</sup> AM. BAR ASS’N PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA’S CHILDREN AT RISK 50 (1993) (“Only about 10% of the cases in which states remove children from their homes involve severe physical injury or severe sexual abuse.”).

to neglect cases may result in less than optimal solutions for some individual children and mothers, and even instances of flagrant injustice to one or both. On the other hand, it is incumbent upon the law, and on its theorists as well as its practitioners, to grapple with the hardest issues, such as how the passage of time affects the respective claims of a parent, a child and the state in the child welfare system.

Section I of this essay reviews the rights claims of parents generally, of mothers in particular, and of children. Section II analyzes the key reform of ASFA, which provides that parental rights be terminated after a child has remained in foster care for 15 out of the preceding 22 months. In doing so, I consider the conflicting interests and postures of the child, the mother and the state, asking whether the passage of time alone is ever sufficient justification for terminating parental rights in light of the protections the law affords parents. Section III considers two categories of hard cases which demonstrate the vital liberty interests and practical needs of mothers and children: (1) cases involving substance abusing mothers and (2) cases involving battered mothers whose children were removed despite the mother's success in protecting the child from observing or experiencing violence. Both of these categories illustrate that, in some instances, children's interests might be better served by flexibility where the child asserts a claim to a continued relationship with a biological parent.

## I. Rights Perspectives: Parents, Women and Children

The vast majority of children live with their mothers, whether in single parent households, with their father as well as their mother, or with their mother and her significant other<sup>10</sup> This necessarily means that where abuse or neglect takes place, a mother's role is likely to be at issue, either as a perpetrator, for placing the child in harm's way, or for failure to protect the child from another adult. Indeed, when we talk about child abuse and neglect we are almost always talking, at some level, about mothers and their children, even if the mother's partner is the abuser.

This section first considers the constitutional rights accorded to parents, regardless of sex, and the ways in which those rights diminish the independent claims of children. It then considers the role of feminist theory in discussions of the rights of mothers and children in the context of child abuse and neglect. Finally, it offers a way of thinking about children's legal claims within the child welfare system separate from those of their parents, with particular emphasis on the legal regime created by ASFA.

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<sup>10</sup> According to the 2000 census, of the 37 million families with children in the United States, roughly ten million families are headed by a single mother, and two million families by a single father. Jason Fields & Lynne M. Casper, *America's Families and Living Arrangements*, CURRENT POPULATION REPORTS, June 2001, at 6-7 (U.S. Census Bureau 2001). Five percent of all children live with a single father without their mother or another female partner being present. *Id.* at 7. See also Jason Fields, *Living Arrangements of Children*, CURRENT POPULATION REPORTS, April 2001, at 5-6 (U.S. Census Bureau 2001)(comparing 1996 U.S. Census statistics concerning numbers of children residing with unmarried mothers and fathers). Most of the remainder live with a married or unmarried couple, which includes one of their parents. Fields & Casper, *supra*, at 13. Another 1.3 million children live with a grandparent, without either parent. Fields, *supra*, at 12. Although the census data are not specific, experience indicates that children living with their grandparents are likely to be living with a grandmother.

As Annette Appell has pointed out, "the constitutional definition of parent differentiates between women as mothers and men as fathers. . . . Parenthood to date requires a biological connection between the mother and child; a nurturing connection between the prospective other parent and the mother; or a nurturing and genetic connection to the child" for those who claim fatherhood. Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J. L. REFORM 683, 694 (2001).

## A. Parental Liberty Interests and Due Process Rights

Even in the context of the modern child welfare system, the constitutional rights of parents frequently subsume the legal rights of their children.<sup>11</sup> The Supreme Court has found a substantive liberty interest in parenting,<sup>12</sup> which “does not evaporate simply because [the parents] have not been model parents or have lost temporarily the custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.”<sup>13</sup> The resulting legal presumption that parents speak for their children does not fully evaporate once the children come to attention of a child welfare agency, or even once a child enters foster care. Under this legal regime, as opposed to a therapeutic one, information must be considered in a certain order. Before a court can assume that the child or someone else claiming to speak for the child (such as the state or an appointed guardian *ad litem*) is in a better position than the parent to present the child’s best interests to the court, the court must determine that the parent has behaved in a way that justifies stripping the parent of her presumed identity of interests with her child. Only after such a finding may a court determine that the parent no longer speaks for this particular child. Consequently, any legislative initiative designed to

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<sup>11</sup> I have argued elsewhere that minors should and do have legal rights independent of their parents. Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223 (1999) [hereinafter *An Emerging Right*]; Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571 (1996) [hereinafter *Vulnerability to Voice*].

<sup>12</sup> *Troxel v. Granville*, 530 U.S. 57 (2000); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *M.L.B. v. S. L. J.*, 519 U.S. 102, 119 (1996) (the *Lassiter* and *Santosky* courts were “unanimously of the view that ‘the interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.’,” quoting *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting)). See David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125 (2001); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527 (2000).

<sup>13</sup> *Santosky*, 455 U.S. at 753.

elevate the child’s developmental needs over the rights of his or her parents may conflict with generally applicable constitutional principles protecting the family unit as a whole. It is critical, therefore, to understand the scope and strength of the parent’s rights before seeking to explicate the balance of interests between children and their parents in the context of the child welfare system.

The substantive due process jurisprudence that governs claims involving a parent’s liberty interest in his or her child requires a court to engage in strict scrutiny of government intervention. In short, any infringement on the parent’s rights must be narrowly tailored to serve a compelling state interest.<sup>14</sup> But while the government’s compelling interest in safeguarding children is rarely questioned, the means the government uses to achieve its goals are frequently the subject of litigation.<sup>15</sup>

The liberty interest of parents in their children also mandates procedural protections before a parent’s rights may be terminated. In the 1972 case of *Stanley v. Illinois* the Supreme Court held that a state may not deprive a parent of his or her parental rights without an individualized determination of the parent’s fitness.<sup>16</sup> Speed and efficiency, the Court declared, may not be allowed to run “roughshod over the important interests of both parent and child.”<sup>17</sup> In subsequent cases the Supreme Court examined three procedural issues that

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<sup>14</sup> In re H.G., 757 N.E.2d 864, 871 (Ill. 2001).

<sup>15</sup> See Catherine J. Ross, *Anything Goes: Examining the State’s Interest in Protecting Children from Controversial Speech*, 53 VAND. L. REV. 427, 463-67 [hereinafter *Anything Goes*] (discussing the lack of judicial scrutiny accorded to the state’s claims of a compelling interest in protecting children in the context of regulations on controversial speech).

<sup>16</sup> *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>17</sup> *Id.* at 657.

arise in termination cases: the right to appointed counsel, the standard of proof, and the right to an appeal.

In its 1981 opinion in *Lassiter v. Department of Social Services*, the Court held that due process does not require appointment of counsel for parents in all termination proceedings.<sup>18</sup> The *Lassiter* opinion makes clear, however, that an appellate court may reverse a trial court's decision not to appoint counsel if the decision violates fundamental fairness under the facts of the case.<sup>19</sup> In addition, although the Court found that appointing counsel is not constitutionally required in all termination cases, the majority noted that a "wise public policy" would require appointing counsel for parents who cannot afford attorneys at all stages of dependency proceedings.<sup>20</sup>

The Supreme Court has ruminated on the high personal stakes that make termination of parental rights something more than an "ordinary civil action" resulting in "mere loss of money."<sup>21</sup> In *Santosky v. Kramer*, decided the year following *Lassiter*, the Supreme Court

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<sup>18</sup> *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981) (While Justice Powell took no part in the consideration or voting in *Stanley*, 405 U.S. 645 (1972), he voted with the five person majority in *Lassiter*).

<sup>19</sup> *Lassiter*, 452 U.S. at 27-28, 31-32 (applying formula set forth in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

<sup>20</sup> *Lassiter*, 452 U.S. at 33-34. At the time *Lassiter* was decided, the Court noted that thirty-three states and the District of Columbia provided appointed counsel for indigent parents in termination proceedings, and that nothing suggested that such statutes were other than "enlightened and wise." *Id.* at 34. Since *Lassiter* was decided, the wave of opinion in the states has become even more pronounced. *See Brown v. Division of Family Services*, 803 A.2d 948, 952-53 (Del. 2002) (since *Lassiter* was decided, "there have been substantial dynamic statutory and procedural developments" regarding the right to counsel in termination of parental rights proceedings). In 2002, the Supreme Court of Delaware noted that Delaware was one of only five states that have not "established a right for indigent parents to be represented by counsel at State expense in dependency and neglect proceedings.... [either by statute] or as a matter of state constitutional law." *Brown*, 803 A.2d at 955. Nonetheless, like most other states, Delaware "routinely appoints" counsel to indigent parents who request it. *Id.* at 957-58 (holding that Delaware must provide timely notice to parents that they may have a right to representation at the state's expense in termination proceedings and expressly reserving the question of whether indigent parents are entitled to state-appointed counsel at all stages of dependency and neglect proceedings).

<sup>21</sup> *Santosky v. Kramer*, 455 U.S. 745, 747, 756 (1982).

held that in light of the stakes in termination proceedings, due process requires that the state support its allegations by an elevated evidentiary standard -- “at least clear and convincing evidence” -- before it may “sever completely and irrevocably the rights of parents in their natural child.”<sup>22</sup>

Most recently, in *M.L.B. v. S.L.J.*, the Supreme Court held that the due process and equal protection clauses mandate that a state may not deny appellate review to a person whose parental rights have been terminated. The Court held that states must provide every parent with access to the appellate courts following termination of parental rights regardless of the parent’s ability to pay the requisite costs.<sup>23</sup> In the context of a contested step-parent adoption, the *M.L.B.* majority again focused on the substantial and irreparable injury to parents who lose all rights to their children, as well as the potential for judicial error, in holding that “decrees forever terminating parental rights” fall into “the category of cases in which the State may not ‘bolt the door to equal justice.’”<sup>24</sup> The Court, however, did not balance the child’s potential interests against the parent’s rights, and did not have before it the argument that delay—whether caused by the appellate process or by other contingencies—unjustly prolongs the child’s uncertainty about her fate.

The cases from *Lassiter* through *M.L.B.* establish the parameters of the rights and presumptions that parents bring to termination proceedings. These constitutional protections for parents are critical, especially since the fact-finding stage of a termination proceeding

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<sup>22</sup> *Id.* at 747-48.

<sup>23</sup> *M.L.B. v. S.L.J.*, 519 U.S. 102, 107 (1996) (holding the state may not block an appeal by an indigent parent who cannot afford to purchase a copy of the trial transcript).

<sup>24</sup> *Id.* at 124.

“pits the state directly against the parents.”<sup>25</sup> At this stage, the trial court’s task is limited to determining whether “the natural parents are at fault.”<sup>26</sup> This finding of “fault” is understood to be a prerequisite for the conclusion that these particular “parents are unfit to raise their own children.”<sup>27</sup> Because it is assumed that children are generally best served by remaining with their parents, and a finding of fault could lead to their permanent removal from their parents’ care, courts presume that the interests of children converge with the interests of parents at legal proceedings. This presumption remains, even where the facts appear to clearly rebut it.<sup>28</sup> In *Santosky*, for example, the parents’ interests were viewed as converging with their children’s despite the fact that one boy, who had been removed from his parents when he was only three days old, was seven when the case was argued and had never lived with his parents.<sup>29</sup> Yet even on those facts, the Court preserved the legal fiction that parents and child speak with one voice, insisting “until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship;” only after the State proves parental unfitness, are the interests of parent and child deemed to “diverge.”<sup>30</sup>

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<sup>25</sup> *Santosky*, 455 U.S. at 759.

<sup>26</sup> *Id.*

<sup>27</sup> *See Id.* at 760 & n.10.

<sup>28</sup> *Id.* ; *See* Ross, *Vulnerability to Voice*, *supra* note 11, at 1579-86.

<sup>29</sup> *Santosky* 455 U.S. at 751, 760-61 nn.10-11.

<sup>30</sup> *Id.* at 760.

The Supreme Court has expressed doubts about whether “the State constitutionally could terminate a parent’s rights *without* showing parental unfitness,” although it has never directly confronted the question.<sup>31</sup> In *obiter dicta*, the Court opined that

[w]e have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’<sup>32</sup>

Notwithstanding the due process protections accorded the liberty interest of biological parents in their children, once a child enters foster care, the parental rights and responsibilities for that child are apportioned among biological parent, foster parent and the state.<sup>33</sup> The manner of this division resembles nothing so much as the proverbial bundle of sticks well known in introductory law school property classes, reminding us of the long common law history of treating children as property.<sup>34</sup> No matter how long the child remains in foster care, he or she continues to “belong” to the natural parent in some respects.<sup>35</sup> That natural parent – although stripped of custody and day-to-day decision making once a child enters foster care retains the sole ability to make decisions regarding surgery and the right to

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<sup>31</sup> *Id.* at 760 n.10.

<sup>32</sup> *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (quoting *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)).

<sup>33</sup> *Smith*, 431 U.S. at 826-28.

<sup>34</sup> The bundle of sticks analogy clarifies the notion that the rights associated with ownership of property can be “unbundled or disaggregated.” If the property is a bundle of sticks, the owner may give away one or more sticks while retaining the balance of the bundle. The sticks may represent temporary interests such as a particular usage or a term of years. As Joseph Singer explains it, “A particular piece of property may have multiple owners of different sticks in the bundle of rights that comprises full ownership. When we are asked to determine who owns a particular stick in the bundle, it may not help us to know who the “owner” of the land is because ownership of various sticks in the bundle may be spread among several people.” Joseph William Singer, INTRODUCTION TO PROPERTY 2-3 (2001).

<sup>35</sup> *Id.* at 828 & n.20.

marry or enlist in the armed forces as a minor, among other decisions, and is presumed to represent the child’s legal interests, retaining what amounts to a future interest in the child.<sup>36</sup>

The Supreme Court made it clear in *Santosky* that there is no room at the fact-finding stage of a termination proceeding to weigh either the child’s independent interest or the child’s relationship with a foster family against the rights of the natural parents in the care custody and nurture of their child.<sup>37</sup> The focus during fact-finding at a termination proceeding is “emphatically” not on the child, or the other opportunities open to the child, but only on whether “the natural parents are at fault” as the state alleges.<sup>38</sup> There is no room for the child’s perspective—even when there is lack of attachment to the natural parents or positive attachment to current caregivers such as foster parents—until the court turns to disposition.<sup>39</sup> Nor can the court consider the child’s need for protection and safety outside the context of parental fault.<sup>40</sup>

Similarly, lower courts have expressly held that while the best interests of the child should be paramount in all proceedings to terminate parental rights, “a court may not base

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<sup>36</sup>*Id.* at 828 n.20. For example, a Michigan court recently refused to authorize surgery to implant controversial hearing aids in two deaf boys in foster care over the objection of their mother, who the court held retained authority over elective surgery unless and until she loses custody permanently. Jon Hall, *Mich. Judge Rules Deaf Boys Needn’t Undergo Surgery*, BOSTON GLOBE, Oct. 5, 2002, at A-3.

<sup>37</sup> *Santosky*, 455 U.S. at 745.

<sup>38</sup> *Id.* at 759.

<sup>39</sup> *See Id.* at 760

<sup>40</sup> *See* Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 96 (1999) (arguing that child welfare decision making is almost always “tilted in favor of the parents’ rights at the expense of a child’s protection”); *See also* ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER CARE DRIFT, AND THE ADOPTION ALTERNATIVE* 113 (1999) (constitutional law “gives adults fundamental rights to parent their children, while giving children no rights to *be parented* in a nurturing way.”).

termination of parental rights *solely* on the best interests of a child.”<sup>41</sup> In order to terminate parental rights, a court must first find that at least one statutory ground for termination exists.<sup>42</sup> Consistent with the discussion in *Santosky*, state laws governing termination provide for a bifurcated analysis. First, the court must ask whether sufficient statutory grounds have been shown for terminating the parent’s rights (with due consideration to the parent’s constitutional rights). Only then may the court reach the second question: whether termination of parental rights in fact serves the child’s best interest.<sup>43</sup> If the statutory grounds for termination have been well framed and the evidence that those grounds have been met is clear and convincing, the child’s best interests will normally be served by termination, particularly if the state has already identified a permanent or adoptive home for the child.<sup>44</sup>

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<sup>41</sup> *In re Welfare of M.H.*, 595 N.W.2d 223, 228 (Minn. Ct. App. 1999) (citing *In re Welfare of J.K.*, 374 N.W.2d 463, 466 (Minn. Ct. App. 1985)) (emphasis added). See also David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 785-86 (1999) [hereinafter *Family Ties*].

<sup>42</sup> *M.H.*, 595 N.W.2d at 226.

<sup>43</sup> *S.L. v. C.A.*, 995 P.2d 17, 29-30 (Utah Ct. App. 1999) (Wilkins, J., concurring). See also Minn. Stat. § 260C.301 subd. 7 (Supp. 1999) (stating that best interests are considered after the court finds that at least one of the statutory criteria for terminating parental rights has been established).

<sup>44</sup> In limited instances in some states, however, a court may use the best interests inquiry to determine that a sound reason exists **not** to terminate parental rights, even though the court has already determined that the statutory grounds for termination have been satisfied. See *E.g.*, *State v. Timperly*, 750 P. 2d 1234, 1238 (Utah Ct. App. 1988) (opining that the best interests of the child remains a principal consideration in termination proceedings, and in this instance supports termination). See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 136 (1995) (urging judges to “inquire into the child’s best interests and not presume, merely because statutory grounds exist to terminate parental rights, the child’s best interests are served by doing so” particularly where no viable permanent placement is likely).

## B. Women's Rights and Feminist Theory

When the abusive or neglectful parent who asserts a liberty interest and the concomitant procedural protections is a mother, an additional array of troubling cultural and theoretical issues emerges. These include the very definitions of “woman,” “mother,” and themes of essentialism and anti-essentialism. Essentialism and anti-essentialism refer to the notion that all women share, or do not share, a common experience, and are, or are not, characterized by common attributes.<sup>45</sup> Of course, the terms “woman,” and “mother” are loaded with normative assumptions. To be a woman is to be a current, past, or future mother, regardless of individual choice and reality.<sup>46</sup> To be a mother is normatively to be a “good” mother, so that the adjective need not even be stated. A “mother” by default is the normative mother, a socially constructed image that encapsulates many presumptions—especially those of a woman who is middle-class, married, and a caretaker. In this view, only the unusual, deviant mother requires a prefatory adjective: “single,” “working,” “welfare,” or “bad.” In reality, as some feminist scholars have pointed out, an infinite variety of women and mothers exist.<sup>47</sup>

Proceedings to terminate parental rights offer an enormous variety of portraits of

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<sup>45</sup> MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY, 78 (2d ed. 2003). *See also* KATHARINE T. BARTLETT AND ANGELA P. HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 1007-9 (2d ed. 1998) (discussing the meanings of the term “essentialism”).

<sup>46</sup> MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 38, 51 (1995).

<sup>47</sup> *See generally* JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare Reform, Family, and Criminal Law*, 83 CORNELL L. REV. 688 (1998); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); Carol Sanger, *Separating from Children*, 96 COLUMBIA L. REV. 375 (1996).

mothers. Women who have abused, neglected, or failed to protect the children may be single, married, cohabiting or divorced.

Despite the ease with which we can locate these mothers in the real world, feminist theory has “largely ignored ‘bad mothers’ and their implications for child abuse.”<sup>48</sup> This silence may reflect a defensive mechanism exercised by feminists in legal practice either because they are reluctant to believe that their clients had “beaten, struck, or kicked their children,” or because those realities are so difficult to “understand or interpret.” Feminist scholars in turn skirted the issue because the facts did not mesh with an early feminist meta-narrative of women as victims.<sup>49</sup> Recently, however, feminist scholars have also recognized that “women are not only victims ... they are often guilty themselves as agents who abuse children or fail to protect them.”<sup>50</sup>

The admission that women may abuse power and fail to protect their children implicates two distinguishable categories of offense.<sup>51</sup> In the first, the woman herself is the agent of aggressive or passive acts that harm her children. In the second, the woman’s liability stems from her failure to protect her children from abuse or neglect at the hands of third party. In this second category, feminist theory suggests the importance of clearly distinguishing the acts and omissions attributable to the mother from those of the primary source of the harm (commonly the child’s father or the mother’s male

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<sup>48</sup> Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 76 (1993).

<sup>49</sup> *Id.* at 78, 79, 109.

<sup>50</sup> Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 13 (1995). See also Barbara Bennett Woodhouse, *The Dark Side of Family Privacy*, 67 GEO. WASH. L. REV. 1247, 1248 (1999) (discussing the emerging dialogue about child abuse between “feminists and child advocates”).

<sup>51</sup> Becker, *supra* note 48, at 14.

companion). Just as feminist scholars have highlighted the injustices wrought by the traditional legal presumption that a man and his wife were a single legal unit for purposes of spousal violence,<sup>52</sup> so too must contemporary courts learn to distinguish when mothers can and cannot be held accountable for the actions of the men in their lives. Women who know that a particular person threatens their child's safety and nevertheless fail to protect the child from predictable or on-going harm, however, transform themselves into agents of abuse. For example, the mother who refuses to leave a man who she learns is sexually abusing her daughter is not a safe custodian for that child.

Analysis of the context in which events occur and individuals make decisions, a major contribution of feminist theory to the understanding of family violence, has now entered enlightened mainstream discussion,<sup>53</sup> but is frequently overlooked in child welfare decision-making. In context, victimization and social structures contribute to the determination of which women regain their children from the child welfare system and which women lose them forever.<sup>54</sup> Extreme poverty in the face of a lack of services, single parenthood and race all contribute to both initial intervention and ultimate removal of children.<sup>55</sup>

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<sup>52</sup> See Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L. J. 1465, 1477-85 (discussing evolution of the marital rape exemption); *and* Reva Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L. J. 2117 (1996) (addressing the immunity from suit of husbands who beat their wives).

<sup>53</sup> See generally Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1682-83 (1990); Ashe & Cahn, *supra* note 46, at 109; *Nicholson v. Williams*, 203 F. Supp. 2d 153, 163-64 (E.D.N.Y. 2002).

<sup>54</sup> See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemma of Criminalization*, 49 DEPAUL L. REV. 817, 822-826 (2000) (discussing the delicate balance in the criminal and civil legal systems of how to protect both women and children without subordinating either group to the other).

<sup>55</sup> See Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective Services and Welfare Policies: A Response to Ward Doran and Dorothy Roterts*, 61 MD. L. REV. 437, 441-42 (2003) (discussing reports of abuse and neglect from caseworkers in the Temporary Assistance to Needy Families Program ("TANF") based on extreme poverty and homelessness); Leroy H. Pelton, *Commentary, Future Child*. Spring 1998 at 126-29 (criticizing the negative stereotypes of impoverished parents in a

It is not my purpose here to contribute to the theoretical debate over the parameters of what defines a “bad mother.” Instead, I distinguish between two groups of “bad” mothers. The first group, which does not concern me here,<sup>56</sup> consists of the small minority of mothers who kill or physically assault their children or engage in other acts which the law labels “aggravated circumstances,” eliminating the need for efforts to reunite the surviving members of the family under the express provisions of ASFA.<sup>57</sup> Although the mothers who engage in such aggravated behavior can be viewed as bad, indifferent, victims, or all three, depending on the worldview of the observer, from the perspective of the child, ASFA correctly puts the child’s need for safety and stability ahead of the mother’s needs and rights.

The second group of mothers, the group upon which I focus my discussion, consists of women whose children dominate the foster care population. These mothers are labeled “neglectful” for any number of reasons, including substance abuse, poverty, homelessness, and so forth.<sup>58</sup> In some instances, neglect that poses a serious physical and/or psychological threat to the child cannot easily be addressed through services.<sup>59</sup> In other cases, if services

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public child welfare system which is “a coercive apparatus wrapped in a helping orientation.”) and sources cited in footnote 61 *infra*.

<sup>56</sup> Presuming for purposes of this discussion that standards of proof are met and adequate procedural protections have been provided, I will assume that the mother who allegedly drowned, knifed or scalded her child intentionally actually did so. The theoretical problems raised by such cases are distinguishable from those raised by the neglect cases. Moreover, the issues of physical safety and the child’s ability to trust his or her caretaker are starkly framed in such abuse cases. GOLDSTEIN ET AL., *supra* note 4; RICHARD J. GELLES, *THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN’S LIVES* (1996).

<sup>57</sup> 42 U.S.C.A. § 671 (a) (15) (D) (i) (West 2003) (stating that aggravated circumstances, which shall be defined by state law, include but are not limited to “abandonment, torture, chronic abuse, and sexual abuse”).

<sup>58</sup> See Cynthia R. Mabry, *Second Chances: Insuring that Poor Families Remain Intact by Minimizing Socioeconomic Ramifications of Poverty*, 102 W. VA. L. REV. 607, 612-14, 616-24 (2000). See generally Symposium, *The Rights of Parents With Children in Foster Care: Removals from Economic Hardship and the Predictive Power of Race*, 6 N.Y. CITY L. REV. 115 (2003) (experts discussing removals of children from poor parents of color because of child neglect arising from poverty).

<sup>59</sup> See Mabry, *supra* note 58 at 610-11 (2000).

were available and provided in timely fashion, neither the initial removal of the child from the home nor the eventual termination of parental rights would likely prove necessary.<sup>60</sup>

The label of neglectful parent is skewed by class, race, culture and ethnicity from the point of reporting and investigation through removal and termination.<sup>61</sup> To the extent that child welfare agencies or courts view some mothers as “bad” or neglectful based on nothing more than cultural difference or poverty, such failure to conform to an idealized notion of family life does not constitute a legitimate basis for removing a child. One commentator, discussing persistent complaints about the lack of funding for preventive services, concluded “[a]lthough in theory children are not removed from their parents because of poverty . . . this distinction cannot be maintained.”<sup>62</sup> For example, Adriana Recodo, “the victim of an abusive domestic relationship . . . had no income, no place to live and no transportation. When she sought help from a social worker, she received a referral to a psychologist and her son entered foster care. Recodo was studying for her G.E.D., and seeking employment. She could not find stable housing, but the state did not provide her with housing assistance. Her parental rights were terminated due to “chronic instability” in her employment and

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<sup>60</sup> *Id.* at 626-49 (surveying programs and services that help parents either retain or regain custody of their children).

<sup>61</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) (discussing the influence of race permeating America’s child welfare system); Tonya L. Brito, *The Welfarization of Family Law*, 48 U.KAN. L. REV. 229 (2000) (evaluating the intersection and overlap of family law and welfare law); Catherine J. Ross and Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U.J. GENDER SOC. POL’Y & L. 55, 70 (2000) (investigating the socioeconomic assumptions underlying the federalization of foster care). See also Leroy H. Pelton, *Child Abuse and Neglect: The Myth of Classlessness*, 48(4) AMER. J. ORTHOPSYCHIAT. 608 (1978) (arguing that a relationship exists between poverty, child abuse and neglect that should not be ignored); ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (admitting that race and class discrimination does influence state intervention in the family and that coercive intervention disparately impacts poor and minority race parents).

<sup>62</sup> Ramsey, *supra* note 55, at 445; and Diane J. English, *The Extent and Consequences of Child Maltreatment, Future Child.*, Spring 1998, at 49-51 (victims of neglect are the lowest child welfare agency priority and “receive few services”).

housing.<sup>63</sup> The Supreme Court of Nevada affirmed the termination,<sup>64</sup> but a pointed dissent put Recodo's case in the context of other termination cases that had reached the state's highest court, concluding that "the State's *modus operandi* appears to be to go into the homes of handicapped, powerless and usually very poor parents, remove their children ... and put the children into the home of substitute parents who are more affluent than the natural parents and more pleasing to social service agents than the natural parents."<sup>65</sup>

Yet the relationship between poverty and entrance into foster care should not be surprising. It is inseparable from our society's public expectations and legal norms concerning the privatization of caretaking.<sup>66</sup> The denial of collective responsibility for caretaking in favor of norms that emphasize autonomy and self-reliance, as Martha Fineman has argued, deprives caretakers of the social, financial and government support that many of them desperately need.<sup>67</sup> The institution of foster care itself may be understood as a substitution of one private caretaking unit for another, albeit with a small government subsidy (and the oversight that accompanies subsidy in our system).<sup>68</sup> The children of neglectful parents would benefit most from a more sensitive filtering system, in which

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<sup>63</sup> Recodo v. State, 930 P.2d 1128, 1133 (Nev. 1997).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*, at 1136 (Springer, J., dissenting).

<sup>66</sup> Martha Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 15 (1999) [hereinafter Fineman, *Foundational Myths*]; Martha Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL'Y REV. 89, 90-91 (1998) [hereinafter Fineman, *Inevitability*].

<sup>67</sup> See Fineman, *Foundational Myths*, *supra* note 66, at 19-20; Fineman, *Inevitability*, *supra* note 59, at 90-91.

<sup>68</sup> See Ross & Cahn, *supra* note 61, at 57-58.

neglect that does not result in serious harm or danger would trigger benefits in the form of services, rather than potentially unwarranted removal.<sup>69</sup>

It is likely that a regime in which the child's rights were given weight would result in fewer instances of children being removed from borderline domestic situations. In an attempt to articulate current attitudes towards children's rights, the following section examines the child's independent interests within the child welfare system.

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<sup>69</sup> See generally, Goldstein et al., *supra* note 4 (arguing for minimum state intervention into families and use of the "least detrimental alternative" which may include maintenance of the status quo or providing supportive assistance).

### C. Children's Rights

Young children are not autonomous persons. The law recognizes that children need adults to nurture and supervise them.<sup>70</sup> The parental rights doctrine is premised in part on this notion, and the child welfare system is in turn based upon the view that if the biological parents prove unfit for the job of raising their children, the state has a compelling interest in replacing the failed parent with one who is up to the challenge. The state's interest in the healthy development of its youngest citizens is deemed to allow the state to substitute itself and its representatives to be spokespersons for the children in lieu of unfit biological parents. Just as feminists have argued that the woman and man in a marital unit should not be collapsed into one legal and cultural identity, so too children's rights advocates emphasize the importance of being able to distinguish when a child's interests converge with that of the parent, and when it is imperative to recognize that the needs or interests of parent and child substantially diverge.<sup>71</sup> In the context of the child welfare system, it may be inappropriate to assume that the child's needs are fully represented by the parent's legal claims. At the same time, it oversimplifies matters to presume that the interests of a child in foster care are irretrievably at odds with those of her parents. Instead, to do justice to the potentially competing claims of mothers and children in the child welfare system, we need to struggle to find a way to hear the voice of the individual child.<sup>72</sup> While the voices of children of various

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<sup>70</sup> Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1809-11 (1993); Appell, *supra* note 10, at 701-703.

<sup>71</sup> In other contexts, I have argued that children should have the right to counsel in civil litigation where their parents do not adequately speak for them, and should have the right to access information essential to their exercise of constitutional rights from public sources even over their parents' objections. See Ross, *An Emerging Right*, *supra* note 11, at 225-26. See Ross, *Vulnerability to Voice*, *supra* note 11, at 1572-74. On the other hand, I have argued that parents have the right to monitor their children's access to controversial material, and that children need their parents' advice in the context of the juvenile justice system. See Ross, *Anything Goes*, *supra* note 15, at 476-87. See Catherine J. Ross, *Implementing Constitutional Rights for Juveniles: The Parent-Child Privilege in Context*, 14 STAN. L. & POL'Y REV. 85, 107-114 (2003).

ages may be treated differently because the balance of dependency and autonomy shifts during the process of maturation,<sup>73</sup> even very young children may have ways of communicating about their needs.

However, once the law has assigned the designation of “parent” to a particular adult, parental rights doctrine as interpreted by *Santosky* dictates that the child has no voice separate from the parent in court until grounds for termination are established.<sup>74</sup> Because of the importance of parental rights doctrine, courts will not normally substitute the child’s best interest for an analysis of parental fault. Courts frequently decline weigh the unique circumstances of a child’s life, even where they suggest that the child’s emotional well-being would be served by taking into consideration factors other than parental fault, such as the child’s attachment to caretakers.<sup>75</sup>

This was the issue in the case of “Baby Jessica” DeBoer, who was wrongfully adopted at the age of 17 days, even though her father’s rights had not been terminated. She was two years old and had known no parents other than her adoptive mother and father when Justice Stevens refused to stay the lower court’s order returning her to her natural parents. Justice Stevens explained that no law “authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit, simply because

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<sup>72</sup> See generally, Katherine Hunt Federle, *Looking Ahead: An Empowerment Perspective on the Rights of Children*, 68 TEMP. L. REV. 1585 (1995) (arguing that children should not be excluded from the rhetoric of rights and that children should be empowered to voice their preferences about custody in divorce cases).

<sup>73</sup> Ross, *An Emerging Right*, *supra* note 11, at 242-50.

<sup>74</sup> *Santosky*, 455 U.S. at 745.

<sup>75</sup> See Meyer, *Family Ties*, *supra* note 41, at 778-92 (surveying cases).

they may be better able to provide for her.”<sup>76</sup> In the similar and equally controversial case of “Baby Richard,” the father only discovered that Richard was alive 57 days after the birth, well after Richard had been adopted. Ruling that the father's rights had been terminated improperly, the Illinois Supreme Court held that courts may not consider the best interests of the child before determining, as a threshold matter, that parental rights should be terminated. If they could, the court opined, “few parents would be secure in the custody of their own children.”<sup>77</sup> The corollary of this principle is that every child should be secure in her parents’ custody. Thus the issue in both cases, decided in the context of private adoption rather than of the child welfare system, was a profound disagreement between advocates for the children and the birth fathers<sup>78</sup> over whether to define “parents” based on biology or on the child’s emotional experience.

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<sup>76</sup> DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993)(Stevens, Circuit Justice) (denying application for a stay by Jessica’s adoptive parents).

<sup>77</sup> *In re* Petition of Doe, 638 N.E.2d 181, 183 (Ill. 1994), *cert. denied*, 115 S. Ct. 499 (1994).

<sup>78</sup> For a discussion of Richard’s perspective based on his 3-year relationship with his adoptive parents see Goldstein et al., *supra* note 4 at 51-61.

#### **D. The Adoption and Safe Families Act of 1997**

The pendulum of child welfare reform has repeatedly swung between efforts to preserve troubled families at virtually all costs and a passion to rescue every child in need. At the height of a prevailing but oversimplified interpretation of family preservation in the mid-1990's, about half-a-million children were in foster care because they had been "rescued" and were waiting for their parents to be rehabilitated so that they could return home. In many of these situations, the facts made clear that they were unlikely ever to rejoin their parents. Although foster care was designed as a temporary expedient and was administered as if it were in fact temporary, increasing numbers of children were spending three years or more in foster care, many of them in a series of homes. This phenomenon became known as "foster care drift."<sup>79</sup> About one-third of the children in foster care would never return home.<sup>80</sup> Instead, many of these children grew up in a series of foster homes and institutions, languishing for years in a child welfare system that moved at a "glacial pace."<sup>81</sup> At the same time, publicity focused awareness on several egregious cases of children who had been returned to their families, only to die at the hands of a parent.<sup>82</sup>

Eventually, the increasingly widespread perception that the foster care system was out of control and hurting children led to a congressional search for uniform solutions based

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<sup>79</sup> H.R. REP. NO. 105-77, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740; *LaShawn v. Dixon*, 762 F. Supp. 959, 960 (D.D.C. 1991).

<sup>80</sup> Donald Duquette & Mark Hardin, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, I-7 (Dep't of Health & Human Services June, 1999).

<sup>81</sup> Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 649 (1999).

<sup>82</sup> *Id.* at 647.

on the child’s need for safety, nurturance and permanency.<sup>83</sup> ASFA, enacted with overwhelming bipartisan support, proclaimed “two basic goals: [p]reventing children from being returned to unsafe homes, and finding safe and loving and permanent homes for children who cannot be reunited with their families.”<sup>84</sup>

Like other child welfare reform efforts since the 1970’s, ASFA drew heavily on the child development principles set forth in the influential work of Joseph Goldstein, Albert Solnit, and Anna Freud.<sup>85</sup> These principles include consideration of (1) the child’s need for parental continuity—an adult who serves as the child’s “psychological parent,” (2) the importance of instilling in the child the feeling of being safe, protected and loved, and (3) the child’s compressed sense of time and the concomitant urgency of resolution.<sup>86</sup> Above all, the leading interpreters of ASFA called on those charged with applying the law to look at the foster care system “through the eyes of the child.”<sup>87</sup>

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<sup>83</sup> For ASFA’s legislative history and the core provisions that history produced, see Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims’ Rights*, 8 AM. U.J. GENDER SOC. POL’Y & L. 517, 523-29 (2000); Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39(1) FAM. CT. REV. 25, 27-29 (2001); Gordon, *supra* note 70, at 646-56; Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 3-10 (2001).

<sup>84</sup> Gendell, *supra* note 83, at 25 (quoting 143 CONG. REC. H2017 (daily ed. Apr. 30, 1997)).

<sup>85</sup> Robert Gordon credits these influential thinkers with influencing the legislation. Gordon, *supra* note 73 at 652-656. The ideas of Goldstein and his co-authors also influenced the 1980 Adoption Assistance and Child Welfare Act. Guggenheim, *supra* note 42, at 124 (stating that Goldstein and his fellow authors emphasized that the state should avoid “disruption of the parent-child relationship lest the child suffer emotional damage,” but did not distinguish between biological and non-biological relationships that included relationships with foster parents).

<sup>86</sup> Goldstein et al., *supra* note 4 at 19, 41, 89-92.

<sup>87</sup> Duquette & Hardin, *supra* note 80, at I-7. Indeed, this perspective ensures that the goals of ASFA, the child’s health and safety, remain paramount. See Gordon, *supra* note 81, at 637 n.6. The federal government’s recent guidelines for implementing ASFA were developed “by a cross-disciplinary group of experts in child welfare” and “reflect their best thinking about child welfare policy frameworks and what ought to be.” Duquette & Harding, *supra* note 80, at i (quoting Carol Williams, Associate Commissioner, Dep’t Health & Human Services). I had the privilege of chairing the sub-group that developed standards for legal representation. The guidelines recommend that parents receive “competent legal representation” “at all court hearings, including at the preliminary protective proceeding.”

ASFA's proponents urged careful consideration of the child's perspective because they were aware that the interests of parents and children do not always mesh.<sup>88</sup> Several members of Congress expressly stated that the balance of children's and parents' rights had to shift under ASFA.<sup>89</sup> As one commentator has noted, putting children first is "often 'difficult and painful.' It is difficult because adults do not have children's needs and cannot easily see what they are. It is painful because what is good for children may be unfair to adults."<sup>90</sup> Congress made clear that where it was not possible to be equally "fair" to children and their parents, ASFA requires courts to elevate the interests of the child over those of the parent.

The effort to focus on children's needs was embodied in the Act's key provision, providing that in order to retain federal funding, the state "shall" move to terminate parental rights with the goal of adoption or another form of permanent placement in two categories of cases: (1) cases where it is apparent early on that the child cannot safely return home because of "aggravated circumstances," such as torture or a felony assault; and (2) all cases involving children who "have been in foster care under the responsibility of the State for 15 of the most recent 22 months" (the "15/22 months rule").<sup>91</sup> Generally, the aggravated

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*Id.* at VII-5. *See also* Brown v. Division of Family Services, 803 A.2d 948, 954 (Del. 2002) (discussing these guidelines).

<sup>88</sup> Statements on the floor of Congress highlighted the potential conflicts between the rights and needs of children and parents. *See* Gordon, *supra* note 81, at 637 n. 6.

<sup>89</sup> Senator DeWine said "[W]e have to start worrying more about the children's rights and less about the rights of the natural parents," while Representative Hoyer in the House said "our child welfare system too often protects parents' rights rather than children's rights." Gordon, *supra* note 81, at 637 n. 6 (quoting 143 CONG. REC. S3947 (daily ed. May 5, 1997) and 143 CONG. REC. H2021 (daily ed. Apr. 30, 1997)).

<sup>90</sup> Gordon, *supra* note 81, at 657.

<sup>91</sup> Adoption and Safe Families Act of 1997, Pub. L. 105-89 § 103(a)(3)(1997). The statute provides three exceptions to this requirement that states initiate termination proceedings. The exceptions apply when: the child is in kinship foster care; the state can demonstrate to the court a "compelling reason" why such a petition would not serve the child's best interests; or the state has failed to provide the services which its

circumstances cases are not complex in terms of either law or morality. The facts of those cases are so heinous that line-drawing should not prove difficult. In cases involving “aggravated circumstances” the parent has already put the child’s life at risk. In contrast, the cases in the second group are not so straightforward. With the passage of time, termination becomes more and more likely, and the needs all children have for stability and permanence are pitted directly against the claims of their parents. In many, or even most instances, ASFA’s reforms promote the actual needs of the individual child. Unfortunately, as I will demonstrate in Section III, the complexities of child welfare cases are not always amenable to such an easy categorical fix. As a result, if states consistently apply the statute as written, ASFA may unwittingly place the claims of the state in conflict with the demonstrable needs of at least some fraction of children.<sup>92</sup>

In addition to enunciating the “15/22 months” legal rule, the Act imposes specific accelerated time lines for court proceedings designed to guarantee the child a permanent placement, whether with the natural parents or somewhere else. ASFA thus requires that a court conduct a permanency hearing “no later than 12 months after the date the child is considered to have entered foster care.”<sup>93</sup> It is this section of ASFA that squarely raises the

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own case plan “deems necessary for the safe return of the child to the child’s home.” *Id.*

<sup>92</sup> ASFA establishes a presumption that, after 15 months have passed, all children are better off if their parental rights are terminated. Because this presumption is rebuttable only when one of the three statutory exceptions listed *supra* note 91 apply, the ASFA presumption may pit the claims of the state against the demonstrable needs of some children. Early reports indicate that many states and courts are failing to comply with the 15/22 months requirement. See U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, GAO-02-585, 23-31 (June 2002).

<sup>93</sup> 42 U.S.C.A. § 675 (5)(C) (West 2003). This date may be longer than 12 months after the child was removed from the home. ASFA considers a child to have entered foster care on the earlier of “the date of the first judicial finding that the child has been subject to child abuse or neglect” or “the date that is 60 days after the date on which the child is removed from the home.” 42 U.S.C.A § 675 (5)(F) (West 2003). Therefore, the permanency hearing might not occur until fourteen months after the child actually left the parents’ home, even assuming that court calendars allow the hearings to be conducted in timely fashion.

question raised in *Santosky* and left unanswered by the Supreme Court for thirty-five years: is the passage of time sufficient to establish a level of parental “fault” that satisfies the due process clause for the purposes of irrevocably terminating a mother’s right to her child?

The remaining sections of this article consider the interplay between the time line and the respective rights of parents and children – rights that can either be mutually reinforcing, or may stand in direct conflict.

## **II. The Mere Passage of Time**

Federal law creates an implicit presumption that a parent who allows a child to linger in foster care for 15 months is unfit. By virtue of this assumption, in an effort to place the child’s presumptive interests front and center, the Act sidestepped the essential legal question of how the state would establish legally sustainable grounds for termination in light of the court’s obligation to consider the rights of the parent in their child.

By the end of 1999, every state and the District of Columbia had amended local statutes in an effort to comply generally with ASFA.<sup>94</sup> Illinois reconciled the standard of “unfitness” with the 15/22 months rule by revising its statutes to provide, in part, that a parent may be found unfit if, pursuant to a court order, “a child has been in foster care for 15 months out of any 22 month period.”<sup>95</sup> In *In re H.G.*, the only reported case to date considering the due process implications of the 15/22 months rule, the Illinois Supreme Court overturned the section of the state statute (“Section 1 (D)(m-1) of the Adoption

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<sup>94</sup> U.S. GEN. ACCOUNTING OFFICE, STATES’ EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT GAO/ HEHS-00-1 6 (Dec. 22, 1999).

<sup>95</sup> 750 ILCS 50/1(D)(m-1) (West 1998).

Act”) that created this new ground of parental unfitness based on the length of time a child has remained in foster care.<sup>96</sup>

As summarized by the court, the facts of the case are not atypical.<sup>97</sup> Illinois removed H.G. from her mother’s custody in March of 1996 because of neglect. The state alleged that the mother had violated a protective order by allowing H.G. to see her father, and had grabbed H.G.’s arm on two occasions, causing it to dislocate.<sup>98</sup> H.G. entered foster care. Nine months later, in December of 1996, the court placed H.G. in the legal custody of the state and ordered the mother to participate in a variety of services, including obtaining appropriate housing, participating in therapy, and completing

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<sup>96</sup> *In re H.G.*, 757 N.E.2d 864, 865 (Ill. 2001). Although the court stated that the Illinois Adoption Act went a step further than ASFA, it is hard to distinguish the Illinois language from the requirements of ASFA, since ASFA imposes a duty on the state to initiate termination proceedings if the child has been in foster care for 15 of the last 22 months, regardless of whether any other grounds for termination exist. Furthermore, the Illinois act provided defenses to termination that ASFA failed to provide. For example, the Illinois statute built in some judicial discretion, allowing the parent to “prove by a preponderance of the evidence that it is more likely than not that it will be in the best interests of the child to be returned to the parent within 6 months of the date on which a petition for termination of parental rights is filed.” 750 ILCS 50/1 (D)(m-1) (West 1998). In other words, a parent who was almost in compliance and moving forward in a treatment plan could apparently stop the clock and gain a few extra months, if doing so would serve the child’s best interests.

South Carolina has enacted a similar statute which adds a ground for termination where a child “has been in foster care under the responsibility of the State for fifteen of the most recent twenty-two months” and termination is in the best interest of the child. S.C. CODE ANN. § 20-7-1572 (West 2003).

<sup>97</sup> The briefs submitted to the Illinois Supreme Court offer different versions of the facts, which were never litigated. The summary of the facts in the opinion closely resembles the facts as stated by attorneys for the mother. Brief of Respondent-Appellee, E.W., Supreme Court of Illinois (No. JAK 96-041). The state’s rendition of the facts predictably tells a more negative story about the mother who, the state alleges, had failed to protect two older daughters from sexual abuse at the hands of her lover, failed to provide necessary follow-up for H.G. after she had heart surgery, and visited H.G. only sporadically while she was in foster care. Brief of Petitioner-Appellant, People of the State of Illinois. Attorneys who were appointed to represent the children in a companion case made clear that the children whose placement was at issue in that matter had no meaningful relationship with their mother since they had entered foster care at the ages of eight days and three and one-half months, respectively. Brief and Argument of Minors-Appellants in Charles S. and Joshua S. v. Heniak (Nos. 91 J 04221 and 92 J 20380). (All briefs cited here are on file with the author).

<sup>98</sup> *In re H.G.*, 757 N.E.2d at 867.

parenting classes.<sup>99</sup> The record offers no indication of the relationship between the mother's housing and the allegations of neglect, nor does it indicate what services, if any, the state offered the mother in any of these three areas.<sup>100</sup>

In August 1998, 20 months after the trial court's dispositional order and 29 months (or two and a half years) after H.G. was removed from her home, the state filed a petition for termination of the mother's rights. The petition alleged that the mother was unfit under section 1(D)(m-1) of the Illinois Adoption Act because she had failed either to make "reasonable efforts to correct the conditions which were the basis for removal"

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<sup>99</sup> *Id.* The Illinois statute fleshed out one of the most important exemptions to the mandatory filing provisions in ASFA. Under ASFA, the 15/22 months rule does not apply in cases where the state has not met its service and treatment obligations to the natural parents. ASFA provides that the state does not need to file a termination petition based on the 15/22 month rule where "the state has not provided to the family of the child, consistent with the time period in the state case plan, such services as the state deems necessary for the safe return of the child to the child's home" – the undefined "reasonable efforts" that had plagued enforcement of the Adoption Assistance and Child Welfare Act of 1980. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272 § 101 (a)(1) (codified in scattered sections of 42 U.S.C.). For critiques of the reasonable efforts requirement as applied, see Gelles, *supra* note 56 at 95-113, 131 and Cristine H. Kim, Note, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287, 296-309 (1999).

<sup>100</sup> The Illinois statute specified, however, that the "15 month time limit is tolled during any period for which there is a court finding that the appointed custodian or guardian [i.e., the foster care system and its agents] failed to make reasonable efforts to reunify the child with his or her family." 750 ILCS 50/1(D)(m-1) (West 1998). This standard is much more favorable to the family than the language of the federal statute. Under the language of ASFA, a child welfare system could drag its feet, offer inadequate services, and then fully comply shortly before the termination hearing, and prevail. Under the Illinois law, the parent would arguably get credit for every month during which she did not receive adequate services. Given the poor track record of many child welfare agencies around the country in providing services, this approach would likely undermine ASFA's goal of "fast track" permanency planning. See, e.g., Mabry, *supra* note 58, at 617-618, 626-630, 646 (discussing the risk that parental rights may be terminated simply because the family is poor and no services have been provided). The Illinois approach does, however, offer some protection to parents and to children who would be better off remaining with their parents. Perhaps equally important, it may provide an incentive for agencies to improve the responsiveness of their services. On the other hand, it may be impossible for parents to pursue aggressively claims that they have received inadequate services because the same caseworker and supervisor who they are claiming denied them services may continue to hold decision-making power in their case. But services, or the lack thereof, were not the focus of the appellate decision in H.G.'s case.

or to make reasonable progress toward reunification. Trial was originally scheduled for March, 1999, but seven months of continuances, some initiated by the state, followed.<sup>101</sup>

In October 1999, 14 months after the state filed its petition for termination, 34 months after the original disposition order, and 43 months after H.G. entered the foster care system, the state filed an amended petition to terminate parental rights, this time adding an allegation that the mother was unfit because H.G. had been in foster care for 15 out of the preceding 22 months. Another series of continuances postponed the trial date to the end of January 2000. By its own terms, ASFA (as Illinois implemented it) failed H.G. dismally. When the termination hearing finally began, she had been in foster care for more than three years, more than the average length of time that children spent in foster care before ASFA became law.<sup>102</sup>

H.G.'s mother challenged Section 1(D)(m-1) on the grounds that it violated her due process and equal protection rights because it is "not narrowly tailored to achieve its manifest purpose, improperly shifts the burden of proof to a respondent parent, and improperly invites consideration of best interest issues at the fitness portion of a

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<sup>101</sup> *Id.* at 867-70 It is often unclear when the 22 month period begins to run under ASFA, even though the statute provides that "[a] child shall be considered to have entered foster care on the earlier of (i) the date of the first judicial finding that the child has been subjected to abuse or neglect; or (ii) the date that is 60 days after the date on which the child is removed from the home." 42 U.S.C.A. § 675 (5) (F). *In re H.G.* illustrates the problem. The Illinois courts stated that the 15-month time frame of section 1(D)(m-1) became applicable to the case only after the final continuance. *Id.* at 872 (asserting that "[n]ine of the 15 months covered by the state's allegation of unfitness under section 1(D)(m-1) were directly attributable to continuances which were necessary to bring the case to trial."). *See also* Riverside Co. Dep't of Public Social Services v. R.M., 134 Cal. Rptr. 2d 187 (2003) (discussing confusion over when the clock begins to run).

<sup>102</sup> The length of time that H.G. drifted in foster care was not at issue in the case. From the small sample that I have seen in my own consulting, and from the few reported cases, such postponements seem to continue to occur with great frequency. The Government Accounting Office reports that most states do not collect data on their compliance with the 15/22 month provision. The nine states that responded to a GAO inquiry about the impact of the 15/22 month rule reported that "the number of children exempted from the provision greatly exceeded the number of children to whom it was applied." U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, GAO-02-585, 26-27 (June 2002).

termination hearing,” in violation of the holding in *Santosky*.<sup>103</sup> The trial court granted the mother’s motion on all three grounds, stating “[t]he problem is inherent in that this particular statute, unlike all of the other provisions for finding unfitness, relates not to conduct of a parent or an internal flaw of character or behavior or mental illness or physical infirmity, but rather the *mere passage of time*.”<sup>104</sup> The Illinois Supreme Court expressly rejected the state’s argument that “a fit parent does not allow his or her child to languish in foster care for fifteen months.”<sup>105</sup> The court correctly pointed out that the case before it “aptly illustrate[s]” that, “in many cases, the length of a child’s stay in foster care has nothing to do with the parent’s ability or inability to safely care for the child but, instead, is due to circumstances beyond the parent’s control.”<sup>106</sup> It continued,

[b]ecause there will be many cases in which children remain in foster care for the statutory period even when their parents can properly care for them ... the presumption contained in section 1(D)(m-1) is not a narrowly tailored means of identifying parents who pose a danger to their children’s health or safety.<sup>107</sup>

In summary, the court stated, “[w]e decline to recognize that the State has a compelling interest in removing children from foster care in an expeditious fashion when that removal is achieved in an unconstitutional manner.”<sup>108</sup>

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<sup>103</sup> *In re H.G.*, 757 N.E.2d at 868, 873.

<sup>104</sup> *Id.* at 868 (emphasis added).

<sup>105</sup> *Id.* at 871.

<sup>106</sup> *Id.* at 872. At a subsequent hearing, the judge refused to return H.G. to her mother on the ground that it would not be in her best interest even though he found that she could be safely cared for in her mother’s home. *Id.* at 869.

<sup>107</sup> *Id.* at 873.

<sup>108</sup> *Id.* at 874.

Clarity about legal standards and zealous protection of procedural rights is particularly important in termination cases because a profound imbalance of power permeates the relationship between a mother and the state. This imbalance not only dominates the day-to-day dealings of the parties, it also allows the state to play a large role in crafting the record that a court ultimately reviews in most, if not all, cases. As the Supreme Court observed in *Santosky*, in most termination proceedings, because “the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination,” thus increasing the risk of erroneous fact-finding.<sup>109</sup>

If the agency drags its feet, and fails to provide the parent with needed resources and support, fifteen months are likely to be consumed without any discernable change in the parent’s circumstances. In addition, while the mother often lacks legal representation during much, if not all of the process, the child welfare agency is represented by counsel from the inception of its relationship with the mother. Because she lacks legal representation, the mother may be intimidated, inarticulate or confused.<sup>110</sup> Consequently, she may “consent” to a course of action from which it is hard to extricate herself (such as “voluntary” placement under threat of coerced removal of her children).<sup>111</sup> Equally important, caseworkers keep written records of the mother’s attitude, behavior and compliance, all of which can be

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<sup>109</sup> *Santosky*, 455 U.S.at 763, 763 n.13.

<sup>110</sup> *Lassiter v. Dep’t of Social Services*, 452 U.S. 18, 47 (1981) (Blackmun, J., dissenting) (“By intimidation, inarticulateness or confusion, a parent can lose forever all contact and involvement with his or her offspring.”).

<sup>111</sup> *Nicholson v. Williams*, 203 F. Supp. 2d 153, 215 (E.D.N.Y. 2002). Defendants conceded that many child welfare matters evade court review “because mothers will usually agree to attend whatever services [the agency] demands once their children have been in foster care for a few days.” *Id.* For this reason, the federal guidelines for implementing ASFA recommend that “biological parents or legal guardians” receive legal representation in judicial proceedings, “even when the out of home placement originates as a voluntary placement.” *Duquette & Hardin*, *supra* note 80, at VII-6.

introduced as evidence at a termination hearing. Because the caseworker has significant leeway to describe the mother as he or she sees fit in those records, the caseworker wields enormous power. In addition, it may prove difficult or impossible to correct even factual errors in the record.<sup>112</sup> As one federal judge concluded, “the damage to constitutional rights is accomplished in the many months preceding the opportunity for final judicial disposition.”<sup>113</sup>

Despite the clear risks that accumulate with the passage of time, less than one-third of all states have even attempted to craft a statutory rationale for terminating parental rights (absent other statutory grounds for termination) after a child has been in foster care for 15 of the preceding 22 months.<sup>114</sup> The efforts of those states that have tackled the drafting problem tend to fall into one of three approaches: (1) the prima facie case; (2) the rebuttable legal presumption or “res ipse loquitur” case<sup>115</sup>; and (3) the “predictive” approach, based on evaluations of future parental capacity and behavior.

The first approach (the “prima facie case”), exemplified by the statute overturned in Illinois and a similar (as-yet untested) provision in South Carolina,<sup>116</sup> makes the placement

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<sup>112</sup> *Lassiter*, 452 U.S. at 46 (Blackmun, J., dissenting) (“[E]rrors of fact . . . in the State’s case may go unchallenged and uncorrected.”).

<sup>113</sup> *Nicholson*, 203 F. Supp. 2d at 254.

<sup>114</sup> In many states, the reference to 15/22 months (or, in some instances, a shorter period) is found only in the section on definitions, or in the section on when a termination petition should be filed, and the passage of time is not addressed in the portion of the code that spells out the grounds for terminating parental rights. A handful of states do not appear to have incorporated any reference in their statute to the 15/22 month period set forth in ASFA. These include Florida, Hawaii, Michigan, North Dakota, South Dakota, and Vermont. The material discussed in the text accompanying footnotes 114 to 117, 120 and 126-127 are indebted to research performed by Johanna L. Ferraro (University of Pennsylvania Law School Class of 2005) at The Field Center during the summer of 2002.

<sup>115</sup> Res ipse loquitur, the thing speaks for itself, “[is a] doctrine providing that, in some circumstances, the mere fact of an accident’s occurrence raises an inference of negligence so as to establish a prima facie case.” BLACK’S LAW DICTIONARY 1311 (7<sup>th</sup> ed. 1999).

<sup>116</sup> S.C. CODE ANN. § 20-7-1572 (8) (1998)(stating that the court may order termination of parental rights upon a finding that the “child has been in foster care under the responsibility of the State for fifteen of the

of a child in foster care for 15 out of 22 months prima facie proof of parental unfitness and thus an independent ground for termination. The surface advantage of this approach is obvious. It enables lawmakers and judges to circumvent the logjam at the heart of ASFA which is created by the conflict between two legal principles: placing the child's best interests first, on the one hand, and the constitutional imperative not to disrupt the parent-child relationship unless strict legal standards have been satisfied, on the other.

The second approach (which I call the "res ipse loquitur" approach) is similar, but allows some flexibility. Under this regime, if a child has been in foster care for 15 of the preceding 22 months, the law establishes a presumption that the best interests of the child will be served by termination of parental rights.<sup>117</sup> This resembles the approach in tort law that under certain conditions, if one party has been injured (the child) then another party (the parent) must have been negligent, and thus blameworthy. The presumption is that remaining in foster care for 15 out of 22 months causes injury to the child and this serves as evidence of unfitness, because a fit parent would have regained custody of the child in that period of time. Whatever the initial harm to the child may have been, this formulation makes the child's continuing presence in foster care an on-going harm attributable to the parent rather than to the state.<sup>118</sup> The res ipse loquitur approach makes a useful conceptual contribution.

It helps to focus the court's attention on the harms the child has experienced both in the

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most recent twenty-two months").

<sup>117</sup> MONT. CODE ANN. § 41-3-604 (1) (2001). *See also* IDAHO CODE § 16-1623 (i) (2003) (stating that the state shall initiate termination proceedings based on this "rebuttable presumption" when a child has been in the department's custody and in out-of-home placement for 15 out of the preceding 22 months).

<sup>118</sup> In many instances it is unreasonable to blame the parent for the persistence of the conditions that led to the child's initial removal. Examples include situations in which services are provided to children only on the condition that those children not remain in the home. *See* MARY GILBERTI & RHODA SCHULZINGER, RELINQUISHING CUSTODY: THE TRAGIC RESULT OF FAILURE TO MEET CHILDREN'S MENTAL HEALTH NEEDS, (Bazelon Center for Mental Health Law, March 2000).

parent's custody and as a consequence of the child's prolonged stay in foster care. The shift in emphasis from the rights of the parent to the needs of the child is exactly what ASFA intended.

But even though the *res ipse loquitur* presumption is expressly or implicitly rebuttable, it shares some of the infirmities found in the Illinois law at issue in *H.G.* Once the plaintiff (the child, represented by the state) has established by circumstantial evidence that reasonable persons could conclude that the injury was caused by parental negligence, the parents' defense relies on a strong showing of an alternative explanation, which the parents may not be able to establish.<sup>119</sup>

The third, and in my view most promising, approach requires that the court predict the likelihood that the parent will be a fit or unfit parent for this child in the near future. The statutes that adopt a predictive approach require the court to evaluate both the extent to which the state has provided the parent with rehabilitative programs and other opportunities to meet the state's demands, and the parent's efforts to address the state's concerns while the child has been in foster care. In Connecticut, for example, the statute expressly provides a ground for termination where the child has been in the custody of the state for 15 of the 22 preceding months and

the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent . . . and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child.<sup>120</sup>

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<sup>119</sup> In *W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS* §40 (5<sup>th</sup> ed. 1984) (explaining that under the *res ipse loquitur* doctrine, the plaintiff has the burden of proof on the preponderance of the circumstantial evidence).

<sup>120</sup> CONN. GEN. STAT. § 17a-112 (j) (3)(B)(ii) (2003). The statute reins in judicial discretion by requiring that in all cases where parents oppose termination of their rights, the trial court shall make written findings regarding seven factors including: (1) the services offered to the parent; (2) the extent to which the state and the parents fulfilled the terms of any applicable court order; (3) the child's significant emotional ties with

This standard allows the court to take the child's sense of the passage of time into account, and to weigh it heavily against the parent's plea for more time to attempt rehabilitation. The approach is premised on the view that children cannot tolerate prolonged delay while their parents relapse into harmful behavior.<sup>121</sup> As one trial court put it, "children cannot afford to spend the rest of their childhood waiting for their father and mother to also grow up."<sup>122</sup>

Courts are bound by the record in determining parental "fault" and in attempting to predict whether a child can be safe with that parent in the future.<sup>123</sup> According to the American Psychological Association, specific evidence of past behavior is the best basis for

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the parents or any other guardian in whose care the child has been for at least twelve months; (4) the child's age; (5) the parent's efforts to address the conditions which led to the child's removal; (6) the parent's visitation with the child while the child was in out-of-home placement; (7) and the extent, if any, to which the parent's effort to maintain a relationship with the child were constrained by unreasonable acts on the part of any other person or by the parent's economic circumstances. CONN. GEN. STAT. § 17a-112 (k)(1-7).

*See also* ALASKA STAT. § 47.10.088 (d)(4-5) (2002) (stating that a petition to terminate parental rights is appropriate where the parent has made "three or more attempts . . . to remedy the parent's conduct or conditions in the home without lasting change; or . . . a parent has made no effort to remedy the parent's conduct or the conditions in the home by the time of the permanency hearing . . ."); ARIZ. REV. STAT. ANN. § 8-533 (B)(7)(b) (West 2003) ("[T]he parent has been unable to remedy the circumstances which cause the child to be in an out-of-home placement and there is a substantial likelihood that the parent will not be capable of exercising proper and effective parental care and control in the near future.").

<sup>121</sup> *See* *In re Crystal E.*, 2001 Conn. Super. LEXIS 3305, \*80-82 (2001) (granting termination based on mother's "failure to rehabilitate" despite intensive services where the mother, who was raised in a series of foster homes herself, had a juvenile record and dropped out of school after ninth grade, persisted in criminal activity, substance abuse, aggressive behavior, relationships with violent men and a continuing inability to meet her child's needs). As the court explained, "Crystal, who has languished so long in foster care, 'should not be further burdened by having to wait for her mother to achieve the level of rehabilitation necessary to parent her.'" *Id.* at \*72.

<sup>122</sup> *State Dep't of Human Resources v. A.K.*, 851 So.2d 1, 9 (2002) (reversing the trial court's refusal to terminate parental rights and committing the three children to a residential facility instead of an identified adoptive home as an abuse of discretion), *cert. denied*, 851 So.2d 23 (Ala. Nov. 27, 2002).

<sup>123</sup> States vary in their approach to what period of time the court may look at when determining fault. In Connecticut, the court may only consider the parent's behavior up to the date when the state filed the petition to terminate parental rights. *In re Daniel C.*, 776 A.2d 487, 500 (2001). In other jurisdictions, the court considers evidence pertaining to the parents' behavior up to the date of trial, which arguably gives the court a more complete picture. *See In re the Welfare of Chosa*, 290 N.W. 2d 766, 769 (Minn. 1980), *cited in In re the Welfare of D.T.O.*, 1999 WL 431093, at \*3 (Minn. Ct. App. June 29, 1999).

prediction of future behavior.<sup>124</sup> Records in termination cases are replete with evidence of past behavior on which to premise predictions of future parenting behavior. There is, however, no easy checklist that agencies and courts can rely upon in their effort to predict whether a child can be safe with his or her parents. As psychologists explain, “[e]ach case is unique, often involving complex and confusing facts, and the stakes – the safety and welfare of a child – are very high.”<sup>125</sup>

A modification of the predictive approach emphasizes the extent to which prediction is based on past acts for which the parent may equitably be held responsible. In Minnesota, for example, the statute provides for termination of parental rights on the grounds that the child “is neglected and in foster care.”<sup>126</sup> This ground for termination applies to children who have been placed in foster care by court order, who cannot currently be returned to their parents, and “whose parents, despite the availability of needed rehabilitative services, have failed to make reasonable efforts to adjust their circumstances, condition or conduct. . . .”<sup>127</sup> The court is directed to make findings regarding how long the child has been in foster care, as well as about the parent’s efforts to rehabilitate and to maintain contact with the child, and whether the state offered reasonable services to the parent. These latter two factors attempt

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<sup>124</sup> Joan B. Gerbasi, Richard Bonnie & Renee L. Binder, *Resource Document on Mandatory Outpatient Treatment*, 28 J. AM. ACAD. PSYCHIATRY L. 127, 142 (2000) (stating that in the context of civil commitment, predictions of “future dangerousness . . . should be based on the occurrence of such episodes in the recent past.”).

<sup>125</sup> Raelene Freitag & Madeline Wordes, *Improved Decision Making in Child Maltreatment Cases*, 3 J. CTR. FAM., CHILD. & CTS. 75, 75 (2001) (explaining how risk assessment tools help to categorize families, but do not provide a reliable predictor of specific behavior).

<sup>126</sup> MINN. STAT. § 260C.301 (1)(b)(8) (2003).

<sup>127</sup> MINN. STAT. § 260C.007 (24)(c) (2003).

to focus the court on parental behavior while the child has been in foster care rather than on the mere passage of time.

In contrast to Minnesota's approach, the terms of ASFA sidestep the relationship between the passage of 15 months in foster care and the imperative that the state must establish parental fault. In circumventing the constitutional requirement that the state prove parental unfitness by clear and convincing evidence before terminating parental rights, the law does a disservice to both parents and children. Children who have been in foster care for fifteen months or more, who are not likely to return home safely in the near future, and for whom a permanent home has been identified should be able to take advantage of ASFA and be legally adopted and integrated into new families. But if the state fails to come to grips with its burden to prove parental unfitness, it may wrongfully deprive parents and children of a legally protected relationship that is beneficial to the children and unwittingly subject such children to continuing uncertainty in the form of a lengthy appeals process.

In order for ASFA's 15/22 month provision to survive wider appellate scrutiny, the state (including both the child welfare and court systems) bears the onus of keeping each case on schedule in accordance with the statute's time lines and of insuring that parents receive the services they need. If the state were to accomplish these goals, any efforts to terminate parental rights in neglect cases would necessarily be based on allegations of persistent unfitness in the face of opportunities to change and not merely the passage of time. The burden on the state promotes the child's legal and developmental interests as well as the parent's rights because the child may not be well served by an unnecessary permanent separation from a parent whom the child regards as his or her primary caretaker.

In addition to the individual children whose unique histories indicate that they should not be severed from their parents, there are identifiable and predictable subclasses of children who should not be permanently separated from their mothers based solely on the clock running out at fifteen months. Examples of these circumstances are the focus of the next section.

### III. Hard Categories, Harder Cases

Current federal law retains the prevention and reunification provisions that were enacted as part of the Child Welfare Act of 1980.<sup>128</sup> ASFA modifies the “reasonable efforts” provisions of the 1980 Act by providing that some small proportion of children have been hurt so badly, and some parents are so clearly incapable of transformation, that in those cases, time and resources should not be wasted on fruitless efforts that disserve children who will never go home.<sup>129</sup> In all other instances, ASFA as integrated with pre-existing law requires that “reasonable efforts shall be made to preserve and reunify families.”<sup>130</sup> “Reasonable efforts” include providing services that would “prevent or eliminate the need for removing the child from the child’s home,” as well as services following removal “to make it possible for a child to safely return to the child’s home.”<sup>131</sup> Consistent with its vision of termination after a child has remained in foster care for 15 months, however, ASFA specifies that the state is no longer obligated to provide services to the family after the expiration of the 15 month period.<sup>132</sup>

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<sup>128</sup> See discussion, *supra* note 100.

<sup>129</sup> 42 U.S.C.A. § 671 (a)(15)(D) (defining the “aggravated circumstances” which eliminate the requirement that the state make “reasonable efforts” to preserve the family).

<sup>130</sup> 42 U.S.C.A. § 671 (a)(15)(B).

<sup>131</sup> *Id.*

<sup>132</sup> Pub. L. 105-89 § 1305 (b)(2) (codified at 42 U.S.C. § 629a (7)(A)) (time-limited family reunification services designed to “facilitate the reunification of the child safety” apply “only during the 15-month period that begins on the date that the child . . . is considered to have entered foster care.”). Some states provide services for a shorter period of time. In Utah, a parent may not receive reunification services for more than twelve months, or, if child is under three years of age, eight months. UTAH CODE ANN. § 78-3a-311 (2)(c)(iii), (2)(f) (2003). Such statutes underscore that the “overarching purpose” of the child welfare laws is to “provide stability and permanency for abused and neglected children” by indicating a clear legislative intent that “ a parent wishing reunification with his or her child must act quickly towards that end.” *Utah v. S.L.*, 995 P.2d 17, 28 (Utah Ct. App. 1999).

By allowing the state to curtail services for the mother after a child has been in foster care for 15 months (regardless of when the mother actually began to receive the services), ASFA may exacerbate the constitutional infirmities of the 15/22 months rule, as viewed from the perspective of the parent's rights. A range of common parental problems, such as substance abuse, imprisonment, and domestic violence, are not amenable to speedy resolution. Under ASFA, each of these problems might form the basis for termination of a mother's rights as soon as the fifteen month period expires, even if the child could potentially be kept safe in the home with sufficient services. Some children of mothers who have such problems might be better served by preservation of the parental bond than by termination. An individualized determination of the child's best interests would weigh such factors as the child's age, the specific nature of the mother-child relationship, demonstrated harm to the child, and the identified placement alternatives. Because ASFA imposes a categorical imperative that parental rights be terminated after the passage of a certain amount of time, it does not appear to permit the exercise of judicial discretion in response to the best interests of those children who would be better off retaining a legal relationship with their mothers.<sup>133</sup>

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<sup>133</sup> See U. S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, GAO-02-585, 6-7 (June 2002).

## A. Substance Abuse.

Substance abuse is highly correlated with child neglect and abuse. When Congress adopted ASFA, it noted that, along with poverty, substance abuse is “one of the three most common reasons for children entering foster care.”<sup>134</sup> Substance abuse occurs in “up to 80% of substantiated abuse and neglect cases.”<sup>135</sup> Both alcohol dependency and regular use of illegal substances show a high correlation with child neglect, although direct causation has not been demonstrated.<sup>136</sup> The General Accounting Office reports that most children in foster care have at least one parent who abuses one or more illegal drugs such as cocaine, methamphetamines or heroin, and most parents who use illegal substances have done so for five years or more, suggesting that they will not be readily amenable to rehabilitation.<sup>137</sup>

The common relationship between the removal of children from their homes and a variety of biases involving race, class and other norms has been widely noted, and some of those factors may also be implicated in child welfare cases involving substance

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<sup>134</sup> H. R. Rep. No. 105-77 at 19.

<sup>135</sup> Id. Other commentators point to a smaller but still impressive percentage of substance abuse among the parents of children in the child welfare system. Mary O’Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL’Y 243, 245 (1999)(stating that two thirds of the children within the child welfare system surveyed had at least one parent with a substance abuse problem). For purposes of the discussion here, it is not material whether substance abuse causes child maltreatment or whether caseworkers become involved with families where substance abuse is suspected because the caseworkers believe that abuse and maltreatment are linked.

The text accompanying footnotes 135-150 is indebted to research assistance provided by Eliza Kaiser, University of Pennsylvania Law School class of 2002.

<sup>136</sup> See Yuriko Egami, *Psychiatric Profile and Sociodemographic Characteristics of Adults Who Report Physically Abusing or Neglecting Children*, 153:7 AM. J. PSYCHIATRY 921, 923, 926-27 (1996).

<sup>137</sup> U. S. GEN. ACCOUNTING OFFICE, *FOSTER CARE: AGENCIES FACING CHALLENGES SECURING STABLE HOMES FOR CHILDREN OF SUBSTANCE ABUSERS*, GAO/HEHS-98-182, 2 (Sept. 1998).

abuse.<sup>138</sup> It is, however, misguided to ignore the pernicious effects that parental substance abuse may have on children, regardless of the precise substance of choice.<sup>139</sup> Substance abuse can alter judgment, diminish impulse control, and stimulate aggression. At the core of the problem, substance abuse may make it impossible for a parent to perceive – much less respond to -- a child’s needs. The inability to perceive the world around her accurately often interferes with the parent’s ability to minister to the child’s most basic needs.<sup>140</sup> As one teenager reflected, looking back on a substance-abusing mother, “I realize that drugs were more important than me, that I didn’t come first in my mother’s life. She wasn’t worried about if I ate or where I slept – she was more worried about drugs.”<sup>141</sup> Another teen summarized her experience with a substance-abusing mother, saying, “She was always off doin’ her own thing. She wasn’t even really a mom.”<sup>142</sup>

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<sup>138</sup> See generally DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L. J. 1249, 1256-61, 1291-92 (1999).

<sup>139</sup> See ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT AND THE ADOPTION ALTERNATIVE*, 67-81, 207-32 (1999). *But cf.* Mabry, *supra* note 20, at 620 n.84. (“On the other hand, it would be a grave mistake for one to make a generalization that presupposes that alcoholics and drug users neglect their children.”).

<sup>140</sup> U. S. GEN. ACCOUNTING OFFICE, *supra* note 125, at 12. See also Egami, *supra* note 12, at 927. In the early 1980s, as an Assistant Professor of History at the Yale Child Study Center, I worked closely with Albert Solnit and Joseph Goldstein on a number of problems, including an effort to promote individualized consideration of whether a parent’s substance abuse in fact interfered with the child’s care in each individual case. If, for example, a substance abusing mother meets the child’s needs or makes reliable arrangements for a relative to care for the child, the state should not take the position that substance abuse equals prima facie neglect. See generally ALBERT J. SOLNIT, BARBARA F. NORDHAUS AND RUTH LORD, *WHEN HOME IS NO HAVEN: CHILD PLACEMENT ISSUES* (surveying cases of child abuse and neglect) (1992).

<sup>141</sup> THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, *NO SAFE HAVEN: CHILDREN OF SUBSTANCE ABUSING PARENTS* 18 (1999)[hereinafter CASA] (quoting Felicia, age 17).

<sup>142</sup> CASA at 16 (quoting LaTasha, age 18).

For purposes of this discussion, it is not necessary to enter into the debate over whether substance abuse has its genesis in illness, is a rational response to stress, or results from moral failings.<sup>143</sup> From the perspective of the ASFA timeline, the critical issue is that “parents are frequently ordered to undergo drug treatment or other counseling as a condition to regaining custody of a child in foster care. Given the realities of limited funding, it is not uncommon for there [sic] to be waiting lists to receive such services.”<sup>144</sup> Thirty-nine of the 46 states that responded to a recent federal survey reported that they lacked sufficient drug treatment programs.<sup>145</sup> The dearth of services is even more pronounced for women than for men.<sup>146</sup> Social workers report that many women feel trapped - they fear that if they voluntarily enter a treatment program, they run the risk that their children will be removed from them and placed in foster care.<sup>147</sup> Policies that result in forced separation of children from mothers who enter treatment programs run counter to research suggesting that mothers who are able to keep their children while in treatment are more likely to complete treatment successfully.<sup>148</sup>

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<sup>143</sup> Judges have been criticized for being unclear about the genesis of substance abuse and arbitrary in their recommendations for possible treatment. See Richard C. Boldt, *Rehabilitative Punishment And The Drug Treatment Court Movement*, 76 WASH. U. L.Q. 1205, 1230-34 (1998).

<sup>144</sup> *In re H.G.*, 757 N.E.2d at 872 (lamenting the fact that if the state makes “reasonable effort[s] to get the parent the appropriate treatment,” the clock will keep running even if the services are never provided).

<sup>145</sup> U. S. GEN. ACCOUNTING OFFICE, *supra* note 137, at 42 & n.65.

<sup>146</sup> U.S. DEP’T OF HEALTH & HUMAN SERVICES, BLENDING PERSPECTIVES AND BUILDING COMMON GROUND, A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION (Apr. 1999). This report was prepared in response to ASFA’s recognition that substance abuse services need to be more closely linked to child protective services. H.R. Rep. No. 105-77, at 15 (requiring HHS to report on the problem).

<sup>147</sup> CASA at 35. See also United States General Accounting Office, *supra* note 122, at 42 & n.65 (reporting inadequate resources for treatment and a lack of collaboration between treatment providers and child welfare agencies).

<sup>148</sup> CASA at 36; Polina Friedland, *Children and Mothers at Risk: A System Failing to Alleviate the Devastation of Drug Abuse*, 10 S. CAL. INTERDISC. L.J. 107, 124-26 (2000).

Even where services are available, substance abusers often require several courses of treatment before they stop relapsing (and some never succeed in breaking the cycle of addiction or significantly improve their ability to function).<sup>149</sup> From the vantage point of a mother's parental rights, this suggests that when the state removes children because of neglect stemming from a mother's substance abuse, the 15-month clock is likely to run before a mother can establish that she has successfully completed treatment. The running of the clock is of equal concern from the child's point of view if it means that the child loses the chance to have a sound relationship with a parent because timely, comprehensive treatment is not available for that parent.<sup>150</sup>

The likelihood that a mother will regain custody of a child who has entered the child welfare system is further diminished if the mother is incarcerated as a result of her abuse of illegal substances. As many as eighty percent of incarcerated women are mothers, and most of those are single mothers.<sup>151</sup> Nearly two-thirds of women in state prisons report that their children lived with them until they were incarcerated.<sup>152</sup> If a woman is in prison because of drug related offenses, the court may have been required to sentence her under mandatory sentencing guidelines without discretion to consider the

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<sup>149</sup> See *E.g.*, NORMAN K. DENZIN, *TREATING ALCOHOLISM* 88 (1987) (estimating that up to seventy percent of those completing rehabilitation for alcohol abuse relapse within six months).

<sup>150</sup> CASA at 8 ("Every child has a right to have his or her substance-abusing parents get a fair shot at recovery with timely and comprehensive treatment.").

<sup>151</sup> Mariely Downey, *Losing More Than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 *BUFF. WOMEN'S L.J.* 41, 41, 45 (2001); See also Leslie Acoca & Myrna S. Raeder, *Severing Family Ties: The Plight of Nonviolent Female Offenders and Their Children*, 11 *STAN. L. & POL'Y REV.* 133, 136 (1999) (explaining that the "war on drugs" disproportionately impacts women and deprives children of their mothers).

<sup>152</sup> Christopher J. Mumola, *Incarcerated Parents and Their Children*, Bureau of Justice Statistics Special Report NCJ 182335 (U.S. Dep't of Justice) Aug. 2000 at 4.

impact of the sentence on her children.<sup>153</sup> When men who live with their children enter prisons, over 90% report that the children remain with the child's other parent; only one percent of children of male inmates entered foster care.<sup>154</sup> In stark contrast, only 28% of women prisoners report that their children are living with the children's father.<sup>155</sup> Although over half of the children of women prisoners live with grandparents or other relatives, nearly 10% of women prisoners report that their children have entered foster care – putting them at risk of termination of parental rights since the average mother in a state prison is expected to remain there for 49 months.<sup>156</sup>

If applied mechanistically, the 15/22 months rule would be a death knell for the parental rights of all parents with children in foster care who remain in jail for more than a year and a half. From the vantage point of the incarcerated mother who wishes to retain a relationship with her child, the state's reliance on the 15/22 months rule seems patently unfair. As one women's advocate explained, “[f]or many inmates, children are a life-sustaining force. To break that bond is a punishment of the worst kind.”<sup>157</sup> In order to avoid categorical severance of the parental rights of all incarcerated women, courts could perform an individualized assessment. Such an assessment could examine the mother's

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<sup>153</sup> *Id.* at 6; Nicole S. Mauskopf, *Reaching Beyond the Bars: An Analysis of Prison Nurseries*, 5 CARDOZO WOMEN'S L.J. 101, 104-5 (1998).

<sup>154</sup> Acoca & Raeder, *supra* note 151, at 136.

<sup>155</sup> Mumola, *supra* note 152, at 1.

<sup>156</sup> *Id.* at 1, 3. In contrast, less than 2% of male state or federal prisoners who lived with their children before entering prison report that their children are in foster care. The data do not indicate whether any of the children in foster care are in a kinship foster care arrangement, in which case ASFA would not require the state to file a petition to terminate parental rights (“TPR”).

<sup>157</sup> Acoca & Raeder, *supra* note 151, at 136 (quoting the United Nations Special Rapporteur on Violence Against Women).

fault and predict her future behavior by looking at such factors as whether she has pursued opportunities for treatment, cooperated with and completed services that were made available, relapsed and tested positive for drugs, experienced further arrests, and whether she used every available means to maintain contact with her child (such as writing letters, calling and seeking visits). Unfortunately, effective treatment programs for women involved with the criminal justice system are virtually non-existent.<sup>158</sup> But under ASFA, the incarcerated mother could permanently lose her rights to her child even if she made every feasible effort to rehabilitate herself, communicate with her children or have them visit her in jail.<sup>159</sup> Regardless of what the court finds about the relationship between a particular mother and her child, the 15/22 months are likely to expire while the mother remains in prison.

Even where courts insist that the state establish a ground for termination other than the passage of time, incarceration is likely to contribute to termination under more generalized theories of fault. Appellate courts in several states have expressly held that termination may not be based solely on the parent's incarceration.<sup>160</sup> In most instances,

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<sup>158</sup> *Id.* at 138-140.

<sup>159</sup> *In the Matter of J.L.N.*, the Nevada Supreme Court found that the mother overcame the statutory presumption that her child's best interests would be served by termination. 55 P.3d 955 (2002). The mother, who the court noted had no substance abuse problems and had provided a stable home for her children for several years, was serving a sentence for violating the conditions of her parole on an old conviction for forging checks, after her boyfriend turned her in to authorities for leaving the state without permission. Over the mother's objections, the children were left in the care of the boyfriend, who subsequently abused them. The children were placed in foster care in another state. The child welfare authorities refused to transfer the children to the custody of their maternal grandmother, whose home was in the state where the mother was serving her sentence. The mother fulfilled every condition of her case plan that could be accomplished while she was in prison, maintained contact with her children and the child welfare agency, and was scheduled to be released no later than 11 months after the trial court terminated her rights (before the ruling issued on her appeal). *See id.* at 956-958. The court overturned the lower court's decision terminating the mother's parental rights because the trial court had found parental fault "solely based 'on the passage of time.'" *Id.* at 960.

<sup>160</sup> *Id.* at 961 (reversing termination); *Johnson v. Arkansas Dep't of Human Services*, 78 Ark. App. 112, 120, 82 S.W.3d 183, 188 (Ark. Ct. App. 2002) (affirming termination); *In re Dependency of J.W. v. Williams*, 90 Wash. App. 417, 426, 432, 953 P.2d 104, 109, 112 (Wash. Ct. App. 1998) (affirming

however, courts treat incarceration as a factor in determining whether the parent will be able to resume parenting obligations, looking at “factors being related to incarceration” rather than deciding to terminate parental rights based “solely” on the fact of incarceration.<sup>161</sup>

Commentators have largely overlooked two recent changes to the federal law, which courts are likely to erroneously view as “factors being related to incarceration” bearing on a mother’s ability to resume parenting responsibility. First, as part of the Temporary Assistance for Needy Families (“TANF”) legislation, Congress “stipulated that persons convicted of a state or federal felony offense involving the use or sale of drugs are subject to a lifetime ban on receiving cash assistance and food stamps.”<sup>162</sup> Forty-two states are enforcing the ban in full or in part and, although it applies only to benefits for the mother, it is likely to diminish the household income of paroled drug offenders significantly and result in the mother’s “neglect” of children who have been returned to her.<sup>163</sup> In a second development during 1996, the federal government authorized local Public Housing Authorities to obtain criminal records and to use

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termination); *In re R.P., M.P. and G.P.*, III, 498 N.W.2d 364, 368 (S.D. 1993) (affirming termination); *In the Interest of P.O.M.*, 255 Ga. App. 534, 536, 566 S.E.2d 334, 337 (Ga. Ct. App. 2002) (affirming termination) (citing *In the Interest of R.H.*, 240 Ga. App. 551, 553(2), 524 S.E.2d 257 (Ga. Ct. App. 1999)); *In re Interest of Brettany M. et al. v. Brett W.*, 11 Neb. App. 104, 120, 123, 644 N.W.2d 574, 587, 590 (Neb. Ct. App. 2002) (affirming termination).

<sup>161</sup> *Brettany M.*, 644 N.W.2d at 588 (upholding termination in the case of a father who was the primary caretaker of special needs infant and her sibling, had petitioned the court to establish paternity and gain custody, but who was serving at least nine years in prison for assaulting the children’s mother).

<sup>162</sup> Patricia Allard, *Life Sentences: Denying Welfare Benefits to Women Convicted on Drug Offenses* (Washington D.C.: The Sentencing Project 2002) at 1, (citing the Personal Responsibility and Work Reconciliation Act of 1996, Pub. L. No. 104-193 § 115 (a) (1996)).

<sup>163</sup> *Id.* (reporting the results of a study of the 28 states that imposed “immediate and lifetime ineligibility following a conviction” affecting 92,000 women as of December 2001 and calling for repeal of the provision as likely to lead to the dissolution of families).

information about drug convictions to deny public housing to people “hav[ing] a drug conviction or are suspected of drug involvement.”<sup>164</sup> This provision may not only bar mothers convicted of drug offenses from obtaining public housing, it also may mean that they cannot stay with relatives in public housing without subjecting their hosts to the risk of eviction. The combined blow of a lifetime ban on welfare benefits and lack of access to public housing severely diminishes the prospect that a mother newly released from prison will be able to convince authorities that she can provide a safe home for her children. Since ASFA provides that the state does not have to engage in “reasonable efforts” after a child has been in foster care for 15 out of 22 months, the poverty that results from a mother’s status as a drug offender may be transformed into an unwarranted justification for permanently severing her from her children.

In the absence of broader social reform, however, termination because a relationship has withered while a parent is in prison fulfills ASFA’s intention to require the law to look at foster care through the child’s eyes. From the viewpoint of a young child, it may not matter why her mother is unable to care for her. What matters is that whatever stability she once had has been disrupted, her mother has not been her primary psychological parent and, perhaps (if she is lucky), someone else now occupies that place in her life.

Conflict between the needs of the child and the desires of the parent may be brought to a head even before termination is an issue. The mother may have a right to maintain her relationship with her child even while using drugs or incarcerated, but the

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<sup>164</sup> *Id.* at 12 (citing Housing Opportunity Program Extension Act of 1996, Pub. L. No. 104-120 (1996)). For a discussion of how this policy undermines the “authority of poor black and brown” mothers over their children, see Regina Austin, “*Step on a Crack, Break Your Mother’s Back*”: *Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 *YALE J. L. & FEMINISM* 273 (2002).

child may have an equally strong claim not to have contact with a parent if such contact is more harmful than beneficial. Consider, for example, a young child in a stable, pre-adoptive foster home, who has no memory of either of his drug-addicted parents. One parent—who is still addicted to crack—has vanished, and cannot be located by the child welfare agency. The other parent, who is in prison on charges related to drugs and has not seen the child for several years, requests that the agency bring the child for a visit and the agency complies. As a result of contact with his virtually unknown parent in jail, the child experiences severe developmental setbacks. These setbacks include rage, severe enuresis, and other behavioral manifestations so pronounced that the foster parents reconsider whether they want to adopt the boy, ultimately asking the agency to remove him from their home. Meanwhile, the parent is granted parole, expects to be released shortly, and seeks custody.<sup>165</sup>

How should a court respond to an absent parent's demands for continued visitation and custody? The child's best interests must weigh heavily in the decision, but that is not necessarily a sufficient response to the claims of parental rights, especially if the parent has completed drug counseling and was a model prisoner. On the other hand, it is hard to imagine how a parent newly released from prison, without an apartment or a job, whose kin were not available to care for the boy when the parent was sentenced, will be able to handle the stresses of parenting a demanding child while seeking to adjust to life after prison. These conflicting priorities of mothers' rights and children's needs may

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<sup>165</sup> This example is based on a consultation by the author. In this instance, the parent who disappeared was the mother, and the imprisoned parent was the father, but the sex of the imprisoned parent does not affect the analysis. A remarkably similar reported case is *Dependency of J.W.*, 953 P.2d 104, except that J.W.'s father, a serial rapist, was likely to remain in prison until she reached maturity. Because seven-year-old J.W. had no bond with her father, and "appeared bored and confused when she visited him in jail," the trial court denied the father the right to have her visit him in prison as harmful to her welfare. *Id.* at 110, 112.

be irreconcilable both as a matter of generally applicable law and as applied to specific cases. Congress concluded that such conflicts must be resolved in favor of the child's needs, whether or not the mother is at "fault" in the sense of intent, omission or other facts suggesting accountability as opposed to strict liability. When a court is confronted with such a choice, the child's interest outweighs the parent's claim because the legislature has made it clear that the consequences of any other decision are too harmful to the child and, ultimately, to society.<sup>166</sup> As the State of Washington's highest court pronounced even prior to the ASFA regime, "when the rights of parents and the welfare of their children are in conflict, the welfare of the minor children must prevail."<sup>167</sup>

This child-centered view does not depend on any interpretation of mothers as good or bad, self-sacrificing or selfish. It reflects the law's intervention as defender of those least able to protect themselves; even where women have been victimized or unfairly treated, the law presumes that adult women can rise to their own defense at least to some extent but that children cannot. Even within that framework, however, the principle of balancing irreconcilable claims in favor of the child rather than the mother should not allow the law to sidestep the analytical question of how to reconcile placing children first with the liberty interests of parents, as it attempts to do under ASFA's 15/22 month rule.

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<sup>166</sup> *In re Doe*, 159 Ill.2d 347, 370-71, 638 N.E.2d 181, 191-92 (Ill. 1994) (Supplemental Opinions Upon Denial of Rehearing) (McMorrow, J., dissenting from the denial of rehearing) (arguing that whether the parental rights doctrine or the best interests of the child should prevail is a matter for the legislature to determine, but the court should hear questions including "the extent of the court's duty to protect children when that protection may conflict with parental rights established by law.").

<sup>167</sup> *In re K.R.*, 128 Wash.2d 129, 146, 904 P.2d 1132, 1141 (Wash. 1995). (quoting *In re Sego*, 82 Wash.2d 736, 738, 513 P.2d 831, 832 (Wash. 1973)). *See also* *Johnson v. Arkansas Dep't of Human Services*, 78 Ark. App. 112, 119, 82 S.W.3d 183, 187 (Ark. Ct. App. 2002) ("Parental rights . . . will not be enforced to the detriment or destruction of the health and well-being of the child.").

In the final section of this paper I turn to a category of cases involving domestic violence, in which the independent but mutually supportive interests and liberty claims of mother and child may remain congruent in the face of the challenge the 15/22 month rule poses to their ability to survive as a family.

### **B. Battered Mothers and Their Children.**

A large number of incarcerated women, presumably including some of the jailed substance abusers discussed in the previous section, have experienced domestic abuse.<sup>168</sup> But many other victims of domestic violence who have no history of drug abuse, have never been imprisoned and have neither abused nor neglected their children, the women who are the focus of this section, are also at risk of having their children removed from their care. Advocates for battered women and their children have succeeded in promoting the widespread realization that children who witness domestic violence are its victims even if the children do not suffer physical trauma themselves.<sup>169</sup> This development, however, had an unanticipated effect when it resulted in the removal of children from battered mothers who had succeeded in protecting them from witnessing any abuse, or who had successfully extricated themselves from their relationships with their abusers.<sup>170</sup>

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<sup>168</sup> See Naomi Cahn, *Battered Women, Child Maltreatment, Prison and Poverty: Issues for Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & LAW 355, 359 (2003).

<sup>169</sup> See generally Judith J. Gische, *Domestic Violence as a Factor in Custody Determinations in New York State*, 27 FORDHAM URB. L.J. 937 (2000) (discussing "a growing national trend to give greater attention to the serious effect domestic violence has on children."); Laurel A. Kent, Comment, *Addressing the Impact of Domestic Violence on Children: Alternatives to Laws Criminalizing the Commission of Domestic Violence in the Presence of a Child*, 2001 WISC. L. REV. 1337, 1342 (arguing that realization of underreporting of domestic abuse has led some researchers to estimate that more than 90% of domestic violence incidents are "witnessed" by children); Jeffrey Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. OF INTERPERSONAL VIOLENCE 839 (1999) (reviewing the social science and medical literature); AMERICAN BAR ASSOCIATION, *THE IMPACT OF DOMESTIC VIOLENCE ON CHILDREN*, 1 (American Bar Association 1994) (estimating that up to 10 million children may witness domestic abuse annually).

<sup>170</sup> The unanticipated loss of custody by mothers occurs in the private law sphere as well as in the child welfare system. See Gische, *supra* note 169, at 937-38. (discussing a 1996 New York State statute requiring

Mothers who are victims of domestic violence too often become the subjects of “double abuse,” in the words of District Court Judge Jack Weinstein: first by a partner and then by the state “through forced unnecessary separation of the mothers from their children on the excuse that this sundering is necessary to protect the children.”<sup>171</sup> *In re Nicholson*, a case that should become a landmark, Judge Weinstein considered the claims of a class of battered mothers whose children were deemed neglected by the New York City Administration for Children’s Services (“ACS” or “the City”) solely because the mother was a victim of domestic abuse. (The court also considered the claims of a court-created subclass of their children.)<sup>172</sup> Judge Weinstein reflected early on that the case involved “three sometimes conflicting principles”:

First, as a parent, a mother has rights to uninterrupted custody of her children and a child has rights to remain with parents; within wide limits, adults and children in a household are immune from state prying and intrusion. Second, domestic abuse – particularly if physical – of a mother or child will not be tolerated. Third, the state has the obligation to protect children from abuse, including, where clearly necessary to protect the child, the power to separate the mother and child.<sup>173</sup>

The court held that the City had violated the right of mothers and children to live together (the first principle) by misconstruing its mandate not to tolerate domestic abuse (the second principle) and by unjustifiably relying on that mandate when it misused its power

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that the court must consider the issue of domestic violence in determining custody disputes, when raised by either party, but providing no guidance on how to define violence or how heavily to weigh it).

<sup>171</sup> *Nicholson v. Williams*, 203 F. Supp.2d 153, 163 (E.D.N.Y. 2002) (granting a mandatory preliminary injunction), supplementing 181 F. Supp.2d, 182 (E.D.N.Y. Jan. 3, 2002), question certified by *Nicholson v. Scopetta*, 344 F.3d 154 (2d Cir. 2003), certified question accepted, 2003 WL 22770072 (N.Y. Nov. 25, 2003) (No. USCOA 2, 171).

<sup>172</sup> *Id.* at 165-65. The court offered to create a second subclass of alleged batterers, but no one appeared to join that class. *Id.* at 165.

<sup>173</sup> *Id.* at 164.

to separate children from their mothers in order to protect the children from abuse (the third principle).<sup>174</sup>

The ten women named as plaintiffs in *Nicholson* display remarkable similarities. Not one plaintiff mother had struck or physically abused her child. In each instance, one or more children were removed from a battered mother either because the batterer had also attacked the child (and the mother had “failed to protect the child”),<sup>175</sup> or more commonly, because the mother either had not extricated herself from the abusive situation or, in the process of trying to separate from her abuser, entered a transitional situation that was not deemed appropriate for the child (such as no longer having an apartment to live in). Indeed, the definition of the class omitted battered mothers who had abused their children or were still failing to protect their children from abusers.<sup>176</sup> In many instances, mothers included in the class had been charged with neglect or abuse based on strict liability, even though their children had not witnessed the abuse and had not suffered either physical or emotional harm in the mother’s home.<sup>177</sup>

The sharp parallels to the problems that ASFA’s 15/22 months rule creates for mothers with histories of substance abuse, discussed above in Part III.A, are readily apparent, including the reluctance of many mothers to seek help (even if it were

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<sup>174</sup> *Id.*

<sup>175</sup> See V. Puallani Enos, *Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229, 229-30 (1996) (arguing that women who are victims of domestic violence should only be held accountable for failing to protect their children if they failed to act as a reasonable person in their position would have acted, where they had the ability to affect the outcome).

<sup>176</sup> *Nicholson v. Williams et al.*, 202 F.R.D. 377, 380 (E.D.N.Y. 2001) (the class includes all persons subject to domestic violence or its threat who are legal or de facto custodians of children “but where the children themselves have not been physically harmed . . . by the non-battering custodian”).

<sup>164</sup> *Id.*

available) due to fear that scrutiny will lead to removal of the children from the mother's home.<sup>178</sup> Mothers who are victims of domestic violence, however, have an even stronger argument than substance abusers that they are not "at fault," especially in light of the many obstacles to separating from an abusive situation. These obstacles include the increased physical danger to the woman and her children in the period immediately following her departure, the lack of domestic violence shelters, an inability to find permanent housing, and a lack of employment.<sup>179</sup>

The interaction of the City's treatment of abused mothers and the ASFA time line was not an issue in *Nicholson*,<sup>180</sup> and the record does not indicate that any of the named class representatives in *Nicholson* suffered the termination of parental rights (perhaps in part because they were well represented once they became part of the class). But the issues of removal, passage of time, and delay are likely to mean that some proportion of mothers who are victims of domestic violence will lose their children permanently, for no other reason than that City agencies acted with "benign indifference" while the clock ran to 15 months.<sup>181</sup>

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<sup>178</sup> *Nicholson*, 203 F. Supp. 2d at 204; See also Nancy K.D. Lemon, *The Legal System's Response to Children Exposed to Domestic Violence*, 9 *Future of Children* 71 (1999) (asserting that battered mothers frequently have their parental rights terminated even when neither the mother or batterer has abused the children); Katie Scrivner, *Domestic Violence Victims After Welfare Reform: Looking Beyond the Family Violence Option*, 16 *WIS. WOMEN'S L.J.* 241, 252 (2001) (battered women fear that if they flee and disappear, with or without their children, they will ultimately lose custody of their children).

<sup>179</sup> *Nicholson*, 203 F. Supp. 2d at 194. See also Shelly Kintzel, Comment, *The Effects of Domestic Violence on Welfare Reform: An Assessment of the Personal Responsibility and Work Opportunity Reconciliation Act as Applied to Battered Women*, 50 *U. KAN. L. REV.* 591, 593-602 (2002) (summarizing the literature on the ways in which abusers sabotage women's efforts to train for or maintain employment, the relationship between poverty and domestic violence, and other barriers to leaving).

<sup>180</sup> The three published opinions in the case mention ASFA only once, in the context of the complex interacting federal, state and local statutes and regulations implicated by the issues in the case. See *Nicholson*, 202 F.R.D. at 381.

<sup>181</sup> *Nicholson*, 203 F. Supp. 2d at 163.

The child's independent interest in remaining with his or her mother and siblings or, alternatively, in maintaining a legal relationship with her biological family constitutes a corollary of the mother's interest in preserving her parental rights.<sup>182</sup> ASFA imposes a legal presumption that every child who has been in foster care for 15 out of 22 months would be better off severing ties with her biological parents and moving into a new permanent situation, unless the case falls within one of the three enumerated exceptions. It assumes that although the natural parent may continue to speak legally for the child until the termination proceedings are completed, the state, advocating termination, more accurately represents the child's best interest. In many, or even most, instances, this may be true, especially in cases involving physical abuse of the child. But ASFA leaves no discretion for taking into account the individual child's interest in remaining with her natural family.<sup>183</sup>

The psychological and emotional detriment to a child who is separated unnecessarily from a parent (and siblings) has been well documented.<sup>184</sup> The child suffers the trauma of separation, leading to such symptoms as fear, anxiety, depression, a diminished sense of self and regressive behavior.<sup>185</sup> All of the symptoms associated with

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<sup>182</sup> Commentators have long noted that "the child's best interests would be better served by removing the abuser from the family than by removing the child from the home." Rachel Venier, *Parental Rights and the Best Interests of the Child: Implications of the Adoption and Safe Families Act of 1997 on Domestic Violence Victims' Rights*, 8 AM. U.J. GENDER SOC. POL'Y & L. 517, 534 (2000); See also Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C.L. REV. 577, 588 (1997). Of course, this approach only works when the mother is prepared to leave her abuser.

<sup>183</sup> ASFA provides that older adolescents have the right to decline adoption.

<sup>184</sup> See generally JOHN BOWLBY, ATTACHEMENT: ATTACHMENT (1969); JOHN BOWLBY, ATTACHEMENT: SEPARATION, ANXIETY AND ANGER (1973); JOHN BOWLBY, ATTACHEMENT: LOSS, SADNESS AND DEPRESSION (1980).

<sup>185</sup> *Nicholson*, 203 F. Supp. 2d at 198-200 (quoting expert testimony).

loss occur at the same time that the child “confront[s] an unfamiliar and often dangerous foster care system,” including the frequent pattern of separation from friends, neighborhood and school.<sup>186</sup> Children frequently believe that they are responsible for the breakup of the family following domestic violence just as they do in cases of divorce. The intensity of those feelings may be exaggerated where the state intercedes due to domestic violence because the child does not know whether the battered parent is safe.<sup>187</sup>

One expert has explained that “taking a child whose greatest fear is separation from his or her mother and in the name of ‘protecting’ that child [by] forcing on them, what is in effect, their worst nightmare, . . . is tantamount to pouring salt on an open wound.”<sup>188</sup> Such evidence materially undermines any claim that the state serves the child’s best interests when it separates children from mothers who are victims of domestic violence.<sup>189</sup>

The right of a mother and child to remain together arguably does not belong to the mother alone. The Second Circuit recognized a “right to the preservation of family integrity encompassing the reciprocal rights of both parent and children a quarter of a century ago in *Duchesne v. Sugarman*.<sup>190</sup> Finding a “mutual interest in an interdependent

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<sup>186</sup> *Id.* at 253.

<sup>187</sup> *Id.* at 199.

<sup>188</sup> *Id.* (quoting Dr. David Polcovitz) (opining that children of battered mothers have a significantly elevated risk of separation anxiety disorder).

<sup>189</sup> *See id.* at 200.

<sup>190</sup> *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (reversing dismissal of a complaint pursuant to 42 U.S.C. §1983 based on the separation of two minor children from their mother without her consent and without benefit of a court hearing or order). The Second Circuit reiterated in 1999 that the members of a family have a “fundamental right” to “remain together without the coercive interference of the awesome power of the state.” *Tenenbaum v. Williams*, 193 F.3d 581, 599, 600 (2d Cir. 1999) (holding that a temporary separation for one afternoon did not implicate the family’s substantive due process rights).

relationship,” the Court of Appeals identified what it labeled “consistent support” in Supreme Court decisions concerning the rights of parents.<sup>191</sup> In *Nicholson*, Judge Weinstein expanded this doctrine by enunciating an interest in “familial integrity,” which guarantees all family members a right not to be separated from each other.<sup>192</sup>

Supreme Court opinions skirt the issue but offer some support for the argument that the liberty interest is reciprocal.<sup>193</sup> In *Michael H. v. Gerald D.*, for example, the plurality expressly noted that the Court “never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship” and declined to do so in what it construed as a case involving a claim to preserve a child’s relationships with two “fathers,” one biological and one—the mother’s husband—statutory.<sup>194</sup> In a compelling dissent Justice Brennan went a step further. He recognized that the relationship between the biological father and his child constituted “a

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<sup>191</sup> *Duchesne*, 566 F.2d at 825 (citing *Stanley v. Illinois*, 405 U.S. 545, 651 (1972) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *May v. Anderson* 345 U.S. 528, 533 (1953); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944))

<sup>192</sup> *Nicholson v. Williams*, 203 F. Supp. 2d at 233-34. In its interim opinion on *Nicholson*, the Second Circuit noted that removal of a child from a “blameless” parent presented a serious substantive due process question and observed that the courts of New York State had never “reached the issue as to whether removing a child from a battered mother serves the interests of the child.” *Nicholson v. Scoppetta*, 344 F.3d 154, 173-74 (2d Cir. 2003). New York’s highest court accepted certification of that question as this article was going to press. 2003 WL 22770072, 2003 N.Y. Slip Op. 18877 (N.Y. Nov. 25, 2003). Since constitutional rights are not absolute, presumably the child’s right to family integrity would be overcome by sufficiently compelling state interests (i.e. showing of parental unfitness following procedures that comport with due process requirements). *Smith v. OFFER*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring). (concluding that “if a State were to attempt to force the breakup of a natural family over the objections of the parents and their children without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest, I should have little doubt that the State would have intruded impermissibly on the private realm of family life which the state cannot enter.”). See also *Nicholson*, 203 F. Supp. 2d at 241 (claiming that *Stanley v. Illinois*, 405 U.S. 645 (1972) recognizes “the fundamental right of a parent and child to reside together.”).

<sup>193</sup> See *OFFER*, 431 U.S. at 839. See also *Michael H. v. Gerald D.*, 491 U.S. 110, 131 (1989).

<sup>194</sup> *Michael H.*, 491 U.S. at 130-31.

liberty interest protected by the Due Process Clause,” and acknowledged the child’s claim that she too had a “liberty interest” in that relationship.<sup>195</sup>

I have argued in a variety of other contexts that children may have liberty interests independent of their parents, and that the law should take the young person’s expression of those interests seriously.<sup>196</sup> Applied to ASFA, this argument suggests that where child and parent each assert a complementary independent liberty interest in preserving the parent-child relationship, the court should weigh the child’s argument heavily. Despite its intended focus on the child, ASFA, as currently designed, does not afford courts the opportunity to take the individual child’s views into account. Allowing a child’s views to be heard does not mean that the child’s preferences will trump all other arguments. Among other things, even seriously abused children frequently have strong feelings of attachment to their abusers, and the child’s safety should remain paramount.

ASFA also fails to take the different needs of children of varying ages into account in formulating the 15/22 months rule. Age is one of the factors that should weigh for or against termination because the child’s age has predictable consequences. A child’s age affects the depth of the relationship between the child and the biological parent, as well as the child’s memory of that relationship. The infant placed at birth will obviously have no experience with her biological mother, and may have a well-developed relationship with a foster family, while the 14-year old may have positive feelings toward her mother, and regard the foster family as a recent intrusion. Equally important, if the state terminates the biological mother’s parental rights to a 14-year-old,

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<sup>195</sup> *Id.* at 151 (Brennan, J., dissenting).

<sup>196</sup> See generally Ross, *An Emerging Right*, *supra* note 11; Ross, *Vulnerability to Voice*, *supra* note 11.

she is likely to become a “legal orphan” – a child who is legally free for adoption but for whom the state cannot find an adoptive home.<sup>197</sup> Whether or not they are freed for an adoption that remains only a fantasy, many adolescents who graduate from foster care turn to their biological families for support. If the parental rights of the biological parent have been terminated, legal services lawyers report, teenagers “often come back and say to us, ‘You know, I want that termination vacated because I want to have a connection with my biological family.’”<sup>198</sup>

Existing sibling relationships may be a factor in the resistance some older children mount to adoption because termination of parental rights also terminates the legal relationship between siblings who may be placed separately. Many children in foster care have indicated that one of the most painful parts of their experience was the loss of siblings.<sup>199</sup> When one sibling is adopted, and others remain in foster care, they often lose touch with each other completely.<sup>200</sup> Termination also severs ties with other

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<sup>197</sup> Children over the age of 11 make up nearly half of the foster care population, but less than 14% of the children adopted out of foster care are over 12-years-old. U.S. GEN. ACCOUNTING OFFICE, *supra* note 80, at 21-22 (June 2002) (stating that children adopted from foster care “are much more likely to be under age 12.”). The unintentional – but predictable – creation of legal orphans through termination of parental rights preceded ASFA. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States*, 29 FAM. L. Q. 121, 140 (1995) (“Modern reforms aimed at helping families in need have resulted in creating the highest number of unnatural orphans in the history of the United States.”).

<sup>198</sup> Monica Drinane, *Foster Care & Adoption Reform Legislation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN’S J. LEGAL COMMENT. 441, 444 (2000) (discussing teenagers whose parents’ rights were terminated when the child was six or seven, but who were never adopted). In administering ASFA states distinguish between teenagers and younger children by providing that teenagers must be given the right to consent before they are adopted. U.S. GEN. ACCOUNTING OFFICE, *supra* note 94, at 29. (finding that some teenagers “have strong ties to their families, even if they cannot live with them, and will not consent to adoption.”).

<sup>199</sup> Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L. J. 1249, 1290-91 (1999) (“Separation from siblings remains one of the most devastating aspects of the foster care and adoption systems.”).

<sup>187</sup> See *id.*.

blood relatives including grandparents, aunts, and uncles, with whom the child may have a beneficial relationship of long standing.

Some young people are sophisticated enough to fight to retain important family ties. One 14-year-old resisted an adoptive placement that involved moving out of a foster home in which he had resided for eight years. He insisted that his younger sister needed him and talked about setting up a household in which he and his sister could live together. He fantasized that if the parental rights of his severely neglectful and detached mother were terminated, he would claim custody of his sister from wherever she had been placed when he graduated from the system at age eighteen. Responding to the state's notion that he could no longer linger in the legal limbo of foster care for the four years that remained of his minority, he stated simply, "the law is retarded."<sup>201</sup> He may have been too harsh. But in this instance the law may be "doctrinally challenged." The complexity of parental termination cases may not be amenable to the attractive simplicity of a timeline or any other mechanistic solution. It may not be possible to respond categorically to the needs of all vulnerable children. The application of general principles to specific cases may be more likely to lead to sensitive decisions about each neglected child. This approach would not require us to throw out the ASFA reforms, but rather would call for continued tinkering. The ultimate goal should be to replace blanket presumptions – whether they favor parents, as in the old regime, or children, as in the ASFA regime – with nuanced appraisals of individual relationships that enable judges to

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<sup>201</sup> Based on confidential evaluation files and follow-up provided to the author by Dr. Annie Steinberg of Children's Hospital of Pennsylvania in Philadelphia. This resourceful boy circumvented the system by recruiting a woman from his church to become a foster parent for him and his sister. The arrangement fell apart after the foster mother became ill, and the boy was last known to be living with his grandfather.

respond to the individual child who is, under ASFA, the proper focus of any termination proceeding.

#### **IV. Conclusion**

Termination and permanency raise issues that cut across many visions of the rights of children. In the child welfare context, children clearly have a right to be protected and cared for, if not by their parents, then through the state's intervention. As much as children need to be taken care of, simple substitution of one paternalistic presence (the state) for another (the biological parent) is not sufficiently responsive to children's claims. Just as ASFA recognizes that children's interests may diverge from those of their parents, so too may the interests of children diverge from the presumptions enunciated by the state. From the perspective of rights theory, children often have both a procedural and substantive interest in preserving family relationships that benefit them and a correspondingly strong claim to be legally free to join a new family where the facts warrant it.

If we lived in a world where no child was ever removed unnecessarily, every child who was removed returned home as soon as basic safety could be assured, and well-designed services were available to all who needed them, then a sound legal ground for termination would generally exist after the passage of 15 months. In such a hypothetical world, one whose existence ASFA presumes, the state would be able to demonstrate the grounds for termination by clear and convincing evidence without relying on the mere passage of time. In this hypothetical universe, by the time the state filed for termination of parental rights the claims of mother and child would usually be at odds just as ASFA presumes them to be.

In the messier world that mothers and children actually inhabit, cases at the margins elude easy solutions. These marginal cases raise two separate and equally important legal problems. First, the mother's constitutional interests in her relationship with her child require that the state establish clear individualized grounds for termination. The passage of time, without more, does not appear to satisfy the heavy burden imposed on the state. Second, the child in any individual case may be better off retaining a legal relationship with her mother. Thus, the court considering a petition for termination should be required to hear any arguments a child offers for preserving the relationship and should have discretion to take those arguments into account. Both of these issues may be addressed if courts are required to assess the likelihood that an individual parent will be a fit or unfit parent for the individual child in the near future, rather than relying solely on a categorical 15-month rule.

The irrebuttable presumption embedded in ASFA's 15/22 month rule fails to do justice to every mother and every child that appear in a termination proceeding. The rule prevents courts from considering the narratives of each individual mother and child and of their unique relationship. It ignores context in favor of a bright line rule. In accounting for a child's sense of time and need for continuity, the resolution of each child's case requires consideration of the individual child's unique strengths, vulnerabilities, personal history and desires. The law a crude instrument at best needs to endeavor to respond flexibly to the minority of cases in which an individual child would be better off returning to his or her mother even after the passage of time.

The lack of clear legal grounds for termination under the 15/22 months rule is the elephant in the room that no one wants to talk about. The legal grounds for termination

after 15 months in foster care must be clarified, and the standards must address due process concerns. Clarification would reassure both child welfare agencies and the courts that hear their termination petitions that “permanent” decisions will withstand subsequent judicial review in the rare instances where an appeal is filed. Sensitivity to the constitutional stakes for parents is doctrinally required. A predictive approach, involving judicial scrutiny of whether a parent is likely to be able to resume safe parenting within the child’s time frame, is the test least likely to violate constitutional rights. The predictive approach at its best would integrate consideration of the child’s best interests with assessment of parental fault by asking whether this individual parent would be able to resume parenting responsibility for this individual child, considering the child’s specific developmental needs and time frame.

Children whose circumstances diverge from ASFA’s bright line approach to termination would benefit from restoration of discretion within the parameters of a rebuttable presumption that children who have been in foster care for 15 of the last 22 months should be legally free to enter a new permanent family. Such restored flexibility would enable courts to respond appropriately to individual children whose circumstances do not fit the normative model. An approach that incorporates this flexibility without giving judges unlimited discretion might even help both mother and child come to terms with the court’s decision regardless of who “wins” and who “loses” in any given termination proceeding. A clear nexus between the passage of time and a constitutionally sufficient showing of parental fault would help to insure that the relationship between mother and child is not terminated needlessly in cases where their interests converge, and would also enable courts to take into account the unique child’s

point of view, rather than the viewpoint the state imputes to all similarly situated children.