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INNOVATION HELD HOSTAGE: HAS FEDERAL INTERVENTION STIFLED EFFORTS TO REFORM THE CHILD WELFARE SYSTEM?

Vivek S. Sankaran*

The past thirty years have been marked by an increased federalization of child welfare law, which, like other areas of family law, traditionally remained within the sole purview of state legislatures. Despite increased oversight by the federal government, outcomes for foster children remain unacceptably poor. The number of children in foster care has more than doubled over the past twenty-five years and reports of suspected maltreatment have skyrocketed. Children continue to stay too long in care and have too many placements. Case workers assigned to work with families and attorneys representing parents and children are overwhelmed and rarely provide meaningful assistance. State courts face pressures to move cases through a busy docket rather than spend the time needed to make informed decisions about individual children. Many child welfare systems are or have been subject to court monitoring after evidence that the systems violated the constitutional and statutory rights of families.

This Article explores the unintended consequences of federal involvement in child welfare policy and argues that federal involvement in dictating the substance of child welfare policy must be minimized to spark the vigorous debate and innovation needed to reform child welfare systems. The Article first explores the significant growth in federal laws affecting the foster care system over the past thirty years. Then, it discusses the unintended consequences of this growth, primarily its impact on stifling much needed innovative approaches and rigorous debate in the area. Finally, the Article proposes that the federal government’s role in child protection issues should be limited to four areas: 1) supporting, not supplanting, the states’ responsibility to design systems to meet the needs of their families; 2) ensuring that states protect the constitutional rights of parents and children; 3) resolving interstate issues affecting children that cannot be adequately addressed by individual states; and 4) providing research and technical assistance to states as they design their policies.

INTRODUCTION

The past thirty years have been marked by an increased federalization of child welfare law, which, like other areas of family law, traditionally remained within the sole purview of state legislatures. In 1974, the Child Abuse Prevention and Treatment Act

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represented the federal government's first major effort to assuage growing concerns over abused and neglected children. Since that time, the federal government has enacted a plethora of legislation to manage aspects of child welfare. The Adoption Assistance and Child Welfare Act ("AACWA"), the Adoption and Safe Families Act ("ASFA"), the Multi-Ethnic Placement Act ("MEPA"), and the Foster Care Independence Act ("The Chafee Act") only represent a sampling of the ways in which the federal government manages state child welfare systems. The Department of Health and Human Services has developed detailed regulations to administer federal statutes, and a vast machinery now exists in Washington, D.C. to manage federal child welfare programs.

For the most part, federal involvement in child abuse and neglect cases has been welcomed. Federal intervention in child protection matters has attracted much needed attention to the plight of abused and neglected children, substantially increased funding for foster care systems, and sparked procedural changes, such as appointing guardians ad litem to represent the interests of foster children, convening timely court hearings and forcing state courts and agencies to consider a child's permanency needs. The federal government has commissioned reports and studies on child

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8. The ASFA requires periodic review of a court case at least every six months, as well as a permanency planning hearing once every twelve months for as long as the child remains in foster care. 42 U.S.C. § 675(5)(B)-(C) (2000).
abuse and neglect and has taken the lead in developing strategies to improve the well-being of foster kids. At this juncture, few, if any, question the federal government's role in these capacities.9

But have the lives of children over the last thirty years actually improved on account of such federal involvement? That question remains open, as child welfare conditions remain unacceptably poor. The number of children in care has more than doubled over the past twenty-five years and reports of suspected maltreatment have skyrocketed.10 Children continue to stay too long in care and have too many placements.11 Social workers assigned to work with families and attorneys representing parents and children are overwhelmed and rarely provide meaningful assistance.12 State courts

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9. The overwhelming praise for the enactment of the ASFA, the last major federal child welfare initiative, indicates the broad public support federal child welfare policy has received. See, e.g., Jeff Katz, Finally The Law Puts These Kids' Interests First, MILWAUKEE J. SENTINEL, Dec. 28, 1997, at 1; John MacDonald, Two Examples Of Congress At Its Best, HARTFORD COURANT, Nov. 22, 1997, at A11; Bob Hohler, Opening A Door To Stable, Loving Homes, Clinton Signs Law To Make Safety of Children Top Priority In Adoptions, BOSTON GLOBE, Nov. 20, 1997, at A1.

10. “During Federal fiscal year (FFY) 2005, an estimated 3.3 million referrals, involving the alleged maltreatment of approximately 6.0 million children, were made to [child protective services] agencies.” CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2005 xiv (2007). Approximately thirty percent of the investigations determined that a child was a victim of child abuse and neglect. Id. at 5. Between 1990 and 2002, the number of child maltreatment investigations increased by 21.3% despite a decrease in the victimization rate by 7.5%. CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD MALTREATMENT 2004 21 (2004). The number of foster children has also increased over time. Over the past twenty-five years, the number of children in foster care has increased from roughly 262,000 to approximately 500,000. CHILD. BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., THE AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006 (2006), http://ww.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report15.pdf.

11. Twenty-five years ago, there were 262,000 children in foster care. Off. ASSISTANT SEC’Y FOR PLAN. & EVALUATION, U.S. DEP’T OF HEALTH & HUM. SERVS., TRENDS IN THE WELL-BEING OF AMERICA’S CHILDREN AND YOUTH 44-45 (1977), available at http://aspe.hhs.gov/hsp/97trends/intro-web.htm. About forty-eight percent of children spent two or more years in care and about twenty percent were in care for more than six years. Statement on Signing H.R. 3434 into Law, 16 WEEKLY COMP. PRES. DOC. 1124 (June 17, 1980). Today, nearly half a million children are in foster care, fifty percent of whom spend at least two years in care and twenty percent of whom spend five or more years there. THE AFCARS REPORT, supra note 10.

12. Social workers and attorneys handling child protective cases are overwhelmed. THE ANNIE E. CASEY FOUNDATION, THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITION OF THE FRONTLINE HUMAN SERVICE WORKFORCE 9 tbl.1 (2003), http://69.18.145.86/upload/PublicationFiles/the%20unsolved%20challenge.pdf (observing that the annual turnover rate in the child welfare workforce is twenty percent for public agencies and forty percent for private agencies); David Herring, The Adoption and Safe Families Act—Hope and Its Subversion, 34 Fam. L.Q. 329, 333-34 (2000) (describing child welfare systems to be “extremely resource poor, especially in urban areas. Public child welfare agency caseworkers often carry ongoing caseloads in excess of thirty families each... [T]he other actors in these public systems are also extremely overburdened. Attorneys for each of the parties (i.e. the public agency, the parents, and the children) often carry enormous caseloads or devote
face pressures to move cases through a busy docket rather than spend the time needed to make informed decisions about individual children. Many child welfare systems are or have been subject to court monitoring after evidence that the systems violated the constitutional and statutory rights of families. A recent audit conducted by the federal government found that the vast majority of states were not in substantial conformity with federal requirements. In Michigan alone, over six thousand children whose parents’ rights have been terminated await adoptive families. Until then, these legal orphans remain in state custody indefinitely without any meaningful familial relationships. The question begs to be repeated: Are foster children actually better off now than they were thirty years ago, before major federal involvement in the area of child welfare began?

Though advocates may answer this question differently, few, if any, would disagree that much work needs to be done to improve

only a small portion of their time to child welfare cases.”); Editorial, A Legal Hand for Foster Children, S.F. CHRON., Sept. 28, 2005, at B18 (“With many of these lawyers burdened with overwhelming student loans, poorly compensated posts and outrageous caseloads, many are being forced out of these roles that foster children so desperately rely on.”).

15. Herring, supra note 12, at 334 (“Judges also handle very large caseloads within the child welfare system. In some urban systems, each judge will dispose of forty to eighty cases within an eight hour day.”).

14. Children’s Rights Inc., a non-profit legal organization based in New York City has litigated numerous class action cases which have resulted in court oversight over state child welfare systems. See Children’s Rights, Cases, https://secure2.convio.net/cr/site/SPageServer?pagename=cases (last visited Sept. 4, 2007) (listing ongoing and completed cases handled by Children’s Rights Inc.). This list only represents a partial summary of successful systemic actions brought against dysfunctional child welfare systems. See, e.g., CHILD WELFARE LEAGUE OF AMERICA & ABA CENTER ON CHILDREN AND THE LAW, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 2 (2005), http://www.cwla.org/advocacy/consentdecrees.pdf (finding that twenty-one states were either currently under a court approved consent decree or court order or had pending litigation brought against their child welfare agency).

15. Federal audits of the foster care system conducted in 2001 and 2002 found that the majority of states were not in substantial conformity with federal child welfare laws. Ben Kerman, What is the Child and Family Service Review?, Voice, Fall 2003, at 34, 35, http://www.caseyfamilyservices.org/pdfs/casey_voice-iv_2.pdf. One-third of the states did not have an adequate case review system as required by federal law. Id. “Only five states met the criteria for protecting children from abuse and neglect. None of the states reviewed satisfied the outcome of providing children with permanency and stability in their living situations.” Id. Ultimately, not one state passed the audit.

our policies to better address the needs of families affected by the child welfare system. A robust, creative, and energizing debate must occur that re-examines current child welfare policies and charts out future paths for reform.\textsuperscript{17} All options need to be on the table. How much time should the State afford a neglectful or abusive parent to prove her ability to care for her child? Does a policy mandating the reporting of child abuse and neglect further interests in protecting children or does it create an unnecessarily adversarial relationship between parents and the State and also overwhelm child protective agencies? How should scarce public funds be spent? Should relatives be given a subsidy if they obtain guardianship of children to prevent them from entering the foster care system? Should attorneys be appointed for parents and children prior to court intervention in order to explore options other than foster care for these families? What supports should adoptive parents receive to prevent adopted children with serious needs from returning to the foster care system? An endless list of questions emerges to guide the rigorous discourse about the future of the child welfare system.

Where should such a discussion occur? Traditionally, states have been the forum for policy debates involving family law.\textsuperscript{18} Not only do principles of constitutional federalism strictly limit the federal government’s authority to directly legislate on these issues, but as a matter of policy, most would agree that the federal government is ill-suited to mandate specific prescriptions on family law.\textsuperscript{19} As one legal scholar accurately observed:

\textsuperscript{17} The need for creativity and flexibility was acknowledged by the Administration of Children and Families. In a policy statement issued on May 23, 2002, it stated, "Child welfare systems throughout the country continue to face many complex and difficult challenges. New, creative and innovative efforts are needed to stimulate meaningful change in child welfare service delivery and to promote improved outcomes for children and families." CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., INFORMATION MEMORANDUM ON TITLE IV-E CHILD WELFARE DEMONSTRATION PROJECTS REQUESTS FOR EXTENSIONS—PROCEDURES AND CRITERIA (2002), http://www.acf.hhs.gov/programs/cb/laws_policies/policy/im/2002/im0206.pdf.

\textsuperscript{18} See, e.g., United States v. Lopez, 514 U.S. 549 (1995) (observing, in both the majority and the dissent, that family law constituted a clearly defined realm of exclusive state authority); Anne C. Dailey, \textit{Federalism and Families}, 143 U. PA. L. REV. 1787, 1821 (1995) ("From the earliest days of the Republic until the recent past, family law has unquestionably belonged to the states."). But see Jill Elaine Hasday, \textit{Federalism and the Family Reconstructed}, 45 UCLA L. REV. 1297, 1299–1300 (1998) (stating that the federal government played a dominant role in family law during the period of Reconstruction, but arguing against the contention that history demonstrates the exclusive localism of family law).

\textsuperscript{19} In his dissent in \textit{Santosky v. Kramer}, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting), Justice Rehnquist observed that "few of us would care to live in a society where every aspect of life was regulated by a single source of law," \textit{id.}, and that "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the
The communitarian nature of family law requires a level of political engagement and a sense of community identity that lie beyond the reach of national politics. As the quality of political deliberation falls and as the bonds of community thin out, the danger that shared values will degenerate into governmentally dictated values increases. By situating communitarian politics at the state level, therefore, localism ensures that the civic participation, political dialogue, and shared values essential to family law will develop within the states' smaller, relatively more accessible political locales.

Consistent with this view, substantive debates about contentious family law issues occur primarily on the state level. Issues such as gay marriage and adoption, the merits of a joint custody presumption, or the legal grounds for divorce, are left to state legislatures to decide. Divergent approaches allow states to generate information about best practices and present citizens across the country with a spectrum of options from which to choose a system that accords with their moral and philosophical beliefs. As another scholar noted:

Legal decision-makers confront fundamental questions concerning the meaning of parenthood, the best custodial placements for children, the rights and obligations of marriage, the financial terms of divorce and the standards governing foster care and adoption. In answering such questions, state legislatures and courts draw upon community values and norms on the meaning of the good life for families and children.

Regardless of significant policy differences throughout the states on family law issues, no one has proposed that the federal government nationalize family law and usurp the states' authority to make

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21. Id. at 1790.
these policy judgments on general family law matters. Accordingly, family law issues are primarily handled at the state level.\footnote{See Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (quoting \textit{ex parte Burrus}, 136 U.S. 586, 593–94 (1890)) ("[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); Dailey, supra note 18, at 1789 ("[F]amily law constitutes a clearly defined realm of exclusive state authority.").}

However, child welfare policy in particular, which today is driven by federal law, represents a notable exception to this pattern of state control on family law matters. Over the past thirty years, the federal government’s involvement in managing state child welfare systems has increased dramatically, primarily through a series of funding statutes designed to conform state systems to a federal model of what is best for children.\footnote{For a more detailed discussion on federal funding of the child welfare system, see Miriam Rollin et al., \textit{Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process}, in \textit{Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Cases} 143–183 (Donald N. Duquette & Marvin Ventrell eds., 2005).}

Although considerable debate exists about the validity of the federal model,\footnote{See, e.g., Martin Guggenheim, \textit{Commentary: The Foster Care Dilemma and What To Do About It: Is the Problem that too Many Children Are Not Being Adopted Out of Foster Care or that too Many Children Are Entering Foster Care?}, 2 U. PA. J. CONST. L. 141 (1999) (criticizing the Adoption and Safe Families Act); Gary B. Melton, \textit{Mandated Reporting: A Policy Without Reason}, 29 \textit{Child Abuse & Neglect} 9, 14 (2005) (questioning the benefits of mandatory reporting laws driven by federal requirements).} debate on this issue at the state level is stifled. By conditioning states’ receipt of federal funding on a detailed set of statutes and regulations mandating how each individual case \textit{must} proceed, states, which desperately need funding, have very little flexibility to innovate. States looking to receive federal funding are given financial incentives to implement a one-size-fits-all model which places poor children in foster care, terminates parental rights expeditiously and locates adoptive homes immediately. Any State wishing to deviate from federal mandates risks losing millions of dollars.\footnote{See infra text accompanying notes 28–57 (discussing a series of federal child welfare statutes that condition the receipt of federal dollars on state compliance with specific mandates).}

While limiting innovation at the state policy level, federal micromanagement of child welfare policy has also pushed juvenile court proceedings in a direction inconsistent with the individualized needs of children. Faced with the daunting task of complying with a detailed and complex set of federal statutes, state court judges use what limited time they have on cases ensuring compliance with federal policies. Thus, court hearings are often transformed into perfunctory exercises designed to guarantee that the correct box on a pre-printed form is checked. Courts have also
abandoned their sacrosanct role of preventing overreaching and poor decision-making by child welfare agencies, afraid that doing so will reduce federal funding. Achieving outcomes that are best for an individual child is a secondary concern. Instead, the juvenile court judge's priority is to issue orders that will enable the State to maximize the amount of child welfare assistance it receives from the federal government. Creative, case-specific solutions to the problems confronting the family are the exception, not the norm.26

This Article will explore the unintended consequences of federal involvement in child welfare policy and will argue that federal involvement in dictating the substance of state laws must be minimized to spark the vigorous debate and innovation needed to reform the child welfare system. Part I will briefly explore the significant growth in federal laws affecting the foster care system over the past thirty years. Part II will discuss the unintended consequences of this growth, primarily its impact on stifling innovative approaches and rigorous debate in the area. Finally, Part III will propose that the federal government's role in child protection issues should be limited to four areas: 1) supporting, not supplanting, the states' responsibility to design systems to meet the needs of their families; 2) ensuring that states protect the constitutional rights of parents and children; 3) resolving interstate issues affecting children that cannot be adequately addressed by individual states; and 4) providing research and technical assistance to states as they design their policies.

I. Expansion of the Federal Government's Role in Child Welfare

Consistent with the traditional view that the responsibility to confront family law issues rested with state governments, prior to the early 1970s, the federal government assumed a very limited role in child welfare issues.27 In 1974, awakened to issues involving child abuse and neglect by Dr. Henry Kempe's landmark article, The Battered Child Syndrome, and concerned about the inadequacies in state child protection and foster care systems, Congress passed the Child Abuse Prevention and Treatment Act ("CAPTA"), the

26. See infra text accompanying notes 105–116 (discussing ways in which federal child welfare statutes have limited the options available to state court judges to resolve child protection cases).

first in a series of bills in which Congress, exercising its constitutional authority pursuant to the Spending Clause, sought to reform state systems through incentive-based funding. In exchange for receiving funding to support their child welfare systems, states had to agree to federal mandates. Congress, in 1980, followed with the Adoption Assistance and Child Welfare Act ("AACWA") and seventeen years later, amended AACWA in the Adoption and Safe Families Act ("ASFA").

Each of these laws passed with overwhelming bipartisan support. During congressional debates, however, legislators went to great lengths to allay concerns that federal involvement would divest states of the authority to make policy judgments regarding how to meet the needs of foster children. Repeatedly, legislators and executive officials acknowledged that state governments were best suited to craft unique policies for children in their jurisdictions.

28. Id.
29. See supra notes 2-3.
30. Rollin et al., supra note 23, at 144 ("One crucial element of the history of federal child welfare policy making is that the protection of children who are at risk of abuse or neglect, and of children who have been abused or neglected, has been overwhelmingly bipartisan.").
31. Those opposing increased federal involvement in child welfare policy primarily have focused on federalism concerns. For example, during the CAPTA debate, the Nixon administration believed that "local community efforts should be encouraged and supported rather than supplanted by Federal mandates" and that the CAPTA was counterproductive by "mandating specific procedures" on state governments. 119 Cong. Rec. 23,906-07 (1973). Senator Helms stated that the CAPTA represented "another step in the direction of centralizing further power and responsibility in Washington" and that "[c]hild abuse . . . is a crime that States and local governments have as their responsibility." 119 Cong. Rec. 23,907 (1973). Senator Thurmond argued that "the protection of children is primarily a state responsibility" that "should not be controlled by a Federal bureaucracy." 119 Cong. Rec. 23,908 (1973).
32. Supporters of federal child welfare policy argued that increased federal involvement was intended to support state efforts to combat child abuse and neglect. For example, Senator Mondale, a primary sponsor of the CAPTA stated that "[t]he purpose of the 'Child Abuse Prevention and Treatment Act' is to provide support to successful and promising efforts to deal with child abuse." 119 Cong. Rec. 23,903 (1973). Representative Schroeder clarified that the purpose of the Act was simply to "spur the States to strengthen and expand their own programs." 119 Cong. Rec. 39,231 (1973). During the AACWA debates, the House Committee on Ways and Means, in which the legislation originated, stated that the legislation was not intended "to place a new and onerous burden on the States" and that the purpose was to complement and allow for expansion of State efforts. H.R. Rep. No. 96-196, at 37 (1979). Senator Moynihan echoed these sentiments, believing that the CAPTA "does
For example, during the debate on the CAPTA, Senator Javitts, who supported the legislation, recognized that "the Federal Government will serve basically an innovative and catalytic function." Senator Dominick remarked:

This legislation is not intended to establish a permanent Federal program, but to enlarge public and professional awareness, and to stimulate the development of State and private programs which will both reduce the incidence of child abuse and provide treatment to its victims.

After the planning and implementation of State Programs has begun to crystallize, the role of the Federal Government in this area can be reduced if not eliminated.

In the House of Representatives, Representative Eshelman, who also voted for the legislation, observed that "a solution to these problems cannot and will not be found strictly through the Federal Government intervention. This is primarily a State and local matter." Similar statements were made during debates of the AACWA and ASFA, together evincing a legislative intent to limit the role of the federal government in managing state child welfare policy.

In reality, however, a different relationship between the states and the federal government has emerged. Cash-starved states desperate to receive funding for child protective systems have abdicated their authority to develop their own child welfare policies and instead have yielded to increasingly specific mandates made by the federal government on issues of much normative and substantive disagreement, such as when to terminate parental rights and what types of efforts should be made to reunify families. To date, no state has rejected federal fund-

not expect more of the States... than is reasonable to expect of them" nor does it "burden them with excessive regulations." 125 CONG. REC. 29,504 (1979). Similarly, Representative Rangel's statements during the ASFA debates typified the views of many legislators. "We do not have all of the answers here in Washington.... But one thing is clear, that the facts and circumstances surrounding the condition and the welfare of that child is closer to the State than it is Washington, DC." 143 CONG. REC. H2,016 (1997).

34. Id. at 23,907.
35. Id. at 39,228.
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To receive funding, these states must demonstrate that their system matches a host of federal requirements which have become increasingly restrictive over the years. For example, the CAPTA, which was reauthorized in 2003, conditions states’ receipt of federal funds, in part, on the establishment of a comprehensive program for 1) mandated reporting of suspected child maltreatment; 2) responding to those reports with assessment methods that assess the validity of the reports; 3) taking action appropriate to the level of risk of harm; and 4) requiring the appointment of a guardian ad litem to represent the best interests of the child. To avail themselves of federal funding under the statute, states must reapply every five years and submit a plan that complies with the CAPTA’s requirements. Funds under the CAPTA can be used to support efforts aimed at preventing maltreatment and responding to reports of child abuse and neglect.

The AACWA, the ASFA, and detailed regulations issued in 2000 to clarify the scope of these and other federal child welfare statutes impose additional requirements on states looking to receive federal funds. In exchange for federal funding, states must comply with an exhaustive list of requirements. They include, but are not limited to the following: making judicial findings at the first court hearing that leaving the child in her home is contrary to her welfare; making a judicial finding within sixty days of the child’s removal that reasonable efforts were made to prevent the removal of the child from her home (but waiving that requirement when aggravated circumstances are present); developing a detailed case plan within sixty days of removal; initiating an effort to terminate


37. Herring, supra note 12, at 331 n.13 ("Although the states are free to refuse federal funds, no state has exercised this option, and in fact, every state actively seeks and desperately needs federal funds in order to operate their child welfare systems.").
39. Id.
40. Id.
41. § 5106a(b)(2) (A) (xiii).
42. Rollin et al., supra note 23, at 149.
43. 45 C.F.R. § 1356.21(c) (2006).
44. § 1356.21 (b) (1)(i).
45. 42 U.S.C. § 671(a)(15)(D); 45 C.F.R. 1356.21(b)(3).
46. 45 C.F.R. § 1356.21(g)(2).
parental rights within sixty days of removal in certain enumerated circumstances;\(^{47}\) holding a permanency planning hearing every twelve months;\(^{48}\) seeking termination of parental rights when a child has been in foster care for fifteen of the most recent twenty-two months unless specific exceptions apply;\(^{49}\) maintaining the responsibility for the child's placement and care in a public child welfare agency as opposed to a court;\(^{50}\) mandating specific licensing requirements for foster parents and barring certain individuals from becoming foster parents;\(^{51}\) and providing foster parents and other caregivers notice and an opportunity to be heard at any hearing on the child.\(^{52}\) Failure to comply with any one of these and other mandates could jeopardize the states' receipt of federal funding.\(^{53}\)

States complying with the AACWA and the ASFA can receive matching federal funds under Title IV-E of the Social Security Act, which can be used for maintaining and administering the foster care system, adoption subsidies, and training.\(^{54}\) This pool of funds is by far the largest source of federal funding available to states for child welfare programs, and thus, states are particularly sensitive to ensuring compliance with these provisions. Additionally, the statutes provide states with financial incentives to move children into adoptive homes by establishing a baseline of adoptions and awarding states a bonus for each adoption from foster care in excess of that baseline.\(^{55}\) Compliance with these federal provisions is monitored through child and family service reviews which assess state performance based on various indicators.\(^{56}\) State systems that fail this test are given a limited opportunity to implement an improvement plan before losing federal funding.\(^{57}\)

The discussion above is not intended to paint a comprehensive picture of the federal government's involvement in child welfare

\(^{47}\) § 1356.21(i)(ii)–(iii).

\(^{48}\) 42 U.S.C. § 675(5)(C).

\(^{49}\) 45 C.F.R. § 1356.21(i)(1)(i).

\(^{50}\) 42 U.S.C. § 672(a)(2).

\(^{51}\) 45 C.F.R. § 1356.30.

\(^{52}\) § 1356.21(o).

\(^{53}\) 42 U.S.C. § 674(d).

\(^{54}\) See Murray, supra note 36, at 3. Federal reimbursement under Title IV-E is provided for 1) maintenance payments to foster families, covering the costs of shelter, food, and clothing; 2) placement and administrative costs of children in foster care, including case management, eligibility determination, licensing, and court preparation; and 3) training for staff and adoptive parents. Id.

\(^{55}\) 42 U.S.C. § 673b.

\(^{56}\) 45 C.F.R. § 1355.33.

\(^{57}\) § 1355.35.
issues, as many others have already undertaken that task. The brief analysis simply illustrates the tremendous role that the federal government has played and continues to play in managing state child welfare systems. No doubt, federal involvement has generated a lot of positive change for vulnerable families. Key aspects of today's child protective system that many would agree has benefited families, such as appointing guardians ad litem for children, providing foster care and adoption subsidies to caregivers, and convening timely court hearings to address the interests of the children have been sparked by federal laws. In addition, millions of federal dollars flow into state systems annually and the federal government conducts and disseminates timely research on child abuse and neglect through the National Clearinghouse on Child Abuse and Neglect, which was established in the CAPTA. Again, federal involvement has played and continues to play an important and beneficial role in this area. Nevertheless, such expansive federal intervention has resulted in several unintended and negative consequences, many of which have yet to be explored. In what ways has federal involvement stifled reform efforts and creativity in the states? Has it hampered a family court judge's ability to craft creative, case-specific solutions that suit the needs of individual families? Is there a way that federal policy can be redesigned to address the needs of foster children while still encouraging innovation? The next two sections confront these and other questions.

II. UNINTENDED CONSEQUENCES OF FEDERAL INVOLVEMENT

While federal involvement in child welfare has produced positive changes in a number of ways, it has stifled innovation in the states in two primary ways. First, by conditioning receipt of desperately needed federal funds on compliance with specific mandates and by restricting the expenditure of funds to certain programs, the federal government has imposed its normative judgments on states about what is best for children and removed the ability of states to deviate from these policies. Second, state court judges, cognizant that their decisions may jeopardize federal funding, spend their limited time during court hearings carefully crafting orders, using designated words and phrases drawn from federal

58. For a more comprehensive discussion of federal child welfare policy, see generally Rollin et al., supra note 23.
statutes such as "reasonable efforts" and "contrary to the welfare of the child," all in an effort to ensure that federal mandates have not been violated—as opposed to focusing on the individual needs of the children before them.

As illustrated in the previous Section, across the country, the dominant policy concern of state child welfare agencies is to ensure that they maximize federal funding. Annually, the federal government provides billions of dollars of assistance to states to be allocated to their child protective systems, and states rely upon this funding to operate these child welfare systems. Without federal funding, any progress made over the past thirty years would crumble.

Yet, states pay a price for accepting such funds. They must conform their systems to federal mandates and yield their discretion to the federal government in making certain policy judgments about families. Two issues are illustrative of this point: mandatory reporting laws and termination of parental rights. In the CAPTA, the federal government conditioned receipt of federal funds on states by establishing a comprehensive program for mandated reporting and investigation of suspected child maltreatment. Currently, every State has established such a program, and each year, child protective services receives millions of reports of child maltreatment, of which less than a quarter are eventually substantiated as evidence of child abuse or neglect. Though state requirements vary on who must report suspected maltreatment, state systems generally share a similar investigative scheme. Individuals are either required to or can voluntarily call child protective services to report abuse or neglect, a protective services worker is sent to the house to investigate, and he or she makes a finding of whether the allegation should be substantiated or not. Based on this finding, the worker then makes both a risk and safety assessment of the

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60. The terms "reasonable efforts" and "contrary to the welfare of the child" are used throughout federal child welfare statutes. See, e.g., 42 U.S.C. § 671. Pursuant to federal laws, findings, specifically using this language, must be made by juvenile courts in order to preserve eligibility for federal child welfare funding. See Rollin et al., supra note 23, at 152-57.

61. See infra text accompanying notes 105-116 (discussing ways in which federal child welfare statutes have limited the options available to state court judges to resolve child protection cases).

62. Scarcella et al., supra note 36, at 7 (stating that the federal government provides state child welfare systems with over eleven billion dollars in financial assistance each year).


64. See Child Maltreatment 2005, supra note 10, at 5 (noting that 62% of reports were investigated and that 28.5% of those investigations determined that the child was abused or neglected).

children in the home, also required by federal law, and makes a further decision on whether the children should be immediately removed from the home or whether court involvement is necessary. This standard system of investigation, which is utilized across the states, focuses exclusively on whether abuse or neglect has occurred and establishes an adversarial relationship between the State and the parent at the outset of the relationship. Furthermore, because the largest federal grant to states for child welfare involves reimbursing costs associated with housing children in foster care as opposed to preventive services, states have a strong financial incentive to place children in foster care after the completion of this investigative process, as opposed to working with families on a voluntary basis while children remain in their homes.

Yet, while mandatory reporting is the law throughout the United States, it is not universal across the world. In countries such as Belgium, the Netherlands, and Germany, professionals are not required to report abuse or neglect. Those jurisdictions have rejected the process on several grounds, including that it is unnecessary, encourages professionals to diminish their own responsibility to address the problem, and wastes resources that could be better spent on other assistance programs. These nations

66. Id. at 220–22.
67. Id. at 219–23.
68. See, e.g., Judith R. Tackett, Federal Policy Hampers Foster Care, NASHVILLE CITY PAPER, June 17, 2004, available at http://www.nashvillecitypaper.com/news.php?viewStory=33858 (“The federal government gives monetary incentives for states to place children who are in their custody into the foster care system, cutting funding if kids are placed in permanent homes.”). Not surprisingly, the Pew Commission on Children in Foster Care found that “[t]he current federal funding mechanisms for child welfare encourage an over-reliance on foster care at the expense of other services” and “[b]ecause funding for safe alternatives for foster care is so limited, states use placement in foster care more than they might otherwise.” Pew Comm’n On Child. In Foster Care, Fostering the Future: Safety, Permanence and Well-Being for Children in Foster Care 13, 20 (2004), http://pewfostercare.org/research/docs/FinalReport.pdf [hereinafter Fostering the Future].
70. See Catherine Marneffe & Patrick Bross, Belgium: An Alternative Approach to Child Abuse Reporting and Treatment, in Combating Child Abuse, supra note 69, at 167, 170, 177 (citations omitted) (observing that mandatory reporting requirements “make it difficult for health professionals to help and for the abusive parents to ask for help.” In Belgium, “[c]omprehension and compassion, the offer of noncoercive services and support by one agency for those who fail in the familial relationships, are put forward instead of scandal, reporting, and the obligation to visit a specific agency for those who are labeled child abusers.”); Marian A. S. Roelofs & Herman E. M. Baartman, The Netherlands: Responding to Abuse—Compassion or Control?, in Combating Child Abuse, supra note 69, at 192, 199 (“[T]here is the practical fear that a system of mandatory reporting would inhibit abusing parents from voluntarily coming forth to seek help.”); Reinhart Wolff, Germany, A Nonpunitive Model, in Combating Child Abuse, supra note 69, at 212, 215 (describing German child protection
have instead opted for family-centered, preventive approaches, such as home health visitors and parent education as their primary means of addressing the issue.\footnote{71}

In addition to criticism from abroad, many in this country have also decried the process of federally-mandated reporting. Observing that most allegations of abuse are unsubstantiated, and that the vast majority of allegations consist of cases that involve neither serious harm nor immediate physical injury to the child, some have concluded that "[t]he current flood of unfounded reports is overwhelming the limited resources of child protection agencies."\footnote{72} Others have gone farther. Gary Melton, a professor at Clemson University, writes,

\begin{quote}
[T]here is no logical relationship between the problems presented and the response undertaken. The United States and other societies that have adopted the central tenets of U.S. child protection policy have an enormously successful calamitous system that has neither a realistic scientific foundation nor well articulated normative underpinnings.\footnote{73}
\end{quote}

Even the U.S. Advisory Board on Child Abuse and Neglect recognizes the problems associated with relying too heavily on reporting and response mechanisms. The report issued by the Board made the following observations:

The most serious shortcoming of the nation’s system of intervention on behalf of children is that it depends upon a reporting and response process that has punitive connotations and requires massive resources dedicated to the investigation of allegations.\footnote{74}

\begin{footnotes}
\footnotetext[71]{See, e.g., Marneffe & Bross, supra note 70, at 170 (describing creation of specialized centers in Belgium for the prevention and treatment of child abuse and neglect. At these centers, the emphasis is on treatment and not on investigation); Wolff, supra note 70, at 215-16 ("German child protection relies mainly on a full-fledged system of services ranging from low-cost day care to free counseling, from infant health care and social assistance (which guarantee a life above the poverty line), to family services and family aides (homemakers), plus a special network of accessible, regionalized services like the multidisciplinary Child Protection Centers.").}
\footnotetext[72]{Douglas Besharov, Contending With Overblown Expectations: CPS Cannot Be All Things To All People, 45 PUB. WELFARE 7, 7-12 (1987).}
\footnotetext[73]{Melton, supra note 24, at 12.}
\footnotetext[74]{U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 80 (1990).}
\end{footnotes}
The result of the current design of the child protection system is that investigation often seems to occur for its own sake, without any realistic hope of meaningful treatment to prevent the recurrence of maltreatment or to ameliorate its effects.\footnote{75. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 10-11 (1993).}

To those who oppose the requirement, mandatory reporting distracts professionals from addressing the underlying problems affecting the family. Instead, such a requirement shifts the focus of the child welfare system to legal definitions, rules for gathering evidence, and standards for coercive intervention.\footnote{76. Melton, supra note 24, at 13-14 (observing that mandatory report diverts CPS' attention "from the task of increasing the safety of children. It is largely engaged instead, as a matter of legal obligation, in evidence gathering and preparation of actual or potential court cases." In short, attention is focused on the question of "'What happened?', not 'What can we do to help?'... Vast human and fiscal resources that could be spent in prevention or treatment are instead expended in investigations that usually result in significant disruption of family life but little if any benefit.").}

The purpose of this discussion is not to resolve the debate about whether such a requirement should be a facet of our child protective system. A resolution of this contentious issue is well beyond the scope of this Article. The conversation, however, must occur throughout the states as they evaluate whether their approach is the most effective method to address maltreatment. For example, perhaps a non-adversarial system, as seen in many European countries utilizing parenting aides and home health visitors, would engender trust between parents needing support and state agencies, and would encourage parents to voluntarily seek assistance.\footnote{77. Mandatory reporting policies may deter families from seeking help and increase distrust among neighbors. Id. at 14-15. Melton suggests that "[g]overnments ought to facilitate the development of community environments that by their nature provide family support and that ensure watchfulness for children." Id. at 16.}

Maybe even a model where other professionals, such as doctors, teachers, and therapists, assume a more active role in working with parents in need of help, as opposed to assigning that responsibility solely to a child protective services worker, would better address families' needs and encourage the community to help vulnerable families. A system that saves money currently being depleted by vast investigation machinery could fund innovative projects like multidisciplinary teams that could better assess the needs of parents and children and prevent unnecessary removals. Ultimately, a framework in which different states design systems attuned to the needs and beliefs of their population would produce data upon which others could rely to make informed judgments.
Yet, these crucial conversations are not taking place at the state level due to federal requirements that mandate a specific model, emphasizing reporting, investigation, and court involvement, which each state must either comply with or risk losing federal funding. Regardless of doubts over the effectiveness of this model, dissent is silenced and innovation is stifled because states no longer possess the flexibility to propose creative alternatives to the federal government’s mandates.

Another difficult issue confronting policy-makers involves determining how much time to afford parents to demonstrate their fitness prior to terminating their parental rights to a child. Some argue that a child’s need for permanency is paramount, and that parents should only be given a short period of time, if any at all, to prove their fitness as parents before alternate options such as adoption can be pursued. In the State of Michigan, for example, most parents are given twelve months to prove that they have addressed the underlying reasons for the child’s entry into the foster care system. If they fail to make the required showing, termination proceedings are initiated against them. Other situations warrant immediate petitions to terminate parental rights.

Critics contend that the complex needs of families affected by the child protective system, such as poverty, substance abuse, and mental illness demand a flexible approach, and that the termination of parental rights should only be used infrequently as a remedy to resolve child protection cases. For example, Justice Springer of the Nevada Supreme Court writes:

I understand the current “permanency” fad and the perceived need to place children in more ‘stable’ homes; but this, in my view, does not necessitate permanent severance of natural parental ties, except in the direst of cases. I do not see why terminating this child’s heritage ... from his life can be said to be in his “best interests,” especially when there is no evidence that by keeping the natural parental ties intact he

78. Elizabeth Bartholet, for example, contends that a pervasive “blood bias” in the child welfare system sacrifices children’s interests. ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 7 (1999). She alleges that the State is overly deferential to parents’ rights and far too unwilling to remove children from homes where they have been abused or neglected. Id.
79. MICH. COMP. LAWS ANN. § 712A.19a(5)–(6) (West 2007).
80. § 722.638(2).
would lose the "permanency" and stability that he apparently enjoys in foster placement.  

In addition, most European countries rarely terminate the rights of parents and instead pursue other less extreme alternatives.  

The debate on this issue among academics and others continues. Yet, among state policy-makers, the debate is again silenced as a direct consequence of federal laws that have supplanted the ability of individual states to make their own judgments on these normative issues. For instance, the ASFA mandates that states file petitions to terminate parental rights if children have been in foster care for fifteen out of twenty-two months absent exceptional circumstances. The Act also requires states to file immediate termination petitions in specific situations that are detailed in the statute, and provides a financial bonus for states to finalize the adoption of children. States cannot receive the bonus until the rights of a biological parent have been terminated. Although federal laws permit states to terminate parental rights under a more expedited timeframe than the one set forth under the ASFA, states cannot extend that time limit. For example, a state that passes a law giving parents two years to prove their fitness prior to initiating termination of parental rights would run afoul of federal mandates and would be in serious danger of losing precious federal dollars. Not surprisingly, every state has adopted the federal policy favoring an expedited timeframe and promoting the termination of parental rights and adoption. That every state accepts federal requirements in this area does not necessarily suggest that they agree with such requirements; rather, state compliance reflects a reality that states are willing to cede decision-making authority to receive federal funds.

84. Id.
86. § 678 (permitting State to take any action "to protect the health and safety of children in individual cases").
87. See Herring, supra note 12, at 381 n.13 (observing that every State has accepted federal foster care funding, which, in turn, mandates following federal requirements).
88. Concerns over the expedited termination of parental rights illustrate this point. For example, recently the State of California enacted legislation permitting courts to reinstate parental rights after termination when in a child's best interest. The law resulted out of a concern that the State had terminated the legal rights of both parents to over six thousand children, many of whom would never be adopted. Realizing that many of these children
Federal laws control state policy-making, not only by conditioning receipt of funding on following specific requirements, but also by limiting the expenditure of federal funds to certain purposes. The vast majority of federal funding can only be accessed by states once children from poor homes have been removed and placed in foster care. These funds, distributed under Title IV-E of the Social Security Act, constitute forty-eight percent of all federal child welfare spending in 2000. The program is a permanently authorized, open-ended entitlement and can only be spent on costs associated with placements of children in licensed foster homes and on subsidies for adoptive parents. In contrast, funds under Title IV-B of the Act, used primarily for prevention, family preservation, and reunification efforts, comprise only five percent of the spending and are a capped entitlement subject to reauthorization by Congress on a regular basis.

The perverse incentives are clear. States that develop effective programs diverting children from foster care receive minimal federal assistance, whereas those that place children in foster care indefinitely obtain maximum aid. Once a child is removed from her home, if a state wishes to return her to her family, it must rely primarily on state and local funds to pay for any services provided to the family or for monitoring of the home. In contrast, if a state keeps the child in foster care, it will continue to receive federal funding.

Accordingly, states which are interested in preserving would actually benefit from a continued legal relationship with their biological parents, the State now permits children, in limited circumstances, to file petitions to reinstate parental rights. Child advocates have praised this legislation. "At minimum, it allows juvenile courts to correct a mistake that does not benefit a child who is never adopted. As lawyers representing children . . . we owe it to them to use all [of] our talents, both legal and legislative, to find creative ways to repair their families when possible and not subject them to the unhappy consequence of life as a permanent legal orphan." Camerin Schmidt & Brenda Dabney, Restoring Parental Rights: Giving Legal Orphans a Chance at a Family, 21 CHILD LAW PRAC. 169, 171 (2007).

89. 42 U.S.C. § 672(a)(3); see also PEW CHARITABLE TRUSTS, TIME FOR REFORM: Fix THE FOSTER CARE LOOKBACK 1-7 (2007), http://kidsarewaiting.org/reports/files/lookback.pdf (describing the problems in funding created by tying a child's eligibility to federal funding under the now defunct Aid to Families with Dependent Children program). As a result of this "lookback provision," federal funding for foster children declined by 1.9 billion dollars between 1998 and 2004 and the number of children eligible for federal funding is expected to decline by five thousand each year. Id. at 1. Many groups, including the National Governor's Association, the American Public Human Services Association, and the Child Welfare League of America have called for the elimination of this provision.

90. Murray, supra note 36, at 2.
91. Id. at 3.
92. Id. at 2.
93. Many organizations and commentators have criticized the current funding incentives but little change has occurred. See, e.g., CORNERSTONE CONSULTING GROUP, INC., CHILD WELFARE WAIVERS: PROMISING DIRECTIONS, MISSED OPPORTUNITIES 13 (1999),
familial relationships through subsidized guardianships or reunifications are left to generate their own funds, whereas those that look to increase adoptions are supported through federal incentive payments. Not surprisingly, since the passage of the ASFA, adoptions have increased by fifty-seven percent nationwide. As summarized by Gary Stangler, executive director of the Jim Casey Youth Opportunities Initiative, "[t]he only way [for states] to get federal money is if a child is in foster care. The irony is, the more successful [states are], the more they get punished." Innovation is discouraged and the status quo is perpetuated.

The federal government recognized the disincentives to innovate created by its funding streams, and in 1995 attempted to remedy the problem by creating a process by which states could apply for waivers from the federal government to use IV-E monies to fund innovative demonstration projects. The initial legislation established waivers in ten states, and in the ASFA, the process was expanded to allow as many as ten waivers in each fiscal year. Since 1995, the waivers have been used to pilot a host of programs including subsidized guardianships, community-based supports for

http://www.cornerstone.to/images/child.pdf (citations omitted) ("When agencies remove poor children from their homes, they have unlimited access to Title IV-E funds to keep them in foster care or institutional placements ... When they try to keep them at home safely or bring them back home after a temporary placement, however, they must search for smaller sources of federal funding aimed toward prevention or use state and/or local dollars to pay for those services."); Nat'l Governor's Ass'n, Policy Position—HHS-14: Child Welfare Services (2006), http://www.nga.org (follow "Policy Positions" hyperlink under "Federal Relations"; then follow "HHS-14, Child Welfare Services" hyperlink) ("[T]he majority of federal funding for child welfare programs is targeted towards out-of-home care, with a much smaller portion of federal funds focused on services that protect child safety, prevent the need for out-of-home placement, promote family stability or reunification when appropriate."); Christian & Nat'l Conf. of St. Legis., supra note 36, at 18 (observing that "funding for foster care is an open-ended entitlement, whereas funds for prevention, family support and treatment are capped at a level that is insufficient to meet the complex needs of children and families").

94. Under the ASFA, states receive $4,000 for each completed adoption over an initial baseline and $6,000 for adoptions of special needs children. 42 U.S.C. § 673b (2000). As noted above, no such incentives exist for completed guardianships or successful reunifications.

95. U.S. Gen. Acct. Off., Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children, but Long-Standing Barriers Remain 3 (2002). "During the first five years of the Adoption Incentives Program, adoptions from foster care increased substantially, from 31,000 in 1997 to approximately 51,000 in 2002. In all, an estimated 238,000 adoptions were completed during this time." Fostering the Future, supra note 68, at 32.

96. Tackett, supra note 68.
97. See Cornerstone, supra note 93, at 7.
98. Id.
families, and post-adoption assistance to families, such as therapy and case management.99

Unfortunately, the legislation creating the waiver program has not been reauthorized. Thus, no waiver process currently exists, and states can still only apply IV-E funds to cover costs associated with foster care and adoption.100 Even when the program existed, however, severe restrictions curtailed its effectiveness. Only a few states could apply for waivers per year and each waiver was limited to five years.101 Thus, states looking to initiate comprehensive reforms were discouraged because federal funding for the innovations would disappear after five years.102 Additionally, states applying for waivers could not replicate reforms in another state and thus the impact of successful projects, such as subsidized guardianships, was extremely limited.103 The Department of Health and Human Services prohibited similar waiver projects due to fear that similar innovations might constitute “policymaking through the back door” and create a de facto shift in the way federal funds are spent, regardless of whether such a shift actually benefited children.104 Complex bureaucratic and administrative procedures also deterred states from utilizing the process.105 At least five states withdrew their waiver proposals at some point in the process, and several states decided not to submit applications because they had determined that the waiver process was too complex, rigid, and time consuming.106 Some of these states withdrew because of limits that were placed on the proposed project’s scope and innovation.107 Regardless, the waiver program no longer exists, and states are

99. Id. at 81-91; see also HOME AT LAST, CHILD WELFARE FINANCE STRAIGHTJACKET TIGHTENS 1 (2006), http://www.pcsao.org/InTheNews/HomeAtLast/06ChildWelfareFinancingStraightjacketTightens.pdf (“During the past ten years, 18 states have implemented 26 child welfare waiver demonstrations to test innovative programs and services, including subsidized guardianship, flexible funding to local agencies, managed care, substance abuse services, intensive preventive services, and tribal administration of federal child welfare funds.”).

100. HOME AT LAST, supra note 99, at 1 (stating that on March 31, 2006, the authority of the federal government to grant waivers in the use of federal child welfare funds will come to an end and that without the waiver, Title IV-E funds can only be used to support children who have been removed from home and placed in foster care).

101. CORNERSTONE, supra note 93, at 7.

102. Id. at 35.

103. Id.

104. Id.

105. Additionally, each state with a waiver had to develop an outside evaluation of the project’s effectiveness and had to be cost neutral. Id. at 8.

106. Id. at 33.

107. Id. The Cornerstone study found that national, state, and local experts agreed that there was no clear vision on the federal level for how the waivers contributed to child welfare reform. Id. at 92.
permitted no flexibility to use federal funds for innovative ideas to reform the child welfare system.

These issues typify how policy judgments, traditionally within the purview of state and local governments, have been removed from the discretion of the states by the federal government's dominance over child welfare issues. A one-size-fits-all approach to child welfare has enveloped the nation, yet little evidence exists that this approach is necessarily the most effective. In addition to displacing the ability of states to make certain policy decisions regarding child welfare, federal involvement has also stifled innovation by overburdening child welfare agencies, which devote scarce time and resources to complying with a complicated and detailed set of federal regulations and statutes.108 Trainings to ensure that courts and agencies are ASFA-compliant are prevalent, and states spend considerable time self-monitoring their compliance with federal laws to ensure compliance. A hypersensitivity about violating federal law abounds. For example, recently, the Michigan Department of Human Services sent a letter to a lawyer representing a child stating that the child was deemed ineligible for federal funding because the petition in her court case was not read on the record.109 The letter further stated that the problem would be remedied in the future by a requirement that all petitions be read at the initial hearing of the case.110 Though no such requirement actually exists in federal regulations and has little to do with the best interests of a child, the vignette typifies the level of paranoia state child welfare
officials experience when trying to comply with burdensome federal mandates.

This paranoia has been heightened by recent federal audits which resulted in findings that the majority of states were not in substantial conformity with federal child welfare laws. Consequently, a number of states have been given a limited amount of time to develop program improvement plans to remedy their technical deficiencies. A failure to adhere to such plans may result in losses of tens of millions of dollars—a risk no state can afford to take. In the current climate, when faced with a new and creative proposal to reform the system, states often ask the wrong question. Rather than inquiring whether the reforms further the interests of children, the first question child welfare agencies ponder is how the proposal may affect compliance and funding under Title IV-E.

The preoccupation with maximizing federal funding has pervaded state court decision-making as well. Traditionally, a distinguishing feature of the dependency system has been the broad discretion vested in juvenile court judges, who act as parens patriae to the child. The judge possesses vast discretion to craft remedies suited to the individual child before her and is given broad authority to develop creative solutions to address the needs of the entire family. Dependency judges have the flexibility to issue court orders based on a very subjective standard—the best interest of the child—because of the uniqueness of each case and the impracticality of applying generic rules and policies to address specific situations. By meeting the family and the child, and hearing information presented to her by all the parties, the juvenile court judge is best situated to make a decision in the child’s interests.

Yet, today, the independence of the judiciary is being compromised and the role of the family court judge is being transformed. Many state court judges, facing intense political pressure to avoid taking any actions that jeopardize federal funding, are forced to focus not on the best interests of the child but on maximizing federal dollars. Although the ASFA is not binding law on dependency judges, courts are directed to “collaborate” and develop close

111. See Kernan, supra note 15.
112. See Ventrell, supra note 27, at 132-42 (discussing the juvenile court’s parens patriae functions).
113. The ASFA is a federal funding statute, enacted under Congress’ powers under the Spending Clause of the Constitution that imposes obligations on state child welfare agencies who receive federal funds. The ASFA is not substantive law that state courts must follow. See 42 U.S.C. § 678 (2000) (permitting state courts to take any action necessary to protect the health and safety of a child in a particular case).
partnerships with state agencies to ensure judicial compliance with the various provisions in the ASFA. States have developed handbooks, established task forces, and drafted extensive protocols between the two groups defining the new relationship. For example, after the State of Kansas failed a federal audit in 1999, juvenile court judges and state child welfare officials worked closely together to determine why the federal government gave them a failing grade and how court orders could be re-drafted to increase the likelihood of satisfying federal regulators. In Iowa, the courts and executive agency officials entered into a memorandum of understanding that each would work together before making "any changes in process or procedure that may have impact on the agency or the court's performance and the state's ability to comply with federal regulations." Similarly, in West Virginia, there has been agency and court collaboration to provide a set of Title IV-E form orders for judges to use in child protection cases. A primary focus of judicial activities and decision-making is centered on ensuring that the State not lose any federal funding.

This transformation raises concerns about the quality of judicial decision-making. Judges now spend what limited time they have

114. Judges, policy-makers, and other child welfare professionals have all emphasized the need for "collaboration" in the post-ASFA era, emphasizing that the complexities presented by a child welfare proceeding demand a new role for the judiciary. See Cecilia Fiermonte & Nancy Salyers, Improving Outcomes Together: Court and Child Welfare Collaboration 1, 1 (Fostering Results 2005), http://www.fosteringresults.org/results/reports/pewreports_06-22-05_improvingoutcomes.pdf ("[T]oo often, the court and the agency work on their common goals independently of one another."); National Child Welfare Resource Center on Legal and Judicial Issues, http://www.abanet.org/child/rclji/cfsr/home.html (last visited Sept. 6, 2007) (describing various ways in which judges and executive agency officials have collaborated on child welfare issues). Fiermonte & Salyers cite Judge Nancy Salyers, former Presiding Judge of the Cook County Juvenile Court's Child Protection Division, as stating, "'[c]ollaboration between courts and agencies is in the best interests of the child for whom they share responsibility. When courts and child welfare agencies work together, share information, and engage in activities like cross-training, children can attain the safety, security and permanence they need.'" Fiermonte & Salyers, supra, at 2; see also Judith S. Kaye, Making the Case for Hand-On Courts, Newsweek, Oct. 11, 1999, at 13 (Judicial "'[c]ollaborations with government agencies and community groups are essential.""); Anthony J. Sciolino, The Changing Role of the Family Court Judge: New Ways of Stemming the Tide, 3 Cardozo Pub. L. Pol'y & Ethics J. 395, 407 (2005) ("The hallmarks of this [post-ASFA] project are judicial leadership and close collaboration between the Court, the Department of Social Services, foster care agencies, service providers, and the legal community.").


preoccupied about complying with federal funding statutes, rather than seeking individualized solutions to the specific problems a family is facing. Standard court forms, which are constantly changing to appease federal regulators, have been redrafted to contain ASFA buzz phrases like "contrary to the welfare of the child" and "reasonable efforts," and judges spend much of the hearing making sure that the right box has been checked. These phrases, however, carry little meaning. These terms, which lie at the heart of the ASFA, are not defined by federal law and are ill-defined in state statutes. A recent case in Michigan exemplifies the vacuousness of these terms. After a family court judge had ordered that two children be returned to their mother and the child protective case be dismissed, the judge contradictorily required in his written order that the agency make "reasonable efforts ... [to] reunify the family" and found that it was contrary to the welfare of the children to return home, even though the children were returned home. Meaningless box-checking to comply with federal mandates predominates during these hearings.

Additionally, the judge's responsibility to serve as a check against overreaching and poor decisions by executive agencies is being compromised by federal involvement. As noted above, in the post-ASFA era, family court judges are developing close, collaborative relationships with child welfare agencies and are becoming in-

118. See, e.g., id. (describing how in Kansas, after the state failed an initial audit, courts and agency officials worked together to conduct a range of activities including drafted mandated court orders in juvenile cases).
119. See Rollin et al., supra note 23, at 154 ("Defining what constitutes 'reasonable efforts' in a way that is truly helpful and provides practitioners with the guidance they need has proven elusive.").
121. David Herring made similar observations after the enactment of the AACWA. He observed that:

[T]he reasonable efforts requirement was not vigorously enforced, or even mentioned, in many case review hearings. Overwhelmed attorneys and judges did not have the time or the inclination to explore the adequacy of the agency's efforts. None of these actors had an interest in jeopardizing federal foster care funds. Thus, decisionmakers in many systems developed 'form' court reports and court orders that included a preprinted statement finding that the agency had made reasonable efforts. This compliance in form was sufficient to pass a federal audit of case files and to keep federal dollars flowing into the jurisdiction, but it surely did not live up to the spirit of the AACWA.

Herring, supra note 12, at 335. Herring concluded that policy-makers simply "constructed procedural mechanisms and systems of documentation that assured the flow of federal funds under AACWA" but they "failed to make and implement decisions that would achieve timely permanent placements for children." Id. at 336. This meaningless process has only worsened since the passage of the ASFA.
vested in a process with a primary focus on maximizing federal funds. A natural consequence of this collaboration and investment in an extra-judicial policy matter is that judges often appear paralyzed by a fear of taking any action against a child welfare agency that may jeopardize funding, regardless of what the law requires.122

For example, even when confronted with clear evidence that a child welfare agency has failed to make reasonable efforts to preserve a child’s placement with a parent, judges are extremely reluctant to issue such a finding out of fear that it will result in a cut in federal funding.123 Under federal law, if a judge does not make a finding that reasonable efforts have been made within sixty days of removal, children are permanently ineligible for federal funding for the duration of their stay.124 No judge wishes to put a State in this type of fiscal bind, precisely the type of outcome that

122. Herring further elaborates that:

[I]t is essential to recognize the pressures faced by state juvenile court judges. These judges serve local constituencies, often facing local elections to gain and retain office. Under such conditions, judges do not have a strong incentive to enforce federal law requirements . . . that can only have negative consequences for their local constituents—the loss of federal funds for seemingly essential child welfare services and foster care placements. Lax enforcement allows the system to continue its operations and maintain an acceptable status quo. It is understandable that these judges believe that the local system may not be the best for children, but that it is better than the system that would result from a loss of funds caused by their vigorous enforcement of federal law.

Acting under this belief, state judges regularly find ways to close their eyes to the subversion of federal law requirements even when their state’s legislature has incorporated the federal requirements into state law. They allow the system to construct mechanisms that comply with federal and state law in form, but not in substance (e.g., preprinted statements concerning the adequacy of the agency’s efforts). This compliance in form allows the system to pass a federal file audit, but does not serve childrens’ interests as intended.

Id. at 342.

123. In a statewide survey of judges in Michigan, 90.4% stated that they either rarely or never find that the child welfare agency failed to make reasonable efforts to prevent the removal or reunify the child. MUSKIE SCH. OF PUB. SERV. & ABA CTR. ON CHILD. & LAW, MICHIGAN COURT IMPROVEMENT PROGRAM REASSESSMENT 105 (2005), http://www.courts.michigan.gov/scao/resources/publications/reports/CIPReassessmentReport090605.pdf.

In another survey, when asked what factors limit a judicial determination of negative reasonable efforts, 36.3% of the respondents reported that the complexity of Michigan’s system of funding child welfare services was a factor. ABA CTR. ON CHILD. & LAW & NAT’L CTR. FOR ST. CTS., MICHIGAN COURT IMPROVEMENT PROJECT ASSESSMENT OF PROBATE COURTS’ HANDLING OF CHILD ABUSE AND NEGLECT CASES 93 (1997), http://courts.michigan.gov/scao/resources/publications/reports/cipaba.pdf. Michigan’s system of funding to support foster children, similar to the structure of other states, “creates a disincentive for judges and referees making negative reasonable efforts determinations.” Id. at 93-94.

124. 45 C.F.R § 1356.21 (b) (2006).
the collaborative team, of which the judge is a member, is trying to avoid. Similarly, a common misconception among judges is that the ASFA regulations prohibit them from ordering specific placements of children in foster care (e.g., a specific foster home). Even when confronted with evidence that state law affords them this authority and federal regulations do not prohibit it, judges are loath to act, particularly when faced with an argument by a state official, a member of the team to which they are beholden, that the ASFA will be violated by the issuance of such an order. Similar paralysis occurs when discussing a wide variety of issues including setting permanency goals, ordering services for a child, and determining when a child may emancipate from the foster care system. Federal laws have altered the balance of power in child protective proceedings, as the judiciary, a crucial check monitoring executive action, appears reluctant to act against child welfare agencies due to a fear of doing anything that may jeopardize funding under federal statutes. The long-venerated status of a dependency judge as protector of the child is being transformed into the protector of federal funding.

The overall effect of federal involvement in the child welfare system has been a mixed blessing. Though the federal government’s efforts have significantly increased funding for child welfare systems, induced the states to act, and brought considerable attention to the plight of abused and neglected children, today, its dominant role in the process is suppressing innovation and creativity of both state legislatures and juvenile court judges. The next Section argues that the federal government must revisit its role in addressing these issues and must establish limits over the next thirty years to scale back its current micromanaging of states’ child welfare systems so that these systems remain flexible enough to confront the complex challenges facing vulnerable families.

III. THE APPROPRIATE ROLE OF THE FEDERAL GOVERNMENT IN ADDRESSING CHILD WELFARE ISSUES

A comprehensive plan delineating the federal government’s role in child welfare cases is beyond the scope of this Article.125 What-

125. A number of policy-makers and academics have issued proposals to reform federal financing of the foster care system. The proposals range from creating a block grant for child welfare spending to reducing the rate of federal reimbursement for foster care depending on how long children remain in care. See generally CORNERSTONE, supra note 93, at 35 (describing various funding options); FOSTERING THE FUTURE, supra note 68 (outlining comprehensive plan to reform the foster care system); Robert M. Gordon, Drifting Through
ever new plan is created, however, must be simple to administer in light of the bureaucratic burdens pervasive throughout the current system and must permit states to craft child welfare systems reflective of their constituents’ needs. Limiting the federal government’s involvement to the following four areas would achieve these goals: 1) inducing states to act and encouraging innovation through financial support; 2) protecting the constitutional rights of parents and children; 3) confronting federal issues implicated by the child welfare system, such as the interstate placement of foster children, and the effects of federal student loans on attracting and retaining child welfare professionals; and 4) providing research and technical assistance to help states design their policies. Each of these will be addressed in turn.

Over the past thirty years, the federal government has spent billions of dollars to support state child welfare systems. Undoubtedly, this investment has spurred states to create and improve their systems, which prior to federal involvement, were inadequate and poorly administered. Currently, this funding is indispensable, as it constitutes the overwhelming majority of funds spent on foster children in a number of states. At this juncture, any reduction in the amount of money spent would irreparably deprive states of the resources they need to serve children and families. Preserving the permanently authorized, open entitlement status of IV-E funds is essential to ensuring that states have the ability to respond to sudden surges in the number of foster children caused by unpredictable circumstances, such as a heightened poverty, increased substance abuse, or rising criminal activity.

Many of the conditions that federal laws impose on states, both in terms of mandating specific procedures and restricting how funds can be spent, must be eliminated so that states have the autonomy to determine good policies for their citizens. Under this standard, the federal government would not dictate the policies that states must implement. The states would maintain the discretion to determine how long a parent should have before her rights are terminated, or under what circumstances a person should be licensed as a foster parent and what rights she would receive should she be successful. The legal jargon that dominates child welfare discourse would be eliminated, and instead, states would be

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*Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997, 83 Minn. L. Rev. 637, 689-91 (1999) (arguing that entitlement status of Title IV-E funds should be retained but that federal spending for foster children should decline the longer a child spends in care).*

126. *See supra* note 36 and accompanying text (discussing states’ reliance on federal foster care funding).
given the flexibility to design unique state laws, as long as their laws did not violate the constitutional rights of families, a restriction more fully discussed below.

Additionally, restrictions on the expenditure of federal funds must be eliminated, and one pool of flexible funding should be created for states to spend on all costs associated with the child welfare system, including preventive services, foster care expenses, reunification efforts, adoptive placements, and post-adoption subsidies. An example of a policy consistent with this idea is the Pew Commission’s recent proposal to combine Title IV-E and IV-B funds to create a new pool of flexible funding for states to use towards a variety of purposes. These and other similar proposals recognize that forcing states to use the funds for a particular purpose, as the current system does, creates perverse incentives for states to achieve certain outcomes that may not be in the child’s interests. For example, as discussed above, the current system encourages states to keep children in foster care indefinitely or to place them in adoptive homes even when reunification or guardianship may be more appropriate outcomes. Providing states with more flexibility will enable them to dedicate additional resources at points in the case where sustained change in families is more likely to occur, such as prior to the removal of children from their homes or after permanency is achieved to stabilize the placement. The current practice of indefinitely funding children who remain in temporary foster homes runs counter to the overwhelming evidence which suggests that the state is an inadequate surrogate parent of children. Instead, states must concentrate their resources on either preventing children’s entry into care or expediting their exit.

Removing many of the current funding restrictions would also simplify the process considerably and virtually eliminate the expensive machinery currently in place solely to monitor whether states are complying with extensive federal laws and regulations. Federal audits of state systems, in the form of child and family service reviews, would be eliminated, and states would not constantly expend resources conducting self-assessments, creating new court forms or training judges to comply with federal laws. Additionally, judges would no longer be paralyzed by the fear of violating one of many federal laws or regulations that could jeopardize funding. Savings

127. FOSTERING THE FUTURE, supra note 68, at 20 (arguing for the creation of a Safe Children, Strong Families Grant which combines the Title IV-B program with the administration and training components of Title IV-E).
from eliminating this machinery could be reinvested to fund actual programs and services for parents and children.

Removing many of the current financial restrictions on states would not risk undermining the constitutional rights of parents and children. Under the proposed regime, the federal government would require that states receiving federal funds protect the federal constitutional rights of parents and children. Supreme Court precedent and decisions from federal courts establish clear protections mandated by the Federal Constitution in child protection proceedings. For example, biological parents are presumed to be fit, and children cannot be removed from their homes absent evidence of parental unfitness. If children are removed, parents and children are entitled to a prompt post-deprivation hearing and a timely trial on the allegations against them. Once children are placed in care, the State has a duty to protect them from harm. Other areas of constitutional protection may include procedural rights, including a parent's right to counsel or the provision of counsel for children.

Conditioning receipt of federal funding on these basic constitutional provisions will be easy to administer through both public and private means. Rather than establishing a complicated system to monitor state compliance, individuals should be permitted to direct complaints to either the Children's Bureau of the Department of Health and Human Services or the Department of Justice, who can then investigate accordingly. Possible remedies could include instituting legal action or depriving states of federal funds. In the alternative, private causes of action to enforce federal child welfare statutes should be made explicit, with specific provisions for attorneys' fees.

128. See Stanley v. Illinois, 405 U.S. 645, 649 (1972) (holding that, as a matter of Due Process, parents may have a hearing on their fitness as parents before children are removed from their care).

129. See Duchesne v. Sugarman, 566 F.2d 817, 828 (2d Cir. 1977) (holding that failure to hold prompt post-deprivation hearing violated the parent's due process rights under the Constitution).


133. Currently, an individual's ability to bring private causes of action under federal child welfare statutes is unclear. Although the Supreme Court held, in Suter v. Artist M., 503 U.S. 347 (1992), that the "reasonable efforts" provisions in the Adoption Assistance and Child Welfare Act did not create a private cause of action, id. at 363, lower courts, subse-
Inc. and the Youth Law Center have demonstrated a willingness to utilize impact litigation to force states to reform their systems to protect the constitutional rights of families. Encouraging such actions will create an effective monitoring system without the administrative burdens and expenses that currently exist. Additionally, public dissemination of data from state child welfare systems will help generate political pressure for meaningful change. No evidence exists indicating that the absence of federal micromanagement of child welfare policy would result in a "race to the bottom."

Although the federal government's role in dictating the substance of state child welfare laws should be minimized except to protect federal constitutional rights, federal involvement should be expanded to address policy concerns that cannot be addressed by individual states. The interstate placement of foster children is one example. The median time spent in the foster care system by children in need of out-of-state placements is forty-three months, two full years longer than the average waiting time for a child with a potential in-state placement. This disparity exists due to the application of the Interstate Compact on the Placement of Children ("ICPC"), which imposes significant obstacles for foster children who have potential placements in another state. Under the ICPC, a state cannot send a foster child to another state without obtaining approval from the receiving state agency, which must determine whether the placement is contrary to the child's interests. If the
agency denies approval, the Compact prohibits a family court from making the placement. Unfortunately, current practice under the ICPC is dominated by delays, poor decision-making and unnecessary placements of children in licensed foster homes, instead of with their families. Although limited proposals to reform the system have been suggested, only minor change has occurred, partly due to a lack of coordination among the states. The scope of solving these problems is beyond the authority of any individual state, and the federal government is uniquely situated to address them. Possible solutions could include direct federal legislation mandating timeframes in which home studies must be completed,\(^\text{137}\) a national resource to track the completion of the studies, and an administrative process to challenge denials of home studies by individual states. Such leadership to confront a distinctly federal issue would be a way in which the federal government could help foster children without micromanaging individual state child welfare systems.

Another area of possible involvement includes reducing barriers for professionals looking to enter the child welfare field. A study by the Pew Commission’s Home at Last initiative revealed that crushing student loans deter attorneys from representing children in protective proceedings.\(^\text{138}\) Impediments to recruiting and retaining attorneys have direct consequences on children’s well-being. Often, children may be represented by multiple attorneys during their cases, which impedes their ability to form meaningful relationships with their attorneys and prevents attorneys from obtaining a comprehensive understanding of the case.\(^\text{139}\) Similar problems of entry and retention exist for others working in the child protective system, such as social workers and therapists who

\(^{137}\) Recently, Congress passed legislation to improve the timeliness of home studies under the ICPC. The legislation mandates that States that receive federal funding complete interstate home studies within 60 days, 42 U.S.C. § 671(a)(26) (2000), and provides States with a financial incentive to expedite the home studies. § 673c. Due to how recently this statute was enacted, it is too soon to determine its effectiveness. For a more comprehensive analysis of recent efforts to reform the ICPC, see Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 Fam. L.Q. 455 (2006).

\(^{138}\) See generally HOME AT LAST, FOSTER CHILDREN MAY BE PAYING A PRICE FOR ATTORNEYS’ OVERWHELMING STUDENT LOAN DEBT (2005), http://clcla.org/Images/pdfs/pdf_pew/WHITE_PAPER_final_rev.pdf. The study found that 31.2% of responding attorneys graduated from law school with student loan debt in excess of $75,000 and 40% of those believed that loans were a significant factor influencing their decision to leave child advocacy. *Id.* at 2–3.

\(^{139}\) *Id.*
are also poorly paid and shoulder burdensome student loans. Congress could begin to respond to this crisis by enacting a loan forgiveness program for dependency professionals who work in the field for a set period of time. Once again, such action would benefit children, be welcomed by the states and not intrude on their autonomy to make policy decisions.

Finally, the federal government should continue its work providing research and technical assistance to states. The National Clearinghouse on Child Abuse and Neglect Information, created in the CAPTA, has provided incredible access to information and resources for over thirty years. The Clearinghouse has disseminated timely research, publicized conferences, and conducted analyses of state laws and regulations. Additionally, the federal government has funded grants examining various aspects of the child protective system. This research has played an integral role in educating policy-makers and other professionals and will only gain importance in the de-centralized child welfare system suggested in this Article, as state approaches to confront child welfare issues may vary considerably. The federal government should fund studies examining the different innovations being implemented in the states, the strengths and shortcoming of those innovations, and suggestions for future reforms. Rather than mandating what states must do, federal policy-makers should instead collaborate with state officials on the effectiveness of state programs and how to improve them. By observing these four limitations, the federal government will help establish a balance to ensure that states receive sufficient funding to design their child welfare systems while maintaining the necessary autonomy to implement innovative reforms.

CONCLUSION

The next thirty years certainly will challenge state child welfare systems in a myriad of ways. The problems of drugs, poverty, mental illness, and crime continue to plague families in this country, and unfortunately, children suffer disproportionately from the consequences. Increasingly, however, researchers are developing creative and innovative strategies to attack these issues, and states must be given every opportunity to implement them. The federal

government must recognize that its universal policies and restrictions for all child welfare systems have not worked, and that a decentralized process, encouraging states to develop innovative programs, is the key to success. The recognition that the federal government is best suited to serve in an “innovative and catalytic function”\textsuperscript{141} will ensure that families involved in the foster care system can benefit from individualized, creative solutions to their complex problems.