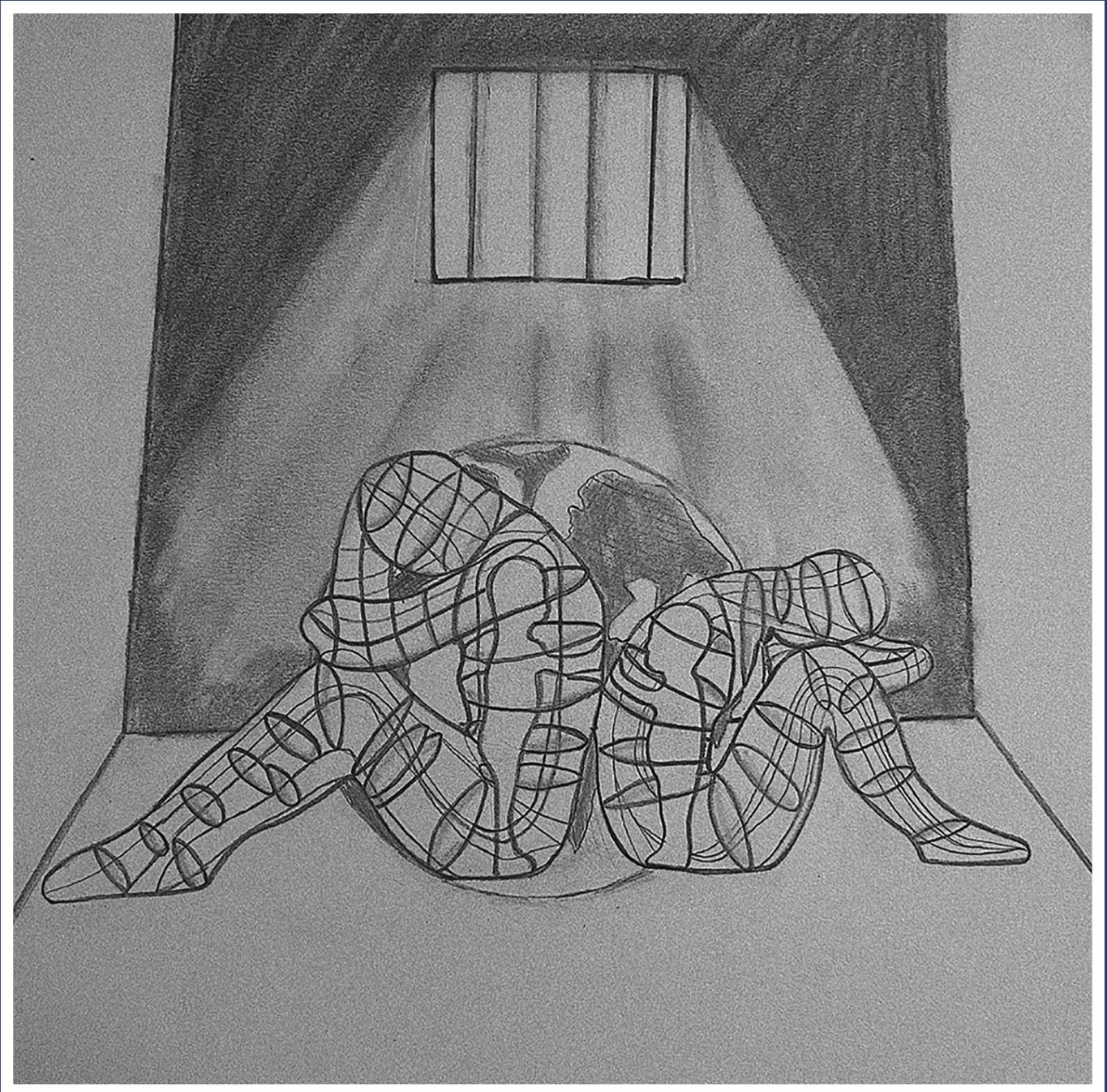


# Family Integrity & Justice Quarterly

A Journal for Family Well-Being | Fall 2021



## The Harm of the Adoption and Safe Families Act

# Family Integrity & Justice Quarterly

A Journal for Family Well-Being

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A Journal for Family Well-Being

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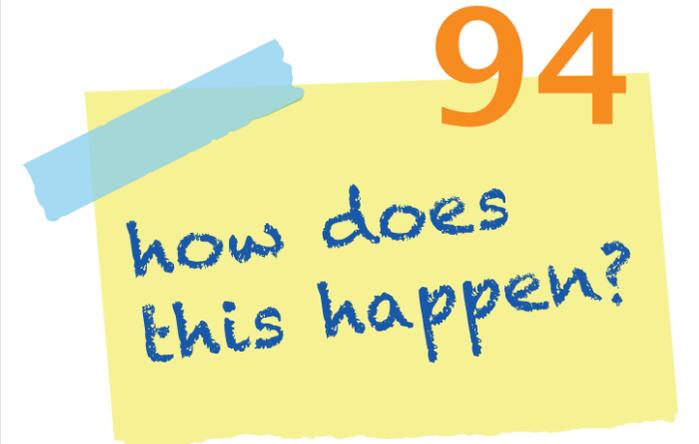
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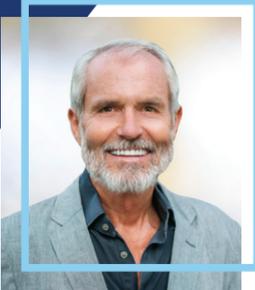
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### ON THE COVER

The art on the cover was created by a young adult with lived experience in the child welfare system. The art conveys some of their thoughts about the child welfare system, such as “youth should not be limited just because there is some unforeseen obstacle in the way” and “being in the system can feel like a prison or a life sentence.” The cover art first appeared in the pages of the [Away From Home](#) report published by [Think of Us](#).



## The Need to Replace Harm with Support Starts with The Adoption and Safe Families Act



**Jerry Milner**  
Director  
Family Integrity  
& Justice Works

In child welfare, we have a penchant for creating many of the hardest problems we face—problems that harm children and families. We then spend our time and resources in efforts to rectify those problems in increasingly arcane ways. This has resulted in a nearly un navigable system of complicated laws and policies, rules, and regulations that require inordinate amounts of time and money to traverse, time and resources that could be spent directly supporting families. This has resulted in the expansion of administrative departments of government and siphoned social worker time away from families, and it has created an entire industrial complex to find solutions to problems we have created or allowed to fester.



**David Kelly**  
Director  
Family Integrity  
& Justice Works

Despite most indications that the solutions we have created do not actually solve the biggest problems within child welfare (i.e., unnecessary family separation, endemic racial disparities, prolonged foster care stays, legal orphans, and poor outcomes for children and families, to name a few), we persist in funding and justifying them, often at the expense of family integrity and child well-being. It is a vicious cycle, but one we have a tremendous opportunity to interrupt, should we have the courage to do so. It takes courage to acknowledge that the child welfare system has caused harm, and it takes courage to admit that the solutions to date have been inadequate at best and often injurious. It also takes courage to seek to eliminate the sources of that harm when it is caused by structures and ways in which many have a great investment and to replace them with sources of support.

The Adoption and Safe Families Act (ASFA) is such an opportunity.

Concerns about the potential impact of ASFA were contemporaneous with its passage and implementation. The lack of inclusion of the American Indian and Alaska Native leaders in the drafting of the law is one powerful example that foretold devastating consequences for native children and families. Incongruence with legislatively bargained timelines for termination of parental rights and knowledge about substance use, misuse, and recovery is another. The preference for adoption over other less intrusive forms of permanence, such as subsidized guardianship, is yet one more source of damage.

Taken together, these many harms are a direct threat to family integrity and child well-being. Taken together, key provisions of ASFA make families less safe. Sometimes the most elegant solution is to simply stop doing the things that cause harm. When accompanied with new approaches informed by what families tell us would be helpful, a replacement can occur.

Dramatically reorienting ASFA, or repealing it entirely, presents a critical opportunity to stop causing harm. Incremental change will enable these harms to persist.

We need to stop creating impermanence in the name of permanency as we do with premature and unnecessary termination of parental rights when there are sources of permanent love and support in a child or youth's life, and instead implement approaches to cultivate and support those relationships.

We need to stop favoring and incentivizing adoption over other forms of permanency and incentivize subsidized legal guardianship and other less traumatic and disruptive permanency options grounded in relationships.

We must stop thinking of permanency in legal terms only and recognize that connection and belonging are essential to well-being.

We need to stop making it hard for extended family, kinship care providers, and fictive kin to care for children and youth by eliminating licensing requirements that disadvantage lower-income families and to provide equitable levels of support to kinship care providers and resource families.

We must stop treating requirements to make reasonable efforts to prevent removal and finalize permanency goals (even as currently defined) as a “rubber stamp” event to secure and maintain federal funding and truly seek to provide the types of support necessary for both.

We need to understand that the administrative data that drive so many decisions reflect systemic and institutional racism, but the analysis and reporting of the data do not account for these built-in biases. While these data provide useful information on system operation, they can be misapplied in harmful ways that fail to acknowledge complex social conditions and reinforce white supremacist thinking.

We must own up to the fact that “facially neutral” laws such as ASFA are not neutral and hurt Black and Native families more.

We can indeed have a compassionate, holistic child and family well-being system that protects children and youth in need of protection but also supports their families in avoiding the harsh vulnerabilities that trigger our current response approach.

*“Dramatically reorienting ASFA, or repealing it entirely, presents a critical opportunity to stop causing harm. Incremental change will enable these harms to persist.”*

In each issue of the Family Integrity & Justice *Quarterly*, we will address one of the areas that we believe must be reconsidered and replaced if we are to achieve that kind of approach to our work with children and families. Each issue is intended to be a call to specific action that inspires readers no matter where they sit to:

- Reflect on how your own role may be causing, contributing to, or perpetuating harm.
- Integrate lived expertise into your work and seek the wisdom of individuals who have experienced the system in identifying sources of harm and crafting replacement approaches.
- Call on your congressperson to take action on replacement approaches.
- Share this publication widely with colleagues.

In this inaugural issue, we take on the harms created by one of our “solutions”— ASFA. We believe the harm and injustice caused by ASFA are overwhelming and must be abolished. It is an outdated law with oversized deleterious effects on children, families, and communities.

This issue is the first of an ongoing series intended to advance one of the Family Integrity & Justice Works (FIJW) key goals, dismantling racism in child welfare. Directly identifying, removing, and replacing structures that stand in the way of justice and equity are central to FIJW’s mission and the purpose of the *Quarterly*.

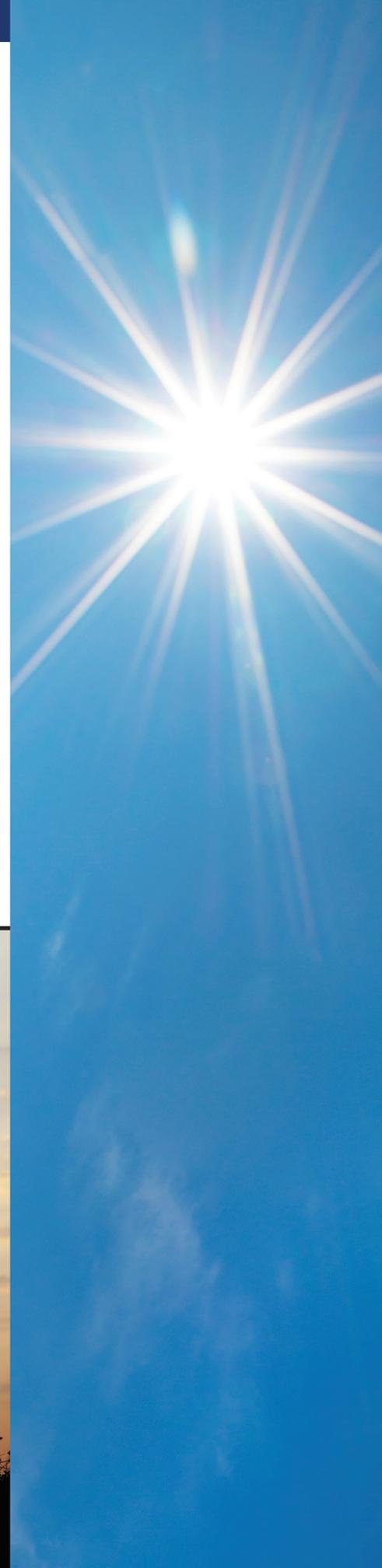
We appreciate the thoughtful treatment of this topic by our group of esteemed authors and contributors.



**Jerry Milner**  
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at Public Knowledge®



**David Kelly**  
Director  
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at Public Knowledge®



## Home: Where You Belong

 *Alexandra Travis*

Legal Services of New Jersey, Parent Ally

My angel, my baby, you've been gone for too long  
It pains me you're in a place you don't belong...  
I miss your laughs and even your cry  
Taken in the night, no time to say goodbye  
You're the reason I live and all that I love  
You're my best friend, we fit like a glove  
My world's so lifeless, lonely, and dark  
I miss all the happy days swinging at the park  
No matter how long I have to fight  
Mommy will fight with all her might  
The end is near, home is in sight  
I can't wait to wake up with you every morning  
and kiss you goodnight  
Don't worry my sweet boy everything will be alright

## A Conversation with Autumn Adams

### An Advocate's Journey

The Family Integrity & Justice Works team sat down for a virtual conversation with Autumn Adams to listen and learn about her journey. During the discussion, Autumn shared her background and experiences with the child welfare system, how she came to be doing what she's doing, and her thoughts on the law and the need for systems change. Autumn has the leadership mindset and system transformation ideals necessary to create a very different approach to child welfare in the United States. Autumn is a Yakama Nation woman, a granddaughter, daughter, sister, kinship care provider to her siblings, foster care alumna, advocate, and first-year law student at Arizona State Law School. Jerry Milner and David Kelly first met Autumn while she was an intern with the Congressional Coalition on [Adoption Institute](#) in 2019 in Washington, DC. Autumn's recommendations while interning led directly to the United States Children's Bureau issuing policy clarifications permitting more flexible use of kinship navigator funds. We are grateful for Autumn's time, openness, and expertise.

### Journey to Law School

I wanted to be a lawyer since I was a little girl. I didn't understand what law school was, or what a lawyer did. But for me, it was synonymous with success, and I wanted to be successful. A lot of it stemmed from wanting to make my grandmother proud. Her impact on my life still makes a difference now.

### Experiences with the Child Welfare System

I entered care when I was nine and reunified when I was close to turning 14. A couple of months after that we lost my grandmother. It

was one of the things that broke the camel's back in relation to my mother's sobriety. I was old enough to understand what was happening, and I was old enough to understand what my parental role could be in saving my siblings from the early life that I lived through with her. By the time I was 16 and a sophomore in high school, my mother was in full-blown addiction again. That's when I started planning our exit strategy. We kept my mother's addiction very hush-hush because we didn't want state involvement again. If the state got involved a second time, the chance of staying together or getting my siblings was non-existent. So, we essentially lived through a year and a half in a drug house. Eventually, my mother got into enough disagreements with me about her drug use around the kids that she took off with them when I was at school one day.

Coming home and finding them gone was a defining moment. I was at my lowest in those few months when I didn't know where they were; I needed to get those beautiful kids back so I could take care of them. I was 17 and a half and knew college was the easiest way for me to get an apartment, to get into housing, so the kids could live with me. I had to find the fight within myself to prove that I was a fit guardian. That was my defining moment of strength. I was only 19-years-old when I officially got my brother and sister, it was a huge uphill battle. In my early 20s, I was dealing with the legal system on a constant basis and advocating for my own voice. In the past, going to court meant being taken from my family, it meant my dad going to prison for years or my mother going away again. But this time good came from it, but it took standing up and fighting for an equitable voice.

### A Desire to Affect System Change

I was on the trajectory to go to law school to become a family law attorney, but that changed after a few days of shadowing at the Indian child welfare center in Minneapolis. I spent a day in a courtroom that only handled Indian Child Welfare Act (ICWA) cases. The

stories I heard were so similar to my own. It was heartbreaking to see the kids' faces, the parents' faces, and the pain that they were experiencing. I realized then that I couldn't do direct representation. It's too close for me; I care too much, I relate too much. It's why I turned toward policy.

It also ties back to why I studied anthropology as an undergrad. I wanted to understand how society impacts people. I started looking at systematic oppression and internalized oppression and how that relates to success versus failure. I began recognizing that a lot of the issues impacting the child welfare system come from a systemic level. Whereas a decision from a specific family court can provide a remedy for a child or family, nothing will be fully fixed until the overarching issue is fixed. That comes with policy. That comes with legislation. That comes from lived experience. So, here I am in law school.

### The Adoption and Safe Families Act's (ASFA) termination of parental rights requirements, permanency paradigm, and impact on tribal children, families, and communities

Much of ASFA is counter to world views in tribal communities. I won't say all because that's very Pan-Indian and also incorrect.

ASFA is an example of how legislation commodifies children, as seen in the language regarding terminating a parent's rights to a child, but the lack of language about the rights of said children. In juxtaposition to the way I was raised, where a child is viewed as having their own autonomy and say in their lives, the Western system undermines the inherent sacredness of a child. I've never made a decision about my siblings without first consulting them because they are their own people and deserve to have a voice in their own lives.

*I had to find the fight within myself to prove that I was a fit guardian.*

This Western view is inconsistent with the interconnectedness and connection that aren't valued in tribal communities. ASFA focuses primarily on parent-child legal relationships and stereotypical families as the meaning of permanency, whereas in tribal communities it's a lot more. The parent-child relationship is honored, but tribal communities also recognize a child's connection isn't to just one person or two people, it's to their culture, it's to the land, it's to the food, it's to the water, and it's to the earth. In addition, it's also about honoring, prioritizing, and maintaining that connection with all aspects of their life and who they are. It highlights how broken the system is in that it does not recognize that permanency looks different in different cultures. I wouldn't be where I am today if I wasn't able to maintain that connection. I was at my lowest in those few months when I didn't know where my siblings were. I would be one of those unfortunate foster youth statistics that we know about if

not for being able to pull on the connection to my extended family; if not for being able to pull on the connection to our teachings about the land and about our role within this world and within this earth. Those connections cemented and grounded my being and who I am and gave me the tools to be successful. The law just doesn't recognize that—they boil it down to terminating parental rights. What about the rights of that child to be who they are? That's what it doesn't recognize.

Pre-contact [before colonization] through today, it was and is not uncommon for an entire tribal community to raise a child. It's not uncommon for me to call my aunts and uncles Mom and Dad because that is the role they played. It's not uncommon to live in multigenerational households, it is how our societies are structured. I think about this holistically because growing up, even though my mother did not make the best choices, I lived in a home with my grandmother, aunts, uncles, and cousins at the time because that's the way we were raised. My mother worked, so my grandmother stepped up and took care of us—there is permanency and safety in that. It's so important to recognize the differences in culture and the differences in values. ASFA doesn't recognize those differences.

## The Need to Change Law and Policy to Support Kinship Care

Requiring a kinship provider to meet the legal definition of being a guardian is really dismissive of a lot of cultural values. By all means, my grandmother was my guardian. She enrolled me in school, made sure I was at the bus every day, and took me to the doctor when I felt sick. Asking her to go and file to take that right away from my mother goes against what

we believe within our culture. That's reflected now in my choice after I received guardianship of the kids—I could have taken it further and had my mom's parental rights terminated and adopted them. I was encouraged to do that, but I didn't want to dishonor the fact that though my mother may not be the ideal mother by anyone's standards, or my own, she is still the one who brought me and my siblings into this world and biologically she is our mom. Physically, mentally, and spiritually she cannot

be a mother, but I'm more than willing to take up that mantle and ensure the kids have a bright future. I would never disrespect her by removing and erasing that bond and her connection to us because we wouldn't be alive if it wasn't for her. But to take care of the kids I had to take the legal route because society today requires legal documentation. When it comes to

accessing financial incentives—those were never offered to me. I have taken care of the kids solely on my own and that translated into me working two jobs while in undergrad. From my own experience, I know how helpful financial support would have been. We need to make access to kinship incentives equitable.

## Inequity

A lot of inequity boils down to a lack of equitable data. I have asked questions pertaining to the native experience and child welfare. Not having data is a way to devalue and delegitimize. For example, the intersection between missing and murdered indigenous women and the foster care system is well known. Girls that I met while I was in the system have been missing for years. There's no data, there's no information, and when I bring it up, I'm always told no one has it. When we're wards of the state, we're your responsibility. Why don't you care enough about our existence to know where we are? That translates into abuse while in the system, too.

That's something I also experienced. I don't talk about it a lot, but that's another area. Data is key to getting recognition and resources. Look at the ICWA cases. What are the number of ICWA cases? Arguably, in the society that we live in now, data is the equalizer. It is the difference between being taken seriously or just being another angry Indian. But how can we stand on the same footing as everyone else if we don't have the same resources that everyone else has?

## A Message to Decision-Makers at All Levels

We need to create more opportunities for foster youth. I want to stress the inclusion of voices of all youth that have been in foster care—not just

the success stories. Usually, it's the successful youth—the four percent who graduated from undergrad, that have the opportunities and are visible. It's not the ones who slipped through the cracks. It's not the ones whose voices were ostracized and minimized and not where I am today. It's my best friend growing up, who was also in care, who is now dealing with drug addiction herself and her kids are in kinship care. It's listening to them about how we failed them so badly. It's not just about hearing from those who managed to make it out like me. I want to stress again the need for data about tribal children and families involved with the system.

I'm tired of being the asterisk at the end of surveys and studies saying data is not valid because there's not enough of us.

*ASFA focuses primarily on parent-child legal relationships and stereotypical families as the meaning of permanency, whereas in tribal communities it's a lot more.*

I'M TIRED OF BEING THE ASTERISK AT THE END OF SURVEYS ...

# SHATTERED

 *Alexandra Travis*

You think you've had a bad day

Tell that to the family that you took their children away

If you would have just given me one more day,  
they wouldn't have gone to strangers, they would have stayed.

When you ripped them from me, my life fell completely apart.

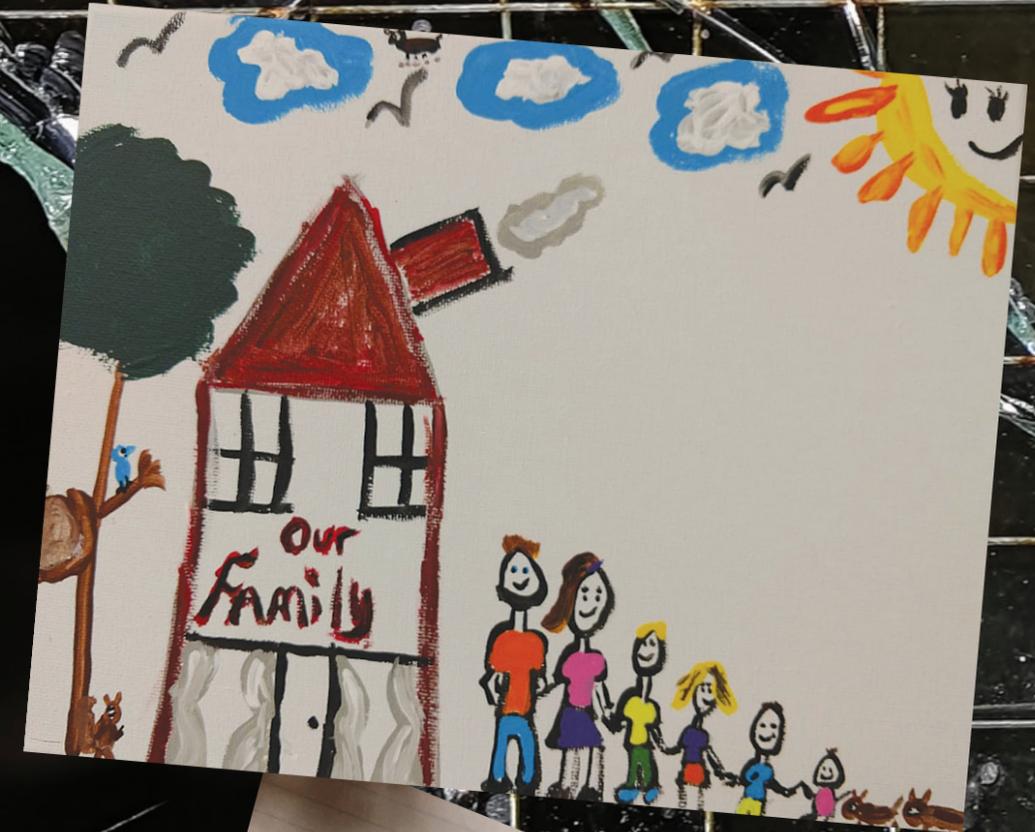
It shattered both mine and my children's hearts

ASFA is unfair to both mother and child

People do recover just sometimes it takes a little while.

Here I am now with 3 younger children and 3 years sober...

As far as my older kids are concerned, they are gone, forever, it's over.



I was the visitor  
and I went  
to my real  
mom's house.

~14~

LIVE STAR  
\*\*\*\*\*



# Stop Blaming the “Uncooperative Mother”:

## The Adoption and Safe Families Act of 1997 Caught in the Aftershock of America’s Racial Reckoning

 *Karen Baynes-Dunning*

### Introduction

I titled this essay *Stop Blaming the “Uncooperative Mother”*<sup>1</sup> because it has become a racial trope used by well-intentioned people who work with families throughout our nation’s child welfare system. Over nearly 30 years of working in and around the child welfare system, I have heard variations on this theme: the angry mother, the hostile mother, the disrespectful mother, the antagonistic mother, the aggressive mother, the argumentative mother, and many other negative labels that drive how systems engage.

Within the child welfare context, there is a power dynamic between agencies and families. Throughout all the “voluntary” engagement as caseworkers assist families who have come to their attention due to allegations of abuse and neglect, there is always the lingering threat that the government may take the family’s children and place them into foster care. Thus, full cooperation, deference, and respect are the subjective land mines that parents must navigate, and often young and inexperienced caseworkers get to control. Rarely is the caseworker’s approach to engagement even considered as a factor in conflict-riddled relationships between caseworkers and birth parents. Tripping any of these land mines and upsetting the caseworker, the Court Appointed Special Advocate (CASA), the judge, or even the court-appointed lawyer assigned to represent the parents, can lead to permanently severing their relationship with their children.

Black children enter foster care at disproportionate rates.<sup>2</sup> And it is a system that is extraordinarily biased toward maternal engagement. Thus, you can substitute “mother” with “Black mother” in the above list of condemnations to directly trace these pejorative stereotypes to the foundational lies used to justify slavery: that Black people are an inferior and lazy race; and Black women are aggressive, ill-tempered, illogical, overbearing, hostile, and ignorant without provocation.<sup>3</sup> Stereotypes about Black women have persisted and made their way into popular culture, mass media, and the explicit and implicit bias of individuals and systems throughout slavery, Jim Crow, the Civil Rights Movement to the present day. In child welfare, the dehumanizing and

degrading views of Black women have resulted in disproportionately adverse outcomes for Black children ensnared by America’s foster care system.

This paper will explore the negative impact of the Adoption and Safe Families Act (ASFA) on Black families within the context of America’s recent reckoning with historic and systemic racism. To better understand ASFA, it is essential to examine other laws passed by Congress shortly before and after the passage of ASFA. The analysis will include how these policies worked in concert with ASFA to disproportionately sever the parental and familial ties of thousands of Black children and ravage Black communities:

- The War on Drugs with the passage of the Anti-Drug Abuse Act of 1986 and the Crime Bill of 1994
- The Personal Responsibility and Work Opportunity Reconciliation Act of 1996
- The Multi-Ethnic Placement Act (MEPA) of 1994
- The Interethnic Placement Act of 1996 (IEPA) of 1996
- The Adoption and Safe Families Act of 1997

While changing these laws is vital, changing the culture within systems requires as much if not more attention. For example, the Families First Prevention Services Act (2018) (FFPSA) has the potential to change the entire child

<sup>1</sup>While this article explores the impact of ASFA on Black mothers, the child welfare system’s view of Black fathers, like in society-at-large, often vacillates between inconsequential and deadbeat to dangerous. Additionally, like Black mothers, the history of racism, stereotypes, and discrimination against Black fathers can also be traced from slavery to the present day in the nation’s laws, policies, and practices. While not discussed in this article, these issues also need research and exploration for practice implications, culture shifts, and the development of new policies to replace current law.

<sup>2</sup>African American children make up 14 percent of the U.S. child population and 23 percent of the foster care population. [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf)

<sup>3</sup>Ashley, Wendy. “The angry black woman: the impact of pejorative stereotypes on psychotherapy with black women.” *Social work in public health* vol. 29,1 (2014): 27-34. doi:10.1080/19371918.2011.619449

welfare system dramatically. The Act allows states to use federal funding to support prevention services to keep children and families together. First, however, child welfare systems must devote time to exploring and developing strategies to eliminate bias and discrimination. Otherwise, FFPSA can become a tool for over-surveillance resulting in an even wider gateway for Black children to enter the foster care system.

Changing culture will take sustained, deliberate efforts to shift mindsets by acknowledging systemic racism and disrupting the negative stereotypes about Black people that influence decision-making at every level. There is a need for more research, education, and training workshops regarding the psychological and sociological impact of systemic racism on the health and well-being of Black Americans. It is also imperative to deepen the understanding of how Black parents deal with racism-induced trauma by developing capacities to protect their children from the very agencies and organizations that purport to assist. In other words, systems and individuals need to shift mindsets and culture such that the once “uncooperative mother” is now viewed as a compassionate and loving parent, willing to do whatever it takes to shield her children from the harms of systemic racism.

## America’s Racial Reckoning: Moving from Rhetoric to Reality

Racism is a part of the DNA of America. Yet, as a nation, we are reluctant to acknowledge this as fact and even more unwilling to accept our role in perpetuating systemic racism and its negative impact on communities of color, especially Black communities. The simultaneous tsunami of murders of Black people at the hands of law enforcement and a global health pandemic that required the nation to shut down and stay at home led to our collective and repetitive television and online viewing of the murder of George Floyd in May 2020. Yet again, an unarmed Black man was killed by an armed white man, acting under the authority of our government. For 9 minutes and 29 seconds, we watched him

casually and callously kneel on Mr. Floyd’s neck until he died. This time America could not deny the horror displayed across their screens and devices. Despite the decades of witnessed lynchings, videotaped beatings, and killings that preceded this one, Mr. Floyd’s murder was the proverbial straw.

As a result, communities held discussions about reimagining public safety and ending systemic racism across the country. Corporations issued new value statements and pledges to diversify and create inclusive work environments. Noteworthy institutions such as the National Football League issued apologies for dismissing players’ concerns about racism within the league and in communities. There are now regular training modules in workplaces, civic organizations, and educational settings that walk participants through the history of racism and policing in America. A history that many believe started in the 1700s with the South Carolina slave patrols designed to find, capture, and torture enslaved men and women trying to escape slavery’s barbaric and dehumanizing tentacles.<sup>4</sup> There is now also an often-repeated expression amongst social justice advocates that “law enforcement is not broken; it is functioning how designed.”

Amidst police brutality protests, chants to “defund the police” reverberated from coast to coast. Media outlets and some advocates summarized this as a call to abolish law enforcement agencies. More nuanced reform discussions among researchers, advocates, and policymakers involved redirecting portions of ever-increasing law enforcement budgets to other government agencies such as mental health, education, child welfare, and affordable housing. The challenge is that all government and nonprofit agencies are affected by systemic racism. Disproportionately adverse outcomes for Black people are evidenced by data within every sector. While additional funding and resources will assist, it will not be enough to improve outcomes without eliminating bias and discrimination. However, it is much more challenging to identify and address systemic racism embedded within non-law enforcement

<sup>4</sup>Reichel, P. L. (1988). Southern Slave Patrols as a Transitional Police Type. *American Journal of Police*, 7(2): 51-77.

agencies and nonprofits. The challenge is even more difficult for the organizations in which we work.

No person dedicates a career to child welfare to harm people. Nor would most wittingly join an organization that devalues specific populations based on race, ethnicity, gender, etc. And yet, the data and evidence that the child welfare system produces horrific outcomes for children, youth, and families of color are undeniable. With police brutality as the backdrop to racial reckoning, systemic racism, white supremacy, and individual racism have been conflated and often used interchangeably. As a result, the workforce can be defensive of their work and themselves, wary of being called racists. While organizations may include some staff who are racists, all staff and all Americans are infused with implicit bias when it comes to race.

It is sometimes tricky to unpack one’s own bias and realize how systemic racism and insidious stereotypes seep into our thinking, decision-making, and actions. For example, people expressed widespread outrage across the country when the federal government began separating children from their parents crossing into the U.S. along the southern border. In an article entitled, *The Moral Failure of Family Separation*, published in the January 2019 edition of *The Atlantic*, the author, Ashley Fetters, wrote:

*It is an axiom of moral life among civilized humans that to separate young children from their parents is an offense against not just nature but society, one of the building blocks of which—as the Republican Party, in particular, has long been at pains to emphasize—is the family. Forcibly yanking children from their parents is of a piece with some of the darkest moments of American history: the internment of Japanese Americans; the forcible separation of American Indian children into special boarding schools; slavery.*<sup>5</sup>

Yet, despite America’s racial reckoning, the reality is that very few advocates express this same outrage for the ongoing systematic separation of Black children from their parents every day by child welfare systems. And as Ms. Fetter points out, these separations have been taking place for Black families since slavery.

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Today, Black mothers engaged with the child welfare system still face the damaging and debilitating stereotypes that cloud the lives of all Black women.

Even Black women who ascend to the pinnacle of education and success continue being belittled and maligned. First Lady Michelle Obama is perhaps the most recognized example to include: a caricature of her on the cover of a 2008 *New Yorker* magazine with a large afro, an angry grimace on her face, and a machine gun slung across her back; a national debate regarding her fit and muscular arms and whether they were too “masculine”; a social media posting by a white female pediatric anesthesiologist at Denver Health in Colorado describing the First Lady on Facebook as “Monkey face and poor ebonic English!”<sup>6</sup>; and a white woman nonprofit director in West Virginia posting on Facebook, “It will be refreshing to have a classy, beautiful, dignified first lady in the White House. I’m tired of seeing an Ape in heels.”<sup>7</sup> This last comment was applauded on

<sup>5</sup>Hayash, Dennis, and Olivia Golden. “Office for Civil Rights Memorandum.” HHS.gov, US Department of Health and Human Services, July 26 2013, [www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/interethnic-adoption-provisions/index.html](http://www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/interethnic-adoption-provisions/index.html).

<sup>6</sup>Cooney, Samantha. “Michelle Obama Called ‘Monkey Face’ by Colorado Doctor.” *Time*, Time, 2 Dec. 2016, [time.com/4588752/michelle-obama-monkey-face-doctor/](http://time.com/4588752/michelle-obama-monkey-face-doctor/).

<sup>7</sup>Chan, Melissa. “Michelle Obama: W Virginia Official Calls Her ‘APE in Heels’.” *Time*, Time, 15 Nov. 2016, [time.com/4571315/west-virginia-michelle-obama-ape-heels/](http://time.com/4571315/west-virginia-michelle-obama-ape-heels/).

social media by a local white female mayor, joining in on the continued process of dehumanizing this extraordinarily accomplished and successful Black woman. (These comments caused a national uproar resulting in suspension of the doctor, the nonprofit leader losing her job and later serving time in federal prison for embezzling FEMA funds, and the mayor resigning).

According to researchers at the [National Museum of African American History and Culture](#), “Stereotypes of African Americans grew as a natural consequence of both scientific racism and legal challenges to both their personhood and citizenship.”<sup>8</sup> As an example, they cite the Supreme Court’s opinion in the 1857 Dred Scott v. John F.A. Sandford case in which Chief Justice Taney explains that negroes are an “inferior order and altogether unfit to associate with the white race,”<sup>9</sup> and thus, were not afforded rights under the Declaration of Independence or the Constitution.

The Supreme Court was not alone in codifying and institutionalizing racism. Congress, state legislators, and local officials also passed laws, ordinances, and policies reinforcing negative stereotypes. For example, Black Codes and Jim Crow laws that were only applicable to Black people, the federal government’s counterintelligence program, known as COINTELPRO, was used to target, discredit, and sometimes kill Civil Rights and Black Power movement leaders.<sup>10</sup> In May 2020, the University of California Berkeley Library received a digital database of FBI records documenting the surveillance of African Americans throughout the 20th century. After reviewing the files, Leigh Raiford, a professor of African American studies at UC Berkeley, stated,

**These documents ... reveal and confirm the kind of root investment in anti-Blackness and quelling dissent that has long been part of our government structure.<sup>11</sup>**

Meanwhile, the passage of seemingly benign federal policy continues to address the needs of American families experiencing poverty and

other challenges. There is an expectation that Black families should trust the systems used to oppress, subjugate, separate, and control their bodies and communities for hundreds of year.

## The War on Drugs Dismantles Black Families and Communities

In 1971, Richard Nixon declared a United States War on Drugs. Forty-five years later, in a 2016 interview for Harper’s Magazine, Nixon’s senior advisor for Domestic Affairs, John Ehrlichman admitted:

***The Nixon campaign in 1968, and Nixon white house had two enemies: the antiwar left and black people. You understand what I’m saying? We knew we couldn’t make it illegal to be either against the war or Black ... But by getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities ... We could arrest their leaders raid their homes, break up their meetings, and vilify them night after night on evening news. Did we know we were lying about the drugs? Of course we did.<sup>12</sup>***

The War on Drugs intensified under President Ronald Reagan, as crack cocaine, a cheaper form of cocaine, was introduced into the Black community. The federal government enhanced its sentencing guidelines so that someone convicted of possessing one gram of crack

<sup>8</sup>“Popular and Pervasive Stereotypes of African Americans.” National Museum of African American History and Culture, Smithsonian, nmaahc.si.edu/blogpost/popular-and-pervasive-stereotypes-african-americans.

<sup>9</sup><https://tile.loc.gov/storage-services/service/ll/llst/022/022.pdf>. Dred Scott.

<sup>10</sup>Davis, J.K. “Assault on the Left: The FBI and the SIXTIES Antiwar Movement.” Assault on the Left: The FBI and the Sixties Antiwar Movement | Office of Justice Programs, 1997, [www.ojp.gov/ncjrs/virtual-library/abstracts/assault-left-fbi-and-sixties-antiwar-movement](http://www.ojp.gov/ncjrs/virtual-library/abstracts/assault-left-fbi-and-sixties-antiwar-movement).

<sup>11</sup>Hobin, Virgie. “Discredit, Disrupt, And DESTROY”: FBI Records Acquired by the Library Reveal Violent Surveillance of Black LEADERS, Civil Rights Organizations.” UC Berkeley Library News, 2021, [news.lib.berkeley.edu/fbi](http://news.lib.berkeley.edu/fbi).

<sup>12</sup>Baum, Dan, et al. “[Report]: Legalize It All, by Dan Baum.” Harper’s Magazine, John R. MacArthur, March 31, 2016, [harpers.org/archive/2016/04/legalize-it-all/](http://harpers.org/archive/2016/04/legalize-it-all/).

would receive a sentence 100 times longer than someone possessing one gram of powder cocaine.<sup>13</sup> President Reagan signed the Anti-Drug Abuse Act of 1986 that provided:

|  |   |   |
|--|---|---|
| \$1 billion to state and federal law enforcement agencies, including \$95 million for new prison construction. | Expansion of no-knock warrants (yes, like the one used in the Breonna Taylor case). | Harsher penalties for federal drug cases up to life imprisonment. |
|--|---|---|

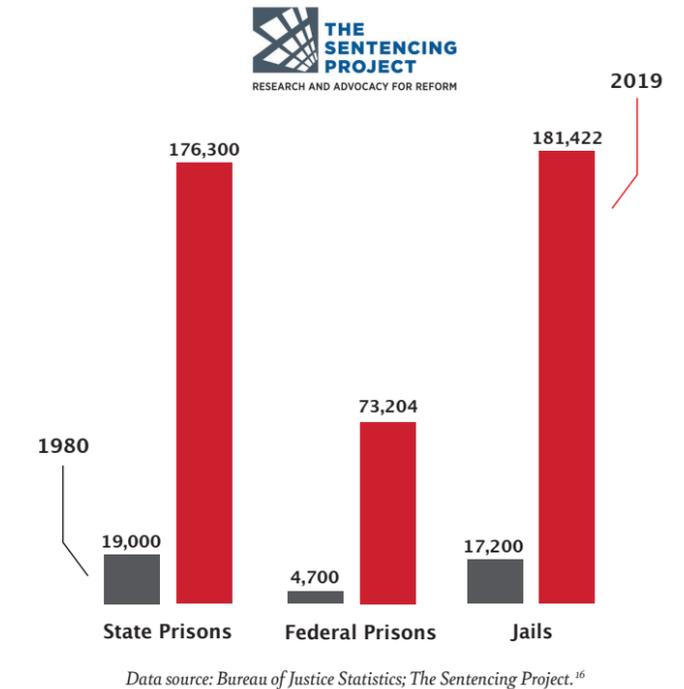
By 1994, despite data that indicated 67 percent of crack users were white, 85 percent of those convicted for use or sale of crack were Black.<sup>14</sup> Black men and women were arrested more frequently and served much longer sentences. Mass incarceration exacerbated and expanded the separation of Black parents and their children. In addition, the costs associated with navigating the criminal justice system’s lawyers, non-refundable bonds, high-priced prison phone fees, etc., intensified the financial instability of already fragile families.

Although violent crime peaked in 1991, Bill Clinton also campaigned on getting tougher on crime. After winning the presidency, he kept his promise by advocating for and signing the Violent Crime Control and Law Enforcement Act of 1994, known as the Crime Bill. The Crime Bill further militarized police departments, increased mandatory sentences for drug-related crimes, shifted discretion from judges to prosecutors (who lacked even more diversity than the judiciary), demonized Black children as super predators and began trying them as adults, and expanded the footprint and population of the prison system with the creation of three strikes and outlaws.<sup>15</sup>

As a result, the prison and jail populations in the U.S. exploded over the next 40 years, especially for drug offenses.



## Number of People in Prisons and Jails for Drug Offenses, 1980 and 2019



## The Destruction of Black Families Reinforced by Welfare Reform

### Temporary Assistance to Needy Families (TANF) (1996)

In addition to getting tough on crime, Bill Clinton also made a campaign promise to “end welfare as we know it.” The Personal Responsibility and Work Opportunity Act (PRWOR Act) of 1996 eliminated Aid to Families with Dependent Children (AFDC) and created

<sup>13</sup>Mauer, Marc, and Keeda Haynes. “Testimony to House Judiciary on FEDERAL Cocaine Sentencing.” The Sentencing Project, May 1 2009, [www.sentencingproject.org/publications/testimony-to-house-judiciary-on-federal-cocaine-sentencing/](http://www.sentencingproject.org/publications/testimony-to-house-judiciary-on-federal-cocaine-sentencing/).

<sup>14</sup>Id. P.7

<sup>15</sup>Three Strikes Laws created mandatory life imprisonment without possibility of parole for defendants with three or more convictions for drug trafficking and serious violent felonies. Many states followed suit and passed similar state statutes. <https://www.ncjrs.gov/txtfiles/billfs.txt>

<sup>16</sup>Criminal Justice Facts.” The Sentencing Project, June 3, 2021, [www.sentencingproject.org/criminal-justice-facts/](http://www.sentencingproject.org/criminal-justice-facts/).

Temporary Assistance to Needy Families (TANF), a time-limited cash assistance program with work requirements for most recipients, and life-bans for those convicted of a drug-related felony. Two short years after the Crime Bill systematically expanded the prison industrial complex, welfare reform removed the safety net from families who were already reeling from the financial strain of having a loved one in the system and the emotional instability of their absence.

The original government welfare program, Aid to Dependent Children (ADC), was a Depression Era entitlement enacted as part of the Social Security Act of 1935. The program's goal was to provide financial assistance to widows with children so that they would not have to enter the workforce. It was designed only for those mothers who were "deemed deserving."<sup>17</sup> Thus, the program did not include divorced women, mothers with children born out of wedlock, and all Black mothers.<sup>18</sup> Likewise, the social security system excluded Black people from its pension program for the elderly.

Interestingly, at the time of its passage, Black women were already in the workforce, especially in the South, continuing to work on farms, as domestics, and as nannies, raising the children of white families. Thus, there was a bias that Black mothers should

continue working, contrary to the bias that white mothers should stay at home to care for their children. However, once Black families began receiving benefits in the 1950s and 1960s, the nation started to sour on the program, believing that it was an unnecessary entitlement for lazy people, taking advantage of taxpayer money. Soon after, Ronald Regan used the "welfare queen" stereotype to slash the program during his presidency. Despite data that the most extensive number of users of ADC were white people, later renamed Aid to Families of Dependent Children (AFDC), the conniving "welfare queens" were always depicted as Black women living in the inner city, choosing to remain in poverty.<sup>19</sup> By the time Clinton signed the PRWOR Act of 1996, he had garnered bipartisan support in Congress and nationwide.

<sup>17</sup>African American children make up 14 percent of the U.S. child population and 23 percent of the foster care population. [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf)

<sup>18</sup>Mauer, Marc, and Keeda Haynes. "Testimony to House Judiciary on FEDERAL Cocaine Sentencing." The Sentencing Project, May 1 2009, [www.sentencingproject.org/publications/testimony-to-house-judiciary-on-federal-cocaine-sentencing/](http://www.sentencingproject.org/publications/testimony-to-house-judiciary-on-federal-cocaine-sentencing/).

<sup>19</sup>Carten, Alma. "How Racism Has Shaped Welfare Policy in America since 1935." APNews, AP, August 21 2016, [apnews.com/article/fbd5d3c83e3243e9b03e46d7cb842eaa](http://apnews.com/article/fbd5d3c83e3243e9b03e46d7cb842eaa).

### *Interethnic Placement Act (IEPA) (1996)*

The Small Business Job Protection Act of 1996 includes Section 1808 entitled "Removal of Barriers to Interethnic Adoption" (IEPA). The stated intent of the section was to strengthen the Multiethnic Placement Act of 1994 (MEPA) by shortening the length of time children wait to be adopted, ensuring diligent recruitment and retention of foster and adoptive parents, and eliminating discrimination in placement considerations. The language included in MEPA read:

*"Permissible Consideration -- An agency or entity [which receives federal assistance] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of such background as one of a number of factors used to determine the best interests of a child."<sup>20</sup>*

IEPA repealed this provision and denied funding to states that considered the child's or the prospective foster or adoptive parent's race, color, or national origin in determining adoptive placements. Proponents of the bill relied on anecdotal cases in which white foster parents did not get selected as adoptive placements for the Black children in their care. These individual examples led to a widespread belief that children were languishing in foster care waiting for adoptive placements due to discrimination against white families. Others also believed that Black families were not stepping forward to become foster and adoptive parents. On the contrary, research has shown that Black families respond to recruitment efforts but are screened out by arbitrary racist policies based on white middle-class standards.<sup>21</sup> Moreover, having a criminal record or someone in your household having a criminal record creates an often-insurmountable presumption that your home is not appropriate for fostering or adoption. Decisions to deny these applications do not consider that the Crime Bill and the disproportionate number of Black people over-

surveilled and arrested by law enforcement increased the number of households navigating life with a criminal record.

To further emphasize getting children out of care and adopted more quickly, Congress passed ASFA the following year.

### *Adoption and Safe Families Act (1997)*

The Adoption and Safe Families Act of 1997 (ASFA) was one in a series of laws signed by then-President Bill Clinton that many now believe perpetuated a direct attack on Black families and communities. Included in ASFA are financial incentives to states to increase the number of adoptions from foster care. These incentives and the name of the Act itself sent a clear message that adoption and not reunifying children with their parents or relatives was the permanency option of choice. I was appointed to the juvenile court bench that same year and became part of a process that systematically set Black families up to fail. As a Black woman, this was certainly not my intention, nor the intention of the compassionate and dedicated people that continue to work in and around the child welfare system.



<sup>20</sup>Hayash, Dennis, and Olivia Golden. "Office for Civil Rights Memorandum." HHS.gov, US Department of Health and Human Services, July 26, 2013, [www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/interethnic-adoption-provisions/index.html](http://www.hhs.gov/civil-rights/for-individuals/special-topics/adoption/interethnic-adoption-provisions/index.html).

The stated intention of ASFA was that children were lingering in foster care for too long and needed to move to permanency more quickly. The Act set forth strict timeframes in which cases must move through the court system. Permanency hearings are required by the 12th month in foster care. For those children who remain in care for 15 of the past 22 months, the child welfare agency must file a petition to terminate parental rights (TPR) unless the caseworker can present a compelling reason that termination is not in the best interest of the child.<sup>22</sup> Moreover, the Act created a financial incentive for states that increase their adoption rates from foster care.<sup>23</sup>

These provisions led to a major shift away from reunification to terminating the rights of parents and legally freeing children for adoption.

It is important to note that the selected time frames were arbitrary and did not consider the slow chug of the criminal justice system. Congress also did not consider discriminatory housing policies and practices, limited employment opportunities (especially for those with criminal records), nor the science regarding drug abuse recovery. Child development, brain science, nor the life-long trauma associated with adoption did not permeate legislative discussions. When first introduced, the bill required filing a TPR if the child was in care for 18 of the past 24 months.<sup>24</sup>

After some debate, legislators shortened it to 12 of the past 18 months.<sup>25</sup> Finally, they split the difference and landed on 15 of the past 22 months.<sup>26</sup> As a Black female juvenile court judge, I did not leave my corporate law firm job to destroy Black families. Nor was it the intention of the compassionate and dedicated people that continue to work in and around the child welfare system. Many judicial and staff training workshops about dependency cases emphasized rapid timeframes, processes, and adoption. In fact, I remember one recommendation from a judicial workshop to hand parents a photocopied giant clock, with dates for hearings to further emphasize the daunting 15 months to complete case plans or face TPR. Other workshops described TPRs as equivalent to the civil death penalty.

Yet, by 1999 merely two years after the passage of ASFA, there were 46,000 adoptions from foster care, an increase of 28 percent from the previous year. The majority of these children (51 percent) were Black.<sup>27</sup> The culture shift away from an emphasis on family preservation and/or reunification to a focus on the health and safety of children and acceleration of permanency was enshrined into state statutes, case practice models, and court processes.

<sup>21</sup>Dunston, Leonard, et al. "Start Fining States That Block African American Foster Families." The Imprint, Fostering Media Connections, January 27 2021, imprintnews.org/opinion/start-fining-states-discriminate-african-american-foster-adoptive-families/50887.

<sup>22</sup>"Intentions and Results a Look Back at the Adoption and Safe Families Act." Edited by Susan Notkin et al., Urban.org, Center for the Study of Social Policy and Urban Institute, 2009, www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF.

<sup>23</sup>Id. P.11

<sup>24</sup>Hort, Katherine A. (2000). "Is Twenty-two Months Beyond the Best Interest of the Child? ASFA's Guidelines for the Termination of Parental Rights". Fordham Urban Law Journal. 29 (6) P.1894.

<sup>25</sup>Id.

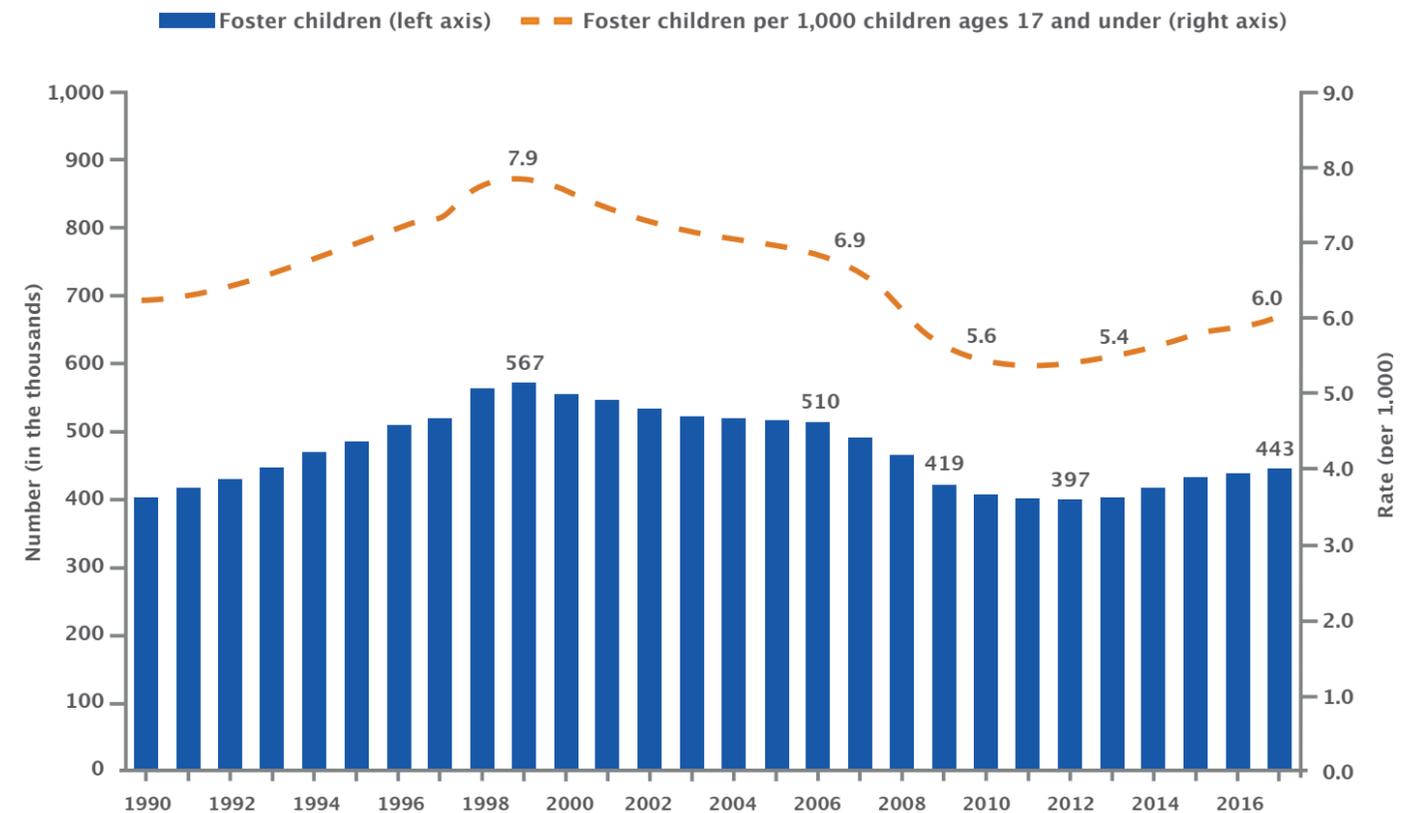
<sup>26</sup>Roberts, Dorothy. "Child Policy - ASFA - an Assault on Family Preservation | Failure to Protect |." Frontline, Public Broadcasting Service, 2002, www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/roberts.html.

<sup>27</sup>James Bell Associates. "Safety Permanency Well-Being Child Welfare Outcomes 1999: Annual Report." Child Welfare Outcomes 1999: Annual Report to Congress, U.S. Department of Health and Human Services, Administration for Children and Families, https://www.acf.hhs.gov/sites/default/files/documents/cb/cwo99.pdf.

## Is Child Welfare Broken, or Is It Functioning as Designed?

The steep increase in prison and jail populations during the 1990s mirrored a steep increase in the foster care population, peaking at 560,000 children separated from their parents in 1999.<sup>28</sup>

### Number and Rate of Children in Foster Care Ages 17 and Younger: 1990-2017\*



\*Data for 2004-2017 are preliminary estimates as of August 10, 2018. Revised estimates may be forthcoming. Sources: Data for 1990-1997: Trends in the Well-Being of America's Children and Youth 1999. Table PF 2.3 U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation. Available at <http://aspe.hhs.gov/hsp/99/trends/> Data for 1998 - 2002: The AFCARS report: Final for FY 1998 - FY 2002. U.S. Department of Health and Human Service, Administration for Children and Families, Administration on Children, Youth, and Families, Children's Bureau. Available at <http://www.acf.hhs.gov/programs/cb/resource/afcars-report-12> Data for 2003: The AFCARS Report: Interim FY 2003 Estimates as of June 2006. U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth, and Families, Children's Bureau. Available at <http://www.acf.hhs.gov/programs/cb/resource/afcars-report-10> Preliminary data for 2004-2017; The AFCARS Report. U.S. Department of Health and Human Services, Administration for Children and Families Administration on Children, Youth and Families, Children's Bureau. <http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/afcars> Population estimates used for calculating Foster Children per 1,000 children ages 17 and under for 1998-1999: U.S. Census Bureau population division, National Intercensal Estimates (1990-2000). <http://www.census.gov/popest/data/intercensal/national/index.html> Population estimates used for calculating Foster Children per 1,000 children ages 17 and under for 2000-2009: U.S. Census Bureau, Population division, National Intercensal Estimates (2000-2010). <http://www.census.gov/popest/data/intercensal/national/nat2010.html> Population estimates used for calculating Foster Children per 1,000 children ages 17 and under for 2010-2017: U.S. Census Bureau, Population division: Annual Estimates of the Resident Population: <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmm>

childtrend.org

During that year, 38 percent of children in foster care were Black, Non-Hispanic and 35 percent of children in foster care were white, Non-Hispanic. Conversely, in 1999, only 29 percent of youth who exited foster care were Black, Non-Hispanic, and 41 percent were white, Non-Hispanic.<sup>29</sup> The Black,

<sup>28</sup>"Trends in Foster Care." Child Trends Databank, Child Trends, May 25, 2018, www.childtrends.org/indicators/foster-care.

<sup>29</sup>U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, www.acf.hhs.gov/programs/cb Final Estimates for FY 1998 through 2002 (12).



Non-Hispanic population remained steady at 15 percent of the total U.S. child population between 1980 and 2000.<sup>30</sup> For nearly every indicator in the child welfare system, Black children experience disproportionately bad outcomes: more referrals to child protective services for investigation, more terminated from their families, and more age out of care with no positive permanency. Any for-profit business that produced similar results would be closed. Over the decades that child welfare data has been disaggregated by race, the storyline has not changed. So, we should ask ourselves, why in the face of such daunting evidence have we not declared that “it is contrary to the welfare”<sup>31</sup> of Black children to remain in the care of America’s foster care system?

Suppose we understand the history of systemic racism and the impact on the laws, policies, and practices that guide government and nonprofits. In that case, we must acknowledge the adverse effects on Black parents and create strategies to eliminate racism and bias from decision-making. In varying degrees, child welfare staff, service providers, and caregivers across the country have grasped the concept of trauma and trauma-informed practice for younger children. However, older youth, birth parents, and relatives fall victim to racist stereotypes and policy-driven barriers. Their trauma is penalized through the foster care and TPR process. As a nation, we must begin to value Black families.

## The Trauma of Parenting While Black in America

Black mothers carry an extra parenting burden in the U.S: the belief that our children can be destroyed by the very systems purporting to protect and support. The nation has now become privy to the private conversations that Black parents must have with their children at very early ages regarding navigating negative and potentially violent interactions with law enforcement and other people in positions of authority. In many ways, it has shocked America that Black children get an opposite narrative to “officer friendly.” Emmitt Till (July 25, 1941 – August 28, 1955), Temir Rice (June 25, 2002 – November 22, 2014), and

**“Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you; we fear our children will be dragged from a car and shot down in the street, and you will turn your backs on the reasons they are dying.”**

the countless other murdered Black children compel Black parents to end the childhood bubble by trying to get our children to understand the dangers that exist for them because of the color of their skin.

In 1983, famed author and activist Audre Lorde penned,

*Some problems we share as women, some we do not. You fear your children will grow up to join the patriarchy and testify against you; we fear our children will be dragged from a car and shot down in the street, and you will turn your backs on the reasons they are dying.*<sup>32</sup>

This reality still exists today for Black mothers and creates a deep-seated fear that other mothers do not experience. Some researchers believe this can lead to race-based traumatic stress and/or immediate or delayed post-traumatic stress disorder (PTSD).<sup>33</sup>

<sup>30</sup>“Trends in the Well-Being of America’s Children and Youth, 2002.” Edited by Westat, ASPE, Office of the Assistant Secretary for Planning and Evaluation, 2002, [aspe.hhs.gov/reports/trends-well-being-americas-children-youth-2002-0](https://aspe.hhs.gov/reports/trends-well-being-americas-children-youth-2002-0).

<sup>31</sup>This language represents required findings by the court for states to receive federal funding for foster care.

<sup>32</sup>Lorde, Audre. *Sister Outsider: Essays and Speeches*. Crossing Press, 1984.p.109.

<sup>33</sup>Helms, J. E., Nicolas, G., & Green, C. E. (2010). Racism and Ethnoviolence as Trauma: Enhancing professional training. *Traumatology*, 16(4), 53–62. doi:10.1177/1534765610389595.

Practitioners and scholars have mainly focused on the trauma caused by direct individually experienced racism and race-based violent acts in the past. However, systemic racism has not been as widely discussed or explored for symptom development.<sup>34</sup>

Health is one sector examining the impact of racially discriminatory institutional policies and practices, especially Black maternal health. More researchers are concluding that institutional racism is a critical factor in the following:

- Disproportionately high infant mortality rates for Black babies (more than twice that of white babies).<sup>35</sup>
- Black babies are more than three times likely to die due to complications from low birth weight than white babies.<sup>36</sup>
- Disproportionately high maternal mortality rates for Black mothers (more than three to four times that of white mothers).

According to the [National Institute for Children’s Health Quality](#) (NICHQ), we must not fall prey to the notion that systemic racism does not exist because slavery and Jim Crow ended when the Civil Rights Movement created more equality.

*Understanding the history associated with this continuum is a vital step toward dismantling policies and practices that continue to adversely affect maternal and child health outcomes. With this knowledge, individuals working in health care institutions can provide culturally competent, compassionate care that recognizes why non-majority populations may mistrust health care institutions; and individuals across the country can examine organizational, state, and federal policies—and work together to eliminate those that stem from institutional racism.*<sup>36</sup>

Practitioners, policymakers, and researchers must also explore history to disrupt and dismantle policies and practices such as ASFA and other legislation that exacerbate poor

outcomes for Black children and families involved in America’s foster care system. Moreover, child welfare and court systems must unpack and eradicate the hidden racial biases throughout every decision point in the process. Finally, systems should consider creating checks and balances for one judge, one family, and one caseworker, one family practice. While it creates process efficiencies and continuity of knowledge about families, it can keep families in bias-riddled bubbles that lead to bad outcomes. In other words, if bias goes unchecked, the “uncooperative mother” can easily find her family heading toward TPR, not because of safety risk to her children, but because she has upset a system influencer or decision-maker.

## Where Do We Go from Here?

I started this essay acknowledging that I was and continue to be a complicit participant in the child welfare system, despite its horrendous outcomes for Black children and their families. As a Black woman in my mid-50s, I grew up hearing various forms of the saying, “You have to be twice as good to get half as much.” That is still a mantra covering every aspect of Black life in America: education, career, and, yes, even parenting. Black mothers are often viewed as “too strict” and “mean” toward our children. For those of us who grew up during a time that corporal punishment was the norm, another often-used expression passed down through the generations was, “This hurts me more than it hurts you.” America’s racial reckoning should now allow us to examine Black parenting through the lens of racial trauma and fear of an unforgiving world. This lens may produce a perspective that Black mothers instead are protecting their children from systemic racism and harmful institutions by ensuring that they cross all their “t’s” and dot all their “i’s at home and in the community.

<sup>34</sup>Id. P.16.

<sup>35</sup>Cdc.gov. 2021. *Pregnancy-Related Deaths* | CDC. [online] Available at: <<https://www.cdc.gov/reproductivehealth/maternalinfanthealth/pregnancy-relatedmortality.htm>> [Accessed 25 September 2021].

<sup>36</sup>NICHQ – National Institute for Children’s Health Quality. 2021. *The Impact of Institutional Racism on Maternal and Child Health*. [online] Available at: <<https://www.nichq.org/insight/impact-institutional-racism-maternal-and-child-health>> [Accessed 25 September 2021].

Black families often come to the attention of the child welfare system due to a lack of adequate employment and income. Historically, Black women have always worked hard and have often had the unenviable position of cleaning up the mess of others, finding ways to survive, and taking care of our families. This strong work ethic is in direct contradiction to the stereotype that Black people are lazy. However, moving out of poverty in America is not just a matter of pulling up one's bootstraps, especially when you gain access to join the game after white men have been playing it for hundreds of years. Societal factors such as discriminatory employment and housing practices, criminal justice, mass incarceration, and policies that prevent fathers from actively participating in the household limit economic mobility for Black families. Thus, achieving case plan goals within ASFA's arbitrary 15 of 22 months is tone-deaf to the realities of these societal factors. Therefore, Congress must repeal this aspect of the statute.

With everything working against Black families, the resiliency, tenacity, and courage of Black mothers should overshadow thoughts of the stereotyped "welfare queen" and the "uncooperative mother." Suppose we genuinely want to transform the child welfare system to prevent Black families from bearing the weight of disproportionately adverse outcomes. In that case, we must not only examine laws such as ASFA, but we must also make deliberate efforts and strides to examine and shift mindsets. Solely repealing ASFA, the Crime Bill, and other destructive laws will only create new policies that will diminish

and dehumanize Black families. This work is imperative as agencies implement the Families First Prevention Services Act (2018) (FFPSA). Without the necessary work of rooting out bias and discrimination, this new policy could also be a slippery slope to the over-surveillance of Black families with even more Black children entering foster care.

Systemic racism is challenging to unpack without individual reflection and understanding of the history of race in America. Older versions of diversity training and the curriculum within agencies and schools of social work must be updated to specifically include the history of racism in the child welfare system and the correlation to present-day negative outcomes for Black families. In addition, there is a need for more research to fully understand racial trauma and how it manifests itself in the lack of trust in and resentment of systems such as child welfare.

These challenges did not happen overnight. Thus, it will take deliberate and prioritized focus, attention, and resources to create a system free of bias and discriminatory practices and policies. Those of us working in and around child welfare must develop skills and courage to talk about race, recognize and disrupt bias, and use data and evidence to change hearts and minds. Our work needs a sense of urgency as the nation prepares to implement FFPSA. We can transform the child welfare system if we stop blaming the "uncooperative parent" and begin examining ourselves.

families must come first!

"HONORING  
THE POWER OF  
FAMILIES AND  
COMMUNITIES"

Family Integrity  
& Justice 



“  
The conveyor belt had delivered this child to the legal destination of its choice — adoption. In the eyes of federal child welfare policy, the victory flag could be hoisted. Success had been achieved.  
”

# Ending the Unnecessary Pain Inflicted by Federal Child Welfare Policy

 *Vivek Sankaran*

## Introduction

*M*y client, the loving mother of an eight-year-old boy, could not care for him alone because she suffered from severe mental health conditions, including schizophrenia, bipolar disorder, anxiety, and depression. But she doted on him in many ways, as any mother would do. She attended his sporting events, showed up for his birthday parties, and helped him with schoolwork for hours each week. Their close relationship was recognized and appreciated by all of those around them.

But after his father was incarcerated, the child entered foster care; and the conveyor belt created by the federal foster care policy began to churn. Although his mother had placed him with family friends who supported their relationship, the conveyor belt still moved the case along like any other. It forced her to comply with a “cookie-cutter” service plan, even though everyone knew she did not have the ability to care for her son on her own. When she could not demonstrate that she could care for her son by herself, it immediately shifted the goal in the case to adoption, without any regard to the fact that such a goal required permanently terminating her parental rights.

Ultimately the judge, the main operator of the conveyor belt, permanently severed the relationship between the child and his mother. It did so even though the friends caring for her child, mental health providers, and even the child welfare agency’s own caseworker attested to the fact that the mother and her son shared a close bond. But both that bond and the harm that would result from its rupturing were irrelevant. The conveyor belt had delivered this child to the legal destination of its choice — adoption. In the eyes of federal child welfare policy, the victory flag could be hoisted. Success had been achieved.

The overarching goal of federal child welfare policy is for a child to exit foster care quickly and achieve a permanent legal arrangement. If a child has been in foster care for 15 of the preceding 22 months, federal laws create a presumption that the state child welfare agency must move to terminate that parent’s rights, regardless of the harm that terminating familial relationships might create.<sup>1</sup> It exacerbates pressures on state agencies by also incentivizing adoptions in these situations by giving states financial bounties if they increase the numbers of adoptions they facilitate.<sup>2</sup> Thus, cash-strapped states are rewarded when they get the conveyor belt to move as quickly as possible so the

child may get quickly adopted. In contrast, nowhere does the law require courts or agencies to explicitly consider the impact on the child of permanently severing familial ties before doing so. Nor does federal law require courts to explore other options, short of terminating parental rights, before destroying a family. Given these dynamics, it is unsurprising that between 2000 and 2016, the number of children adopted through public child welfare agencies grew by 23 percent, even while the number of children in foster care decreased by 21 percent.<sup>3</sup>

The child welfare system celebrates this achievement. In addition to financial rewards given to states that finalize more adoptions, the system praises those who expedite this process. Judges are honored. Child welfare agency leaders are promoted. Adoptive families are recognized at annual adoption day celebrations. Stakeholders in the community unite around the notion that we have succeeded once a child gets adopted.

But what is missing from this narrative, and is not recognized in federal law, is any recognition of the pain

<sup>1</sup>42 USC 675(5)(e)

<sup>2</sup>42 USC 673(b)

<sup>3</sup>Rolock et al., “A Comparison of Foster Care Reentry After Adoption in Two Large US States.” *Research on Social Work Practice*, vol. 29, 2019, pp 154.

created when parental rights are terminated. Children often suffer the loss of important relationships that matter to them. Parents feel intense grief and are disconnected from the very support they need for their well-being. Extended family members, who may be caring for children, feel anguish because the system forces them to adopt children, even though they might not want to because of their support and love for the children's birth parents.

This essay explores the pain created by the federal sanctioned policy of destroying families and calls for a straightforward solution that should be incorporated into federal law. Before a state moves to terminate parental rights, it must demonstrate, beyond a reasonable doubt,<sup>4</sup> that termination is strictly necessary to safeguard the child's physical and emotional well-being. A state must also demonstrate that other less restrictive forms of permanency could leave the parent's legal relationship with the child intact cannot meet the child's needs.

## The Pain Created When Parental Rights Are Terminated

Each time a court terminates the rights of a parent to a child, it can inflict harm to children, parents, and extended family members. The child suffers the loss of a legally recognized relationship with their parent. But unlike other types of losses like death, which bring with

them a sense of certainty and finality, terminating parental rights creates an ambiguous loss. Such a loss occurs "When an individual experiences a lack of clarity about a loved one's physical and/or psychological process."<sup>5</sup>

Research reveals that an ambiguous loss can be the most distressful of losses because "it is unclear, there is no closure, and without meaning, there is no hope."<sup>6</sup> According to Dr. Pauline Boss, the leading researcher on the topic, "people hunger for certainty. Even sure knowledge of death is more welcome than a continuation of doubt."<sup>7</sup> Thus, Boss theorizes that the inability to resolve situations causes "pain, confusion, shock, distress, and often immobilization," and this pain can become "chronic."<sup>8</sup> It can also lead to "rigidity, denial, black-and-white thinking" and externalizing behaviors, including "intense expressions of anger" and "bullying."<sup>9</sup> Exacerbating this impact, individuals dealing with these losses must often navigate these feelings on their own because "society does not recognize the loss, lacks rituals to grieve the loss, or there is no end to the uncertainty, and therefore no hope for true closure."<sup>10</sup>

Studies have shown that children whose parents' rights have been terminated experience ambiguous loss. They still maintain "significant psychological ties" to their birth family and grieve their loss even as they bond with their adoptive parents.<sup>11</sup> Terminating parental relationships can raise a "lifetime of questions for

children about their identities as members of their families of origin and their degree to which they can ever become 'real' members within a foster or adoptive family system."<sup>12</sup> Adoptees who lack access to connecting with their birth families feel that "no matter how they are loved, wanted, and wished for, they understand that a crucial part of them is

<sup>4</sup>The Indian Child Welfare Act already requires the "beyond a reasonable doubt" standard of proof in termination of parental rights cases involving Indian children. 25 U.S.C. 1912(f).

<sup>5</sup>Mitchell, Monique, "The Family Dance: Ambiguous Loss, Meaning Making, And The Psychological Family in Foster Care." *Journal of Family Theory and Review*, vol. 8, Sept. 2016, pp 361.

<sup>6</sup>Mitchell, "The Family Dance." pp 362.

<sup>7</sup>Mitchell, "The Family Dance." pp 362.

<sup>8</sup>Mitchell, "The Family Dance." pp 362.

<sup>9</sup>Robert E. Lee & Jason B. Whiting, "Foster Children's Expressions Of Ambiguous Loss." *Am. J. Fam. Therapy*, 35 *Am. J. Fam. Therapy*, vol. 35 (2007), pp 419, 425-426 (2007); Pauline Boss, "Ambiguous Loss Research, Theory, And Practice: Reflections After 9/11." *66 J. Marriage & Fam.* vol. 66, 2004, pp 553-554.

<sup>10</sup>Gina Miranda Samuels, "A Reason, A Season, Or A Lifetime: Relational Permanence Among Young Adults With Foster Care Backgrounds." Chapin Hall Center for Children, 2008, pp 13.

<sup>11</sup>Matthew B. Johnson, "Examining Risks To Children In The Context Of Parental Rights Termination Proceedings." *N.Y.U. Rev. L. & Soc. Change*, vol. 22, 1996, pp 414. See also Margaret Beyer & Wallace J. Mlyniec, "Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence." *Fam. L.Q.*, vol. 20, 1986, pp 237-240 (describing the role of the family of origin as the child's "primary lifeline").

<sup>12</sup>Gina Miranda Samuels, "Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds," *Child. & Youth Serv. Rev.*, vol. 31, 2009, pp 1229.

lost."<sup>13</sup> Stories after stories of adopted children searching for their birth families highlight the connection so many adopted children yearn for.

The words of youth adopted out of foster care capture these feelings. One youth stated, "We never felt part of the family... You know, no matter how much they tell you they love you, or how much they treat you . . . you always know that you don't belong."<sup>14</sup> Another noted, "I would drop my life at the drop of a dime if my mother needed me to do anything . . . It's so hard not to think about her or call her and talk to her."<sup>15</sup> Consistent with these sentiments, one survey showed only 41 percent of children over six adopted out of foster care expressed having a very warm and close relationship with their adoptive parent.<sup>16</sup> The same survey noted that a third of children adopted out of foster care had a more difficult relationship than they expected with their adoptive parent.<sup>17</sup> Often, in the words of researcher Monique Mitchell, "They are grieving the loss of their identities and their role within their psychological family."<sup>18</sup> So they experience feelings of fear, anger, abandonment, shame, embarrassment, and low self-esteem.<sup>19</sup>

Unsurprisingly then, to avoid these feelings of loss, youth in foster care have called for the rejection of traditional notions of permanency, which requires the severance of relationships, and have instead demanded relational permanency, the nurturing and preservation of *all relationships* that matter to a child.<sup>20</sup> These youth report that

"Their sense of self-identity is forged and sustained when they can maintain relationships with both their biological family and other significant adults in their lives."<sup>21</sup> Young adults who do youth with higher identification with their birth parents had higher self-esteem.<sup>23</sup> These children "may have found that

<sup>13</sup>Glaser, Gabrielle, *American Baby*, Viking, 2021, pp 185.

<sup>14</sup>Rolock, Nancy and Perez, Alfred G., "Three Sides to a Foster Care Story: An Examination of the Lived Experiences of Young Adults, Their Foster Care Record, and the Space Between," *Qualitative Social Work*, vol. 17, 2018, pp 208.

<sup>15</sup>Sanchez, Reina M., *Youth Perspectives on Permanency*, California Permanency for Youth Project, 2004, pp 9.

<sup>16</sup>"ASPE Research Brief: Children Adopted from Foster Care: Child and Family Characteristics, Adoption Motivation and Well-Being," 2011, <https://aspe.hhs.gov/reports/children-adopted-foster-care-child-family-characteristics-adoption-motivation-well-being-0>.

<sup>17</sup>ASPE Research Brief, 2011.

<sup>18</sup>Mitchell, Monique, "The Family Dance", pp 369.

<sup>19</sup>Glaser, Gabrielle, *American Baby*, pp 186, 189, 270.

<sup>20</sup>Rolock, Nancy and Perez, Alfred G., "Three Sides to a Foster Care Story: An Examination of the Lived Experiences of Young Adults, Their Foster Care Record, and the Space Between," pp 198.

<sup>21</sup>Perez, Alfred, *Classifying Relational Permanence Among Young Adults Who Exited Foster Care Through Legal Permanence As Adolescents*, Families in Society: The Journal of Contemporary Social Services, vol. 98, 2017, pp 187.

<sup>22</sup>Cushing, Gretta et al., "Profiles of Relational Permanence at 22: Variability in Parental Supports and Outcomes Among Young Adults with Foster Care Histories," *Children and Youth Services Review*, vol. 73, 2014, pp 79.

<sup>23</sup>Hanna, Michele, et al. "Happily Ever After? The Journey From Foster Care to Adoption," *Adoption Quarterly*, vol. 14, 2011, pp 112.



# ADOPTION

relating to multiple sources, rather than one exclusively, was a more comfortable way of managing relational needs and attachments within complex family structures and circumstances.”<sup>24</sup> Similarly, numerous studies looking at “open adoptions,” adoptions in which children were able to have continued contact with birth parents after the finalization of adoptions, found those children to be less anxious, more at ease, and more satisfied with the outcome.<sup>25</sup> As one researcher put it, “Even when youth no longer live with their biological parents, some birth parents can serve as unique sources of care and support around relational permanence.”<sup>26</sup>

Ironically, one study found that while child welfare professionals obsessed over finalizing legal permanency for the child, children who were the subjects of that permanency could not even correctly identify what form of permanency had even been achieved. Sixty percent of kids interviewed reported permanency outcomes incongruent with administrative data.<sup>27</sup> For example, eight participants reported achieving permanency through subsidized guardianship, whereas their records indicate they had aged out of foster care without permanency.<sup>28</sup> Three participants reported they had been adopted even though records indicated they had left foster care through subsidized guardianships.<sup>29</sup> Though the study was small, it further provides support that children are primarily concerned about relationships and not legal dispositions.

Yet federal law doesn’t recognize the nuanced feelings experienced by youth. And instead, by pushing the termination of parental rights, demand legal permanency at the expense of destroying relationships that matter to them. Not only does this approach harm children, but it inflicts unnecessary pain on parents and extended family members, who are often asked to care for children. Parents with children permanently removed from their care often experience “disenfranchised grief,” or grief not formally recognized and sanctioned by society.<sup>30</sup> One researcher wrote, “Mourners whose grief is disenfranchised are cut off from social supports. With few opportunities to express and resolve their grief, they feel alienated from their community and tend to hold onto their grief more tenaciously than they might if their grief was recognized.”<sup>31</sup> A parent who loses rights to a child has

<sup>24</sup>Cushing, Gretta et al., “Profiles of Relational Permanence,” pp 80.

<sup>25</sup>Glaser, Gabrielle, *American Baby*, pp 270.

<sup>26</sup>Cushing, Gretta et al., “Profiles of Relational Permanency,” pp 80.

<sup>27</sup>Rolock, Nancy and Perez, Alfred G., “Three Sides to a Foster Care Story,” pp 204.

<sup>28</sup>Rolock, Nancy and Perez, Alfred G., “Three Sides to a Foster Care Story,” pp 204.

<sup>29</sup>Rolock, Nancy and Perez, Alfred G., “Three Sides to a Foster Care Story,” pp 204.

<sup>30</sup>McKegney, Sherrie, “Silenced Suffering: The Disenfranchised Grief Of Birth Mothers Compulsorily Separated From Their Children,” Thesis, McGill University, 2003, pp 36, <https://www-proquest-com.proxy.lib.umich.edu/docview/305074522?pq-origsite=summon>.

<sup>31</sup>McKegney, Sherrie, “Silenced Suffering,” pp 36.

no one to turn to; they can’t publicly talk about their grief, so they internalize their pain.

Unsurprisingly, parents report increases in mental illness, substance abuse, anxiety, and depression after they lose rights to their children.<sup>32</sup> The loss of their children also heightens their “structural vulnerability” by increasing risks of housing instability, intimate partner violence, and the initiation of drug use and sex work.<sup>33</sup> A study found mothers used drugs to numb the pain of their loss and engaged in reckless behaviors because they no longer cared about bad things happening to them.<sup>34</sup> One parent described that permanently losing custody of her children made it difficult to be around any kids, while another stated it turned her into a “paranoid nut.”<sup>35</sup> Another described the headaches and nosebleeds she started to experience, while another described her head as “always feeling tight.”<sup>36</sup> A third stated being separated from your children “changes your whole way of thinking, it makes you like a stone inside after. And that is what I feel like now. A stone.”<sup>37</sup> The physical and emotional manifestations of grief, studies have shown, are not alleviated by a belief that their child might be in a better home.<sup>38</sup> Considering many of these parents continue to raise other children, the impact of these effects might be felt for generations.<sup>39</sup>

Extended family members also experience stress created by our system’s insistence that adoption always be the preferred outcome. Many relatives act as the parent’s

support system or recognize the child’s need to have continued relationships with their birth parents. And yet, these relatives are told by judges, caseworkers, and lawyers that these relationships must be ignored because the law demands legal permanency in the form of adoption. They are instructed that parental rights must be terminated to give the child a sense of finality. In other words, they receive the message, repeatedly, that professionals in the system know what is best for the family, rather than the families themselves.

Advocates working within the system can share stories of the pain this creates within families. Relative placements are told they must adopt a child rather than seek a legal arrangement like guardianship that would allow continued contact between a parent and her child. Preadoptive parents are told they cannot allow parents to have contact with their children while the adoption process is underway. After an adoption is finalized, they are warned that allowing any contact between a parent and a child may be grounds for a new Child Protective Services case. The system forces them to make an impossible choice—either care for the child in their home or be a support for a parent whom they love in a time of need. They are not permitted to do both.

Consider, for example, the case described at the outset of this essay. After the court terminated the rights of the mother with mental health issues, the child welfare

agency immediately instructed the preadoptive parents they could not permit any contact between the mother and her son. No longer was the mother allowed to attend soccer games, birthday parties, or school events even though all those involved agreed that the child benefited from his mother’s involvement. The system recklessly ended the child’s relationship with his mother and remained apathetic to the harm it caused them and the anguish it caused those caring for the child who sought to facilitate a relationship. Instead, the system blindly forged ahead towards its destination, which it had predetermined was best for this child regardless of any consideration of the relationships involved.

<sup>32</sup>Wall-Wieler, Elizabeth, et al., “Maternal Health And Social Outcomes After Having A Child Taken Into Care: Population-Based Longitudinal Cohort Study Using Linkable Administrative Data,” *J. Epidemiol. Community Health*, vol. 71, 2017, pp 1148–1150.

<sup>33</sup>Kenny, Kathleen, et al., “I Felt For A Long Time That Everything Beautiful In Me Had Been Taken Out: Women’s Suffering, Remembering And Survival Following The Loss Of Child Custody,” *International Journal Of Drug Policy*, vol. 26, Nov. 2015, pp. 1158–1166.

<sup>34</sup>Kenny, Kathleen, et al., “I Felt For A Long Time That Everything Beautiful In Me Had Been Taken Out,” pp 1158–1166.

<sup>35</sup>McKegney, Sherri, “Silenced Suffering.”

<sup>36</sup>Nixon, Kendra, et al., “Every Day It Takes A Piece Of You Away: Experience Of Grief And Loss Among Abused Mothers Involved With Child Protective Services,” *Journal of Public Child Welfare*, vol. 7, 2012, pp 172–193.

<sup>37</sup>McKegney, Sherri, “Silenced Suffering,” pp. 62.

<sup>38</sup>Glaser, Gabrielle, *American Baby*, pp. 270.

<sup>39</sup>McKegney, Sherri, “Silenced Suffering,” pp. 65.

This is the fundamental sin perpetuated by federal law.

If the child welfare community openly recognized the reality that adoption also involved losses to the child, the birth parent, and relatives caring for children, might that invite us to re-examine whether our federal policies have led us astray? And if so, what might new federal policy, rooted in the preservation of relationships, look like? This final section examines these questions.

## A New Path Forward

Federal child welfare laws must seek to minimize unnecessary pain inflicted on families. To do so, it must require child welfare agencies and courts to closely examine what meaningful relationships would be lost if parental rights were to be terminated. A system that demands legal permanency at the expense of relational permanency. One that creates new, legally permanent relationships only on the condition that the children's existing bonds to those individuals who have been most important to them are terminated completely does not serve their actual needs.

The Children's Bureau, the federal agency charged with administering federal child welfare law and policy, recently recognized the need for a new path forward. In an information memorandum on the importance of preserving relationships, it noted, "emphasizing a child's attachments and connections

while ensuring safety, rather than solely prioritizing timeframes ... will serve to strengthen and preserve families."<sup>40</sup> It also warned "children in foster care should not have to choose between families," and they should have "the opportunity to expand family relationships, not sever or replace them."<sup>41</sup> In other words, "children do not need to have previous attachments severed in order to form new ones."<sup>42</sup> Yet without the backing of changes in federal law, this guidance to agencies and courts will likely go unheeded.

Federal law must be changed to create a child welfare system that prioritizes relationships. First, the provision that creates a presumption that a termination of a parental rights petition must be filed if a child has been in foster care for 15 of the preceding 22 months should be eliminated. Instead, if a child has been in foster care for that length of time, the law should simply require courts to hold a permanency hearing to determine what permanent arrangement would best serve the child. The law should make clear that the child must be returned home unless reunification poses a substantial risk of harm to the child.

If a child cannot go home, then the law should direct the court to explore other options. Before doing so, the court should hear from all parties involved, including the child, their parents, foster parents, and the professionals working with the family. Prior to setting a permanency goal, the court should be required to explicitly

hear evidence on the impact of severing ties between the child and their parent. Only after these relationships are assessed should a permanency plan be developed.

After hearing this evidence, federal law must only permit a court to order the filing of a termination of parental rights petition if it is strictly necessary to safeguard the emotional and physical well-being of the child, and that less restrictive options, that would preserve the parent-child relationship, cannot do so. The law should also make clear, as it does in cases involving Indian children, that termination of parental rights can only occur after the State satisfies its evidentiary burden beyond a reasonable doubt. In this new paradigm, terminating parental rights should become rare, only occurring when maintaining relationships between a child and their parent would inflict documented harm to the child. Instead, other less intrusive arrangements, like guardianship or custody, should become more common.

Other reforms, some of which are discussed in Josh Gupta Kagan's article, *The New Permanency*,<sup>43</sup> can support this paradigm shift. The federal government should eliminate the requirement in the law that requires that adoption be ruled

out as a permanency goal before federal funds can be used to support other forms of permanency, like guardianships. As Gupta Kagan notes, "[T]here is no compelling justification to place for continuing to place adoption over guardianship ... [T]his hierarchy skews decision-making and directs courts and agencies to determine permanency plans based on the hierarchy rather than each child and family's individual situation." Financial incentives should not skew the recommendations made by courts, agencies, and caregivers for children.

Additionally, the federal government should not limit guardianship subsidies to relatives. Instead, it should extend the opportunity to receive them to all foster parents, unrelated or not, who are caring for children and

willing to provide them with permanency. Right now, the only way an unrelated foster parent can receive a federal subsidy for permanently caring for a child is if they adopt that child. This must change, so families have all options available and are not penalized for their willingness to continue the child's relationship with their parent.

Finally, as Gupta-Kagan proposes, on a local level, adoption celebrations should be eliminated and be replaced with "permanent family day" celebrations. We must create a culture in which the preservation of relationships, whether through reunification, guardianship, or some arrangement, are celebrated. We must honor child welfare leaders who work tirelessly to ensure that the relationships between children and parents are kept intact, even when a child cannot

go home. Those that carelessly disregard those ties should not receive our praise.

## Conclusion

While it is far too late to prevent the damage done to the eight-year-old boy who can no longer see his mother, we can stop inflicting this pain on other children. Changing federal law so that 1) the termination of parental rights becomes a rarely used remedy only utilized when strictly necessary to safeguard a child's physical and emotional well-being, while 2) promoting other forms of permanency, like guardianships, that allow a child to remain permanently with a third party while preserving their relationship with their parent, can usher a paradigm shift long overdue in child welfare. Until that shift takes place, families will continue to suffer needlessly.





# A Tipping Point for Change: Adoption and Safe Families Act Reform/Repeal

 *Katharine-Lawson, Priscilla Day, Sarah Mountz*

Systemic abuses involving law enforcement and criminal justice practices have come to the public’s attention over the last two years, most poignantly through the voices of those most impacted. Calls for ending law enforcement have spread to demands to replace other systems, including child welfare, seen by some as a family policing system. Scrutiny of child welfare practice in general, and the Adoption and Safe Families Act (ASFA) in particular, has highlighted many racially biased practices that Black, Indigenous, People of Color (BIPOC) have experienced.<sup>1</sup> To advance deliberations about ASFA and needed changes, this article will focus on several of its flawed elements, their consequences, and possible remedies. The first flaw is that ASFA was enacted without consultation with tribal nations, undermining the implementation of the Indian Child Welfare Act (ICWA). Next, time limits pose insurmountable challenges in addressing complex family issues and poverty, resulting in the accelerated destruction of families, especially BIPOC families, through a sharp increase in terminations of parental rights (TPR). We explore ASFA’s financial incentives to states to increase adoptions, ensuring adoption over reunification. Finally, we examine the condition of older children, emancipated from foster care, and their long-term health and wellbeing challenges. Suggestions are then offered for remedies.

## Tribal Exclusion

Congress passed the ICWA in 1978 to address the excessive numbers (25 percent) of Indian children removed from their homes and to eliminate policies and practices that contributed to high rates of out-of-home placement. This legislation<sup>2</sup> requires the state, local child welfare agencies, and private child-placing agencies to follow ICWA. While the passage of ASFA focused on children in the child welfare system, American Indian/

Alaska Native (AI/AN) children, families, and communities received little attention in spite of their unique political status as sovereign nations. ASFA does not address how it interfaces with the ICWA, including tribal sovereignty and jurisdictional or cultural services unique to AI/AN children. Simmons and Troupe concluded that ASFA should not be interpreted as modifying or superseding ICWA requirements about exclusive tribal jurisdiction over child welfare matters, ability to transfer cases to tribal courts, the ability of tribes to intervene at any time during the case, and full faith and credit given to tribal staff applicable to Indian child welfare proceedings.<sup>3</sup>

When AFSA was passed, tribal nations strongly objected to its passage; many of the issues they were concerned about have come to fruition. Tribal nations reacted negatively because, as with the majority of U.S. laws passed, Tribes were not consulted, even though Congress has recognized tribal sovereignty and the right to consultation since its formation that’s included in the U.S. Constitution. Most consultation policies addressing this right were not passed until 2000 and later. This has led to confusion about which federal law (ICWA or ASFA) states should follow. Training and resources to implement ASFA were extensive, unlike ICWA implementation training and resources, so child welfare caseworkers defaulted to ASFA

<sup>1</sup>Roberts, Dorothy. *Shattered Bonds*. Basic Books. 2002.p. 17. Also see Dethlaff, Alan, Kirsten Weber, Maya Pendelton et al., *How we endUP*. June 18 2021. [www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf](http://www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf)

<sup>2</sup>Cornell Law School, Legal Information Institute, *Indian Child Welfare Act* [www.4.law.cornell.edu/uscode/25/ch21.html](http://www4.law.cornell.edu/uscode/25/ch21.html)

<sup>3</sup>David Simmons & Jack Troupe, *National Indian Child Welfare Association*. P.L. 105-89. *Adoption and Safe Families Act of 1997: Issues for Tribes and States Serving Indian Children*. Nov. 1999. <http://muskie.usm.maine.edu/helpkids/pubstext/icwa.html>

in most situations. Tribal consultation prior to its passage would have helped to mitigate this confusion, which persists today.

## TANF and ASFA Time Limits: Double Jeopardy

The social and political upheaval of the mid-1990s in the U.S. played on the fear of middle-class white people. During this time, a cluster of laws that undermined family integrity was enacted largely to address fears about racial unrest. These laws mainly targeted BIPOC families and those living in poverty. Beginning with the Crime Bill of 1994,<sup>4</sup> addressing crack cocaine use and other drugs, an era of getting tough on crime resulted in criminalizing poverty and co-occurring conditions such as child maltreatment.

Following the Crime Bill were two other race-based bills, Temporary Assistance for Needy Families (TANF),<sup>5</sup> followed a year later by ASFA. TANF, as “welfare reform,” was based on myths and misinformation about so-called “welfare queens”<sup>6</sup> and resulted in ending much-needed financial support for impoverished families. Thus in 1996, with the enactment of TANF, imposing “time limits” on welfare access with a five-year maximum lifetime eligibility (many states opted for less), impoverished families were once again denied aid. One year after enacting TANF came ASFA with its parallel use of “time limits” for foster care. If children were placed for more than 15 out of 22 months in foster care, parental rights could be terminated (TPR), forever severing parental ties,<sup>7</sup> disproportionately impacting the most vulnerable indigenous and families of color.

Instead of family preservation programs that once dominated child welfare practices, ASFA pivoted the child welfare system to adoption.<sup>8</sup> Moreover, TANF time limits accelerated risks for adoption. Many parents on TANF who reached their time limits experienced an increased risk of homelessness and diminished financial capacity to provide for their children. Homeless families have a greater chance of being reported to Child Protective Services.<sup>9</sup> Families on TANF lost aid when their children were removed, further impeding reunification. ASFA time limits stressed impoverished

parents, creating a time-limited “treatment window” for reunification. Data show that BIPOC parents, especially single parents, spend more time in poverty than their counterparts who are white or are in a two-parent family.<sup>10</sup> Dual time limits of TANF and ASFA have created double jeopardy, especially for BIPOC families, undermining their capacity to move out of poverty—estimated by some to take up to seven years for those who have been poor for an extended period of time.<sup>11</sup> Moreover, time limits presume service access and availability. Yet behavioral health services, including substance abuse treatment, may not be available during the allotted time limit.



<sup>4</sup>Rashawn Ray and William A. Galston, “Did the crime bill cause mass incarceration?” Brookings. August 28, 2020. [www.brookings.edu/blog/fixgov/2020/08/28/did-the-1994-crime-bill-cause-mass-incarceration/](http://www.brookings.edu/blog/fixgov/2020/08/28/did-the-1994-crime-bill-cause-mass-incarceration/)

<sup>5</sup>Temporary Assistance for Needy Families (TANF). Administration for Children and Families. Department of Health and Human Services. [www.acf.hhs.gov/ofa/programs/temporary-assistance-needy-families-tanf](http://www.acf.hhs.gov/ofa/programs/temporary-assistance-needy-families-tanf)

<sup>6</sup>Minoff, Elisa. “Entangled Roots: The Role of Race in Policies that Separate Families.” Center for the Study of Social Policy, October 2018. [www.cssp.org/resource/entangled-roots](http://www.cssp.org/resource/entangled-roots)

<sup>7</sup>Rolock, N., Pérez, A.G., White, K.R. et al. From Foster Care to Adoption and Guardianship: A Twenty-First Century Challenge. *Child Adolescent Social Work J* 35, 11-20 (2018). doi.org/10.1007/s10560-017-0499-z

<sup>8</sup>Minoff, Elisa. “Entangled Roots: The Role of Race in Policies that Separate Families.” Center for the Study of Social Policy, October 2018. [www.cssp.org/resource/entangled-roots](http://www.cssp.org/resource/entangled-roots)

<sup>9</sup>Caroline E. Chandler, Anna E. Austin, Meghan E. Shanahan. Association of Association of Housing Stress With Child Maltreatment: A Systematic Review. *Trauma, Violence and Abuse*. (2020) pp2-3.. doi.org/10.1177/1524838020939136

<sup>10</sup>Margaret C. Simms, Karina Fortuny, and Everett Henderson. Racial and ethnic disparities among low-income families. The Urban Institute (August 9, 2020). [www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf](http://www.urban.org/sites/default/files/publication/32976/411936-racial-and-ethnic-disparities-among-low-income-families.pdf)

<sup>11</sup>Ann Huff Stevens. Transitions into and out of Poverty in the United States. Policy Brief, Center for Policy Research. UC Davis. pp.1-2 [www.poverty.ucdavis.edu/sites/main/files/file-attachments/policy\\_brief\\_stevens\\_poverty\\_transitions\\_1.pdf?1445548951](http://www.poverty.ucdavis.edu/sites/main/files/file-attachments/policy_brief_stevens_poverty_transitions_1.pdf?1445548951)

## Financial Incentives: The Push Towards Adoptions

ASFA, created as an adoption promotion bill, resulted in dramatic increases in adoption, from 31,000 in 1997 to over 52,500 in 2002<sup>12</sup> (57 percent increase)<sup>13</sup> and 60,000 in 2018.<sup>14</sup> States were aided by what has been referred to as “a bounty” for any “adoption over a baseline number.”<sup>15</sup> To maximize earnings, states added more adoption staff and worked to shift children from foster care to pre-adoption and adoption status. Adoption “earned income”<sup>16</sup> became a revenue stream generating \$4,000–5,000 per child for increasing the number of child guardianships and \$7,500–10,000 per child for improving the number of foster child adoptions. In 2019, states earned a total of \$70.4 million in adoption incentive awards, the highest annual total amount ever earned. At the same time, nationally, there were 122,200 children in foster care awaiting adoption.<sup>17</sup>

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Another ASFA element that accelerated TPRs was the requirement of “concurrent planning.” Originally designed in Washington state to expedite adoptions in severe cases, like the death of another sibling,<sup>18</sup> concurrent planning created “expectations of failure” to reunify, resulting in some foster parents being designated as “foster-adopt” parents even before TPR. These mostly middle-class white

foster parents were given financial support and childcare respite services. Birth parents were not given similar resources for family preservation and reunification, adding to their time limit challenges and risk for TPRs.

Recent research found that among fostered or adopted youth, 24 percent reported sexual abuse, 46 percent physical abuse, and 49 percent experienced emotional abuse in these “safer” families.<sup>19</sup> Adoption failure rates run between 10–25 percent.<sup>20</sup> Despite concerns about family preservation services and child deaths, research shows that children do better in their own homes or with kin rather than with stranger foster care or adoptive families, and with less long-term trauma and better overall outcomes.<sup>21</sup>

<sup>12</sup>Congressional Research Service Office, Child Welfare: Implementation of the Adoption and Safe Families Act (P.L. 105-89) (2004). p.14.

<sup>13</sup>Government Accountability Office. *Foster Care*. June 2002. p.3.U

<sup>14</sup>Radel, Laura and Emily Madden, *Freeing Children for Adoption within the Adoption and Safe Families Act Timeline*:

U.S. Department of Health and Human Services. (2021) p.1.aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf

<sup>15</sup>National Coalition for Child Protection Reform Child Welfare Blog. “ASFA: the racist child welfare law from the 1900’s that almost no one talks about.” [www.nccprblog.org/2020/11/asfa-racist-child-welfare-law-from.html](http://www.nccprblog.org/2020/11/asfa-racist-child-welfare-law-from.html)

<sup>16</sup>Administration for Children and Families (ACF). Adoption and Legal Guardianship Incentive Award Given to States: Bonus awarded for increased adoptions and legal guardianships from foster care. September 2020. [www.acf.hhs.gov/media/press/2020/2/adoption-and-legal-guardianship-incentive-award-given-states](http://www.acf.hhs.gov/media/press/2020/2/adoption-and-legal-guardianship-incentive-award-given-states)

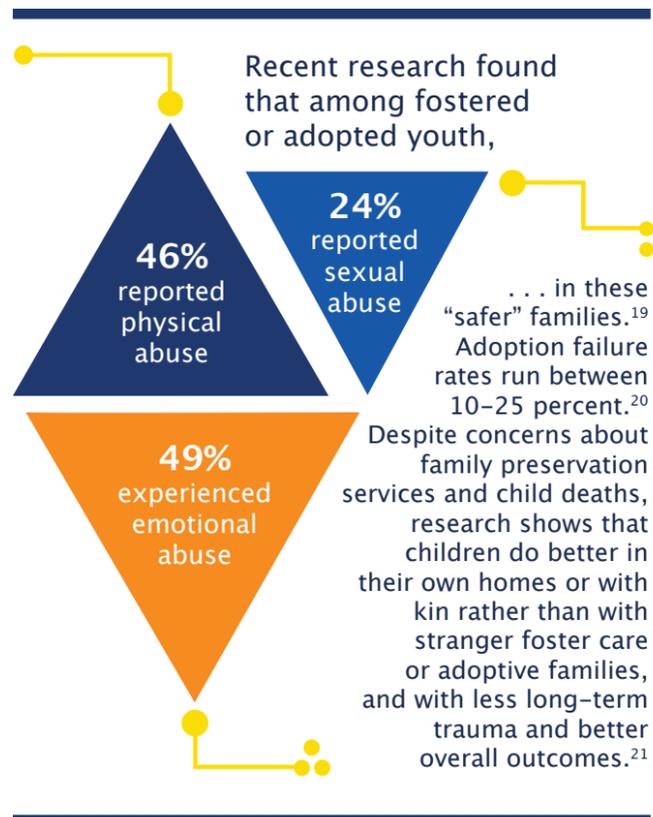
<sup>17</sup>Administration for Children and Families (ACF). Record number of adoptions and reduced number of children in foster care in new “AFCARS” data release. Aug 24, 2020. <https://www.acf.hhs.gov/media/press/2020/record-number-adoptions-and-reduced-number-children-foster-care-afcars-data>

<sup>18</sup>Child Welfare Information Gateway. *Concurrent planning for timely permanence*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau. (2018)

<sup>19</sup>Landers, et.al. “American Indian and White Adoptees: Are there mental health differences?” American Indian and Alaska Native Health, 2017. [www.coloradosph.cuanschutz.edu/research-and-practice/centers-programs/caianh/journal/past-volumes/volume24](http://www.coloradosph.cuanschutz.edu/research-and-practice/centers-programs/caianh/journal/past-volumes/volume24)

<sup>20</sup>Child Welfare Information Gateway. *Adoption disruption and dissolution*. Washington, DC: U.S. Department of Health and Human Services, Children’s Bureau.(2012)

<sup>21</sup>Landers, 54–75.



## Older, Emancipated Youth, Disproportionate Representation, and Disparate Outcomes

ASFA increased disparities in outcomes, exacerbating disproportionate effects on BIPOC families. African American, American Indian/Alaska Native, and Latinx youth are overrepresented in the foster care system at rates higher than the general population and remain in care at rates that exceed those of white and Asian/Pacific Islander (API) children.<sup>22</sup> Youth who identify as LGBTQ+<sup>23 24</sup> and youth with disabilities are also disproportionately represented in foster care, as are youth who experience poverty.<sup>25</sup> A recent study sponsored by [Casey Family Programs](#) found that in some states, more than 50 percent of American Indian/Alaska Native children will be investigated by child protection before age 18. In Minnesota, Alaska, South Dakota, North Dakota, and Oklahoma, it is a part of growing up, having your family investigated by child protection.<sup>26</sup> Poor experiences in care and in outcomes are intensified for youth who are marginalized as a result of their social

identities. LGBTQ+ youth are less likely than heterosexual youth to obtain a high school diploma (43 percent versus 63 percent), more than twice as likely to experience homelessness, have a decreased likelihood of being financially stable or of having work experience.<sup>27 28</sup> Poor outcomes among youth emancipated from foster care provide further evidence of problems with ASFA. Of the more than 437,000 children in foster care,<sup>29</sup> many will transition out or become emancipated; more than 20,000 youth age out annually.<sup>30</sup> Emancipation involves an abrupt cessation of essential supports.<sup>31</sup>

<sup>22</sup>Robert B. Hill, *Synthesis of Research on Disproportionality in Child Welfare*. Administration for Children and Families, "The AFCARS Report: Preliminary FY18 Estimates as of August 2019: No 26," p.1, [www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf](http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf).

<sup>23</sup>Jessica N. Fish, Laura Baams, Armeda Stevenson Wojciak A.S., and Stephen T. Russell, Are sexual minority youth over-represented in foster care, child welfare, and out-of-home placement? Findings from nationally representative data. *Child Abuse and Neglect*, 89 (2019): 208; Bianca D.M.Wilson and Angeliki Kastanis, "Sexual and gender minority disproportionality and disparities in child welfare: A population-based study." *Children and Youth Services Review* 58, (2015): 14.

<sup>24</sup>Laura Baams, Bianca D.M.Wilson, Stephen T. Russell, S. T. LGBTQ youth in unstable housing and foster care. *Pediatrics*, 143, (2019): 4. [doi.org/10.1542/peds.2017-4211](https://doi.org/10.1542/peds.2017-4211)

<sup>25</sup>Melissa Jonson-Reid, M., Brett Drake, & Patricia L. Kohl, "Is the overrepresentation of the poor in child welfare caseloads due to bias or need?" *Children and Youth Services Review* 31, (2008): 425.

<sup>26</sup>Frank Edwards and Theresa Rocha Beardall. "Mechanisms of American Indian/Alaska Native Inequity in Child Welfare Across U.S. States." *Casey Family Programs*. (2020)

<sup>27</sup>Svetlana Shpiegel and Cassandra Simmel. Functional outcomes among sexual minority youth. *Children and Youth Services Review*, 61 (2016): 104–106.

<sup>28</sup>Sarah Mountz, Moshoula Capous-Desyllas, and Elizabeth Pourciau, Because we're fighting to be ourselves: voices from transgender and gender expansive former foster youth. *Child Welfare*, 96, (2018): 110.

<sup>29</sup>U.S. Department of Health and Human Services, Administration for Children and Families, "The AFCARS Report: Preliminary FY18 Estimates as of August 2019. No 26", pp.1. [www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf)

<sup>30</sup>Gina M. Samuels (2008). *A Reason, a Season, or a Lifetime: Relational Permanence Among Young Adults with Foster Care Backgrounds*. Chapin Hall.

<sup>31</sup>Mark E. Courtney and Darcy Hughes-Huerling, 'The transition to adulthood for youth "aging out" of the foster care system', in Osgood, C. F. W., Foster, E. M. and Ruth, G. (eds), *On Your Own without a Net: The Transition to Adulthood for Vulnerable Populations*, pp. 70–85.

Youth who age out of foster care have higher rates of physical, mental health, substance abuse problems; criminal justice system involvement; unemployment; poverty, economic, food, and housing insecurity; early pregnancy and parenthood; and lower levels of educational attainment when compared to their peers in the general population.<sup>32 33</sup> Their disparities have been attributed to a lack of access to resources that their peers receive from family or community-based networks,<sup>34</sup> multiple adversities, and exposure to traumas before, during, and after foster care. The stigma of having grown up in the foster care system is often developmentally integrated into their identities by the time they exit care.<sup>35 36</sup>

This stigma, compounded by the cumulative physical and mental health impact of having been in foster care, can contribute to difficulty in coping with the challenges of adulthood.<sup>37 38</sup> When paired with the trauma of removal from one's own family, such deleterious outcomes for these youth should raise questions about ASFA.

Interlocking systems of oppression, including structural racism, homophobia, sexism, transphobia, ableism, and classism, add to the disproportionate representation and disparate outcomes. These oppressions are reflected in the child welfare system's policing and surveillance role, regulating the lives of impoverished families of color.<sup>39 40</sup> Such oppressions need to be framed against a history of colonization, including the forced removal of Native children and their placement in government-run boarding schools, creating atrocities and resultant historical trauma.<sup>41 42</sup> Contemporary features of the child welfare system, regulating sexuality and gender and reinforcing heteronormativity,<sup>43</sup> and creating a carceral pipeline for youth of color and other marginalized youth,<sup>44</sup> can be seen as reflecting the child welfare system's role in reproducing White supremacist heteropatriarchy.

<sup>32</sup>Amy M. Salazar, Thomas E. Keller, L. Kris Gowen, and Mark E. Courtney, M. E. Trauma exposure and PTSD among older adolescents in foster care. *Social psychiatry and psychiatric epidemiology*, 48, (2013) 549. [doi.org/10.1007/s00127-012-0563-0](https://doi.org/10.1007/s00127-012-0563-0)

<sup>33</sup>Kym R., Michelle M. Garrison, & Mark E. Courtney, Health outcomes in young adults from foster care and economically diverse backgrounds. *Pediatrics*, 134, (2014): 1070.

<sup>34</sup>Rosemary J. Avery and Madelyn Freundlich. You're all grown up now: Termination of foster care support at age 18. *Journal of Adolescence* 32,(2009): 252, 253.

<sup>35</sup>Dominic Hiles, Dunca Moss, Lisa Thorne, John Wright, and Rudi Dallos. "So what am I?"—Multiple perspectives on young people's experience of leaving care. *Children and Youth Services Review*, 41,(2014), 10. [doi.org/10.1016/j.childyouth.2014.03.007](https://doi.org/10.1016/j.childyouth.2014.03.007)

<sup>36</sup>Susan M. Kools. Adolescent identity development in foster care. *Family Relations*, 46, (1997), 266. [doi.org/10.1007/BF01875771](https://doi.org/10.1007/BF01875771)

<sup>37</sup>Peter J. Pecora, Catherine R. White, Lovie J. Jackson, & Tamera Wiggins, Mental health of current and former recipients of foster care: A review of recent studies in the USA. *Child & Family Social Work*, 14, (2009)136. [doi.org/10.1111/j.1365-2206.2009.00618.x](https://doi.org/10.1111/j.1365-2206.2009.00618.x)

<sup>38</sup>Joanne Riebschleger, Angelique Day, & Amy Damashek. Foster care youth share stories of trauma before, during, and after placement: Youth voices for building trauma informed systems of care. *Journal of Aggression, Maltreatment & Trauma*, 24,(2015) 339–360. [doi.org/10.1080/10926771.2015.1009603](https://doi.org/10.1080/10926771.2015.1009603)

<sup>39</sup>Alan Dettlaff, Kristen Weber, Maya Pendleton, Reiko, Boyd, Bill Bettencourt, and Leonard Burton. It is not a broken system, it is a system that needs to be broken: The upEND movement to abolish the child welfare system. *Journal of Public Child Welfare*, 14, (2020) 501. [doi.org/doi.org/10.1080/15548732.2020.1814542SSS](https://doi.org/10.1080/15548732.2020.1814542SSS)

<sup>40</sup>Dorothy Roberts. Abolishing policing also means abolishing family regulation. *The Chronicle of Social Change*. June 16, 2020. [www.chronicleofsocialchange.org/child-welfare-2/abolishingpolicing-also-means-abolishing-family-regulation/44480](http://www.chronicleofsocialchange.org/child-welfare-2/abolishingpolicing-also-means-abolishing-family-regulation/44480)

<sup>41</sup>Lani V. Jones, Sarah E. Mountz, Jeff Trant and Nelia M. Quezada. A Black feminist approach for caseworkers intervening with Black female caregivers: Casework with Black Females. *Journal of Public Child Welfare*, 14,(2020) 397, 398. [doi.org/10.1080/15548732.2019.1621234](https://doi.org/10.1080/15548732.2019.1621234)

<sup>42</sup>Tessa Evans-Campbell, Historical trauma in American Indian/native alaska communities: A multilevel framework for exploring impacts on individuals, families, and communities, *Journal of Interpersonal Violence*, 23, (2008) 327, 328 [doi.org/10.1177/0886260507312290](https://doi.org/10.1177/0886260507312290)

<sup>43</sup>Gerald P. Mallon (1998). *We don't exactly get the welcome wagon: The experiences of gay and lesbian adolescents in child welfare systems*. Columbia University Press.

<sup>44</sup>Leah A. Jacobs, Mimi E. Kim, Darren K. Whitfield, Rachel E. Gartner, Meg Panichelli, Shanna K. Kattari, S., Margaret M. Downey, Shanté Stuart McQueen and Sarah E. Mountz. Defund the police: Moving towards an anti-carceral social work. *Journal of Progressive Human Services*, 32 (2021), 48.



## ICWA and ASFA

The passage of ASFA gave an excuse to states and counties to ignore the ICWA that requires that **tribes have a right to intervene** at any time in child custody proceedings and **to make recommendations** regarding the placement of tribal children; **counties and private child-placing agencies must provide active efforts** as soon as an American Indian family comes in contact with child protection services. **Active efforts mean more than reasonable efforts** and require acknowledging traditional helping and healing systems of an Indian child's tribe and collaborating with Tribes to help the Indian child and family to avoid child removal or to quickly reunite.<sup>45</sup>

Active efforts<sup>46</sup> start as soon as a child protection case comes to the attention of the agency and should continue throughout the life of the case to prevent removal; family preservation/reunification should always be the goal. Active efforts provide an array of support and practices in order to be in compliance with ICWA. These include the provision of financial assistance, food, housing, health care, and transportation, and if an out-of-home placement is warranted, visitation with parents and extended family quickly, often, and throughout placement.

## Solutions: Addressing ASFA Intent and Design Flaws

Despite the lack of inclusion of Tribal Nations in the development of ASFA, the ICWA and other examples can serve to address some of the ASFA flaws. These include 1) an array of income supports for families and emancipated youth (such as universal basic income – UBI) along with educational and relational resources, 2) culturally specific supportive housing developments, 3) customary adoption in place of TPRs, 4) peacekeeping courts, 5) active rather than reasonable efforts for placement prevention and reunification.

Repealing ASFA's time limits are preconditions for helping BIPOC and poor families mitigate

risk factors for removal and/or to address reunification barriers. While judges have discretion in adhering to time limits, a repeal will help ensure that parents working toward reunification have time to stabilize income, reduce poverty, end homelessness, and address related economic and behavioral health challenges. Finally, BIPOC impact statements need to be adopted when legislation is being considered so that explicit negative impacts on families and children of color are addressed before the legislation is enacted.

## Universal Basic Income and Other Supports

TANF, along with child allowances (tax credits) including UBI, need to be integrated into child welfare as family preservation and reunification resources and be offered systematically to parents (even when children are in out-of-home care). COVID-19 provided a unique opportunity to see how providing universal financial support could positively impact child removals. In New York City and across the nation, despite fears about children having to stay home in potentially unsafe families, child abuse reports dropped, children in care were successfully returned home “early” even after things started to “get back to normal” rates remained lower than before.<sup>47 48</sup> In recent years, studies have shown success with universal basic income models.<sup>49 50</sup>

<sup>45</sup>Cornell School of Law, 25 US Code Chapter 21–Indian Child Welfare. [www.law.cornell.edu/uscode/text/25/chapter-21](http://www.law.cornell.edu/uscode/text/25/chapter-21)

<sup>46</sup>Child Safety and Permanency Division, St. Paul, MN. ICWA Active Efforts. [www.dhs.state.mn.us](http://www.dhs.state.mn.us)

<sup>47</sup>Baker, Amy & Martin–West, Stacia Samra, Sukhi & Cusack, Meagan. (2020). Mitigating loss of health insurance and means tested benefits in an unconditional cash transfer experiment: Implementation lessons from Stockton's guaranteed income pilot. *SSM – Population Health*. 11.100578.10.1016/j.ssmph.2020.100578.

<sup>48</sup>National Public Radio (NPR) 2021.

<sup>49</sup>Berman, Matthew. Resource rents, universal basic income, and poverty among Alaska's Indigenous peoples. *World Development*. 106.2018, 161–172

<sup>50</sup>Guo, Eileen. Universal basic income is here—it just looks different from what you expected. *MIT Technology Review*. 2021. [www.technologyreview.com/2021/05/07/1024674/ubi-guaranteed-income-pandemic/](http://www.technologyreview.com/2021/05/07/1024674/ubi-guaranteed-income-pandemic/)

A universal basic income<sup>51</sup> should be made

available to low-income families as well as to youth aging out of foster care. A UBI is currently being piloted in some counties, and California has enacted UBI legislation for all youth aging out of foster care.

As we work to reimagine the child welfare system's engagement with families, we should acknowledge what we know about the severe negative impacts that foster care placement has on young people navigating adulthood. In addition to universal basic income, research, data, and testimony of emancipated youth speak to the need for relational resources and supportive services extended into adulthood. Given the extent of educational injustice and poor educational outcomes experienced by youth who have exited foster care, as well as the significance of education in social mobility, every effort should be made across states to ensure strengthened educational outcomes and sustained educational access. Promising practices employed by some states include Pennsylvania's assurance of full college tuition coverage for youth with foster care backgrounds<sup>52</sup> and California<sup>53</sup> and Michigan's<sup>54</sup> large-scale provision of campus-based support programs within their public university systems. These need to be scaled up nationwide.

**Culturally specific supportive housing developments** have been found to be effective in providing safe, stable housing, especially with indigenous populations.<sup>55 56</sup> These need to be replicated in other communities, especially communities of color whose housing access has been impacted by racial injustices. For example, in Washington State, the Lummi Tribal Council developed “Sche'lang'en Village” specifically for “parents seeking to reunite with their children in foster care, homeless families, those overcoming addictions, and women fleeing domestic violence.”<sup>57</sup> Children who had been in out-of-home care away from the community are reunited with their parents; they report 85 percent retention rates of families who continue to live in supportive environments with counseling, after-school classes, and resident meetings available to them. Elders also provide support and teachings. The federal Office of Native American Programs recognized the Village in 2018 for a “best practice” model.<sup>58</sup> Other

indigenous supportive housing developments include those located in central Phoenix, AZ. Native American Connections is a grassroots, urban organization that started in 1972 that has grown to multiple housing sites (over 850 units) serving over 10,000 individuals and families each year.<sup>59</sup> Their goal is to improve “the lives of individuals and families through Native American culturally appropriate health, affordable housing, and community development services.” They are open to all ethnicities and have specialized communities for “families, seniors, individuals with disabilities, chronically homeless men and women, and homeless youth.” At each site, supports to ensure long-term self-sufficiency are offered like 12-step programs, cooking, financial management, career development, and programs for families and children. This program has supported thousands of residents to live safe and productive lives for themselves, their children, and their community. Such culturally relevant housing and services should be available to child welfare families for placement prevention and reunification.

<sup>51</sup>National Public Radio (NPR) 2021. California program giving \$500 no strings attached stipend pays off, study finds. [www.npr.org/2021/03/04/973653719/california-program-giving-500-no-strings-attached-stipends-pays-off-study-finds](http://www.npr.org/2021/03/04/973653719/california-program-giving-500-no-strings-attached-stipends-pays-off-study-finds)

<sup>52</sup>Schroeder, Laurie Mason. 'A whole new world': New law lets Pennsylvania foster kids attend college tuition-free. *The Morning Call*. July 25, 2019. [www.mcall.com/news/pennsylvania/mc-nws-pa-fostering-independence-through-education-law-20190725-ikkhp66qmnhg7lcq5lplzva37i-story.html](http://www.mcall.com/news/pennsylvania/mc-nws-pa-fostering-independence-through-education-law-20190725-ikkhp66qmnhg7lcq5lplzva37i-story.html)

<sup>53</sup>Okpych, Nathanael J., Sunggeun Park, Samiya Sayed, and Mark E. Courtney. The roles of Campus-Support Programs (CSPs) and Education and Training Vouchers (ETVs) on college persistence for youth with foster care histories. *Children and Youth Services*. 111.2020. 1–13.

<sup>54</sup>Okpych, Nathanael. Policy framework supporting youth aging-out of foster care through college: *Children, Youth and Family Review*. 34( 7), July 2012, 1390–1396

<sup>55</sup>Amon, E. A Village Apart: Lummi Nation Creates a Unique Community to Support Families. *The Imprint: Youth and Family News* [www.imprintnews.org/family/a-village-apart/57033](http://www.imprintnews.org/family/a-village-apart/57033)

<sup>56</sup>Native American Connections [www.nativeconnections.org/housing/](http://www.nativeconnections.org/housing/).

<sup>57</sup>Amon, E.

<sup>58</sup>Amon, E.

<sup>59</sup>Native American Connections.

**Customary adoption** is a legal practice Tribal Courts use to suspend parental rights rather than to do a permanent TPR so as never to sever the bond between children and parents,<sup>60</sup> and additional family members are added in parental roles. In 1996, the White Earth Tribal Nation realized that many of their tribal children were wards of the state, and most of them were in non-relative, non-native homes away from their tribal communities. These children were not in permanent placements, yet parental rights were terminated. When ASFA was passed, they became even more

change. Customary adoption practices should be expanded as an alternative to TPRs in U.S. child welfare practice.

**Peacekeeping Courts**<sup>63</sup> are less adversarial, using a consensus decision-making model that includes the family and other relevant people to support family success. In the process with families, one or two judges who oversee the process invite concerned family members and others to participate in determining the next steps for the wellbeing of the family. The process starts with a ceremony to help everyone approach the dialogue with good intentions; everyone has an equal voice. The judge facilitates the process that may last all day or even several days. The goal is not to hurry but to carefully listen and make decisions together. “In many tribes, peacemaking and harmony are cornerstones of Native American culture and religion, and peacemaking is one approach to Native American justice. Instead of guilt and sentencing, the court focuses

on healing.”<sup>64</sup> Many tribes find this process to be more successful than traditional child protection proceedings. Public courts could also use this approach.

<sup>60</sup>White Earth Band of Ojibwe. “White Earth Band of Ojibwe, Judicial Code.” White Earth Band of Ojibwe. Minnesota. [www.turtletalk.files.wordpress.com/2014/07/whiteearthcustomaryadoptioncode.pdf](http://www.turtletalk.files.wordpress.com/2014/07/whiteearthcustomaryadoptioncode.pdf)

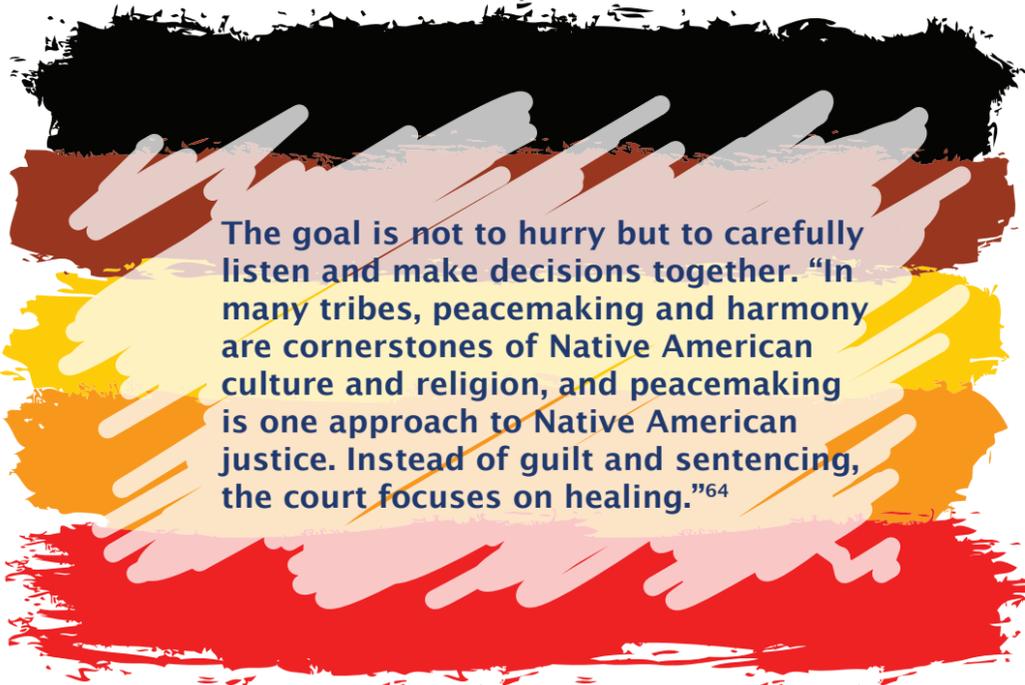
<sup>61</sup>White Earth Band of Ojibwe

<sup>62</sup>Administration for Children and Families (ACF). “Adoption and Legal Guardianship Incentive Award Given to States: Bonus awarded for increased adoptions and legal guardianships from foster care.” September 2020. [www.acf.hhs.gov/media/press/2020/2/adoption-and-legal-guardianship-incentive-award-given-states](http://www.acf.hhs.gov/media/press/2020/2/adoption-and-legal-guardianship-incentive-award-given-states)

<sup>63</sup>The National Judicial College. Justice in a circle: how a peacekeeping court works. Nov. 20, 2016

[www.judges.org/news-and-info/justice-in-a-circle/](http://www.judges.org/news-and-info/justice-in-a-circle/)

<sup>64</sup>The National Judicial College



**The goal is not to hurry but to carefully listen and make decisions together. “In many tribes, peacemaking and harmony are cornerstones of Native American culture and religion, and peacemaking is one approach to Native American justice. Instead of guilt and sentencing, the court focuses on healing.”<sup>64</sup>**

alarmed because of the time limits that would result in even more tribal children in out-of-home care, many in violation of ICWA that prioritizes relative and tribal care. Even though many tribes tried to make the case that ICWA superseded ASFA, they had little success. In 1997, the White Earth Tribal Nation<sup>61</sup> established a Tribal Court to hear Child Protection and other cases and stop TPRs. Through strong advocacy, they were eventually able to convince the Children’s Bureau in 2001 to change their policy that required states (and tribes with IV-E agreements) to use TPRs in order to receive IV-E reimbursement. A policy announcement from the Administration for [Children and Families](http://www.acf.hhs.gov),<sup>62</sup> TPR. Today many tribal nations use Customary Adoption and Suspension of Parental Rights rather than TPR. Some states are also considering this

**ICWA Active Efforts – the Gold Standard** – could be used to serve all children and families with the intent of family preservation. ICWA’s active efforts should replace ASFA’s reasonable efforts. Active efforts literally mean ‘more than reasonable efforts’ and requires acknowledging traditional helping and healing systems of an Indian child’s tribe and collaborating with Tribes to help the Indian child and family to avoid child removal or quickly reunite. If active efforts were applied universally to children and families in child welfare, fewer children would be removed, and more tailored help would be provided to families.

## Summary

ASFA has demonstrated the destructive effects of a focused adoption law on impoverished families, especially BIPOC families. It is urgent to re-vision how to use existing resources to shift from family regulation to family support, from out-of-home care to family preservation, from more punitive practices to trauma-informed practices that in the long run save money, result in better long-term outcomes for children and youth, and more importantly, help families to remain safely intact. Finally, the Family First Prevention Services Act (FFPSA) could be seen as a partial antidote to ASFA and its adoption pipeline. However, absent attention to economic needs, impoverished and BIPOC families will not be aided because FFPSA does not address poverty and concrete needs. Moreover, FFPSA requires the use of evidence-based practices to aid in family preservation.

Few if any indigenous and culturally relevant programs are being considered for funding, furthering racial injustices. The Children’s Bureau must expand IV-E funded programs for placement prevention to include culturally specific family preservation services, generating more BIPOC relevant programs and evidence from the ground up. Moreover, if racial impact statements were generated on each law going forward as well as regulatory practices, some racial injustices could be further averted.

Finally, significant change requires the inclusion of the voices of those impacted the most. The views of families and youth, closest to their own challenges and needs, must be honored and may compel an array of supports. They may include not only income but also employment and educational ladders as well as concrete services (safe housing, childcare, health care, transportation), along with mentors and longer-term supports (behavioral health) that obviate time limits and other critical constraints.

As Eric Martin says, “A willingness to let go of and hospice the old ways of doing things brings forth unimaginable possibilities to create something new.”

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# Reframing Recovery: The Limitations of an ASFA Driven Approach To Substance Use

 Jody Brook



## Introduction

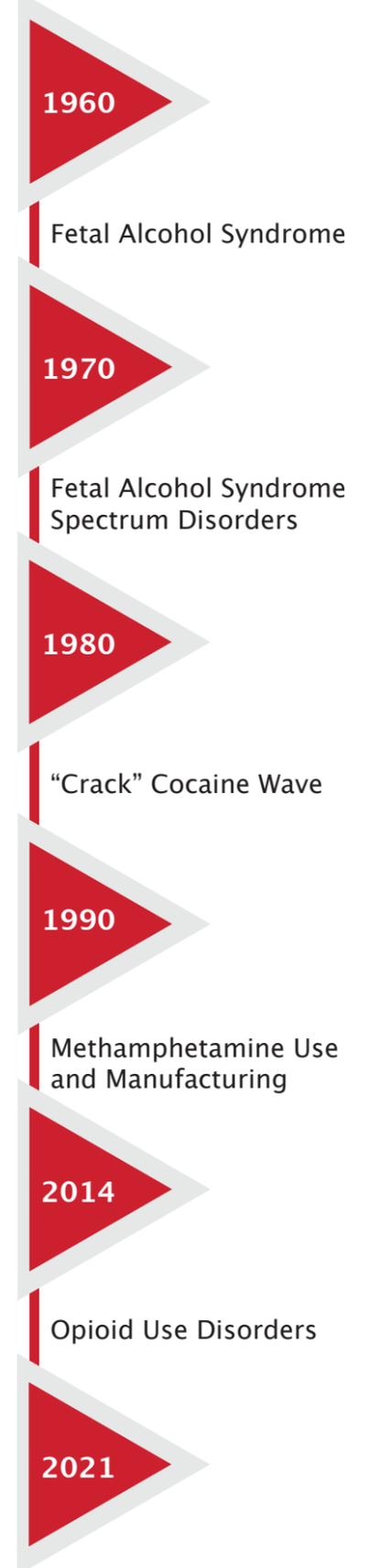
Historical evidence of scientific and moral concerns associated with caregiver substance use (pre- or postnatal) has been documented for centuries. In contemporary times, caregiver substance use has been a significant child welfare and public health issue since the late 1960s. In thinking about the medical and societal concerns, it is known that the diagnosis of Fetal Alcohol Syndrome (now a part of Fetal Alcohol Spectrum Disorders) was introduced in the 1970s as part of an effort to categorize a constellation of characteristics observed by medical, early childhood, child welfare, educational, judicial, and other related service providers.<sup>1</sup> Concurrent with an increased focus on prenatal use of alcohol, three distinct surges in other drugs of abuse have affected public child welfare.<sup>2</sup> These surges are identified as the “crack” cocaine wave in the 1980s, the rise in methamphetamine use and manufacturing that began in the late 1990s, and the multi-tiered opioid epidemic that has origins in prescribing patterns initiated and established in the late 1990s.<sup>3,4</sup> Each of these periods created service challenges for those charged with the task of ensuring the safety, permanency, and well-being of America’s children. For example, the “crack epidemic” in the 1980s revealed how little data had been gathered on the impacts of prenatal substance use on women and their developing children, making it difficult for adult and child-serving professionals to understand what both mothers and children needed in terms of services. The rise in methamphetamines brought challenges associated with children’s exposure to the use and manufacturing of chemicals. The current opioid epidemic has presented a myriad of public service system challenges as well, including workforce training and education surrounding the use of medication-assisted treatment. The presence of these waves has shaped the policies and practices for the United States’ current child welfare, substance abuse, and judicial systems. The opioid epidemic is still occurring, and therefore at the forefront of child welfare systems response strategy. There is evidence of a concerning rise in opioid use among pregnant and parenting women, as research indicates that the presence of opioid

<sup>1</sup>Roberts, Dorothy. *Shattered Bonds*. Basic Books. 2002.p. 17. Also see Dethlaff, Alan, Kirsten Weber, Maya Pendelton et al., *How we endUP*. June 18 2021. [www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf](http://www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf)

<sup>2</sup>Young, N. “Written Testimony of Nancy K. Young (before the United States Senate Committee on Homeland Security and Governmental Affairs, Examining the Impact of the Opioid Epidemic).” 2016. <https://www.hsgac.senate.gov/imo/media/doc/Testimony-Young-2016-04-22.pdf>. Accessed August 1, 2021.

<sup>3</sup>Gonzales, R. et al. “The Methamphetamine Problem in the United States.” *Annual Review of Public Health*, vol. 31, 2010, pp. 385-398, doi:10.1146/annurev.publhealth.012809.103600.

## Centuries of Substance Abuse



use disorders at the time of child delivery quadrupled from 1999 to 2014, and this wide-scale increase in prenatal opioid exposure has resulted in a seven-fold increase in neonatal abstinence syndrome diagnoses from 2000 to 2014.<sup>4,5,6</sup> Our country is also experiencing what is known as a syndemic—when one epidemic is influenced by another. The presence of the COVID-19 pandemic influences the opioid epidemic, and resultantly, the burden of disease is raised. At the time of this writing, every U.S. state has reported a spike or increase in opioid-related problems during COVID-19.<sup>7</sup> For a variety of reasons, the full extent to which substance use among caregivers is a factor in child welfare system involvement and outcomes is not fully understood. These reasons relate to non-standardized operationalization of key terms, measurement differences, data collection timing and characteristics, data systems discrepancies, child welfare practices related to screening and assessment, judicial practices, overlapping risks, and the fact that substance use is generally covert. Importantly, the aggregation of substance use into one category for which there is either a problem (or not) does not facilitate increased knowledge of differences within this group. Having said this, based on data from 2019, the [National Center on Substance Abuse and Child Welfare](#) reports that nationally, an average of approximately 39 percent of children placed in out-of-home care have caregiver substance use concerns as an identified condition for removal. Across U.S. states in 2019, this percentage ranges from a low of approximately four percent to a high of 69 percent. When analyzing these

same data by child age (under one versus older than one), almost 51 percent of the removals nationwide of infants under one are designated as having caregiver substance use concerns as an identified condition for removal (multiple conditions for removal may be listed). Importantly, from federal fiscal year 2000 to 2019, the prevalence of caregiver substance use concerns as an identified condition of removal increased from approximately 18 percent to 39 percent.<sup>8</sup>

<sup>4</sup>Haight, S. C. et al. "Opioid Use Disorder Documented at Delivery Hospitalization — United States, 1999–2014." *Morbidity and Mortality Weekly Report*, vol. 67, Centers for Disease Control and Prevention (CDC), August 10 2018, pp. 845–849 doi:<http://dx.doi.org/10.15585/mmwr.mm6731>.

<sup>5</sup>Faherty, L. J. et al. "Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome." *Journal of the American Medical Association Network Open*, vol. 2, no. 11, 2019, p. e1914078, doi:10.1001/jamanetworkopen.2019.14078.

<sup>6</sup>Patrick, S. W. et al. "Neonatal Abstinence Syndrome and Associated Health Care Expenditures: United States, 2000–2009." *Journal of the American Medical Association*, vol. 307, no. 18, 2012, pp. 1934–1940, doi:10.1001/jama.2012.3951.

<sup>7</sup>Paulozzi, L. J. et al. "Vital Signs: Overdoses of Prescription Opioid Pain Relievers—United States, 1999–2008." *Morbidity and Mortality Weekly Report*, vol. 60, Centers for Disease Control and Prevention (CDC), November 4 2011, pp. 1487–1492. <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6043a4.htm>

<sup>8</sup>National Center on Substance Abuse and Child Welfare. "Child Welfare and Alcohol and Drug Use Statistics." Substance Abuse and Mental Health Services Administration (SAMHSA) 2019 <https://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx>.

Child welfare-involved families impacted by problematic levels of caregiver substance use face many intersecting challenges and barriers that impact the likelihood of favorable child welfare outcomes, making them high risk for "system failure." Overall, this population has higher rates of maltreatment substantiation, higher rates of out-of-home placement, lower rates of exiting to reunification, and a and a greater likelihood of involuntary termination of parental rights by the state.<sup>9,10,11,12,13</sup>

While it is difficult to disentangle caregiver, child, and service system characteristics that result in poor outcomes for these families, it has become increasingly clear that factors beyond substance use play influential roles. The scholarly literature has identified risks associated with socioeconomic status (SES), mental health, disability status, and race and ethnicity—all of which are demonstrated to be related to poor outcomes.<sup>14,15,16</sup> Within the group of caregivers who have problematic substance use, it is not known what factors differentiate those who are abusive from those who are not. There are many factors that are likely to be influential, such as the specific substance of abuse, the legal status of the substance, the presence of co-occurring physical and mental health conditions, presence, and severity of substance use disorder (SUD) and demographic characteristics such as caregiver age.<sup>17,18</sup>

A recent analysis of child welfare system outcomes found when mothers affected by substance use experienced three or more SES-related risk factors, they were significantly less likely to reunify when compared to the same sample cases with one risk alone.<sup>19</sup> Importantly, this research revealed that not all families with SUD are the same and that the accumulation of risk matters. This is an interesting finding

<sup>9</sup>Hong, J. S. et al. "Termination of Parental Rights for Parents with Substance Use Disorder: For Whom and Then What?" *Social Work in Public Health*, vol. 29, no. 6, 2014, pp. 503–517, doi:10.1080/19371918.2014.884960.

<sup>10</sup>Choi, S. and Ryan, J.P. "Completing Substance Abuse Treatment in Child Welfare: The role of co-occurring problems and primary drug of choice." *Child Maltreatment*, 11, 313–325.

<sup>11</sup>Connell, C.M. et al. "Leaving Foster Care: The Influence of Child and Case Characteristics on Foster Care Exit rates." *Children and Youth Services Review*, 28, 780–798.

<sup>12</sup>Lloyd, M. H. et al. "Parental Drug Use and Permanency for Young Children in Foster Care: A Competing Risks Analysis of Reunification, Guardianship, and Adoption." *Children and Youth Services Review*, vol. 77, 2017, pp. 177–187, doi:10.1016/j.childyouth.2017.04.016.d

<sup>13</sup>Lloyd, M. H. and B. A. Akin. "The Disparate Impact of Alcohol, Methamphetamine, and Other Drugs on Family Reunification." *Children and Youth Services Review*, vol. 44, 2014, pp. 72–81, doi:10.1016/j.childyouth.2014.05.013.

<sup>14</sup>Putnam-Hornstein, E. et al. "Cumulative Rates of Child Protection Involvement and Terminations of Parental Rights in a California Birth Cohort, 1999–2017." *American Journal of Public Health*, vol. 111, no. 6, 2021, pp. 1157–1163, doi:10.2105/AJPH.2021.306214.

<sup>15</sup>Wildeman, C. et al. "The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016." *Child Maltreatment*, vol. 25, no. 1, 2020, pp. 32–42, doi:10.1177/1077559519848499.

<sup>16</sup>Lloyd, M. H. "Health Determinants, Maternal Addiction, and Foster Care: Current Knowledge and Directions for Future Research." *Journal of Social Work Practice in the Addictions*, vol. 18, no. 4, 2018, pp. 339–363, doi:10.1080/1533256x.2018.1517009

<sup>17</sup>Freisthler, B. & Kepple, N.J. "Types of Substance Use and Punitive Parenting: A Preliminary Exploration, *Journal of Social Work Practice in the Addictions*, 19:3, 2019, 262–283, DOI: 10.1080/1533256X.2019.1640019

<sup>18</sup>Lloyd, M.H. "Poverty and Family Reunification for Mothers with Substance Use Disorders in Child Welfare." *Child Abuse Review*, vol. 27, no. 4, 2018, pp. 301–316, doi:10.1002/car.2519.

<sup>19</sup>Kepple, N.J. "The Complex Nature of Parental Substance Use: Examining Past Year and Prior Use Behaviors as Correlates of Child Maltreatment Frequency, Substance Use & Misuse", 52:6, 2017, 811–821, DOI: 10.1080/10826084.2016.1253747

**Based on data from the National Center on Substance Abuse and Child Welfare in 2019 reported that nationally . . .**

**▶ 39%**

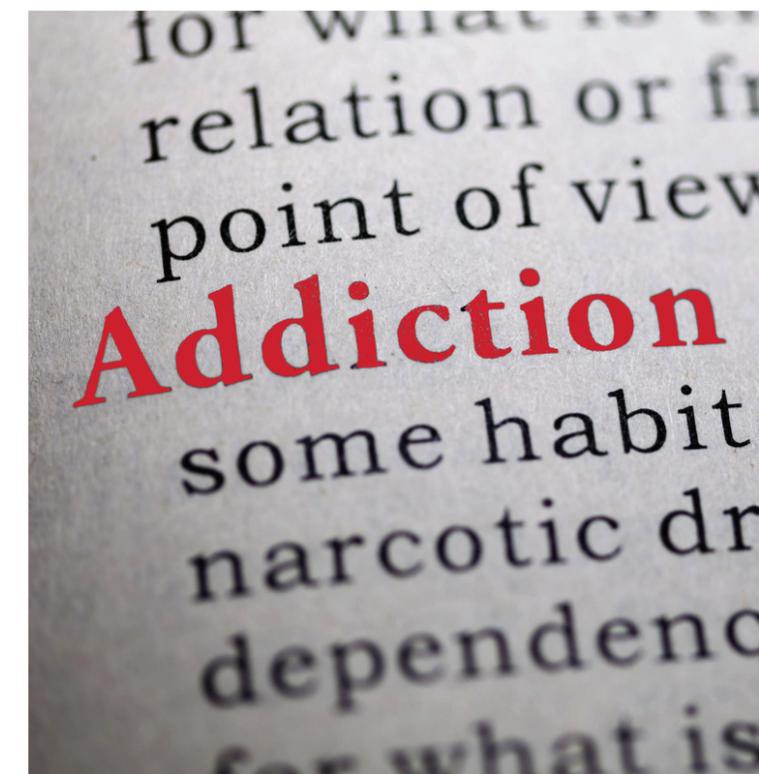
of children placed in out-of-home care have caregiver substance use concerns as an identified condition for removal.

**▶ 51%**

of removals nationwide involving infants under the age of one, when analyzing the same data by child age, under one versus older than one, were because of caregiver substance use.

**▶ 18–39%**

approximate increase in the prevalence of caregiver substance use identified as the condition of removal from federal fiscal year 2000 – 2019.



because practically speaking, SUDs are considered to be present or absent—and once substance use of any kind is identified, SUD becomes a primary target for intervention as it is assumed to be a major driver of the reason for involvement and is an empirically validated factor in child maltreatment. A more nuanced understanding of caregiver behavioral patterns and substance use characteristics (non-problematic, mild, moderate, and severe) would assist in designing prevention and intervention efforts that could be utilized across settings—including child welfare, substance abuse treatment, and primary care.<sup>17,19</sup> In addition to the factors listed above, prior research has also shown a child's age and race are influential, the presence of illicit drug use impacts permanency trajectories, foster care characteristics play an important role, and the availability and status of substance abuse treatment receipt is meaningful.<sup>13,17,21,22,23,24,25</sup>

While it is both desirable and understandable to think of individual case trajectories (i.e., safe and stable permanence for one child), it is concurrently imperative the field focuses on distal outcomes such as overall adult, child, and family well-being. Termination of parental rights for a caregiver affected by substances does not stop the influence of substance misuse, nor does it halt the progression of SUD for the mother. Mothers who have experienced child loss due to drug involvement are likely to have future children who are at increased risk for prenatal substance exposure and postnatal child maltreatment.<sup>26,27,28,29</sup>

By not adequately addressing maternal needs in a robust and effective manner at the earliest possible time point, the service system is essentially delaying the problem until a later date. These findings are not surprising, as loss of child custody among mothers who use drugs is a source of post-traumatic stress and extended grief that leads to a downward spiral of negative consequences to women's health and well-being, including increased use of

drugs as a coping mechanism to deal with the pain of mother-child separation.<sup>30</sup>

<sup>20</sup>Wittenstrom, K. et al. "The Impact of Drugs, Infants, Single Mothers, and Relatives on Reunification: A Decision-Making Ecology Approach." *Child Abuse & Neglect*, vol. 49, 2015, pp. 86-96, doi:10.1016/j.chiabu.2015.06.010.

<sup>21</sup>Brook, J. et al. "Parental Substance Abuse and Family Reunification." *Journal of Social Work Practice in the Addictions*, vol. 10, no. 4, 2010, pp. 393-412, doi:10.1080/1533256x.2010.521078.

<sup>22</sup>Lloyd-Sieger, M. H. "Foster Care Factors and Permanency for Children with Substance-Related Removals." *Families in Society*, vol. 102, no. 1, 2021, pp. 91-103, doi:10.1177/1044389420947225.

<sup>23</sup>He, A. S. "Interagency Collaboration and Receipt of Substance Abuse Treatment Services for Child Welfare-Involved Caregivers." *Journal of Substance Abuse Treatment*, vol. 79, 2017, pp. 20-28, doi:10.1016/j.jsat.2017.05.006.

<sup>24</sup>Doab, A. et al. "Factors that influence mother-Child reunification for mothers with a history of substance use: A systematic review of the evidence to inform policy and practice in Australia." *International Journal of Drug Policy*, 26(9), 2015, 820-831. doi:10.1016/j.drugpo.2015.05.025

<sup>25</sup>He, A.S. et al. "Perceptions of parental substance use disorders in cross-system collaboration among child welfare, alcohol and other drugs, and dependency court organizations." *Child Abuse & Neglect*, Volume 38, Issue 5, 2014, Pages 939-951, ISSN 0145-2134, <https://doi.org/10.1016/j.chiabu.2013.10.020>

<sup>26</sup>Smith, B. D. and M. F. Testa. "The Risk of Subsequent Maltreatment Allegations in Families with Substance-Exposed Infants." *Child Abuse & Neglect*, vol. 26, no. 1, 2002, pp. 97-114, doi:http://dx.doi.org/10.1016/S0145-2134(01)00307-6.

<sup>27</sup>Ryan, J. P. et al. "Recovery Coaches and Substance Exposed Births: An Experiment in Child Welfare." *Child Abuse & Neglect*, vol. 32, no. 11, 2008, pp. 1072-1079, doi:10.1016/j.chiabu.2007.12.011.

<sup>28</sup>Kissin, W. B. et al. "Characterizing Pregnant Drug-Dependent Women in Treatment and Their Children." *Journal of Substance Abuse Treatment*, vol. 21, no. 1, 2001, pp. 27-34, doi:https://doi.org/10.1016/S0740-5472(01)00176-.

<sup>29</sup>Grant, T. et al. "Improving Pregnancy Outcomes among High-Risk Mothers Who Abuse Alcohol and Drugs: Factors Associated with Subsequent Exposed Births." *Children and Youth Services Review*, vol. 46, 2014, pp. 11-18, doi:10.1016/j.chilyouth.2014.07.014.

<sup>30</sup>Kenny, K. et al "I felt for a long time like everything beautiful in me had been taken out": Women's suffering, remembering, and survival following the loss of child custody ,*International Journal of Drug Policy*, Volume 26, Issue 11,2015,Pages 1158-1166,ISSN 0955-3959, <https://doi.org/10.1016/j.drugpo.2015.05.024>

Further, there is evidence that mothers are not alone in experiencing the impact of family separation, as children may suffer significant lifelong psychological, emotional, developmental, social, and traumatic effects associated with family separation and disrupted caregiving, even when the out-of-home stay is considered short.<sup>31,32</sup> In the decision-making process for any type of separation of children from parents, the risks associated with separation are rarely considered.<sup>31</sup>

It is important to understand the central ethos of SUD treatment in the U.S. is the utilization of an abstinence-based paradigm, which requires complete cessation from mood-altering substances while also simultaneously acknowledging the chronic, relapsing nature of SUD. This model does not provide a framework for understanding considerations for the safety, permanence, or well-being of children nested in substance-affected families.<sup>33</sup> Because there is no widespread integrated conceptual model informing these aspects of the SUD recovery process, child welfare and related professionals do not have a theoretical framework to rely upon in decision making for these cases.<sup>16,17,33</sup> At the practice level, child welfare caseworkers make decisions based on their assessment of various influences, including recovery status, typically dichotomized as sober versus using. However, their training does not provide them with the level of expertise that is necessary to adequately assess substance abuse recovery status. The field is only beginning to understand the role of parenting behaviors and substance use in comprising risk.<sup>12,16,21</sup> Perhaps this absence of theoretical and empirical evidence has played a role in the prolific adoption of drug testing in child welfare settings—an inconsistently applied practice whose use in this setting has not been fully evaluated, yet is highly influential in case-level decisions.<sup>33</sup> To be clear: there is empirical support for the use of drug testing as part of comprehensive addiction treatment/recovery-centered programming, often found in primary treatment services and some specialized court dockets. This is different than what is occurring in the context of child welfare services and decision making, where clients are being tested for drugs for a variety of purposes, including compliance and documentation of efforts. There is also evidence

the use of drug testing undermines the clinical relationship through reinforcing hierarchical, authoritarian structures, making it inconsistent with the promotion of mental health recovery and harm reduction.<sup>34</sup> Further, the ethical guidelines established by the [American Society of Addiction Medicine](https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2019/04/11/public-policy-statement-on-the-ethical-use-of-drug-testing-in-the-practice-of-addiction-medicine) promote the use of drug tests only when clinically necessary as part of the therapeutic process in identifying, diagnosing, and treating SUD.<sup>35</sup>

<sup>31</sup>Trivedi, S. "The Harm of Child Removal", *New York University Review of Law & Social Change*, 43, 2019, 523. Available at: [https://scholarworks.law.ubalt.edu/all\\_fac/1085](https://scholarworks.law.ubalt.edu/all_fac/1085)

<sup>32</sup>American Bar Association. "Trauma Caused by Separation of Children from Parents", 2020. American Bar Association, Children's Rights Litigation, Available at:<https://www.americanbar.org/groups/litigation/committees/childrens-rights/trauma-caused-by-separation-of-children-from-parents/>

<sup>33</sup>Lloyd-Sieger, M. & Brook, J." Drug Testing in Child Welfare: A Systematic Review." *Children and Youth Services Review*, 104, 2019. doi: <https://doi.org/10.1016/j.chilyouth.2019.104389>.

<sup>34</sup>Srebniak, Debra S et al. "Conflicts among CMHC clinicians over the role of urine drug testing." *Psychiatric services (Washington, D.C.)* vol. 65,5 (2014): 700-1. doi:10.1176/appi.ps.201300489

<sup>35</sup>American Society on Addiction Medicine "Ethical Use of Drug Testing in the Practice of Addiction Medicine" 2019, <https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2019/04/11/public-policy-statement-on-the-ethical-use-of-drug-testing-in-the-practice-of-addiction-medicine>



## The Impact of the Adoption and Safe Families Act of 1997

While the protection of children was certainly a compelling motivation, the Adoption and Safe Families Act of 1997 (ASFA) was developed and implemented in part as a response to increased fears about drug use and rising incarceration.<sup>31</sup> It is impossible to decontextualize the development and implementation of ASFA from the influence of the War on Drugs, and legal scholars have identified that expansions of state child abuse and neglect definitions to include substance use related allegations coincide with the time period in which policies that resulted in drug-related increases in incarceration were enacted. These policies influenced the development of ASFA and play an important contextual role in implementation.<sup>31,36</sup> It is noteworthy that much of this policy development and expansion of civil definitions do not include distinctions between use, abuse, and diagnosed substance-related and addictive disorders, thereby laying the groundwork for the concept that any and all substance use by caregivers is the same and that the harm associated with caregiver substance use is equally threatening. While the original stated intent of ASFA was to improve the health and safety of children by requiring, “Reasonable efforts shall be made to preserve and reunify families prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child’s home,” the legislation simultaneously invoked strict timeline requirements in which these efforts had to occur, with the intent of preventing long foster care stays and facilitating permanency.<sup>31,36,37</sup> Further, ASFA requires fulfillment of reasonable efforts, yet fails to clearly operationalize

this term and allows for instances when efforts may be bypassed, such as when a parent has had a prior termination of parental rights. As it relates to substance-affected families in child welfare, ASFA has been particularly problematic. Soon

after the passage of ASFA (nearly 25 years ago), Young, et al. documented, described, and made visible the barriers and challenges resulting from incompatible timelines and systems goals across federal, state, and local social service programming typically designed to serve SUD affected, child welfare involved families. This description utilizes a metaphor of “competing clocks” that centers on describing the tension between timelines associated with cash assistance programming requirements, child developmental needs, legislatively dictated requirements for reunification timeliness, and the substance use disorder treatment and recovery process (which is dependent upon highly variable treatment availability and access). As a final clock, Young & Gardner later added a fifth clock—one that describes dynamics associated with agency responsiveness to the competing systemic deadlines and needs of the child and family.<sup>39</sup> While the metaphor is not new, it remains highly relevant and applicable to any discussion of child welfare, substance use, and ASFA. In fact, the metaphor was prescient in that for every “clock” identified, the field now has solid evidence of interrelated poor outcomes for SUD-affected families. To extend the clock metaphor, while ASFA represents only one of the five competing clocks, the alarm it sounds has the highest volume due to the deterministic nature of defaulting to family separation. The time limits imposed by ASFA and the lack of clarity and consistency surrounding reasonable efforts make it incompatible with a trauma-informed, just, and equitable service system.<sup>31,40</sup>

<sup>36</sup>Korn, A.E. “Detoxing the Child Welfare System”. *Virginia Journal of Social Policy & the Law*, 23(3), 293–349, 2016. Available at: [http://vjspl.org/wp-content/uploads/2019/02/2-Korn\\_Detoxing-the-Child-Welfare-System\\_WD\\_8.5.pdf](http://vjspl.org/wp-content/uploads/2019/02/2-Korn_Detoxing-the-Child-Welfare-System_WD_8.5.pdf)

<sup>37</sup>ASFA; Pub. L. 105–89;

<sup>38</sup>Young, N.K., et al. *Responding to Alcohol and Other Drug Problems in Child Welfare: Weaving Together Practice and Policy*. CWLA Press, 1998.

<sup>39</sup>Young, N.K. & Gardner, S.L. *Navigating the Pathways: Lessons and Promising Practices in Linking Alcohol and Other Drug Services with Child Welfare*. Center for Substance Abuse Treatment, Substance Abuse and Mental Health Services Administration, 2002.

<sup>40</sup>Sankaran, Vivek, et al. “A Cure Worse Than the Disease: The Impact of Removal on Children and Their Families.” *Marquette Law Review*, vol. 102, no. 4, Summer 2019, p. 1161–1194. HeinOnline, <https://heinonline.org/HOL/P?h=hein.journals/marqlr102&i=1210>.

It is antithetical to the promotion of public health, child-well-being, and social justice to continue to utilize ASFA as it exists for families with SUD in a time when the professional knowledge base has solidly established that: SUD is a chronic disease, characterized by periods of remission and relapse;<sup>41</sup> there is a lack of publicly funded family-centered, available treatment for this disease;<sup>42</sup> there are racial disparities in surveillance rates, access to treatment,<sup>44</sup> availability of evidence-based treatments, with African Americans faring worse than other racial groups.<sup>45</sup>

## Considerations for Modification

With the passage of the Families First Prevention Services Act (FFPSA), opportunities will be opened up at the federal, state, and local levels to expand family-centered, community-oriented prevention programming services to at-risk families, in hopes of ultimately keeping families safely intact thereby reducing harms to children while strengthening families and building service capacity. This author enthusiastically supports these efforts. At a macro level, tension still exists between prevention/preservation paired with family-centered services compared to those approaches that ostensibly prioritize threats to immediate child safety and protection. A reconciliation of these two philosophies is important, as the services families receive are a reflection of the philosophical standpoints of the community-serving agencies such as child welfare, substance abuse treatment, and the courts. This is to say families know when approaches are supportive and preventative versus punitive and compliance-oriented. It is also my observation false dichotomies exist in some research and practice approaches currently utilized—for example, the dichotomy between prioritizing child safety and the primacy of the family unit. Children are nested in family units, and supporting families is in the best interest of all individuals, including children. The pendulum of policy does not require polar extremes, rather it can include a continuum of practices and legislation that assists in bridging this philosophical gap.

The provision of ASFA that requires

documentation of reasonable efforts needs to be carefully articulated at federal and state levels. Requirements for reasonable efforts should be specified at all major points of decision-making in child welfare: the decision to remove (even temporarily), the decision to reunify, and termination of parental rights. If operationalization of reasonable efforts occurs, then at the local jurisdictional level statutory regulations have the potential to become tools for various agents of the legal system to improve practice.<sup>31</sup> However, cross-systems outcomes monitoring should be conducted by independent researchers to ensure the intent of the revised legislation is carried out. Related systems should understand their role in reasonable efforts, including creating a community-based collaboration with shared outcomes, especially for areas aimed at the needs of individual children such as attachment-oriented activities (i.e., parent-child visitation) and those services that facilitate receipt of appropriate medical, mental health, developmental, and educational services.

For families affected by substance use, reasonable efforts begin with a standardized assessment of substance use disorder status by qualified, cross-trained, clinical providers in order to distinguish non-problematic use from mild, moderate, or severe substance use disorders. Following this, there are a variety

<sup>41</sup>American Society of Addiction Medicine. *Public Policy Statement: Definition of Addiction*, 2011. [https://www.asam.org/docs/default-source/public-policy-statements/1definition\\_of\\_addiction\\_long\\_4-11.pdf?sfvrsn=a8f64512\\_4](https://www.asam.org/docs/default-source/public-policy-statements/1definition_of_addiction_long_4-11.pdf?sfvrsn=a8f64512_4)

<sup>42</sup>Oliveros, Arazais, and Joan Kaufman. “Addressing Substance Abuse Treatment Needs of Parents Involved with the Child Welfare System.” *Child welfare* 90.1 (2011): 25–41.

<sup>43</sup>Kunins, Hillary Veda et al. “The Effect of Race on Provider Decisions To Test For Illicit Drug Use In The Peripartum Setting.” *Journal of women’s health* (2002) vol. 16,2 (2007): 245–55. doi:10.1089/jwh.2006.0070

<sup>44</sup>Cummings J.R. et al, Wen H, Ko M, Druss BG. “Race/Ethnicity And Geographic Access To Medicaid Substance Use Disorder Treatment Facilities In The United States.” *JAMA Psychiatry*. 2014;71(2):190–196. <https://doi.org/10.1001/jamapsychiatry.2013.3575> PMID:24369387

<sup>45</sup>Substance Abuse and Mental Health Services Administration, Office of Behavioral Health Equity. (2020). *The Opioid Crisis and the Black/African American Population: An Urgent Issue*. [https://store.samhsa.gov/sites/default/files/SAMHSA\\_Digital\\_Download/PEP20-05-02-001\\_508%20Final.pdf](https://store.samhsa.gov/sites/default/files/SAMHSA_Digital_Download/PEP20-05-02-001_508%20Final.pdf)



of programs, service collaboration structures, and pathways that could be established to meet the complex needs of SUD-affected families. When the United States encountered its first wave of drug use that impacted child welfare, there were no frameworks to rely upon to implement programming. As stated by Dr. Nancy Young in her testimony to the Senate Committee on Homeland Security and Governmental Affairs in 2016, “We can no longer say that we do not know what to do” (p.15).<sup>2</sup> Through the implementation and evaluation of diverse programs funded by large scale federal initiatives, demonstration sites overall have documented improvements in maintaining children safely at home, decreasing time to reunification, and making improvements in treatment access, availability, and duration. Community collaboration was

determined to be an integral part of service success, and the site’s ability to use data to monitor outcomes was also considered a key feature for sustainability and program improvements.<sup>2</sup> Using a programming strategy and service delivery infrastructure that includes known components of best practice, including adequate resources for timely access and receipt of appropriate levels and duration of treatment should be considered the minimum standard for establishing reasonable efforts.

While this position may be contentious, the use of drug screening for documenting and establishing reasonable efforts should be carefully examined. A drug screen is a seductive tool in that it is a “scientific” way to establish recent/current substance use status. In the often-ambiguous decision-

making process, this rush towards the illusion of empiricism may ultimately harm children by keeping them separate from their families when there may not have been a safety risk present. A drug screen does not provide anything other than information about substance use occurring within one window of time. Given that it is established the disease of addiction is characterized by remitting and relapsing periods, a drug screen is most helpful as a clinical tool used by trained clinical professionals in assessing and guiding treatment. When used as a randomly employed barometer of parental fitness, it is simply a tool that lends itself to the perpetuation of disparity and injustice. Under any circumstances, the use of drug testing should be accompanied by regular data analysis for disparate use based on race, ethnicity, or gender.

Establishing a method of making removal standards more consistent both within and across states, while incorporating the potential for harms associated with removal could also represent an advancement in the field and enforce holistic and balanced decision making.

Finally, different timeframes need to be established for SUD-affected families, as current mandates are incompatible with what is known about the timeliness of treatment access and the disease process. Like many other chronic diseases, it takes time to learn how to manage the illness and implement changes to address associated problems. By not giving families the time that is needed, the system may be contributing to the very problems it is trying to prevent.



# The Failure to Repeal Adoption and Safe Families Act Will Long be a Stain on this Period of American History

 *Martin Guggenheim*

For nearly a generation, America's child welfare system has been organized around the threat and reality of family destruction. It is time for this to end. If not now, when? History will judge this period harshly. Among the worst mistakes the country has ever made in the child welfare field was enacting the Adoption and Safe Families Act of 1997 (ASFA).<sup>1</sup>

Since 1997, the United States has destroyed more than two million families through the ruthless implementation of ASFA.<sup>2</sup> The law encourages states to sever all legal relationships between children and their parents, merely because the children have been in foster care for 15 months, without any requirement to show that the parents have harmed their children or that maintaining the relationship would be harmful to them. The law even pays a bonus for each additional child whose familial relationships with their family of origin were permanently destroyed and who were subsequently adopted by a new set of parents year after year.<sup>3</sup>

With certain exceptions that states too often ignore, ASFA requires that child welfare agencies seek to terminate the parental rights of children whenever they have been in foster care for 15 of the most recent 22 months.<sup>4</sup> Courts are instructed to terminate parental rights unless the parent can show that the conditions that led to the removal initially no longer exist. The law has been responsible for the massive destruction of America's poorest and most vulnerable families, with a vastly disproportionate impact on native, Black, and Brown families.

<sup>1</sup>Roberts, Dorothy. *Shattered Bonds*. Basic Books. 2002.p. 17. Also see Dethlaff, Alan, Kirsten Weber, Maya Pendelton et al., *How we endUP*. June 18 2021. [www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf](http://www.upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf)

<sup>2</sup>It is not easy to obtain figures for the number of terminations ordered each year in the United States. The most recent data indicates that more than 71,000 children are in foster care awaiting adoption after their parental rights were terminated. The number of children awaiting adoption throughout the 20th century has been well above 50,000 each year. That number is considerably smaller than the number of terminations ordered over that time because the total number would include children who were adopted. Using the figure 2 million terminations in this century is a very low estimate. See United States, Department of Health and Human Services, Administration for Children and Families, Children's Bureau. The AFCARS Report, 22 Aug. 2019, [http://s3.amazonaws.com/ccai-website/AFCARS\\_26.pdf](http://s3.amazonaws.com/ccai-website/AFCARS_26.pdf).

<sup>3</sup>United States, Congress. Social Security Act, section 473A, *Social Security Administration*, [https://www.ssa.gov/OP\\_Home/ssact/title04/0473A.htm](https://www.ssa.gov/OP_Home/ssact/title04/0473A.htm).

<sup>4</sup>United States Code. Title 42, section 675(5)(E), U.S. Government Publishing Office, <https://www.govinfo.gov/content/pkg/USCODE-2010-title42/pdf/USCODE-2010-title42-chap7-subchapIV-partE-sec675.pdf>.

ADOPTION

AFSA is vastly overinclusive, impacting far too many families—including those whose children were removed from their parents' custody for reasons unrelated to child abuse. AFSA fails to distinguish between the few parents who have demonstrated complete unsuitability to raise children from the vast majority of parents whose children end up and then remain in foster care for entirely different reasons. As a consequence, we are permanently destroying the parent-child relationship not because the parent is dangerous to the child or because maintaining a relationship is harmful to the child.

It would be an entirely different matter were AFSA limited to the extreme (and relatively rare) cases of parents who have done horrible things to their children and evidence a personality that leads reasonable people to conclude that the only sensible choice is never to allow any contact between the child and parent to take place. There are such cases, of course. Congress calls them "aggravated circumstances" and means to include within that narrow category extreme cruelty, such as torture or the intentional killing of a sibling.<sup>5</sup> We should exclude these parents as potential resources to raise their children both because the prospects for rehabilitation are too dim and because the child may suffer genuine trauma by being sent back to their care. I am not talking about these cases.

The overwhelming majority of children who are separated

from their parents and placed into foster care were never abused by their parents.<sup>6</sup> But ASFA is routinely applied to sever permanently the parent-child relationship, even when children were removed from their families for reasons related to poverty and the manifest challenges families endure when striving to raise children living in poverty. When children from those families are removed from their families, they love and miss their parents and need above all else to be allowed to live with them. Their parents reciprocate those feelings in every way. These parents may have lost custody of their children because they made a judgment error by leaving them home alone, failing to supervise them when they suffered an injury, or because a single parent is sentenced to a term of imprisonment longer than two years. The parents may have failed, for reasons entirely unrelated to the value of maintaining a relationship with their children, to satisfy the agency and the court that the children should be returned to their care within 15 months.

It is these families that are permanently banished, not because anyone ever said or believed they are too dangerous or too unfit to maintain a relationship, but because they lost a game of "beat the clock."

This is allowed even though Congress knew that these highly restrictive timelines meant it would be impossible for many parents to retain their parental rights when, for example, the parent was sentenced to a term of imprisonment longer than 15

months. It also did not matter to Congress that it is often impossible to complete a drug rehabilitation program in 15 months either because of the program's length or because of the lack of programs. Far too many communities lack treatment services capable of helping parents reach a place where they can regain their children's custody within 15 months. As [David Kelly](#) and [Jerry Milner](#) described it, the current system allows officials to "weaponize our systemic shortcomings and use them against parents."

I see cases like this every day. The reader should understand that I have spent my career representing parents, working closely with them, seeing first-hand how much their children mean to them, and how inhumane it is to forbid that possibility by permanently severing their legal relationship to their children. Most who write in journals of this kind are caseworkers, agency directors, judges, guardians ad litem, and other professionals in the system who never see this side of the picture. Instead, they have persuaded themselves of parents' lack of worth and of the importance of "freeing" the

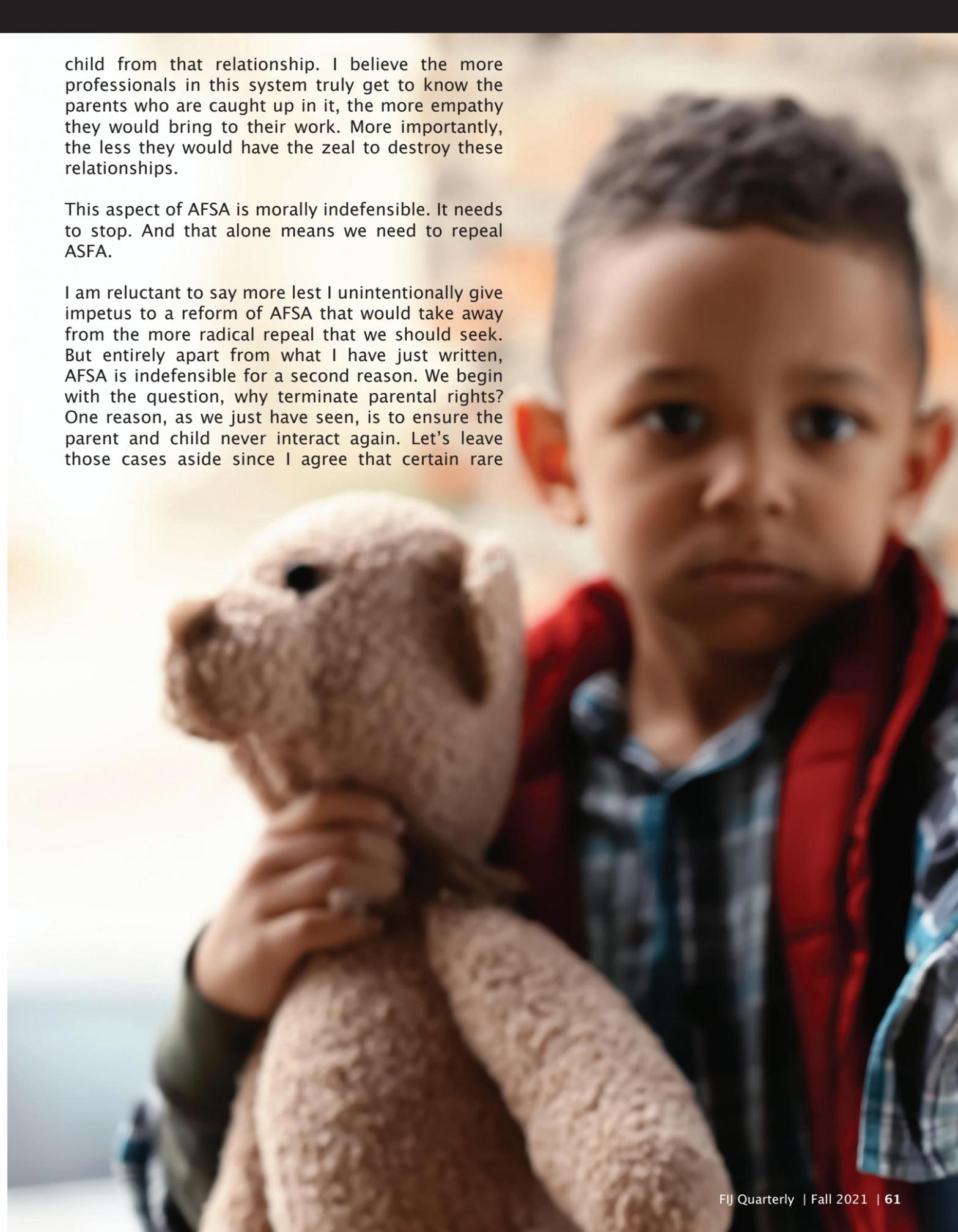
<sup>5</sup>*Ibid.*

<sup>6</sup>See United States, Department of Health and Human Services, Administration for Children and Families, Children's Bureau. The AFCARS Report, 10 August 2018, <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf>; United States, Department of Health and Human Services, Administration for Children and Families, Children's Bureau. The AFCARS Report, 22 August 2019, <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf>.

child from that relationship. I believe the more professionals in this system truly get to know the parents who are caught up in it, the more empathy they would bring to their work. More importantly, the less they would have the zeal to destroy these relationships.

This aspect of AFSA is morally indefensible. It needs to stop. And that alone means we need to repeal ASFA.

I am reluctant to say more lest I unintentionally give impetus to a reform of AFSA that would take away from the more radical repeal that we should seek. But entirely apart from what I have just written, AFSA is indefensible for a second reason. We begin with the question, why terminate parental rights? One reason, as we just have seen, is to ensure the parent and child never interact again. Let's leave those cases aside since I agree that certain rare



circumstances should remain a basis for the permanent destruction of parental ties. But why terminate parental ties when the immediate goal is not to guarantee the child will never again see their parent? The answer is that we do so to make the child “eligible for adoption.” That eligibility is achieved by severing parental rights so that the parent’s consent to a future adoption becomes unnecessary.

Its worst features were predicted even before it was enacted. In 1995, I wrote an article examining a pernicious

trend that was occurring in Michigan and New York in the early 1990s.<sup>7</sup> Even without federal financial encouragement to destroy families, I forewarned the harmful consequences of accelerating and encouraging the destruction of families. In doing so I coined the term “legal orphan,” in the hope it would not become as well-known as it is today. What I found even before AFSA became law is that as states increased the number of terminations of parental rights, they were not keeping up with the number of adoptions. Thus,

even as terminations grew at a certain pace and adoptions also grew, the problem, then and now, is that the number of terminations always has been greater than the number of adoptions. The result? The creation of something largely unknown before in the law: the legal orphan.

<sup>7</sup>Guggenheim, Martin. “The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care – An Empirical Analysis in Two States.” *Family Law Quarterly*, vol. 29, no. 1, 1995, pp. 121-140, [www.jstor.org/stable/25740019](http://www.jstor.org/stable/25740019).

Let’s really take a moment to grasp what it means to be a legal orphan. Then let’s try to think about what kind of system would deliberately create one. I can hardly think of something more hideous for a child than to render the child unrelated to anyone. Many of us are deeply disturbed when we contemplate life as a stateless person: someone who is banished from their own country and forced to live elsewhere. This does not begin to compare to the horrors we impose on children when we banish them from their family of origin and leave them in the stateless category of “foster child.” And in the shockingly bureaucratic lingo of the child welfare system, we categorize these children simply as those who “age out” of foster care.

Many in child welfare who insist that they genuinely care about children’s well-being have spent their careers working on legislation and policies that would ameliorate some of the inhumanities of having created legal orphans. For example, they work on enacting legislation designed to ensure children could remain in foster care beyond their 18th birthday. Or they strive to get them some income when they are furloughed out of foster care to “independence.”<sup>8</sup>

These are grossly inadequate responses to the problem. Instead of striving to limit the harm resulting from the creation of legal orphans, we should change the laws so that we cease creating them. ***The best way to protect children from the harm that follows when they become legal orphans is to prevent***



Let’s really take a moment to grasp what it means to be a legal orphan. Then let’s try to think about what kind of system would deliberately create one.

***them from ever becoming legal orphans.*** As I already indicated, I reluctantly am proposing a change to AFSA to fix this problem out of concern that reform will come at the expense of repeal. If, however, the votes to repeal ASFA aren’t there yet, the very least we should do in the next legislative session is amend federal law to ensure that we cease creating legal orphans.

How to do that? It turns out to be remarkably straightforward. We begin with the purpose of terminating parental rights: as currently practiced in this country, the purpose is not to banish permanently parents from their children (although that often is a consequence of termination). The principal purpose is to make the child eligible for adoption by taking away what otherwise is one of a parent’s most basic legal rights: the right to veto a proposed adoption of one’s child. Except in those “aggravated circumstances” cases where the most important goal is to ensure that the parents and children no longer be permitted to maintain a relationship, we can accomplish all that termination proceedings currently are designed to do by renaming the proceeding to

fit its true purpose. No longer should we call this a proceeding to terminate parental rights. Instead, it should be denominated as a “proceeding to transfer authorization to consent to an adoption to the petitioner.” The final order that would be issued by the court if the petitioner prevailed would be an order transferring the authority to consent to a future adoption to the agency (or party) that brought the case.

If we changed the law in this way, it would ensure that children are never “stateless.” They would never lose their legal connection to a family. They would continue to be legally related to their birth parents until the moment they are adopted when they then remain the legal child of someone.

It would also achieve something that, whenever possible, should become the rule in the child welfare system. To the greatest extent possible, we should strive to treat all children as if

<sup>8</sup>See, for example, United States, Congress. Public Law 110-351. *United States Statutes at Large*, vol. 122, 2008, p. 3949. U.S. Government Publishing Office, <https://www.congress.gov/110/plaws/publ351/PLAW-110publ351.pdf>.

they were born to privileged parents. We *never* force children born into families that commonly avoid child welfare to endure statelessness, even though children are routinely adopted from privileged families. Instead, what happens is that children always remain someone's child and their relationship to the new parent happens in the same instant the relationship to the original parent is severed. The order of adoption simultaneously creates a new parent-child relationship *and* extinguishes the prior one. We do it that way in private placement adoptions because we organize our laws around serving children's needs. Unfortunately, that is not always how we organize laws in the public family law area. It is time to fix that.

What could be the objection to this new way of making children in foster care eligible for adoption? I have heard some suggest that this could reduce the likelihood of someone stepping forward to adopt the child. But there is no good reason for that to happen. The prospective adoptive parents should be told that the child is *eligible* for adoption and the only question the court will have to decide is whether the adoption is in the child's best interests. (The identical question currently asked in all adoptions.) Once the court finds the adoption is in the child's best interests, there would be no barrier whatsoever to finalizing the adoption. The birth parent has no rights at this stage, having already been deprived of the right to veto the adoption. The birth parent would not even have a right to participate in the adoption

proceeding because the prior court order transferred the power to consent to the adoption to someone else.

In short, there are no legitimate objections to this change in the law. But there are powerful benefits to be achieved by this change in the law. Current law is the equivalent of having a child jump out of a building before there is a fire. What's particularly important to grasp is how common it is that after we have these children jump, two things happen. First, we learn the fire never came. And then we learn the child broke their leg when jumping. This is what current practice that achieves with far too much frequency.

 **Consider this:**  
**23,000 children,**  
most of them legal orphans  
"aged out" of foster care.<sup>9</sup>

**Consider this:** Every year since ASFA became law an average of more than 23,000 children, most of them legal orphans "aged out" of foster care.<sup>9</sup> The United States has created hundreds of thousands of legal orphans. **And it has done so needlessly.** For all of those children, the fire never came. They didn't have to jump. But we made them jump anyway. And their broken legs are manifested by the months and years they suffered silently, denied the human right to remain in contact with parents who, even if they didn't satisfy the whims of the family policing agencies that took their children within

the artificial period Congress established in 1997 for them to do so, nonetheless should have continued to serve as a resource for them. They should have stayed in regular contact by visiting together. But one of the many unnecessary, and extremely harmful, collateral consequences of terminating parental rights prematurely are that the parents and children cease having any kind of relationship from that day forward.

An astonishingly 11 percent of all Black children in foster care leave foster care because they "age out."<sup>10</sup> We also know just how difficult the lives of these young people are. One study found that of the more than 23,000 who age out of foster care each year, 20 percent will become instantly homeless.<sup>11</sup> They are also more likely to have been arrested and less likely to be employed.<sup>12</sup>

<sup>9</sup>For data on 1999 to 2005, see *Time for Reform: Aging Out and on Their Own*. Pew Charitable Trusts, May 2007, [https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/news/press\\_releases/foster\\_care\\_reform\\_agingoutmay2007pdf](https://www.pewtrusts.org/-/media/legacy/uploadedfiles/wwwpewtrustsorg/news/press_releases/foster_care_reform_agingoutmay2007pdf). For data on 2006 to 2019, see United States, Department of Health and Human Services, Administration for Children and Families, Children's Bureau, Adoption and Foster Care Statistics, <https://www.acf.hhs.gov/cb/research-data-technology/statistics-research/afcars>.

<sup>10</sup>*Ibid.*

<sup>11</sup>Pecora, Peter, et al. "Improving Family Foster Care: Findings from the Northwest Foster Care Alumni Study," *Casey Family Programs*. Jan. 2005, [https://www.researchgate.net/publication/51993971\\_Improving\\_Family\\_Foster\\_Care\\_Findings\\_from\\_the\\_Northwest\\_Foster\\_Care\\_Alumni\\_Study](https://www.researchgate.net/publication/51993971_Improving_Family_Foster_Care_Findings_from_the_Northwest_Foster_Care_Alumni_Study).

<sup>12</sup>*Ibid.*

We have tolerated for the past 25 years a hideous state of affairs inflicted on children born into the poorest and least powerful families in the United States. And we have done so for no good reason. Instead of investing time and energy, as the child welfare establishment, the many foundations that helped build it, and Congress have done over these many years, striving to ameliorate the harms suffered by children who are made into legal orphans, spend their entire childhood in state custody and leave the system not very differently from how we parole prisoners. We should simply do the right thing and eliminate the possibility of creating legal orphans in the first place.

And, if we really wanted to treat the children who end up in America's foster care system the way we treat children born into more privileged homes, we would even eliminate the artificial time period we created out of thin air (15 months out of the past 22) within which we insist that parents either jump through all the hoops in cookie-cutter "service plans" or forever forfeit their human right to be the parent of their child. In privileged homes, we allow parents as long as it takes for them to improve their lives, whether that means overcoming an addiction, a mental illness, a physical illness, or innumerable other matters. We do not create artificial deadlines. And when they have recovered, we hang up a huge sign that says, "welcome home!"

Some readers may be put off by my constant reference to destroying families. But this

simply reveals the success of a field that has worked hard to create euphemisms that hide the reality of what it does. "Termination of parental rights" is a legal phrase that masks its true meaning which

is, of course, the permanent destruction of a family. If we insisted on calling it what it really is, at a minimum, we might become more committed to using it less frequently. I once called termination of the



atomic bomb in the field; we need to commit ourselves to use it less frequently.<sup>13</sup> Even if we are unable to agree on very much about what is amiss with the current family regulation system, no one can claim with a straight face that we terminate parental rights sparingly. We are the world's leader in destroying families. And we have exponentially

scaled up our doing this in only one generation.

Consider this: according to the [National Institutes of Health](#), the child welfare system destroys families so commonly today that in the United States, the parents of one of every 100 children have their rights permanently terminated.<sup>14</sup> To be clear, this is not one of every

<sup>13</sup>MacFarquhar, Larissa. "When Should a Child Be Taken from His Parents?" *The New Yorker*, 31 July 2017, [www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents](http://www.newyorker.com/magazine/2017/08/07/when-should-a-child-be-taken-from-his-parents).

<sup>14</sup>Wildeman, Christopher, et al. "The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000-2016." *Child Maltreatment*, vol. 25, no. 1, Feb. 2020, pp. 32-42, doi:[10.1177/1077559519848499](https://doi.org/10.1177/1077559519848499).

100 children in foster care; it is **one of every 100 children born in the United States**. For Black children it's 1 in 41; for Native American children, 1 in 37. And that's just the national average; there is enormous variation across the country. Among Black children in metropolitan Phoenix, Arizona, for example, one in every 16 will have their parents torn from them forever.<sup>15</sup>

An American child is nearly three times more likely to have his rights to his parents terminated than to contract cancer (the leading cause of death by disease of children).<sup>16</sup> A Black child is more than seven times more likely.<sup>17</sup> In any given year at least nine times more children will have their rights to their parents terminated than will lose their lives in auto accidents.<sup>18</sup>

It's time to end this travesty. A good way to advance that aim is to start referring to what we do as destroying families.

<sup>15</sup>Edwards, Frank, et al. "Contact with Child Protective Services is pervasive but unequally distributed by race and ethnicity in large US counties." *Proceedings of the National Academy of Sciences*, vol 118, no. 30, Jul. 2021, <https://doi.org/10.1073/pnas.2106272118>.

<sup>16</sup>"US Childhood Cancer Statistics." American Childhood Cancer Organization, <https://www.acco.org/us-childhood-cancer-statistics/>. Accessed 17 Aug. 2021.

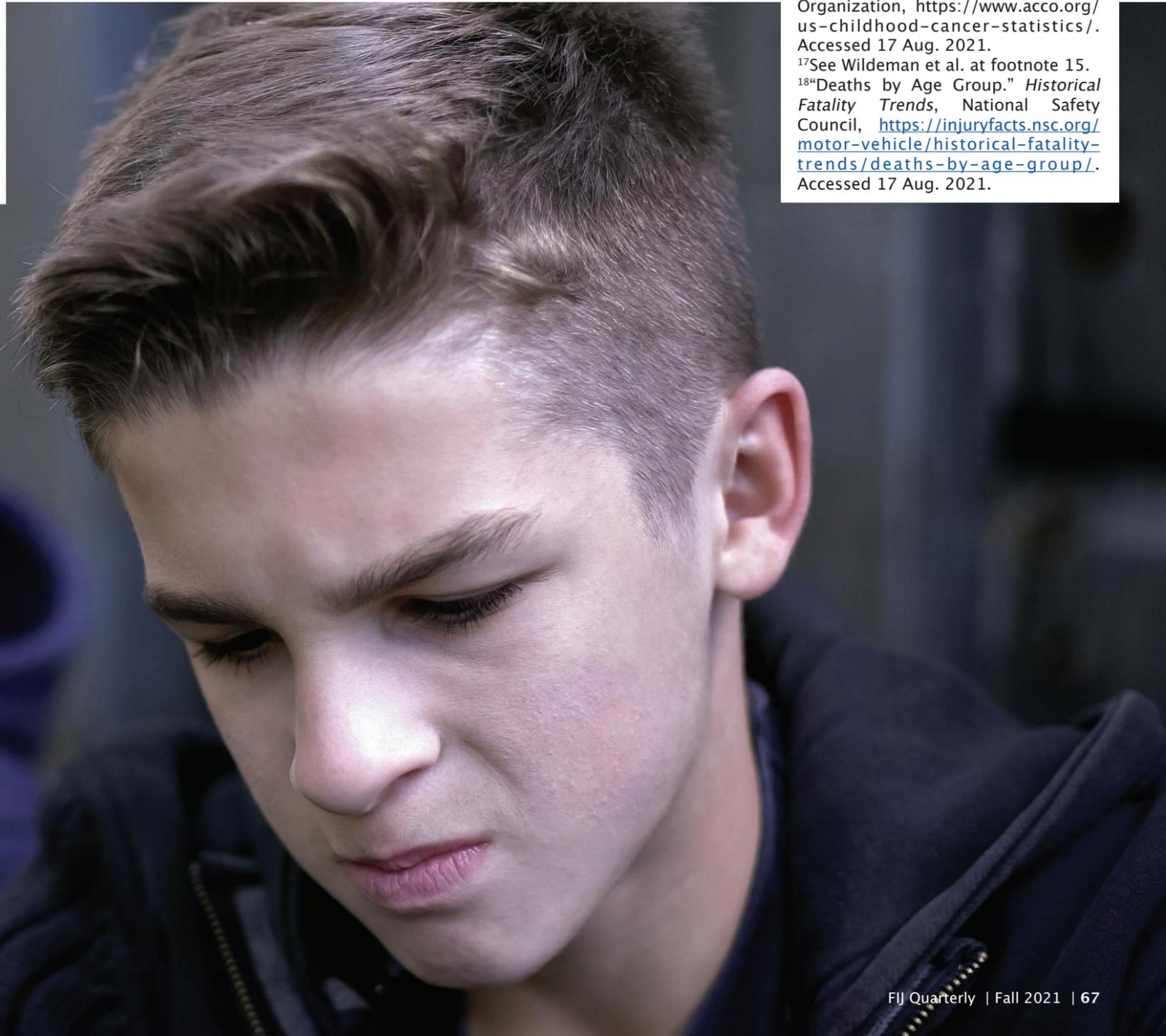
<sup>17</sup>See Wildeman et al. at footnote 15.

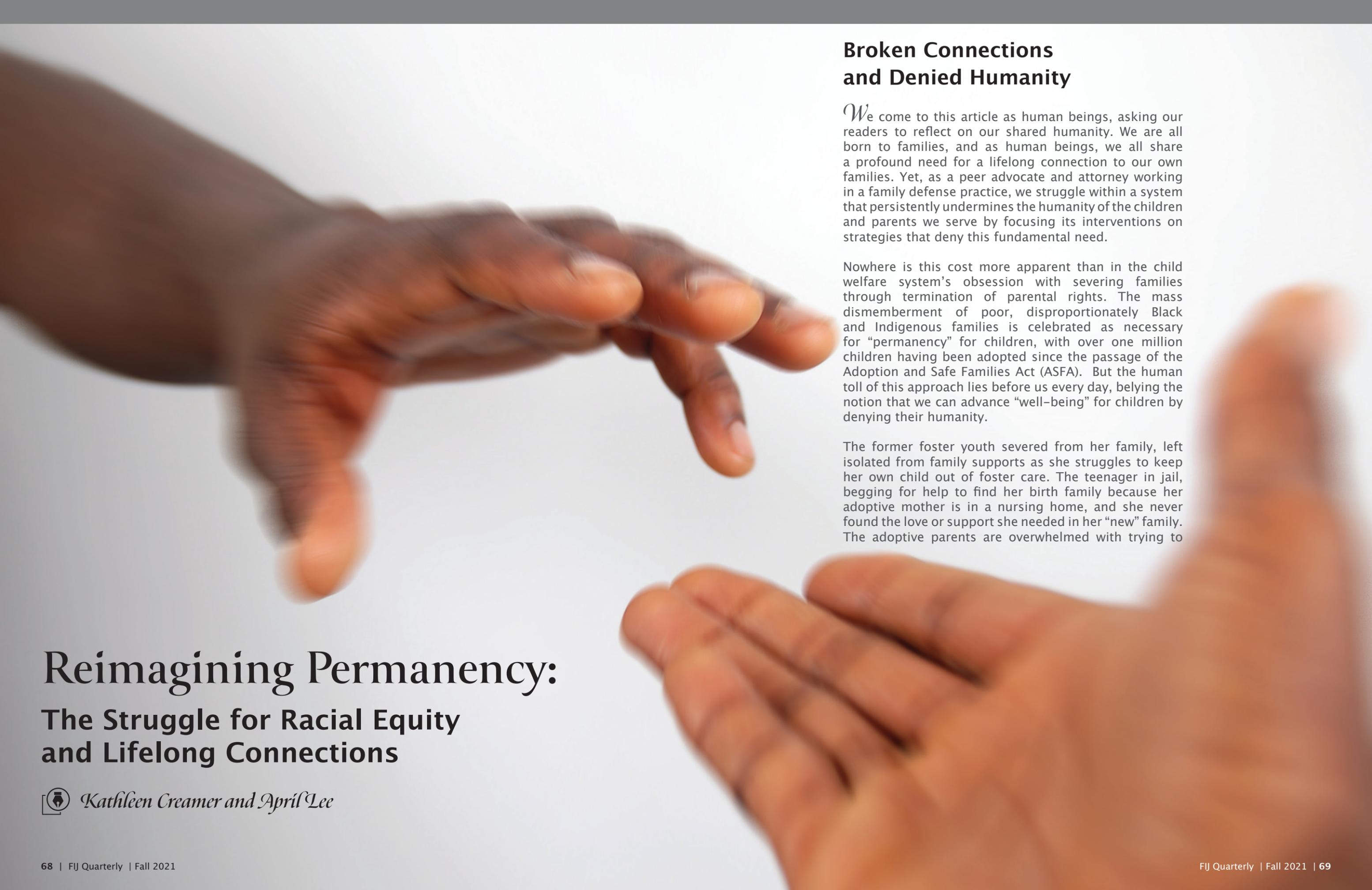
<sup>18</sup>"Deaths by Age Group." *Historical Fatality Trends*, National Safety Council, <https://injuryfacts.nsc.org/motor-vehicle/historical-fatality-trends/deaths-by-age-group/>. Accessed 17 Aug. 2021.



**Consider this:**

the parents of one of every  
**100 children**  
have their rights  
permanently terminated.<sup>14</sup>





## Broken Connections and Denied Humanity

We come to this article as human beings, asking our readers to reflect on our shared humanity. We are all born to families, and as human beings, we all share a profound need for a lifelong connection to our own families. Yet, as a peer advocate and attorney working in a family defense practice, we struggle within a system that persistently undermines the humanity of the children and parents we serve by focusing its interventions on strategies that deny this fundamental need.

Nowhere is this cost more apparent than in the child welfare system's obsession with severing families through termination of parental rights. The mass dismemberment of poor, disproportionately Black and Indigenous families is celebrated as necessary for "permanency" for children, with over one million children having been adopted since the passage of the Adoption and Safe Families Act (ASFA). But the human toll of this approach lies before us every day, belying the notion that we can advance "well-being" for children by denying their humanity.

The former foster youth severed from her family, left isolated from family supports as she struggles to keep her own child out of foster care. The teenager in jail, begging for help to find her birth family because her adoptive mother is in a nursing home, and she never found the love or support she needed in her "new" family. The adoptive parents are overwhelmed with trying to

# Reimagining Permanency:

## The Struggle for Racial Equity and Lifelong Connections

 *Kathleen Creamer and April Lee*

“ Nothing in research tells us that children are better off by irreparably losing their bonds to their birth families. To the contrary, developmental research suggests the opposite: whenever possible, children do best when their family bonds are nurtured and preserved. ”

By creating a statutory presumption requiring that adoption be “ruled out” before more flexible and connected options like guardianship are pursued, ASFA ignores what we know about children’s needs for lifelong family connection, instead creating a punishing binary: reunify quickly with your family, or else lose them forever. This binary represents a fundamental misunderstanding of permanency, confusing “permanence on paper” with the kind of permanence that meets children’s developmental needs – relational permanence. And as we discuss, even permanence on paper is often illusory, exacting unbearable costs on children and families.

## Black Families Matter

Despite the evidence of the benefits of lifelong family connection for children, our system for nearly 25 years has maintained a laser focus on dismantling families through termination of parental rights. Why? As Professor Dorothy Roberts wrote in *Shattered Bonds*, “The color of America’s child welfare system is the reason Americans have tolerated its destructiveness.”<sup>2</sup> While many children who experience the harms of the foster system are white, Black children are significantly overrepresented in foster care relative to the general child population. Indeed, Black children represent 14 percent of children in the United States but 23 percent of all children in foster care.<sup>3</sup> And once in foster care, Black children experience our worst outcomes: they are 2.4 times more likely to experience termination of parental rights<sup>4</sup> but are less likely to be adopted.

<sup>1</sup>Phagan-Hansel, Kim. “One Million Adoptions Later: Adoption and Safe Families Act at 20.” *The Imprint*, 28 Nov. 2016, [www.imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582](http://www.imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582). Accessed 2 Sept. 2021.

<sup>2</sup>Roberts, Dorothy. *Shattered Bonds: The Color of Child Welfare*. New York, Basic Books, p.x., 2002.

<sup>3</sup>“Black Children Continue to Be Disproportionately Represented in Foster Care.” Kids Count Data Center, 13 Apr. 2020, [www.datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity](http://www.datacenter.kidscount.org/updates/show/264-us-foster-care-population-by-race-and-ethnicity). Accessed 2 Sept. 2021.

<sup>4</sup>Wildeman, Edwards C., et al. “The Cumulative Prevalence of Termination of Parental Rights for US Children, 2000–2016.” *Child Maltreatment*, vol. 25, no. 1, 2019, [www.ncbi.nlm.nih.gov/pmc/articles/PMC6868298/](http://www.ncbi.nlm.nih.gov/pmc/articles/PMC6868298/). Accessed 2 Sept. 2021.

care for a child who keeps running away to her birth family. The mother, who found stability but was permanently severed from her child anyway because stability came a few months too late, has now lost her child forever. The young woman who aged out of foster care, desperately searching for her brother, who was adopted from foster care and last seen by his sister as a toddler.

Nothing in research tells us that children are better off by irreparably losing their bonds to their birth families. To the contrary, developmental research suggests the opposite: whenever possible, children do best when their family bonds are nurtured and preserved. Neurobiology research demonstrates the importance of stable long-term relationships for children’s development. Maintaining these relationships is particularly important for children who experience trauma and prolonged periods of stress, both of which are marked characteristics of family separation. Research shows that stable and loving family relationships serve as a “buffer” between youth and adverse life experiences and help them build resilience to adversity and trauma. To that end, the [Center on the Developing Child at Harvard University](http://www.developingchild.harvard.edu) strongly urges that child welfare agencies “establish policies that allow families to preserve and strengthen their relationships.”<sup>1</sup>

Black children are significantly more likely to age out of foster care<sup>5</sup> and experience institutionalization at alarming rates.<sup>6</sup>

ASFA was enacted at a time when myths about Blackness powered federal policymaking. The myth of the Black “welfare queen” supported the passage of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, also known as welfare reform,<sup>7</sup> a policy that plunged disproportionately Black children into deep poverty.<sup>8</sup> The myth of the Black “super predator” encouraged a wave of punitive sentencing laws across the country, including the federal Crimes Bill of 1994,<sup>9</sup> which cumulatively led the United States to become the world’s leading jailer, incarcerating more of its citizens than any country in the world.<sup>10</sup>

Similarly, myths and biases about the suitability of Black mothers to raise their own children fueled child welfare law and policy in the 1990s. The “crack baby” scaremongering by the media drove a powerful narrative doubting the competency of Black motherhood,<sup>11</sup> with leading child welfare experts pushing to limit efforts to reunify families and move children into more desirable homes. Elizabeth Bartholet, a Harvard Law professor who remains today an influential voice in child welfare policy, extolled the virtue of placing Black children for adoption by white parents, speculating that “whites are in the best position to teach black children how to maneuver in the white worlds of power and privilege. Indeed, it seems clear that for black children growing up in a white-dominated world, there would be a range of material advantages associated with having white parents and living in the largely white and relatively privileged world that such parents tend to frequent.”<sup>12</sup> Such rhetoric proved profoundly effective, and the ASFA was passed in 1997 with near unanimity.<sup>13</sup>

In the wake of George Floyd’s murder, child welfare leaders across the country put out statements, many for the first time, proclaiming their commitment to the notion that Black Lives Matter. One might presume that a heightened commitment to Black lives would entail a heightened commitment to Black families. Yet as COVID-19 tore through the lives of Black and other marginalized families involved in the child welfare system, we saw

family time suspended,<sup>14</sup> services halted, and despite pleas from the Children’s Bureau leadership urging all stakeholders to carefully consider whether termination is appropriate in such circumstances,<sup>15</sup> courts adapting to “termination by zoom.” Federal legislation was introduced to halt the 15-month termination

<sup>5</sup>White, Shereen A., et al. “Fighting Institutional Racism at the Front End of the Child Welfare Systems: A Call to Action.” *Children’s Rights*, 2021, p.10, [www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm\\_source=dailykos&utm\\_medium=email&utm\\_campaign=ciofr](http://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm_source=dailykos&utm_medium=email&utm_campaign=ciofr). Accessed 2 Sept. 2021.

<sup>6</sup>For a review of research suggesting that Black children are moved into congregate care at a rate 1.7 times that of their white peers, see Loudonback, Jeremy. “Placing Foster Children with Relatives May Help Prevent Congregate Care.” *The Imprint*, 20 Feb. 2020, [imprintnews.org/child-welfare-2/placing-foster-children-with-relatives-may-help-prevent-congregate-care/40860](http://imprintnews.org/child-welfare-2/placing-foster-children-with-relatives-may-help-prevent-congregate-care/40860). Accessed 2 Sept. 2021.

<sup>7</sup>Roberts, *Shattered Bonds*, p. 194.

<sup>8</sup>Trisi, Danilo & Saenz, Matt. “Deep Poverty Among Children Rose in TANF’s First Decade, Then Fell as Other Programs Strengthened.” *Center on Budget and Policy Priorities*, 27 Feb. 2020, [www.cbpp.org/research/poverty-and-inequality/deep-poverty-among-children-rose-in-tanf-s-first-decade-then-fell-as](http://www.cbpp.org/research/poverty-and-inequality/deep-poverty-among-children-rose-in-tanf-s-first-decade-then-fell-as). Accessed 2 Sept. 2021.

<sup>9</sup>Boger, Carroll, et al. “Analysis: How the Media Created a ‘Superpredator’ Myth That Harmed a Generation of Black Youth.” *NBC News*, 20 Nov. 2020, [www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101](http://www.nbcnews.com/news/us-news/analysis-how-media-created-superpredator-myth-harmed-generation-black-youth-n1248101). Accessed 2 Sept. 2021.

<sup>10</sup>“Criminal Justice Facts.” *The Sentencing Project*, [www.sentencingproject.org/criminal-justice-facts/](http://www.sentencingproject.org/criminal-justice-facts/). Accessed 2 Sept. 2021.

<sup>11</sup>The Editorial Board. “Slandering the Unborn: How Bad Science and a Moral Panic, Fueled in Part by the News Media, Demonized Mothers and Defamed a Generation.” *N.Y. Times*, 28 Dec. 2018, [www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html](http://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html). Accessed 2 Sept. 2021.

<sup>12</sup>Bartholet, Elizabeth. “Where Do Black Children Belong? The Politics of Race Matching in Adoption.” *University of Pennsylvania Law Review*, vol. 139, p. 1222, 1991.

<sup>13</sup>United States, Congress. Adoption and Safe Families Act of 1997. *Congress.gov*, [www.congress.gov/bill/105th-congress/house-bill/867/actions](http://www.congress.gov/bill/105th-congress/house-bill/867/actions). 105th Congress, House Resolution 867, passed 13 Nov. 1997.

<sup>14</sup>Hager, Eli. “These Parents had to Bond with Their Babies Over Zoom or Lose Them Forever.” *The Marshall Project*, 14 Apr. 2021, [www.themarshallproject.org/2021/04/14/these-parents-had-to-bond-with-their-babies-over-zoom-or-lose-them-forever](http://www.themarshallproject.org/2021/04/14/these-parents-had-to-bond-with-their-babies-over-zoom-or-lose-them-forever). Accessed 2 Sept. 2021.

<sup>15</sup>Milner, Jerry. “Letter to the Field: Ensuring the Continuation of Critical Court Hearings.” *Department of Health & Human Services*, 4 Dec. 2020, [www.acf.hhs.gov/sites/default/files/documents/cb/ensuring\\_continuation\\_critical\\_court.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/ensuring_continuation_critical_court.pdf).

filing requirement during the public health crisis,<sup>16</sup> but it drew support from only one leading child welfare organization, Children's Rights.<sup>17</sup> The legislation failed, and family dismemberment continued apace in much of the country.<sup>18,19</sup>

## A Trail of Orphans

Professor Roberts speaks of the carceral logic<sup>20</sup> of the child welfare system, and nowhere is this more evident than in the child welfare system's ruthless drive to dismember families through termination of parental rights, whether a child has a potential adoptive resource waiting or not. Indeed, the number of "legal orphans," children who have lost their families through termination but leave the system without any family to call their own, has been an alarming, marked, and persistent feature of the past decades of ASFA.

Since ASFA was enacted, nearly half a million children have aged out of our foster care system, many having been severed from their families<sup>21</sup> by the termination of parental rights. Each year, the number of children "waiting to be adopted" significantly outpaces the number of adoptions finalized.<sup>22</sup> A recent analysis of data by the Children's Bureau found that 25 percent of children whose parental rights have been terminated will go on to age out of care.<sup>23</sup> As with all of the harms of the child welfare system, the legal orphan phenomenon is profoundly racialized and falls harshly on the backs of Black children, who are significantly more likely to experience termination of parental rights, but less likely to be adopted.<sup>24</sup>

The carceral logic that Professor Roberts so aptly names drive us to punish parents, no matter the collateral damage to children. And, of course, the carceral logic quickly trains itself upon these children as they become adults who are left to navigate the world alone. The seminal study on outcomes for children who age out of care showed us that these youth face severe educational deficits, economic devastation, heightened criminal justice involvement, and alarming rates of homelessness.<sup>25</sup>

<sup>16</sup>Community Legal Services. "CLS Supports H.R. 7976 to #Stoptheclock and Help Families Reunify During the COVID-19 Crisis." *Category Archives: Family*, 18 Aug. 2020, [www.clsphila.org/family/hr-7976-stoptheclock-press-release/](http://www.clsphila.org/family/hr-7976-stoptheclock-press-release/). Accessed 2 Sept. 2021. Press Release.

<sup>17</sup>@ChildrensRights. "Thank you @Gwen4Congress, for putting families first and introducing the Protecting Families in the Time of COVID-19 Act (HR 7976). Under this bill, states would be allowed to suspend deadlines to prevent parental rights from being terminated during #COVID19." *Twitter*, 22 Sept. 2020, 4:56 p.m., [twitter.com/ChildrensRights/status/1308510524242616322](https://twitter.com/ChildrensRights/status/1308510524242616322).

<sup>18</sup>Harvey, Sylvia A. "When the Clock is Cruel: Parents Face Pandemic Hurdles as They Race to Keep Their Kids." *The Imprint*, 2 May 2021, [www.imprintnews.org/child-welfare-2/parents-pandemic-hurdles-race-keep-kids/54024](http://www.imprintnews.org/child-welfare-2/parents-pandemic-hurdles-race-keep-kids/54024). Accessed 2 Sept. 2021.

<sup>19</sup>We note with gratitude that Philadelphia's judicial leadership, with the support of all stakeholders, issued a standing order halting the 15-month filing requirement during the time that COVID forced limited access to family time, reunification services, and court hearings. Court of Common Pleas of Philadelphia County. "Juvenile Dependency Child Visitation." *Amended Order Signed by Supervising Judge Walter J. Olszewski*, 25 Aug. 2020, [www.phila.gov/media/20200831180508/Policy-for-Family-Visits-During-Covid-19.pdf](http://www.phila.gov/media/20200831180508/Policy-for-Family-Visits-During-Covid-19.pdf). We are aware of no other court in the nation that followed suit.

<sup>20</sup>Roberts, Dorothy. "Abolishing Policing Also Means Abolishing Family Regulation." *The Imprint*, 16 June 2020, [www.imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480](http://www.imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480); Roberts, Dorothy. "A Conversation with Professor Dorothy Roberts Demystifying Abolition." *ABA Center on Children and the Law*, 12 Aug. 2021, at 11:15 [youtu.be/2N-PvSDH-vA?t=12](https://youtu.be/2N-PvSDH-vA?t=12). Accessed 2 Sept. 2021.

<sup>21</sup>National Coalition for Child Protection Reform. "ASFA, 'Aging Out' and the Growth in Legal Orphans." *NCCPR.org*, 9 Sept. 2020. <https://drive.google.com/file/d/1X3X9a4H6LFfKWRnSDoLDxuZb6Dm4yUdA/view>

<sup>22</sup>United States, Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. "The AFCARS Report: Preliminary FY 2019 Estimates as of June 23, 2020." *Data & Research: Adoption & Foster Care Statistics*, 23 June 2020, p. 16, [www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf). Accessed 2 Sept. 2021.

<sup>23</sup>United States, Department of Health and Human Services, Administration for Children and Families, Children's Bureau. "Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." *Children's Bureau: Policy & Guidelines*, 5 Jan. 2021, [www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf). Accessed 2 Sept. 2021.

<sup>24</sup>White, Shereen A., et al. "Fighting Institutional Racism," p. 10, [www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm\\_source=dailykos&utm\\_medium=email&utm\\_campaign=ciofr](http://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf?utm_source=dailykos&utm_medium=email&utm_campaign=ciofr). Accessed 2 Sept. 2021.

<sup>25</sup>Dworskey, Amy, et al. "Midwest Evaluation of the Adult Functioning of Former Foster Youth." *Chapin Hall at the University of Chicago, Research Collection*, 2011, p. 2 <https://www.chapinhall.org/research/midwest-evaluation-of-the-adult-functioning-of-former-foster-youth/>. Accessed 31 Aug. 2021.

## Listening to Lived Experience

If we were a system that truly listened to youth voice, our approach to permanency would be quite different. Foster youth have admirably led the charge in urging practitioners to understand "permanency" as they themselves understand it: permanency of relationships, permanency of connection, permanency of family ties, permanency of love.<sup>26</sup> Time and again, youth tell us that they value their families, and that family is where they find belonging and identity. Interviews with older foster youth tell us that permanence of relationships is what matters most to their well-being. Indeed, an article summarizing interviews with foster youth tells us that youth prefer the promise of ongoing relationships, particularly with their siblings, friends, and others in their community, and express skepticism about adoption. As one youth tells us: "Legal permanence could be taken off the list and I wouldn't miss it. You can have legal permanence—but without relational or physical permanency, what's the point? Without the last two, the first is not important."<sup>27</sup> Similarly, Children's Bureau leadership met with youth across the country and learned from youth that they strongly value "relational permanency," noting that "legal permanence alone doesn't guarantee secure attachments and lifelong relationships."<sup>28</sup> Yet lifelong family relationships are precisely what ASFA tells us we must sever.

We also have much to learn from parents who have experienced the pain of our punishing presumption for adoption. A campaign to Repeal ASFA was recently launched, led by parents who "bear our lacerated hearts" and urge an end to the "unjust and racist policies that separate us, such as the Adoption and Safe Families Act."<sup>29</sup> Parents who have experienced the "civil death penalty" of termination of parental rights have come forward to share the devastating trauma of having their children adopted. Suzanne Sellers, a mother who had her rights terminated but was finally able to reconnect

with her children when they turned 18, speaks of the "devastating" and "irreversible" loss that her family experienced.<sup>30</sup> Corey Best described the trauma of losing his son to adoption as "prolonged." Despite a decade of sobriety, his child's adoptive mother prohibits contact, leaving Corey to create a box of letters and cards that he can only hope that his son might one day have the chance to read.<sup>31</sup> Elizabeth Brico describes the searing pain of having her rights to her daughters terminated, promising her a "lifetime of unending trauma and loss."<sup>32</sup>

Joyce McMillan, the founder of the Parent Legislative Action Network, tells us that "any system built to actually protect children should in no way mimic a system that tortures adults."<sup>33</sup> But torture is exactly what these parents are describing.

<sup>26</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 2, [www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf). Accessed 2 Sept. 2021.

<sup>27</sup>Mandelbaum, Randi. "Re-Examining and Re-Defining Permanency from A Youth's Perspective." *The Capital University Law Review*, vol. 43, no. 2, p. 279, 2015.

<sup>28</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 12, [www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf). Accessed 2 Sept. 2021.

<sup>29</sup>Repeal ASFA. "Our Work." *Repeal ASFA*, [www.repealasfa.org/our-work](http://www.repealasfa.org/our-work). Accessed 3 Sept. 2021.

<sup>30</sup>Sellers, Suzanne, "Demonizing 'Crack Mothers,' Victimized Their Children," *The New York Times*, 5 Jan. 2019, <https://www.nytimes.com/2019/01/05/opinion/letters/crack-mothers-children.html>. Accessed 2 Sept. 2021.

<sup>31</sup>Hager, Eli, and Flagg, Anna. "How Incarcerated Parents are Losing their Children Forever." *The Marshall Project*, 2 Dec. 2018, [www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever](http://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever). Accessed 2 Sept. 2021.

<sup>32</sup>Brico, Elizabeth. "The Civil Death Penalty—My Motherhood is Legally Terminated." *Filter*, 13 July 2020, [filtermag.org/motherhood-legally-terminated/](http://filtermag.org/motherhood-legally-terminated/). Accessed 3 Sept. 2021.

<sup>33</sup>Schwartz, Molly. "Do We Need to Abolish Child Protective Services?" *Mother Jones*, 10 Dec. 2020, [www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/](http://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services/). Accessed 31 Aug. 2021.



April was fortunate to be spared ASFA's punishing presumption for adoption. Her child welfare case ended in guardianship to a family

member, which allowed her to eventually regain custody of her three children:

I often sit and think, what if ASFA had worked in my life as it was intended to. Who would my children be? Would the problems that they had/have be worse today? Would my daughter still be this angry little girl who could only express rage as an outlet? Would my middle son still express abandonment issues as he thinks about the mother that he thought didn't care and didn't fight for him? Would my eldest son still be so passive to the point that all he can say is sorry to the abuses he suffered, that were not caused by the very mother the system was trying to protect him from? ASFA tells children that parents and family gave up on them, but actually, the system gave up on the family. Although my family is whole in theory because we are reunited, I still can see the remnants of the trauma of separation in all of our lives.

Many families that faced this clock do not share my story due to the presumption for adoption within the hierarchy of this law. What this law doesn't show you is the tears shed by a parent who loses hope of being in their child's life. Or the tears I shed as I understood that my children were growing up without me. This law can't possibly show the vast majority of separations that are due to issues that are out of the parent's control. To this day, my heart breaks as I think about all my children went through because they were born to a mother who was raised in poverty. That mother being born in the projects where she knew hunger and famine before she knew how to write or read. A mother who was unfortunate enough to try her hardest to come out of that poverty only to be raped and sent on an emotional downward spiral that would lead to her children being taken, split up, and assigned a number.

## The Value of Guardianship and the Punitive Presumption for Adoption

Guardianship offers children the opportunity to leave the foster system but keep their family ties. It does not require termination of parental rights or the loss of legal connection to a child's family but does promise children that they can have the legal permanency of a committed, lifelong caregiver. Although some states limit the availability of guardianship to relatives, nothing in federal law requires this limitation. And crucially, children and families share that they themselves value the option of guardianship.<sup>34</sup>

Despite the value of guardianship to families, it is currently disincentivized by ASFA in favor of adoption, and even the expansion of federal reimbursement for guardianship for kin has failed to meaningfully move the needle on its use. The most recent Adoption and Foster Care Analysis and Reporting System report tells us that only 11 percent of children who exit foster care do so because they were placed in guardianship.<sup>35</sup> For comparison, eight percent of children exited to emancipation, also known as "aging out." This means that children are nearly as likely to leave our system with no family at all as they are to leave our system in a stable guardianship.

The mythology that adoption is more "permanent" than guardianship has driven much of the anti-guardianship rhetoric. But this narrative is false. Research has shown that children who exit foster care to guardianship are no more likely to reenter foster care than children who exit to other permanency, including adoption, and very few children who exit to guardianship experience placement disruptions.<sup>36</sup>

And although the ASFA hierarchy prefers adoption to guardianship, adoption itself provides no guarantee of permanency, with available data showing that 10–25 percent of adoptions disrupt before they are finalized, and 1–10 percent of adoptions dissolve, with the adoptive parent experiencing termination of parental rights after they are finalized.<sup>37</sup> Worse, although data collection on the experiences

of children after adoption is inadequate and inconsistent, emerging research into "broken adoptions," cases in which an adopted child returns to state custody, suggests that adoption may be less "permanent" than ever imagined.<sup>38</sup>

Some policymakers, recognizing the potential harm to children of disrupted attachment to their birth families, have proposed open adoption as a solution. Though ASFA presumes a traditional approach to adoption and most adoptions from child welfare are closed,<sup>39</sup> a growing number of states have amended their statutes to permit post-adoption contact in some instances.<sup>40</sup> While open adoption is better for children than closed adoption, it is important to confront the limitations of this approach. Some open adoptions allow children regular, ongoing contact with their parents, but adoptions may be called "open" if they merely allow the parent to receive updates and photos about their child, with no in-person parent-child contact at all. Most states condition the availability of open adoption agreements on a parent's consent to relinquish her parental rights, meaning that children whose parents fight for their right to lifelong relationship are penalized should that fight fail. There are also significant barriers to the enforceability of

<sup>34</sup>Gupta-Kagan, Josh. "The New Permanency." *U.C. Davis Journal of Juvenile Law and Policy*, vol. 19, pp. 16–17, 2015.

<sup>35</sup>United States, Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau. "The AFCARS Report: Preliminary FY 2019 Estimates as of June 23, 2020." *Data & Research: Adoption & Foster Care Statistics*, 23 June 2020, p. 3, [www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf). Accessed 2 Sept. 2021.

<sup>36</sup>Josh Gupta-Kagan, "The New Permanency," p.18 (reviewing research on guardianship outcomes).

Child Welfare Information Gateway, *Adoption Disruption and Dissolution* (June 2012), found online at: [https://www.childwelfare.gov/pubPDFs/s\\_disrup.pdf](https://www.childwelfare.gov/pubPDFs/s_disrup.pdf)

<sup>38</sup>Post, Dawn J. & Zimmerman, Brian. "The Revolving Doors of Family Court: Confronting Broken Adoptions." *The Capital University Law Review*, vol. 40, p. 449, 2012.

<sup>39</sup>Appell, Annette Ruth. "The Myth of Separation." *Northwestern Journal of Law and Social Policy*, vol. 6, pp. 295–96, 2011.

<sup>40</sup>United States, Children's Bureau. "Postadoption Contact Agreements Between Birth and Adoptive Families." *Child Welfare Information Gateway*, current through Aug. 2018, [www.childwelfare.gov/pubPDFs/cooperative.pdf](http://www.childwelfare.gov/pubPDFs/cooperative.pdf). Accessed 3 Sept. 2021.

open adoption contracts. Most states do not appoint counsel for enforcement proceedings, and most place the burden on the party seeking enforcement to prove that enforcement is in the best interests of the child. By placing a heavy burden on unrepresented parents to navigate courtroom processes, open adoption statutes, in practice, create presumptions *against* enforcement.<sup>41</sup>

From a policy perspective, while open adoption is better than closed adoption for most children, open adoption statutes fail to reflect the developmental needs of children for lifelong connection to their families and fail to move the needle meaningfully away from the needless destruction of parent/child bonds. Rather, open adoption statutes merely beg the question: if the parent/child relationship is important enough to preserve, why sever it in the first place?

We note the punitive irony of our presumption for adoption in the name of permanency. The child welfare system itself doesn't guarantee permanency, yet parents are punished for failing to provide something the system itself does not. How often do we see foster placements disrupt? We watch as children are hauled from place to place, foster home to foster home. Congregate care to congregate care. Or even kinship home to kinship home. The data tells us clearly about the trauma to children being moved from home to home or even separated in the first place. We see a parent who cannot afford a stable home and moves a lot as "transient," unable to provide permanency. Yet, we also watch as that parent's child gets moved from home to home in stranger foster care in the name of finding "permanency." We justify this compounding trauma by saying it is in the best interest of the child, all the while knowing the outcome for the child might be worse than had their family been preserved. Our notion of "permanency"

is narrow, rigid, and demands something of parents that the child welfare system itself has never meaningfully provided.

## Toward a Law that Values Family Connection

There is no doubt that ASFA in its current form must be repealed. Black and other marginalized families must be, finally, relieved of a system that has been programmed by statute to "search and destroy," with predictably disastrous consequences. Much of the rhetoric of ASFA urged the field of child welfare to focus on the rights of the child rather than the rights of the parent.<sup>42</sup> But we must be clear-eyed about the harm that ASFA's approach has caused to children. Time and again, in its zeal to punish parents, ASFA has made children collateral damage. If ASFA were truly designed to focus the child welfare system on child well-being and spare children a lifetime in foster care, its policy solutions might look much different.

If ASFA truly concerned itself with the well-being of children, it would ground its solutions in reverence for a child's right to lifelong connections to her own family. A child-centered law would never permit the state to separate a child from her family under a vague, amorphous "contrary to the welfare" standard. A child-centered law would create a meaningful, specific, and enforceable standard of precisely what efforts the state must take on behalf of a child's right to be safe in her own home. A child-centered law would never suggest that the state must only act "reasonably" to prevent the life-altering harm of family separation.

<sup>41</sup>We also offer gratitude to Ashley Albert and Amy Mulzer, whose forthcoming journal article "Adoption Cannot Be Reformed" illuminates the racist history of adoption policy in the United States as well as the limits of reformist approaches like open adoption.

<sup>42</sup>Roberts, *Shattered Bonds*, pp. 254–257.

A child-centered law would never create a 15-month doomsday clock for children's families based on an arbitrary timeline that is not matched in any way to a child's individual needs or the circumstances of her family. A child-centered law would never neutrally permit states to create timelines even more draconian and punishing, nor would it allow states to call struggles of families in poverty like mental illness or disability "aggravated circumstances," allowing them to freely bypass the meager, "reasonable" support offered to families to reunify. A child-centered law would never give states financial bonuses for taking away children's families forever. A child-centered law would never be morally neutral about whether its interventions might leave a child orphaned.

Most crucially, a child-centered law would compel us all to work tirelessly to guarantee that children have an uninterrupted sense of belonging in the context of their family, their culture, and their community. The ASFA hierarchy would reorder itself to prefer guardianship to adoption. Termination of parental rights would require proof that a child would be harmed by preserving her connections to her parents, her siblings, her grandparents, her aunts, her cousins, her family. The dismemberment of Black and other marginalized families through termination of parental rights would be rare, and high adoption rates would be a source of shame rather than celebration.

We join the calls in these pages for a radical reimagining of federal law. In the meantime, though, we urge everyone reading these words to act with urgency to limit the harm of ASFA's presumption for adoption. A recent information memorandum (IM) from the Children's Bureau, [Achieving Permanency for the Well-being of Children and Youth](https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf),<sup>43</sup> preserve family relationships and honor the connections of

foster youth. Perhaps most crucially, the IM tells us that "children in foster care should not have to choose between families," exhorting us to "expand family relationships, not sever or replace them,"<sup>44</sup>; "preserve a child's core identity and sense of belonging," and to be mindful that even after termination, children "most often still have living parents, [and] other relatives they are connected to"<sup>45</sup>; reminds us that "guardianship is an appropriate permanency goal"<sup>46</sup>; is pursued, "agencies and courts should insist on protecting a child's key connections even if it means losing a potential adoptive family."<sup>47</sup>

While implementation of this IM should be imperative for all child welfare professionals to prioritize today, make no mistake: statutory change is urgently needed and long overdue. The presumption for adoption is inhumane and a source of profound trauma for families. It creates a persistent threat of lifelong harm. It tells children that the agency will only "reasonably" try to reunite their families, but when those modest efforts fail, it tells children that they must irretrievably lose their parents, their siblings, their culture, their community. It tells families that their bonds do not matter and are not worth preserving. We have an entire generation of children and parents whose connections have been irreparably broken, with devastating consequences. Simply put, we know better. It's time for us to commit to doing better.

<sup>43</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." [www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf](https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf). Accessed 2 Sept. 2021.

<sup>44</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 10.

<sup>45</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 11.

<sup>46</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 17.

<sup>47</sup>Informational Memorandum: Achieving Permanency for the Well-being of Children and Youth." p. 19.



# ODE TO THE FAMILY DESTRUCTION SYSTEM: THEY DECIDED NOT TO LISTEN TO HER

 *Diane Redleaf*

They decided that she was a mess.

They slapped on labels:

addict,

crazy,

hopeless case.

And she was a black woman, too.

So she could hardly force anyone to listen  
in the years before anyone thought to be  
“trauma informed”

or thought that

a black momma mattered.

It’s unclear, looking at case records,  
whether a single person

listened along her way.

And by the time her son knew of her struggles,  
he could see them listening to his dad,  
not her,

as they claimed righteous concern for his welfare,  
keeping him away from her.

He wanted to shout to them,

Including the one in black robes,

“Listen to her; she’s worthy, too!”

But he was too young to

articulate the point:

that claims about caring for children

ring hollow

when uttered by the mouths

of those who hate their mommas—

the ones who have decided that

hey can manage a child’s welfare

without reckoning with so intangible a thing

as a mother’s love.



## TO COME

# FULL PAGE ADVERTISEMENT

## Southern Poverty Law Center

# Disrupting the Foster Care to Termination of Parental Rights Pipeline:

## Making a Case for Kinship Guardianship as the Next Best Alternative for Children Who Can't Be Reunified with their Parents



*Mark F. Testa,*

Distinguished Professor Emeritus  
University of North Carolina  
at Chapel Hill

The Adoption and Safe Families Act of 1997 (ASFA) staked out a policy position on the termination of parental (TPR) rights, which remains controversial to this day. The law shortened the period for holding a permanency (dispositional) hearing from 18 to 12 months after the child enters foster care. It further stipulated that a state shall file a petition to terminate the rights of all parents of a child who had been in state custody for 15 of the most recent 22 months. It permitted states to apply the accelerated timetable even if there were no identified homes available to adopt the child.

Critics of ASFA alleged that the changes stacked the deck against family reunification by setting unrealistic time frames for parents to resolve the problems that prompted their child's removal from the home. Speeding up the foster care to TPR pipeline before finding a home willing to adopt, they warned, risked adding to the number of adolescents who age out of foster care without any lawful ties to parents, siblings, and grandparents.

Champions of ASFA countered that the risks were a tolerable trade-off compared to the harms of retaining children in long-term foster care. Freeing children quickly for adoption, especially infants, while simultaneously abolishing the traditional practice of matching caregivers to children based on their race, color, or national origin (which in the distant past both enforced prohibitions against transracial adoptions and helped shroud same-race adoptions in secrecy), would enable states to tap into the presumably large reservoir of families willing to welcome a racially diverse group of dependent and neglected children permanently into their homes.

Looking back, the best available evidence indicates that the permanency designs of ASFA were mostly realized. A majority of states doubled the number of adoptions from foster care over their respective baseline (1995–1997) in at least one of the years between 1998 and 2002.<sup>1</sup> The number of children in foster care for longer than three years declined 65 percent from 182,600 in 1998 before plateauing at an average of 63,600 children between 2014 and 2019. In spite of these accomplishments, most states still struggled to clear their waiting lists of children “freed” for adoption. Nationally, the number of children waiting for adoption whose ties to all living parents were legally severed never dipped below 58,000 and in recent years has climbed back up from 58,240 children in 2012 to 71,335 children in 2019.<sup>2</sup>

The rise in the number of so-called “legal orphans” was foreseeable at the time of AFSA's passage, but alternative solutions were largely overlooked.<sup>3</sup> In framing the issue narrowly as a binary choice between

<sup>1</sup>U.S. Children's Bureau. *The AFCARS Report, Final Estimates for FY 1998 through FY 2002 (12)*. U.S. Department of Health and Human Services. AFCARS Report #27.

<sup>2</sup>Roberts, *Shattered Bonds*, pp. 254–257.

<sup>3</sup>*Id.* AFCARS Report #27.

<sup>3</sup>Martin Guggenheim forewarned of the potential risks before ASFA was passed based on trends he observed in Michigan and New York. See Guggenheim, Martin. “The Effects of Recent Trends to Accelerate the Termination of Parental Rights to Children in Foster Care – An Empirical Analysis in Two States.” *Family Law Quarterly*, vol. 29, no. 1, 1996 1995, pp. 121–40.



reunification or adoption, both critics and champions of ASFA deflected attention away from an alternative permanency option that did not require TPR and was more in keeping with traditional multifamily identities than formal adoption.<sup>4</sup> The option was kinship guardianship.

## Kinship Guardianship

ASFA reaffirmed legal guardianship as a permanency goal, which it defines as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control, custody of the person, and decision-making.” Even though ASFA widened the pathway to family unification, which like reunification preserves both parental and extended family ties, it left the option financially unaffordable for most kinship caregivers by restricting federal permanency assistance to adoption alone. The law appropriately excused placements with kin from the accelerated TPR timetable, but this exemption conveyed the misleading impression to the field that there was little urgency to addressing the permanency needs of the thousands of children languishing in long-term, kinship foster care.

The U.S. Congress sought to rectify some of ASFA’s permanency deficiencies by creating the Guardianship Assistance Program (GAP) in 2008. GAP offers federal permanency stipends to relatives without requiring the severance of parental ties and recasting of extended family identities in the nuclear family mold of parent and child. The widening of the pathway to family unification, however, was cut short by the law’s also requiring guardianship assistance to be offered only after the state determined that being adopted was not an appropriate permanency option for the child. The rationale for the law’s ranking of preferences was that adoption was “more permanent” than guardianship.<sup>6</sup>

The purpose of this paper is to assess the rationale for and empirical adequacy of the federal preference for adoption over guardianship where a relative is the intended guardian. It cites research showing that subsidized legal guardianship is just as lasting as subsidized adoption when kinship guardianships are appropriately compared to what might have happened if subsidized legal guardianship was unavailable as a permanency option. In light of the absence of meaningful differences between guardianship and adoption for a child’s sense of belonging and continuity of care, it is untenable to retain the requirement that a state determines that adoption is not an appropriate permanency

<sup>4</sup>Robert B. Hill. *Informal Adoption among Black Families*. National Urban League, Research Department, 1977.

<sup>5</sup>42 U.S.C. § 675(7)

<sup>6</sup>42 U.S.C. § 675(1)(F)(v).

option as an eligibility condition for receiving GAP payments. Eliminating the adoption rule-out provision and opening up GAP to children already in safe and stable kinship foster care, regardless of the home’s licensing status, can help bring the benefits of multifamily permanence to thousands of children who face the prospect of aging out of foster care without a family they can permanently claim as their own.

## Demotion of Kinship Guardianship as a Permanency Goal

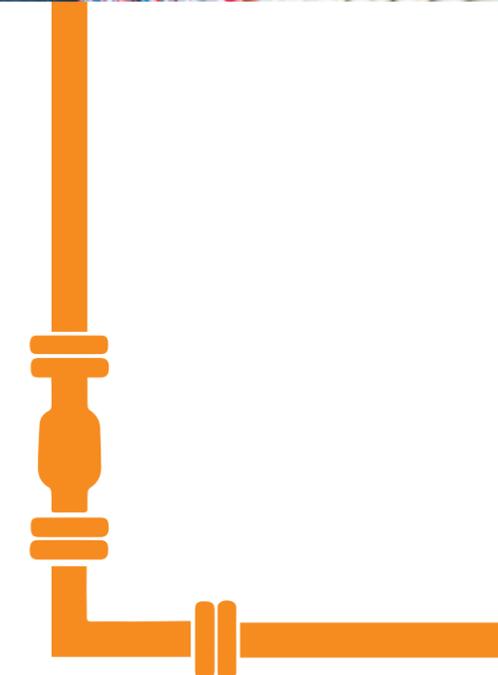
Prior to ASFA, many practitioners and scholars accepted kinship guardianship as the next best alternative to reunification with parents.<sup>7</sup> The child psychiatrist, Marilyn Benoit, noted that: “In such a setting, the children will best experience a sense of belonging (by reason of kinship) and permanence rather than a feeling of expendability.”<sup>8</sup> The U.S. Children’s Bureau later departed from this viewpoint. It maintained that child welfare agencies must first determine adoption is either inappropriate for or unavailable to the child before deciding that guardianship is the appropriate plan of choice for a child.

A slightly more stringent “adoption rule-out” version became the boiler-plate requirement of the IV-E waivers that HHS granted states between 1996 and 2008 to test the impact of subsidized legal guardianship.<sup>9</sup> The language was subsequently softened for the GAP legislation. It stipulated that states must first determine that adoption is not an appropriate permanency option for the child. The rationale for the Children’s Bureau’s preference for adoption over guardianship was foreshadowed in the 2000 [Report to Congress on Kinship Foster Care](#) that ASFA instructed the U.S. Secretary of Health and Human

<sup>7</sup>Leashore, Bogart R. “Demystifying Legal Guardianship: An Unexplored Option for Dependent Children Legal Essay.” *Journal of Family Law*, vol. 23, no. 3, 1985 1984, pp. 391-400.

<sup>8</sup>Marilyn B. Benoit. “The Quality—Not the Category—of Care.” *When Drug Addicts Have Children*, edited by Douglas J. Besharov, Child Welfare League of America and American Enterprise Institute, 1994, p. 246.

<sup>9</sup>In Illinois, the stipulation was that subsidized guardianship will be offered “only when other permanency goals, including returning home and adoption, have been ruled out as acceptable alternatives.” See Section 2: Implementation, 2.0, U.S. Children’s Bureau, *Waiver Authority, State: Illinois*, 1997.





Services to prepare.<sup>10</sup> It acknowledged that legal guardianship enables kin to assume permanent care of the child, but inserted the following qualification: “However, guardianship does not provide the same protections against later, unexpected changes in custody that adoption does and may be seen as less than a total commitment to permanency.”<sup>11</sup>

In previous writings, I have characterized the reordering of permanency preferences as shifting the meaning of permanence from its original child-based definition of “lasting” (i.e., an enduring relationship that arises out of feelings of belongingness) to

a newer caregiver-based definition of “binding,” (i.e., an enduring commitment that is legally enforceable).<sup>12</sup> The original definition, as disseminated through the pioneering work of Victor Pike and his colleagues on the Oregon Freeing Children for Permanent Placement Demonstration, emphasized four qualities of permanence: continuity of relationship across space and time, belongingness rooted in familiarity and cultural identity, respected social status for both the child and the family, and the intent for the relationship to last indefinitely.<sup>13</sup>

When the [National Council of Juvenile and Family Court Judges](#) (NCJFCJ) issued its best practice guidelines in 2000, it added

<sup>10</sup>ASFA mandated the Secretary to prepare the report to Congress based on the comments submitted by an advisory panel established by the Secretary in consultation with the chairs of the House Committee on Ways and Means and the Senate Committee on Finance. I was one of the members of the 26-person advisory panel.

<sup>11</sup>U.S. Department of Health and Human Services. Report to Congress on Kinship Foster Care. U.S. Department of Health and Human Services, 2000, p. 50.

<sup>12</sup>U.S. Department of Health and Human Services. *Report to Congress on Kinship Foster Care*. U.S. Department of Health and Human Services, 2000, p. 50.

<sup>13</sup>Testa, Mark F. “The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption.” *Virginia Journal of Social Policy & the Law*, vol. 12, no. 3, 2005, pp. 499–534.

<sup>14</sup>Pike, Victor, et al. *Permanent Planning for Children in Foster Care: A Handbook for Social Workers*. Washington: Dept. of Health, Education, and Welfare, Office of Human Development Services, Administration for Children, Youth and Families, Children’s Bureau, 1977.

a fifth quality: “a legal relationship that is binding on the adults awarded care, custody, and control of the child.”<sup>14</sup> Even though NCJFCJ’s addition can be interpreted as augmenting rather than displacing the other four qualities, the experiences of professionals responsible for implementing the rule-out provision suggest the provision has sometimes been misused to manipulate family choice. As recounted by Leslie Cohen, who monitored the implementation of the IV-E waiver demonstration in Illinois, caseworkers who refrained from disclosing the full range of permanency alternatives contended that the waiver’s rule-out provision required that “each goal be presented in a sequential fashion and that they cannot discuss guardianship until they are absolutely confident the family will not accept adoption.”<sup>15</sup> Further muddying the waters were accusations that caseworkers, who did engage in full disclosure, were coaching kin in how to circumvent adoption rule-out provisions: “Some officers of the court felt that preserving family relations was too flimsy a justification and blocked efforts to achieve permanency through guardianship. They felt that adoption was still possible, if not with the current family, then with other families, including non-relatives, who should be approached about their interest in adoption.”<sup>16</sup>

## The Re-Formalization of Permanency Planning Practice and Policy

There are several plausible explanations for the shift in the meaning of permanence from a lasting relationship to a binding commitment. The most straightforward is it was an outgrowth of the *re-formalization* of permanency planning, in terms that are more reliably communicable to judges than the concepts of psychological attachment and relational continuity upon which the original meaning of permanence was built.

Prior to the passage of the Adoption Assistance and Children Welfare Act (AACWA) of 1980, the NCJFCJ guidelines noted, court involvement in child welfare cases was often just a “rubber stamp” for plans and recommendations made by social

<sup>14</sup>National Council of Juvenile and Family Court Judges. *Adoption and Permanency Guidelines: Improving Court Practice in Child Abuse and Neglect Cases*. 2000 at 14.

<sup>15</sup>Leslie Cohen. “Rule Out.” *Using Subsidized Guardianship to Improve Outcomes for Children: Key Questions to Consider*, edited by Mary Bissell and Jennifer L. Miller, Cornerstone and Children’s Defense Fund, 2004, pp. 19–25 at 21.

<sup>16</sup>*Id* at 21–22.



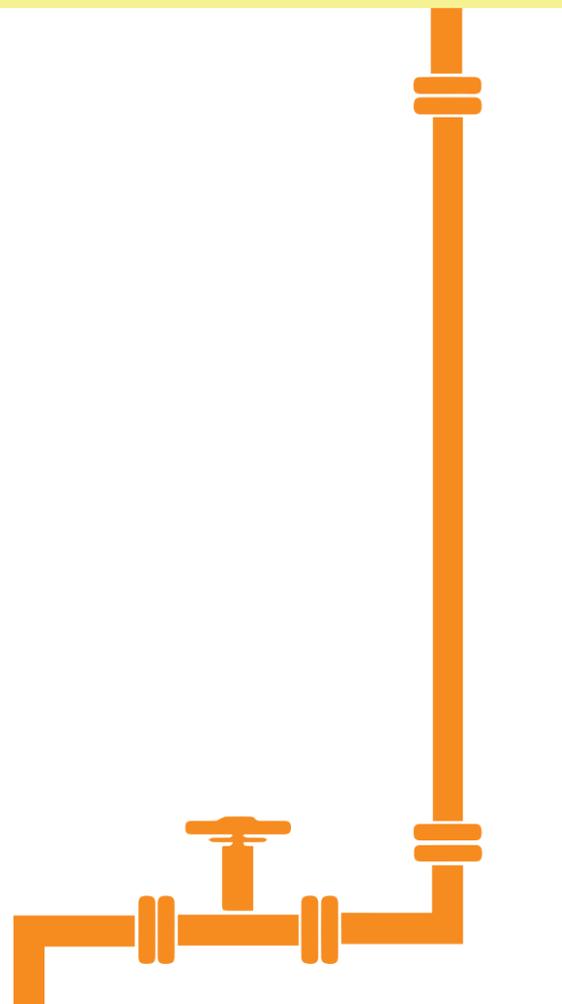
workers and psychologists. Assessing and making predictions about the continuity, respect, belongingness, and intent of family relationships was very much in their bailiwick. With the implementation of AACWA, however, juvenile and family court judges became accountable for the *collective agency* of all professionals involved in the permanency planning process.<sup>17</sup> The formality of clearly defined timetables, sequential rule-out procedures, timely filing of TPR petitions, and impartial review of the grounds for terminating parental rights was in keeping with the court's obligation to ensure that agency recommendations and plans were set apart from the personal feelings, subjective biases, and power imbalances of everyday life. Based on the formal criteria of adequacy and communicability, guardianship indeed sounds "less permanent" in the sense that it is more easily vacated and more vulnerable to subsequent legal challenges than TPR and adoption. But with respect to the criterion of improvability, the question that needs answering is whether TPR and adoption, in fact, improve upon the less formal and less restrictive practice of kinship guardianship.<sup>18</sup>

## Is Adoption by Relatives Truly More Permanent than Guardianship?

Answering this question requires an act of imagination that is difficult to approximate in actual practice. Called "counterfactual reasoning," it involves imagining the difference in permanency outcomes for a child whose relative caregivers are offered the

<sup>17</sup>The concept of collective agency draws from the writings of the psychologist, Albert Bandura, who specifies three levels of human agency: personal, proxy, and collective. Applied to child welfare, minor children lack the personal agency to act independently and to make their own free choices. Therefore, they must rely on the proxy agency of parents, extended kin, and other community members to act in their best interests. If these informal agents lack the material resources or parenting competencies that the community deems appropriate for raising a child to adulthood, community members can call on the collective agency of the state to intervene. Whenever possible, formal intervention begins with supplementing the home with needed resources and social supports, but it may escalate to reassigning proxy agency temporarily to relatives, foster families, and child-care institutions if adverse conditions in the home remain unchanged. As a last resort, proxy agency may be reassigned permanently to legal guardians or adoptive parents if the children cannot be reunited with their birth families. From an agentic perspective, the child welfare department is accountable for the oversight of proxy agency relationships on the child's behalf and the juvenile or family court is accountable for the coordination of collective agency interventions that support, supplement, or substitute for those relationships. See Bandura, Albert. "Social Cognitive Theory: An Agentic Perspective." *Annual Review of Psychology*, vol. 52, no. 1, Annual Reviews, Feb. 2001, pp. 1-26.

<sup>18</sup>The sociologist, Arthur Stinchcombe, defines a practice as formal to the extent that it is cognitively adequate to the situations it governs (adequacy), it is communicable to the agents who must act in those situations (communicability), and it is improvable and in fact improving upon alternative or less formal practices (improvability). See Stinchcombe, Arthur L. *When Formality Works: Authority and Abstraction in Law and Organizations*. Chicago: University of Chicago Press, 2001.



choice of subsidized legal guardianship compared to what might have happened if that same family was offered only adoption assistance or remaining in long-term foster care. This imaginary scenario is, of course, impossible to implement in the real world. The same child and their caregivers cannot simultaneously be observed under both intervention and comparison conditions. However, it is possible to approximate the desired experiment at the aggregate level by randomly assigning a large number of families to the two conditions and then tracking their individual-level outcomes over time. In the absence of randomization, comparing the outcomes for a group of adopted children to a group of guardianship children can be misleading. It is likely the adopted group differs in important ways from the guardianship group. For example, adopted children are younger, on average, than children taken into legal guardianship. If it were later learned that a greater percentage of the children discharged to guardianship had exited their homes a year later than the adopted group, it would be imprudent to infer that the primary reason for the difference is that adoption is "more permanent" than guardianship. Instead, the fact that older children are generally more difficult than younger children to control, more likely to run away, and more liable to get in trouble with the law would first need to be taken into account before concluding that adoption is superior to guardianship in ensuring family permanence.

Randomized controlled trials (RCTs) help avoid some of the pitfalls of uncontrolled observational studies by increasing the likelihood that the intervention and comparison groups are statistically similar within the bounds of chance error. Not only does randomization help ensure that the groups are similar on readily recordable measures such as age at removal and genealogical relationship to the caregiver but also on less quantifiable characteristics such as affection for the caregiver and early childhood trauma.

Randomization is the method that was used to evaluate the IV-E waiver demonstrations in the states of Illinois, Tennessee, and Wisconsin. The central finding was that the offer of subsidized guardianship boosted the percentage of children discharged to permanent homes over what could have been expected if their options were limited to reunification, adoption, or staying in foster care. In Wisconsin, the boost translated into a 20 percent point higher rate of overall permanence, 15 percent -points higher in Tennessee, and 6 percent points higher in Illinois.

In the states of Illinois and Tennessee, proportionately fewer children in the intervention group were discharged to adoptive homes (60 percent and 32 percent, respectively) compared to the comparison group (75 percent and 56 percent, respectively). In Wisconsin, there were no significant differences in adoptions between the intervention and comparison groups (31 percent versus 29 percent, respectively). Considering that in both Illinois and Tennessee, a significantly lesser proportion of children in



# PIVOTING FUNDING TO PREVENTION

Subsidized guardianship

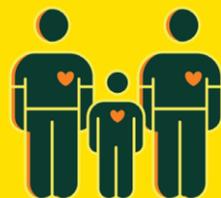
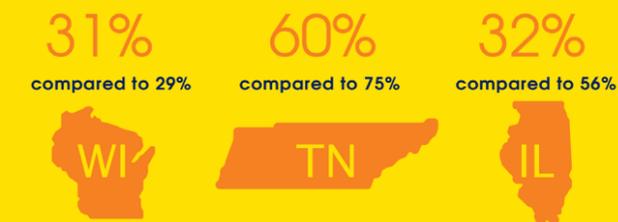
**boosted children going to permanent homes,**

if their options were limited to reunification, adoption, or staying in foster care.



# IV-E WAIVER DEMONSTRATIONS

Waivers were first authorized by Congress in 1994, with the goal of improving foster care by freeing a state's use of federal dollars from some of the restrictions of Titles IV-B and IV-E of the Social Security Act.



## Lessons Learned

- Have flexible funding to cater to individual state needs
- Pivoting funding to drive Prevention, Permanency, and Well-Being for children and families will yield better long-term outcomes

the intervention group were adopted than in the comparison group, the expectation is that family relationships would be longer lasting in the comparison group if adoption were indeed more permanent than guardianship.

After two years of follow-up in Tennessee, there was no significant difference in the percentage of children who were not residing in the home in which they were living at the time of random assignment: 11 percent in the intervention group (N= 264) versus 14 percent in the comparison group (N= 227). Similarly, in Illinois, after 10 years of follow-up, there was no significant difference: 30 percent in the intervention group (N = 1,197) versus 32 percent in the comparison group (N= 1,228). Follow-up interviews in Illinois with children aged nine and older showed that the lower rate of adoption in the intervention group did not result in their feeling any less part of the family. In the intervention group, 90.3 percent of the youth (N = 489) answered that they felt like they were part of the family either most of the time or all of the time compared to 90.5 percent (N = 501) in the comparison group—about as close to perfect agreement as you can expect in a statistical sample.

The above results suggest that the particular type of legal permanence may be less consequential for lasting family relationships than some caseworkers and judges typically believe. An observational study conducted by Nancy Rolock and Kevin White helps shed light on the possible reasons for the perception of adoption as being more lasting than guardianship, contrary to the best available evidence.<sup>19</sup> Their study compared a sample of subsidized adoption cases to a sample of subsidized guardianship cases. They tracked the two samples for a minimum of 10 years and recorded if the children re-entered foster care or stopped receiving a subsidy payment. Payments stop if a child leaves the home for another reason besides re-entering care. Whereas 6 percent of the adopted sample re-entered foster care or

<sup>19</sup>Rolock, Nancy, and Kevin R. White. "Continuity for Children after Guardianship versus Adoption with Kin: Approximating the Right Counterfactual." *Child Abuse & Neglect*, vol. 72, Oct. 2017, pp. 32-44.

stopped receiving payments, 11 percent of the guardianship sample experienced an interruption of care or cancellation of payment. Clearly, the adoption sample experienced fewer interruptions than the guardianship sample. But as noted above, this raw comparison doesn't take into account other potentially confounding factors such as age differences. In fact, the adoption sample profiled 1.4 years younger, on average, than the guardianship sample. Another complicating factor is that a large fraction of the guardianship cases would not have been adopted and instead would have stayed in long-term kinship care. Omitting them from the comparison and ignoring their placement interruptions in kinship foster care understates the discontinuity of care that they would have endured. Matching guardianship cases to the combined samples of adopted children and kinship foster care cases help balance the groups on age, race, and other characteristics and better approximates the right counterfactual of how the guardianship cases would have fared if adoption and long-term foster care were their only alternatives. After matching the samples, Rolock and White found no difference in discontinuities of care between the groups. The result replicates the findings from the more rigorous RCTs conducted in the waiver sites. Because people can't make the sorts of statistical adjustments in their heads that researchers can make on their computers, the day-to-day experiences of caseworkers and judges reinforce the belief that adoption is more permanent than guardianship in spite of scientific evidence to the contrary.



## A Multifamilial Concept of Permanence

RCTs are useful for generating statistical inferences about the causal impact of a promising intervention, like subsidized guardianship, but they provide only partial insight into the qualities of permanence that matter most to children— Am I loved here? Will these relationships last? Are my family circumstances respected by others? Will there always be space for me if I need to return home? To understand these qualities more fully, it is helpful to ask open-ended questions of youth and analyze their responses using an interpretative framework. Gina Samuels conducted such a study in 2008 using a convenience sample of 29 youth, aged 17 to 26 years old, who had transitioned from foster care without establishing a permanent family relationship authorized by the court. Even though the number of participants is small, the composition of the sample is well suited for the purpose of examining the case for kinship guardianship. The participants plausibly represent the kinds of youth in the comparison group who might reject adoption but agree to legal guardianship if it were available to them and their families at the time.

Samuels reported that 20 of the 29 youth (69 percent) stated they had not wanted to be adopted. Some of the youth felt that being adopted was a symbolic betrayal of their families of origin and could cause them to permanently lose this family identity. One of the youths explained their rejection of adoption because it would rearrange personal allegiances and make it impossible to belong to more than one parent and family system at a time. Samuels interpreted these and other rejections of adoption as a response to the child welfare system's portrayal of adoptive parents as a potential replacement family rather than as an added resource to a child's existing family ties. Even when birth parents cannot function as the day-to-day parent, they can provide emotional support and a sense of relational continuity. Kinship guardianship allows youth to retain a "multifamily identity"—one that acknowledges "varied levels of family identity and membership (i.e., legal biological, relational) within more than one family unit."<sup>20</sup>

## Concluding Remarks

Both the quantitative and qualitative evidence presented above suggests there is little to be gained from formalizing the preference for TPR and adoption over kinship guardianship. There may still be a case for retaining the requirement for non-relatives because adoption is the accepted means of establishing a kinship relationship in the absence of blood ties. However, because GAP applies only to pre-existing kinship relationships, the formal preference for TPR and adoption should be stricken from the law. Instead, the

<sup>20</sup>Samuels, Gina Miranda. "Ambiguous Loss of Home: The Experience of Familial (Im)Permanence among Young Adults with Foster Care Backgrounds." *Children and Youth Services Review*, vol. 31, no. 12, Elsevier Science, Dec. 2009, p. 1229.



choice should be left to the proxy agency of adult family members and the personal agency of children according to their age and maturity.<sup>21</sup> As I have written previously, family members "are in the best position to assess whether adoption or guardianship best fits their cultural norms of family belonging, respects their sense of social identity, and gives legal authority to their existing family commitments."<sup>22</sup> At a minimum, the law should be value-neutral about the choices that relatives make. At the same time, recognizing the entrenched beliefs about the improvability of kinship relationships through TPR and adoption and the greater restrictiveness they impose on family ties, it may be worth considering whether the formal hierarchy of preferences should revert back to the more traditional acceptance of kinship guardianship as the next best alternative for children who can't be reunified with their parents. Where a relative is the intended permanent caregiver, the default would be kinship guardianship unless the relative expressed a preference for adoption or termination was necessary to ensure the safety of the child. The precise language would need to be crafted by legislators, but in general, it could instruct the child welfare agency to describe the reasons for the relative's preferences for termination of parental rights and adoption as the more appropriate permanency alternative for them.

Even though it is often assumed that relatives will be "soft" on their close kin, research shows most relatives choose adoption on their own when fully informed of their choices.<sup>23</sup> Placing faith in the competency and wisdom of kinship caregivers to make a responsible and informed choice—most of whom have already been caring for the child for months or even years—is a constructive step that child welfare systems can take to restore the community trust that has been eroded by historical injustices and current disparities in the outcomes experienced by oppressed and marginalized communities.

As I write these remarks, I am mindful that there is little that is groundbreaking or new in the recommendations offered

<sup>21</sup>See supra note 18 for definitions of the italicized words.

<sup>22</sup>Testa, supra note 7, at 534.

<sup>23</sup>Testa MF, et al. "Permanency Planning Options for Children in Formal Kinship Care." *Child Welfare*, vol. 75, no. 5, Child Welfare League of America, Oct. 1996, pp. 451-70.



As I have written previously, family members "are in the best position to assess whether adoption or guardianship best fits their cultural norms of family belonging, respects their sense of social identity, and gives legal authority to their existing family commitments."<sup>22</sup>

in this paper. Bogart Leashore articulated the case for legal guardianship as a child welfare resource over three decades ago, and Josh Gupta-Kagan several years back called for eliminating the hierarchy of the preferences that favored TPR and adoption.<sup>24</sup> Nonetheless, the findings from the IV-E waiver experiments bear repeating as well as the call for a multifamily concept of permanence. The latest data show that GAP continues to fall short of expectations. The [U.S. Administration for Children and Youth](#) sought to bolster optimism by noting that GAP growth resembled the early years of the IV-E adoption assistance program.<sup>25</sup> The latest numbers for 2018, however, show GAP continues to lag behind adoption assistance. Whereas in the ninth year of the program's operation (FY 1989), states were paying adoption subsidies on behalf of a monthly average of 40,000 children, in the ninth year of GAP (FY 2018), states were paying guardianship subsidies on behalf of a monthly average of 32,100 children. If GAP growth had kept pace with the early growth in adoption assistance, states would now be paying guardianship subsidies on behalf of 75,300 children instead of the 45,800 children that the [Office of Management and Budget](#) (OMB) estimates will be served in FY 2022.<sup>26</sup> This represents a decrease from the average of 46,300 per month, which OMB projected for FY 2021.

In order for subsidized kinship guardianship to replicate the results from the IV-E waiver experiments, it will be necessary to rid GAP of the eligibility restrictions that weren't part of the original terms and conditions of the waivers. GAP restricts subsidies to only kinship homes that meet foster home licensing standards. This restriction cuts off too many safe and stable kinship placements from receiving guardianship assistance because of the limited availability of bedroom space, the arrest histories of household members, and other standards that disproportionately disqualify low-income families from being licensed by the state. Because licensing is not a requirement for placing children with kin, the law permits, intentionally or not, the build-up of children in unlicensed kinship care that supports homes at only a fraction of the cost of maintaining them in licensed foster care. Not only does kinship foster care deprive relatives of the personal and proxy agency to make their own free choices, but it also holds over their heads the constant threat of separation if a caregiver or parent violates any number of bureaucratic restrictions, such as limits on parental visits, unauthorized travel out-of-state, and sleepovers at a neighbor's home that was not previously subjected to a criminal background check. As long as a relative has safely and stably cared for the child for at least six months or longer while under the supervision of the child welfare agency, the family should qualify for GAP regardless of the home's licensing status. Eliminating the adoption rule-out provision and opening up the foster care to guardianship pipeline to children in safe and stable, unlicensed kinship foster homes should go a long way towards bringing the benefits of an inclusive form of family permanence to thousands more children for whom kinship guardianship is the more appropriate permanency alternative than TPR and adoption.

<sup>24</sup>Leashore, Bogart R. "Demystifying Legal Guardianship: An Unexplored Option for Dependent Children Legal Essay." *Journal of Family Law*, vol. 23, no. 3, 1985-1984, pp. 391-400. Gupta-Kagan, Josh. "The New Permanency." *UC Davis Journal of Juvenile Law and Policy*, vol. 19, no. 1, 2015, pp. 1-83.

<sup>25</sup>Administration for Children and Families. Title IV-E GAP Programs: A Work in Progress. U.S. Department of Health and Human Services, 2018, [https://aspe.hhs.gov/sites/default/files/migrated\\_legacy\\_files/179696/GuardianshipBrief.pdf](https://aspe.hhs.gov/sites/default/files/migrated_legacy_files/179696/GuardianshipBrief.pdf).

<sup>26</sup>Office of Management and Budget. *Appendix, Budget of the U.S. Government, Fiscal Year 2022*. The White House, 2021.

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# Harm Caused by the Adoption and Safe Families Act

 Dr. Amelia Franck Meyer, LISW

## Introduction

In 2001, on my first day of work as the Executive Director of a treatment foster care agency, I received a call that a 12-year-old youth needed surgery to remove a benign cyst on his kidney. Five hours later, I received a call that the youth passed away in surgery. There were exactly four people in attendance at this youth's funeral: the county social worker, the private agency social worker, and the two foster parents from the home he had just moved into days earlier.

When I received the reimbursement request for the youth's funeral clothing, it was only for the top half of a suit because apparently, you don't need the bottom half of clothing to bury a child. We had just, quite literally, buried someone's baby half-naked and alone. *How does this happen?* It happens because we created an entire system based on rescuing and removing children from their families and redistributing them to new, unknown, and unrelated families. This system operates like a machine, and the machine delivered exactly the outcomes it was designed to deliver: "protecting" the child by removing him from his family and severing his relationships.

Over a decade later, in a Permanency and Adoption Competency Certificate class at the University of Minnesota, classmates were presenting cases of youth in need of permanency and, child after child; the story and the outcomes remained the same. It seemed almost formulaic: 1) child was determined to be at risk of harm; 2) child was removed from their family; 3) child was placed with unknown and/or unrelated persons; 4) child demonstrated pain-based behaviors, and with each move in placement, the youth's trauma—and therefore, trauma-responses—escalated; 5) foster parents gave notice and asked for the child to be moved out of their house, 6) child was moved to a new home of unrelated/

unknown persons, 7) often the child's behavior escalated so significantly that they needed to be placed in residential care, 8) and here we were "staffing a case" because the child "had no one" and "no chance of permanency." Not to mention the stories that included the child being revictimized while in out-of-home care. Again, you might ask, *how does this happen?* Now, 20 years after burying that young boy alone in 2001, this story is still not unique. Instead, it is repeated hundreds of thousands of times each year in the United States.

## Our Child Welfare System Is Not Set Up for Children to Thrive

According to our most recent data, in 2019, there were an estimated 423,997 children living in substitute care outside their own homes, nearly half of whom were living with non-relatives.<sup>1</sup> Furthermore, these data are point-in-time data, measured only on September 30th of each year,<sup>2</sup> which means that the actual number of youth living outside of their homes each year is likely much greater than the number reported. According to the March 2021 Child Welfare Information Gateway Foster Care Statistics 2019, "the number of children in foster care on September 30th, 2019, (423,997) is almost equal to those in care on the same day in 2009 (423,773)."<sup>3</sup> A decade of reforms later, the results remain the same.

Children are physically and legally separated from their families and placed in the care of the state, and yet, over 20,000 youth age out of care with no permanency option.<sup>4</sup> They also have no family connection because the system failed to reunite them with someone they know and love or to whom they are related, or to find a suitable alternative permanent family. Instead, they are "emancipated" and discharged from care, sent out to the world on their own because they are too old to remain the responsibility of the state. Since the passing of the Adoption and Safe Families Act in 1997, the number of youth who exited foster care with no legal family ties increased.<sup>5</sup> And again, we must ask ourselves, *how does this happen?*

how does this happen?

It happens when we start with intentions to protect children, which leads to changes in laws with unintended consequences. On November 19th, 1997, former President Bill Clinton signed the Adoption and Safe Families Act (ASFA) into law; the primary intention was two-fold: 1) to reduce the number of children living in substitute care for extended periods of time, and 2) to increase the number of children who achieved permanency through adoptions and legal guardianships.<sup>6</sup> ASFA delivered on both outcomes; however, these outcomes weren't good for children or families,

<sup>1</sup>Child Welfare Information Gateway. "Foster care statistics 2019." U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (2021). [www.childwelfare.gov/pubs/factsheets/foster/](http://www.childwelfare.gov/pubs/factsheets/foster/).

<sup>2</sup>Child Welfare Information Gateway. "Foster care statistics 2019." U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (2021). [www.childwelfare.gov/pubs/factsheets/foster/](http://www.childwelfare.gov/pubs/factsheets/foster/).

<sup>3</sup>Child Welfare Information Gateway. "Foster care statistics 2019." U.S. Department of Health and Human Services, Administration for Children and Families, Children's Bureau (2021). [www.childwelfare.gov/pubs/factsheets/foster/](http://www.childwelfare.gov/pubs/factsheets/foster/).

<sup>4</sup>Adoption and Foster Care Analysis and Reporting System (AFCARS) FY 2019 data. "AFCARS Report." Children's Bureau (2020). Report #27. [www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf](http://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf), PDF file.

<sup>5</sup>Golden, Olivia & Ehre Macomber, Jennifer. "Intentions and Results: A Look Back at the Adoption and Safe Families Act." Urban Institute (2009). [www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF](http://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF), PDF File.

<sup>6</sup>Golden, Olivia & Ehre Macomber, Jennifer. "Intentions and Results: A Look Back at the Adoption and Safe Families Act." Urban Institute (2009). [www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF](http://www.urban.org/sites/default/files/publication/30016/1001351-Intentions-and-Results-A-Look-Back-at-the-Adoption-and-Safe-Families-Act.PDF), PDF File.

especially children and families of color.<sup>7</sup> Now we know better, and we must do better.

## A Fatal Flaw of AFSA: Focusing on Children Outside of the Context of their Family

Our human wisdom, practice experience, and research evidence point to children needing more than a family to thrive; instead, they need their own family to thrive; therefore, there is an urgent need to find alternatives to non-kin care for children.<sup>8</sup> AFSA created a systemic response that “rescued,” removed, and often redistributed children from their own families to other families, and sometimes to no permanent family at all. In 2019, 71,335 children were legally separated from their parents by the state yet remained without a legal family of their own,<sup>9</sup> effectively rendering these youth as legal orphans. If children must be placed out of their homes, they fare better when they live with relatives.<sup>10</sup> This fact highlights critical omissions with AFSA, which was created without regard to a child’s need to be with their family.

We know through our centuries-old human experiences that what every child on the face of the earth needs is for their parents to be able to parent them safely. However, in contrast, the goals of AFSA focus solely on the child, without regard to the parents. According to Susan Marshall Mason and Dunia Dadi, the current evidence requires that we recognize the “interdependence of children with their families and communities.”<sup>11</sup> When we understand that children do not exist merely as individuals; rather, they exist in the context of their familial, communal, and/or tribal relationships, Mason and Dadi argue that we must “shift our focus from ‘protecting’ children toward equitably protecting and investing in families.”<sup>12</sup> The research brief titled, Evidence Base for Avoiding Family Separation in Child Welfare Practice, offers this summary conclusion about Mason and Dadi’s call for a shift in practice, “The results of the studies summarized in this report demonstrate the dire consequences for our children and ultimately our communities if we fail to make this shift.”<sup>13</sup>

That is the basis for the critical error in AFSA; it was created on the assumption that if children are in a permanent family, it would be an equally good substitute for their own family, and the research is clear, it is not.<sup>14</sup> As AFSA implementation progressed forward with great focus and speed, there was a push for timely guardianships and adoptions, often with unknown and/or unrelated caregivers, breaking the bonds forged by blood and by birth and untethering children from their roots, their identity, their culture, and their people with dire life-long predictive outcomes.<sup>15</sup>

## Recovery Takes Longer than ASFA Allows

ASFA moves forward with these short and pressured timelines to permanency in defiance of what we know about the length of time it takes a person to recover from alcohol and other drug addictions, which were identified

<sup>7</sup>Christie, C.A.P. *The Adoption and Safe Families Act: In whose “best interests”?* 2012 University of Wisconsin-Milwaukee, PhD unpublished dissertation.

<sup>8</sup>Sugrue, Erin. “Evidence Base for Avoiding Family Separation in Child Welfare Practice.” *Alia* (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>9</sup>Harvey, Sylvia A. “When the Clock is Cruel: Parents Face Pandemic Hurdles as They Race to Keep Their Kids.” *The Imprint* (2021). [imprintnews.org/child-welfare-2/parents-pandemic-hurdles-race-keep-kids/54024/](http://imprintnews.org/child-welfare-2/parents-pandemic-hurdles-race-keep-kids/54024/).

<sup>10</sup>Sugrue, Erin. “Evidence Base for Avoiding Family Separation in Child Welfare Practice.” *Alia* (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>11</sup>Mason, S.M. & Dadi, D. “Nielsen’s departure won’t heal the traumas of child separations.” *The Gender Policy Report*, University of Minnesota (2019). [genderpolicyreport.umn.edu/niensens-departure-wont-heal-the-traumas-of-child-separations/](http://genderpolicyreport.umn.edu/niensens-departure-wont-heal-the-traumas-of-child-separations/).

<sup>12</sup>Mason, S.M. & Dadi, D. “Nielsen’s departure won’t heal the traumas of child separations.” *The Gender Policy Report*, University of Minnesota (2019). [genderpolicyreport.umn.edu/niensens-departure-wont-heal-the-traumas-of-child-separations/](http://genderpolicyreport.umn.edu/niensens-departure-wont-heal-the-traumas-of-child-separations/).

<sup>13</sup>Sugrue, Erin. “Evidence Base for Avoiding Family Separation in Child Welfare Practice.” *Alia* (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>14</sup>Sugrue, Erin. “Evidence Base for Avoiding Family Separation in Child Welfare Practice.” *Alia* (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>15</sup>Courtney, Mark E., et al. “Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 21.” *Chapin Hall Center for Children at the University of Chicago* (2007).

by the [National Institute on Drug Abuse](https://www.nida.nih.gov/) as a medical disease.<sup>16</sup> One of the most common challenges facing parents involved in the child welfare system is substance use and, subsequently, treatment can be especially difficult to complete.<sup>17</sup> In 2000, the prevalence of parental alcohol or drug abuse as an identified condition of removal in the United States was 18.5 percent, and by 2019, it increased to 38.9 percent. For children under one year of age, the prevalence of parental alcohol or drug abuse as an identified condition of removal in the United States was 27.8 percent, and by 2019, it increased to 50.9 percent.<sup>18</sup> The ASFA timelines require that a parent achieve recovery in under 15 months; however, the mean number of serious recovery attempts is 5.35, and the time between the first treatment attempt to last substance use is reported at nine.<sup>19,20</sup>

In many situations, parents are not given adequate time to seek the healing and treatment deemed necessary by the state to avoid losing their legal rights to parent their children. Instead, there are timelines and pressures placed upon parents—who are often in the throes of their own grief, loss, shame, and guilt—and are now expected to do the thing they could not do before their child was removed: recover from drug or alcohol addictions, heal the impacts of their own childhood abuse, leave an abusive partner, and more. Furthermore, parents are expected to complete this recovery and life change with little support or resources and without a consistent, nurturing relationship with someone who can see them through to the other side of their pain.

<sup>16</sup>NIDA. “Preface.” *National Institute on Drug Abuse* (2021). [www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/preface](http://www.drugabuse.gov/publications/drugs-brains-behavior-science-addiction/preface).

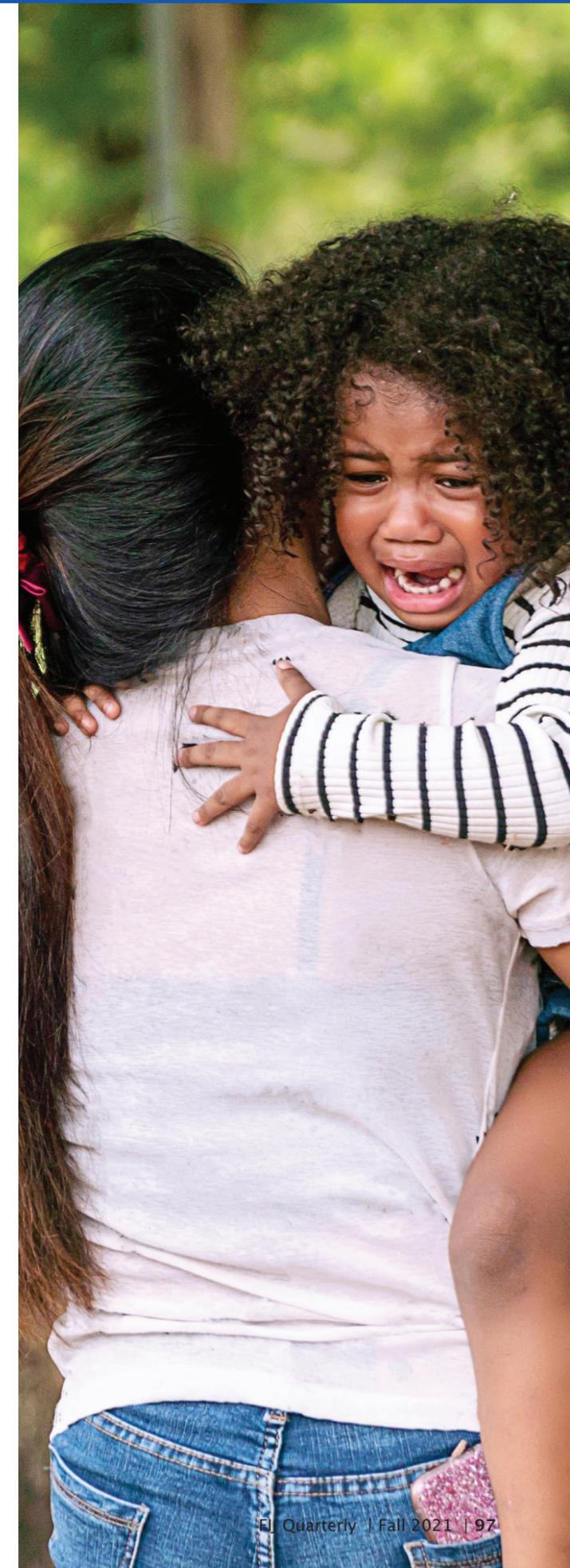
<sup>17</sup>Gregoire, Kathryn A., and Delray J. Schultz. “Substance-abusing child welfare parents: treatment and child placement outcomes.” *Child Welfare* 80.4 (2001).

<sup>18</sup>“Child Welfare and Alcohol and Drug Use Statistics.” *National Center on Substance Use and Child Welfare* (2019). [ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx](http://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx).

<sup>19</sup>“Child Welfare and Alcohol and Drug Use Statistics.” *National Center on Substance Use and Child Welfare* (2019). [ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx](http://ncsacw.samhsa.gov/research/child-welfare-and-treatment-statistics.aspx).

<sup>20</sup>Kelly, John F., et al. “How many recovery attempts does it take to successfully resolve an alcohol or drug problem? Estimates and correlates from a national study of recovering US adults.” *Alcoholism: Clinical and Experimental Research* 43.7 (2019): 1533-1544.

<sup>20</sup>Knight, Meredith. “Helpless at birth: Why human babies are different than other animals.” *Genetic Literacy Project*, 2018, [geneticliteracyproject.org/2018/06/22/helpless-at-birth-why-human-babies-are-different-than-other-animals/?utm\\_source=TrendMD&utm\\_medium](http://geneticliteracyproject.org/2018/06/22/helpless-at-birth-why-human-babies-are-different-than-other-animals/?utm_source=TrendMD&utm_medium).





in a state of heightened arousal about when the next knock on the door will occur that will cause another disruption in their caregiver bond. And each time a caregiver bond is broken, a child's capacity to connect becomes more diminished. Therefore, we must center families as our unit of support and use every resource at our disposal to treat separating familial bonds as a nuclear option because the fall-out is far-reaching in one's own lifetime and across many generations and maybe worse than leaving the child in their home.<sup>22</sup>

This act of separating a child from their parents creates an Adverse Childhood Experience (ACE) with known life-long predictive harm and is to be avoided if we want children to thrive. Additionally, AFSA does not include provisions to invest in supporting or repairing parents' ability to safely parent, nor does it properly weigh the traumatic life-long repercussions of breaking a parent-child bond on the child, the parent, siblings, or other family members. Protecting children must extend beyond ensuring their physical safety.

## We Are Asking the Wrong Questions

For humans, safety is both physical and psychological and is achieved in the context of secure, nurturing, protective relationships. Humans are the most vulnerably born mammals,<sup>21</sup> and without the care and protection of another human, they die. Therefore, we are all deeply wired for connection because for humans, connection equals protection. For children, psychological safety is created where there is an uninterrupted sense of belonging—a secure, stable connection from birth. However, our child welfare system is not built on this ancient and indigenous wisdom. Once a child knows that the connection to their parents can be broken, they are forever in fear of the potential loss of that bond, or any bond with any caregiver being broken again; living

<sup>21</sup>Knight, Meredith. "Helpless at birth: Why human babies are different than other animals." Genetic Literacy Project, 2018, [geneticliteracyproject.org/2018/06/22/helpless-at-birth-why-human-babies-are-different-than-other-animals/?utm\\_source=TrendMD&utm\\_medium](http://geneticliteracyproject.org/2018/06/22/helpless-at-birth-why-human-babies-are-different-than-other-animals/?utm_source=TrendMD&utm_medium).

<sup>22</sup>Trivedi, Shanta. "The harm of child removal." NYU Rev. L. & Soc. Change 43 (2019): 523.

of the most important things we can do as a society, and we know that helping parents to safely parent is the primary way to achieve that goal, there is no specific role in child welfare agencies that is dedicated to supporting parents, in the intensity or length needed, to ensure they can safely parent. Instead, our resources go to pay strangers to care for their children while parents are left to struggle on their own.

There is a great deal of empathy for children and a desire to "save the children," but we must come to the hard realization that the children do not need us, nor do they need our services or our treatments, and often our interventions create more harm than help.<sup>23</sup> What our children need is for their parents to be able to parent them safely and for parents to receive the support and resources to make that possible. The question remains, are we willing to do what we know needs to be done to remove the tool of family separation from our collective toolbox?

What if the mandate was not to separate families after 15 months but to use exhaustive efforts to keep families together safely? What if the federal measures did not penalize systems for youth in care over 15 months but instead rewarded systems for keeping youth safely with their families? What if it were seen as cruel and unusual punishment to separate families, including siblings, grandparents, and extended families, from their biological relatives? What if in recognition of a decade or more of research and data that demonstrate that youth are, even in cases of maltreatment, most often better off at home, we dedicated all our best efforts to ensuring that can safely happen, rather than spending precious resources to find and pay strangers to care for children? We are focusing on the wrong things and asking the wrong questions. We need new questions.

## New Questions

An example of new questions can be found in the four questions mentioned in training where an Iowa judge was present. The judge took the questions and proposed to seven judges that they ask them on their cases. The judge did not grant or deny permission to remove a child until the following four questions were asked by the judge and answered by the Iowa Department of Human Services worker. The questions were:

1. What can we do to remove the danger instead of the child?
2. Can someone the child/family knows move into the home to remove the danger?
3. Can the caregiver and child go live with a relative/fictive kin?
4. Could the child move temporarily to live with relatives or fictive kin?

"The pilot project produced impressive results. Eighty-three requests for the removal of children went to the seven judges. Of those 83 requests, 44 were granted. A closer examination of the 44 removals reveals that over half of the children were placed with either biological or fictive kin. The remaining fifteen went to licensed foster care."<sup>24</sup> The system is set up to produce the results we are getting and making the thing we are trying to change harder—by pausing to ask important questions—we can slow down the processes that are automatic to take the time to change course.

<sup>23</sup>Sugrue, Erin. "Evidence Base for Avoiding Family Separation in Child Welfare Practice." Alia (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>24</sup>Iowa Judicial Branch 2020 Annual Report.



## We Must Redirect Resources to Helping Parents to Safely Parent

What if our questions focused on what parents needed to be able to keep children safely at home? There are efforts afoot to experiment with basic income supports for parents, and the results are promising.<sup>25</sup> It turns out that when we provide concrete supports in times of need, it is, in fact, a Protective Factor<sup>26</sup> that can help avoid out-of-home placements. In a recent experiment, Alia used “UnSystem Funds”—unrestricted funds to help families avoid placement or support reunification—80 percent of UnSystem funds went directly to families and 20 percent to community-based services. Of the 80 percent, 53 percent of that went to housing-related expenses. Housing challenges were resulting in children being in care for extended periods of time unnecessarily.<sup>27</sup>

Small investments in parental supports, especially in preventative ways, can save significant expenses later. By every measure—the voices of youth,<sup>28</sup> the long-term outcome data,<sup>29</sup> and even the social return on investments,<sup>30</sup> our investments in out-of-home care produced negative impacts for all involved. When we mean to help, but our help provides more harm than help,<sup>31</sup> it is time for a change. The Family First Prevention Services Act provides a step in the right direction; however, more must be done. We must make the resources available to states much more robust and available to support parents in ways that support them to parent safely. The majority of resources available to states to fund their high-cost child welfare agencies are only available after a child is placed out of the home. More resources must be dedicated to avoiding this perilous outcome.

The resources of child welfare must be redirected to keeping children safely *with*, not *from*, their families. We consistently see the disproportionate harm created when we believe that there are “better families” who can give children a “better life.” These beliefs, upon which AFSA was founded, are rooted in racism (e.g., assumptions that white families can give a better life to Black, Brown, and

*The resources of child welfare must be redirected to keeping children safely with, not from, their families. We consistently see the disproportionate harm created when we believe that there are “better families” who can give children a “better life.”*

Native Children), classism (e.g., assumptions that wealthier families can give a better life to poorer children), and religiocentrism (e.g., assumptions that children would do better in Christian homes). We know now that it is better to sleep on your grandmother’s floor than in a princess bed in the home of a stranger, or more likely, the homes of more than eight strangers,<sup>32</sup> which is the average number of moves a child in foster care experiences. We know that each placement causes additional trauma,<sup>33</sup> and therefore, must be avoided at all costs.

## Conclusion

ASFA was initiated to stop children from lingering in care and to ensure that all children received what they deserved, a permanent, nurturing family.<sup>34</sup> It is true, and this is what every child needs and deserves; however, every child is born into a family. Instead of casting that family aside with blame, shame, and punishment—and believing that providing treatment and services to a child will allow them to thrive without connections to their family—it is time to begin supporting families to be able to raise their own safely.

Our current child welfare system is a treadmill of separating children from their families, searching for and paying strangers to care for children—as they become more and more traumatized by each move, and eventually needing to warehouse children in congregate care settings before we discharge them from our care without any family connections. A new era is dawning, one in which we recognize that children need their families, their communities, and their connections to thrive, and no number of services, treatments, or

placements can substitute for the human need for belonging. Families are the solution and the foundation of lifelong well-being, and it is time to fundamentally rethink our purpose, moving to keep children safely *with* their families, not *from* their families. To accomplish this, we must redirect our resources, both financial and human, to keep children safely within their families while simultaneously supporting parents to parent safely.

<sup>25</sup>Weiner, D. A., Anderson, C., & Thomas, K. “System transformation to support child and family well-being: The central role of economic and concrete supports.” Chapin Hall at the University of Chicago (2021). [www.chapinhall.org/research/economic-supports-child-welfare/](http://www.chapinhall.org/research/economic-supports-child-welfare/).

<sup>26</sup>“Strengthening Families Protective Factors.” Center for the Study of Social Policy. [cssp.org/wp-content/uploads/2018/11/About-Strengthening-Families.pdf](http://cssp.org/wp-content/uploads/2018/11/About-Strengthening-Families.pdf), PDF File.

<sup>27</sup>“Lessons in System Redesign: Alia UnSystem Cohort Report.” Alia, 2021. [www.aliainnovations.org/unsystemcohortyeartwo?hsLang=en](http://www.aliainnovations.org/unsystemcohortyeartwo?hsLang=en), PDF file.

<sup>28</sup>Riebschleger, Joanne, Angelique Day, and Amy Damashek. “Foster care youth share stories of trauma before, during, and after placement: Youth voices for building trauma-informed systems of care.” *Journal of Aggression, Maltreatment & Trauma* 24.4 (2015): 339–360.

<sup>29</sup>Courtney, Mark E., et al. “Midwest evaluation of the adult functioning of former foster youth: Outcomes at age 21.” Chapin Hall Center for Children at the University of Chicago (2007).

<sup>30</sup>Nielsen, William, Timothy Roman, and Ecotone Analytics. “The unseen cost of foster care: A social return on investment study.” Alia (2019). [www.aliainnovations.org/sroi-report](http://www.aliainnovations.org/sroi-report), PDF File.

<sup>31</sup>Sugrue, Erin. “Evidence Base for Avoiding Family Separation in Child Welfare Practice.” Alia (2019). [www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf](http://www.thetcj.org/wp-content/uploads/2019/10/Alia-Research-Brief-2019.pdf), PDF File.

<sup>32</sup>Havlicek, Judy. “Patterns of movement in foster care: An optimal matching analysis.” *Social Service Review* 84.3 (2010): 403–435.

<sup>33</sup>Jones, A. S. & Wells, S. J. “PATH/Wisconsin-Bremer Project: Preventing Placement Disruptions in Foster Care—Final Report.” Center for Advanced Studies in Child Welfare (2008). [cascw.umn.edu/portfolio-items/path-bremer-placement-disruption-pub/](http://cascw.umn.edu/portfolio-items/path-bremer-placement-disruption-pub/), PDF file.



# Reasonable Efforts and the Adoption and Safe Families Act

## A Judicial Perspective



 Judge Leonard Edwards (ret.)

### Introduction

This paper addresses federal child welfare law over the past 41 years, from the Adoption Assistance and Child Welfare Act of 1980 (AACWA) to the Adoption and Safe Families Act of 1997 (ASFA) to more current federal laws passed this century. The history of federal legislation reveals that the two legislative initiatives mentioned focused on “child saving” and not on support and preservation of families. ASFA, in particular, has harmed both children and families in several respects. The paper will note how recent federal legislation has attempted to modify the effects of ASFA but how more needs to be done.

### The Adoption Assistance and Child Welfare Act

Congressional hearings in 1978–1980 revealed the child welfare system in the United States did not serve children or families well. Social service experts testified that no one knew how many children were being served by child welfare agencies, how many children were in out-of-home care, nor did anyone know where these children were or how long they had been there. Congress learned that many children removed from home drifted from foster home to foster home, never finding a permanent home, and that child welfare agencies failed to create case plans for foster children.<sup>1</sup> Congress responded with the adoption of AACWA, a revolutionary piece of legislation that selected the nation’s juvenile courts as monitors of child welfare agency practices.<sup>2</sup>

In order for states to qualify for federal financial support, AACWA requires each state to submit a state plan outlining how it will support families throughout their contact with the child welfare agency. In return, the federal government will pay the state a portion of the costs of foster care placements.

The state plan is each state’s promise to provide services to prevent the removal of a child from parental care and facilitate the return of a child to parental care if that child has been removed. A critical component of AACWA requires judges to oversee the actions of child welfare agencies and hold those agencies accountable for their

actions when children come to their attention because of parental abuse or neglect. To ensure the state is fulfilling its promise, judges are required to make findings on the record throughout the legal proceedings whether the state provided those services (reasonable efforts were made) or did not provide those services (reasonable efforts were not made). The latter finding results in financial penalties for the state as federal funding will not be provided for portions or all of that case.

### The Adoption and Safe Families Act

Criticisms of portions of AACWA led to the passage of the Adoption and Safe Families Act (ASFA) in 1997.<sup>3</sup> Critics pointed out that parents were given too much time to reunify with their children, that child safety should be the highest priority in child welfare, and some parents did not deserve to be offered services to reunify because of their egregious behavior. Proponents lauded the enactment of ASFA. Senator John Chafee of Rhode Island said, “We will not continue the current system of always putting the needs and rights of the biological parents first.... It’s time we recognize that some families simply cannot and should not be kept together,” while President Bill Clinton who signed the legislation stated the bill, “Makes clear that children’s health and safety are the paramount concerns.”

Both AACWA and ASFA were child-saving efforts. That the word ‘adoption’ is prominent in the title of both measures makes it clear that saving children from a life of abuse, neglect, and poverty would result in the adoption by a wealthier, “safe” family.<sup>4</sup> The intent of each bill is even clearer when one follows the money authorized. With unlimited funding available through Title IV-E of the Social Security Act,

<sup>1</sup>See Garrison, M., “Why Terminate Parental Rights?” 35 *Stanford Law Review*, 423, (1983). For additional information regarding the congressional findings, see Edwards, L., *Reasonable Efforts: A Judicial Perspective*, 2nd Edition, Section I, Legislative History.

<sup>2</sup>P.L. 96–272; 42 U.S.C. §670 et seq.

<sup>3</sup>Pub. Law 105–89.

<sup>4</sup>This approach is reminiscent of the early efforts to remove Native American children from their homes and place them in “normal” homes so they could live a better life

these legislative initiatives allocated the money to foster care costs, not to family support or services to prevent removal. Only very limited monies were allocated to family preservation and those were allocated from Title IV-B provisions.

ASFA went even further to make it difficult for families to remain together. The key provisions included a mandate that the court terminate parental rights if the child had been in out-of-home care 15 of the previous 22 months<sup>5</sup> and that reunification services might not be offered to parents who had demonstrated by their conduct that there were unfit to parent.<sup>6</sup> ASFA also added a third reasonable efforts requirement—courts and child welfare agencies must also use reasonable efforts to ensure that children reach timely permanency.<sup>7</sup> However, ASFA did nothing to engage and include relatives and kin in the child welfare process.<sup>8</sup>

Both federal legislative initiatives assumed that court oversight of agency practices would serve children and families well. Court oversight included required judicial findings

throughout the life of each case. For the agency to have the authority to remove a child from parental care, the law requires the court to make a finding that removal was necessary to protect the child from immediate, serious harm.<sup>9</sup> The court further had to make rulings regarding the child welfare agency's provision of services first to prevent removal of the child from parental care, second, to provide services to facilitate the return of the child to parental care, and third, to ensure the child reached a permanent home in a timely fashion. The legal term 'reasonable efforts' refers to the number of social work actions to accomplish these three goals. The court had an obligation to make a specific finding that the social worker either provided reasonable efforts or did not.

<sup>5</sup>Pub. Law 105-89, Section 103

<sup>6</sup>Pub. Law 105-89, Section 101(a)(D)(i-iii).

<sup>7</sup>See Edwards, *op. cit.*, footnote 1.

<sup>8</sup>"Intentions and Results: A Look Back at the Adoption and Safe Families Act," ([https://www.urban.org/research/publication/intentions-and-results-look-back-adoption-and-safe-families-act/view/full\\_report](https://www.urban.org/research/publication/intentions-and-results-look-back-adoption-and-safe-families-act/view/full_report)). *Urban Institute*. Retrieved 2020-04-29.

<sup>9</sup>"...continuation in the home from which the child was removed would be contrary to the welfare of the child." 42 U.S.C. §472(2)(A)(ii); 45 CFR 1356.21(b)(1)(2006).

ASFA was intended to improve the safety of children, promote adoption and other permanent homes for children, and support families. Now, decades later, it has become clear the implementation of ASFA has harmed many children and families who are the subject of child welfare proceedings.<sup>10</sup>

## Implementation Challenges

Congress must have assumed that the child welfare agencies were capable of providing services that would enable the parents to address the issues that brought their child to the attention of the child welfare agency. What Congress did not know was how difficult this would be. Some communities had no services and the agency had to develop them. When parents asked for missing services, the court sometimes refused to require the agency to make those services available.<sup>11</sup> Even in those communities with services, there were details that made it difficult for parents to participate in them, such as transportation and conflicting work schedules. Delays in the provision of services frustrated many parents and reduced the reunification period for parents significantly.<sup>12</sup> A third difficulty was that the agency may have developed services, but those were not what the particular parents needed. As Judge Robert Lowenbach stated, "Let's give families what they need, not just what we've got."<sup>13</sup>

## Reasonable Efforts and Reasonable Services

The Congressional mandate that the courts oversee the actions of social service agencies was based on their dissatisfaction with agency practices, particularly regarding the parents and children involved in child abuse and neglect proceedings. Congress believed that courts would hold agencies accountable for using the federal monies to provide services to these families. But this goal has been elusive.

There is no statutory definition of reasonable efforts. That term refers to the actions or lack of actions provided by the social worker

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As Judge Robert Lowenbach stated, "Let's give families what they need, not just what we've got."<sup>13</sup>

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assigned to work with a family. Another term frequently used is reasonable services. That term refers to the quality of services provided to parents and children. Additionally, there is the question of whether a particular service is available in the community. Several judges report they have made 'no reasonable efforts'

<sup>10</sup>See Guggenheim, M., "How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997 - the Worst Law Affecting Families Ever Enacted by Congress," a paper delivered at a symposium organized by *The Columbia Journal of Race and Law*, June, 2021; and Roberts, D., *Shattered Bonds: The Color of Child Welfare*, Basic Books/Civitas, 2001.

<sup>11</sup>For example, see *In re Shirley B.*, (2010) 993 A. 2d 875, 191 Md. App. 678, where the appellate court stated: "That the Department's efforts to connect Ms. B. with services for parenting and basic living skills were unsuccessful, because the services were not available, does not mean that the Department's actions did not satisfy the "reasonable efforts" requirement."

<sup>12</sup>For example, see *T.J. v Superior Court* (2018) 21 Cal. App.5th 1229; *In re Alvin R.*, (2003) 108 Cal. App.5th 962

<sup>13</sup>For example, in the case of *Patricia W. v Superior Court* (2016) 244 Cal. App. 4th 397 the appellate court held that the services offered to the mother did not address the problem (mother's compliance in taking medication for her mental illness) that brought the child to the attention of the child welfare agency. The appellate court held that the agency did not provide reasonable services and returned the case to the trial court for further proceedings. In the case of *In re K.C.* (2012) 212 Cal. App. 4th 323 the court reversed the trial court's order terminating reunification services finding that the department knew that the father needed a psychotropic medication evaluation, but did little to secure that evaluation.





findings when a service was not available even though it was<sup>14</sup> or should have been a part of the state plan.<sup>15</sup> Some judges have alerted the community leaders about the absence of a service the judge finds is necessary to reunite a family.<sup>16</sup> These few examples affirm that judges are the ultimate authority on what constitutes reasonable efforts, not the agency.

The actions by these judges are exceptions. Most judges accept what the social service agency tells them. If court oversight of agency practices in child welfare cases was one of the critical aspects of these legislative initiatives, it has not been successful. In many states, reasonable efforts are not addressed in child welfare proceedings. Thus, the adequacy of services and the work of the social worker are not monitored by the court. Instead, many judges simply check a box stating that reasonable efforts have been offered by the agency or simply adopt the pre-printed findings prepared by the child welfare agency.<sup>17</sup> In other states, the services are not readily available to parents, are ineffective, or the social worker does not provide sufficient support to the parents.

Moreover, many social workers do not give sufficient support to parents who are involved in child welfare proceedings. As several appellate courts have written, “Family reunification services are not ‘reasonable’ if they consist of nothing more than handing the client a list of services and then putting the entire responsibility on the client to find and complete the services.” Yet, that is the practice in many jurisdictions around the country.<sup>18</sup>

## Family Time

Another service involves ensuring the relationship between parents and their children who have been removed from their care is maintained. This is referred to as family time or visitation. Removing a child from parental care is a traumatic event for the child and parents. Moving a child into a new home is also traumatic, particularly if that home is with strangers. Once removed, parents want to see their child. In fact, the most litigated issue in juvenile courts has to do with the number of times parents and their children see each other and whether that time is supervised or not. Around the country, family time generally starts several days, if not weeks after the removal; it is supervised, possibly in the agency offices, and occurs once or twice a week. Because of short staffing, social workers do not have the time to provide transportation and supervision to increase family time. Child development experts conclude that the quantity and quality of visitation nationwide are inadequate.<sup>19</sup> In addition, parents are challenged by transportation issues and work schedule conflicts that make those visits particularly difficult.

<sup>14</sup>Edwards, L. “Overcoming Barriers to Making Meaningful Reasonable Efforts Findings,” American Bar Association, January 30, 2019; See page 4 where Judge Douglas McNish found a service in the State Plan that the agency did not have, but that a parent needed to complete rehabilitation. The judge was able to require the state to develop that service.

<sup>15</sup>See Edwards, L., *op.cit.*, footnote 1, Appendix D

<sup>16</sup>*Id.*

<sup>17</sup>Thus, the judge’s oversight becomes “merely a hollow formula designed to achieve the result the agency seeks.” *In re Ashly F.*, 225 Cal. App. 4th 803 (2014).

<sup>18</sup>For an example of this conduct by a social worker, see *Robin V. v Superior Court*, (1995) 33 Cal. App. 4th 1158.

<sup>19</sup>Edwards, L., *op. cit.*, footnote 1, Section VII. B. 3.

## The 15-Month Limitation on Reunification Services

Providing services has been a challenge from the outset of the implementation of the federal laws. Two principal reasons for the failure of the federal laws to support children and families are the lack of timely and effective services throughout the country and the short time (15 months) the law grants the parents before the court terminates parental rights. Even if timely and effective services were in place, there simply is not enough time to recover from many of the problems parents face. As one long-time juvenile court judge wrote,

“Chronicity of Social Problems are incongruent to the ASFA Policy – Poverty, homelessness, domestic violence, mental health disorders, trauma and substance abuse disorders cannot be successfully addressed in 15 months. These are chronic social, emotional, disorders that require long-term interventions for parents to live their best selves under imperfect circumstances. The ASFA requires parents to improve quickly and then the court will return your children. There is little allowance or consideration of the complexity of the human being nor of the society that they live in. This is the human condition and the ASFA is inconsistent with this reality.”<sup>20</sup>

That same judge reflects on one of the great tragedies in child welfare practice – the child who has been freed for adoption and then returned to the child welfare system by the adopting parents.

Legal Orphans – The rush to terminate parental rights of “adoptable” children prior to that child being bonded and/or settling in with a ‘forever family’ leads to children being “given back” to the system – this is our biggest shame. A child with no one, with no legal right to inherit, no one to write to or call when they join the armed forces, or graduate from high school, no one to send the body back to when they are killed serving our country.”<sup>21</sup>

In discussions with attorneys and Guardian Ad Litem representing children, this case is their worst nightmare.

## The Importance of Appellate Court Decisions

One reason trial judges have not been more active in following the reasonable efforts law is the lack of appellate decisions discussing the importance of the issue of reasonable efforts. Appellate court decisions regarding reasonable efforts send a message to trial courts that the issue of reasonable efforts is important and should be addressed in trial court proceedings. Recent appellate decisions in Massachusetts and the District of Columbia demonstrate the impact an appellate decision can have on trial court proceedings message.<sup>22</sup> In each of these jurisdictions the appellate

decision was the first in that jurisdiction that addressed reasonable efforts and sent a message to trial courts and attorneys that reasonable efforts is an important issue to be tried. Trial court practice was changed in both jurisdictions.<sup>23</sup>

Unfortunately, there are still states with very few or no appellate decisions regarding reasonable efforts. These states include Florida, Idaho, Illinois, Mississippi, Nevada, South Carolina, Virginia, West Virginia, and Wisconsin. Some other states have only one such appellate decision; this is unfortunate. When an appellate court addresses the issue of reasonable efforts, trial judges and attorneys take notice. The decision sends a message that

<sup>20</sup>Judge Katherine Lucero, Presiding Judge of the Santa Clara County Juvenile Court

<sup>21</sup>Judge Katherine Lucero, Presiding Judge of the Santa Clara County Juvenile Court

<sup>22</sup>See *Care and Protection of Walt*, (2017) 478 Mass. 212 and the comments in Appendix A (Massachusetts) and *In re T.A.L.*, (2016) 149 A. 3d 1060 and the comments in Appendix A (District of Columbia) both found in Reasonable

Efforts: A Judicial Perspective 2nd edition, 2021, NCJFCJ.  
<sup>23</sup>*Id.*

this is an important issue, one they should address in trial court proceedings. As Justice Ingrid Gustafson of the Montana Supreme Court wrote about the case she authored focused on reasonable efforts: (In re R.J.F., 443 P. 3d 387 (2019)).

“This decision certainly brought the issue to the forefront of judges’ minds – many have related to me they are considerably more focused on this issue than they have been in the past. I believe this decision has also impacted the agency’s handling of cases with more emphasis on considering the specific needs of the parent and family rather than merely requiring the same laundry list of tasks for every parent.”<sup>24</sup>

## Judicial Attention to Reasonable Efforts

A principal purpose of the early federal laws was for judges to use the reasonable efforts findings to hold child welfare agencies accountable for their actions. However, experience has shown that many judges are reluctant to make ‘no reasonable efforts’ findings. Some judges say: (1) Social workers are the experts—I respect their expertise; (2) I do not want to take money away from an already financially-strapped agency; (3) I don’t know enough to make a judgment about reasonable efforts; and (4) There is no definition of reasonable efforts. Some attorneys report that they raise the issue but that the judge is not interested in discussing it.<sup>25</sup> These are surprising positions for judges to take since they are ignoring the law, and most judges have no difficulty holding the executive branch accountable in criminal law proceedings by suppressing the admission of evidence and confessions when law enforcement has violated personal rights.

ASFA mandates when a child has been placed in out-of-home care for 15 out of the previous 22 months; the court shall either return the child to the parents or set a termination of parental rights hearing. This is regardless of the reason the children were placed in

foster care and even when the parents never abused or harmed them. Clearly, ASFA did not prioritize maintaining the family unit. The 15-month limitation is a harsh rule, one that puts juvenile court judges in a difficult position. They may not believe that returning home is possible yet, but the alternative is to terminate parental rights. Most judges follow the law and terminate parental rights. However, often there is no permanent placement available for the youth. Many children are neither adopted nor placed in a permanent placement. As a result, thousands of children have become legal orphans, their parents have lost their parental rights to their child, and the child will age out of the foster care system in stranger care.<sup>26</sup>

This was an unanticipated result of ASFA—the large number of youths who age out of the foster care system each year without a permanent home.<sup>27</sup> The average number of youths aging out from foster care and congregate care each year is over 20,000.<sup>28</sup> Studies reveal that from 11 percent to 36 percent of these youths will become homeless during the transition to adulthood.<sup>29</sup> Within four years of aging out, 50 percent have no earnings, and those who do make an average annual income of \$7,500.<sup>30</sup>

The principal reasons why so many cases resulted in a termination of parental rights have been the shortness of time reunification services were offered to parents and the inadequacy of the services provided by the state. A few states have worked around this problem by extending the time for reunification

<sup>24</sup>Email to the author. A copy is available from the author. Also see Justice Gustafson’s complete remarks in Edwards, L., *op.cit.*, Appendix A, Montana.

<sup>25</sup>Edwards, L., *op.cit.*, see comments of attorneys in Appendix A.

<sup>26</sup>A permanent placement is with family, an adoptive home, a guardianship, or with a relative. It is neither foster care nor congregate care.

<sup>27</sup>Gossett, D., “The Client,” *The University of Memphis Law Review*, 48: 2018–12–09.

<sup>28</sup>U.S. Department of HHS, ACF, Administration on Children, Youth, and Families, Children’s Bureau, the AFCARS Report #26, September 2018.

<sup>29</sup>Dworsky, A., Nappitano, L., & Courtney, M., “Homelessness During the Transition from Foster Care to Adulthood,” *Am. J. Public Health*, 2013 103 (Suppl 2) S318–S323.

<sup>30</sup>“6 Quick Statistics on the Current State of Foster Care,” *iFoster*, November 9, 2020.

services beyond 15 months when the court finds that reasonable efforts have not been provided by the agency.<sup>31</sup> These courts reason that parents should not lose their parental rights when the welfare agency has not offered them reasonable efforts or services. Very few states have appellate caselaw or statutes that permit this extension of reunification services.

## Recent Developments

It seems the federal government has recognized some of its errors in enacting ASFA. The Fostering Connections Act of 2008 acknowledged that relative placement is preferable to foster care and congregate care.<sup>32</sup> As a result, states are slowly increasing the number of children placed with relatives.<sup>33</sup> The Preventing Sex Trafficking and Strengthening Families Act of 2014<sup>34</sup> emphasized courts addressing permanency in both child welfare and juvenile justice cases, while the Family First Prevention Act of 2018<sup>35</sup> permits Title IV–E funding to be available to prevent removal and to create evidence-based services.

## Family Finding and Relative Preference

The legislative shift away from the harshness of ASFA emphasizes permanency for children as a goal and the importance of family. Studies now demonstrate that children do better when placed with families and people they know. That conclusion has led to efforts by social service agencies to find and engage family members and kin as a preference for placement.

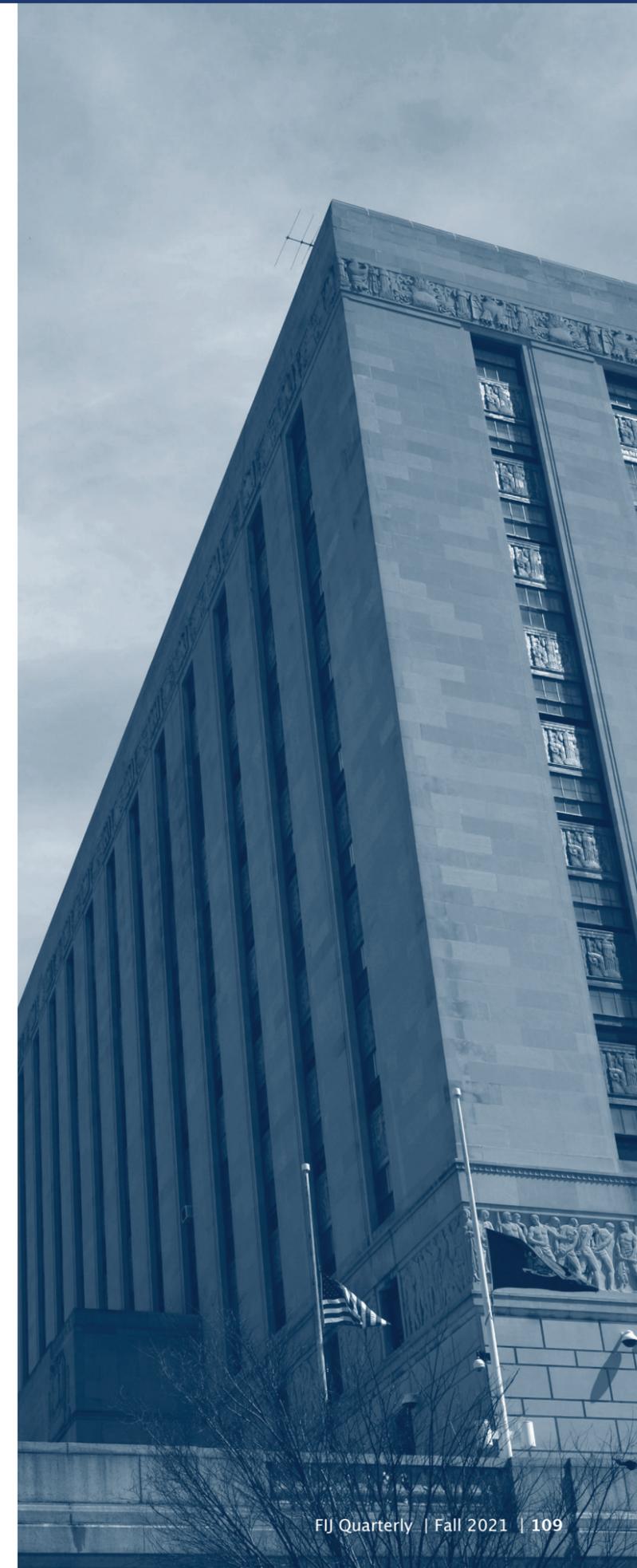
<sup>31</sup>See *In re James G.*, 178 Md. App. 543, 943 A.2d 53 (2008); *T.J. v Superior Court*, (2018) 21 Cal.App.5th 1229 – The agency failed to provide reasonable services designed to address special needs of an intellectually disabled mother. The remedy was to award services up to 24 months from the date of removal. See also *Serena M. v Superior Court*, (2020) 52 Cal. App. 5th 659.

<sup>32</sup>The Fostering Connections to Success and Increasing Adoptions Act, Public Law 110–351.

<sup>33</sup>See Edwards, L., “Relative Placement: The Best Answer for Our Foster Care System,” *Juvenile and Family Court Journal*, Vol 69 No 3, 2018 National Council of Juvenile and Family Court Judges.

<sup>34</sup>Preventing Sex Trafficking and Strengthening Families Act of 2014; P.L. 113–183.

<sup>35</sup>Family First Prevention Services Act, HR 1892 (2018), passes as part of the Bipartisan Budget Act of 2018.



Family Finding was highlighted in the Fostering Connections Act as a best practice.<sup>36</sup> The Family Finding model, developed by a social worker and family advocate Kevin A. Campbell, offers methods and strategies to locate and engage relatives of children who have been removed from parental care. The goal of Family Finding is to connect each child with a family so that every child may benefit from the lifelong connections that only a family provides. As Kevin Campbell has written:

- 1) **Every child has a family, and they can be found if we try**
- 2) **Loneliness can be devastating, even dangerous, and is experienced by most children in out-of-home care**
- 3) **A meaningful connection to family helps a child develop a sense of belonging**
- 4) **The single factor most closely associated with positive outcomes for children is meaningful, lifelong connections to family.**

There are additional reasons why relative care is a preferred placement. Data now demonstrates that placement in foster care and congregate care have lifetime negative effects on children. Over their lifetime, these children will have poorer health and mental health outcomes and will die sooner than children at home or with relatives.<sup>37</sup>

One study followed over 160,000 children who were placed in non-parental care for a period during their childhood. The researchers followed their lives for 30 years. One of their conclusions was that children who were placed in out-of-home care reported worse health than children who grew up in a family environment. The authors conclude that:

**“... when non-parental care is required, priority be given to non-residential care, especially the child’s extended relatives and friends.”<sup>38</sup>**

Other studies confirm the poor health outcomes for these children placed in stranger care. These children have been found to have higher levels of emotional, psychological, and behavioral problems, such as poor well-being, conduct disorder, attention disorder, aggressiveness, depression, and psychopathology.<sup>39</sup>

Two studies concluded that children in care are, on average, more likely to die earlier than average in their adult lives. One study followed over 353,000 children who were once in care 42 years later. They concluded that these adults, on average, had a higher risk of mortality long after they had left care, mainly from unnatural causes.<sup>40</sup>

The second study followed over 15,000 children for 60 years, nine percent of whom had been placed in out-of-home care during their childhood. This study found that children in out-of-home care constitute a high-risk group for subsequent mortality. The study also found an elevated risk of mortality was particularly pronounced among those who were placed as adolescents and/or because of their own behaviors. Children exposed to out-of-home care showed increased mortality rates compared to children who grew up in similar conditions but did not experience placement.<sup>41</sup>

<sup>36</sup>Public Law No: 110-351, §102(a)(2).

<sup>37</sup>Murray, E., Lacey, R., Maughan, B., & Sacker, A., “Association of childhood out-of-home care status with all-cause mortality up to 43-years later: Office of National Statistics Longitudinal Study,” *BMC Public Health*, (2020) 20-735.

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

<sup>39</sup>McCann JB, J., Wilson, A, Dunn, G., “Prevalence of psychiatric disorders in young people in the care system,” *BMJ*, 1996; 313:1529-30; McMillen JC., Zima, TB, Scott, D.L., et/al. “Prevalence of psychiatric disorders among older youths in the foster care system. *J. Am. Acad. Sci. Child Adolescent Psychiatry*, 2005; 44:88-95.

<sup>40</sup>Berlin, M., Vinnerljung, B., Hjern, A., “School performance in primary school and psychosocial problems in young adulthood among care leavers from long term foster care,” *Child Youth Serv. Rev.* 2011; 33: 2489-97; Leslie, I.K., Landsverk J., Ezzer-Lofstrom, R. Tschann, J.M., Slymen, D.J., Garland, A.F., “Children in foster care: Factors influencing out-patient mental health service use,” *Child Abuse Negl.* 2000; 24: 465-76

<sup>41</sup>Gao, M., Brannstrom, L., Almquist, Y., “Exposure to out-of-home care in childhood and adult all-cause mortality: a cohort study, *International Journal of Epidemiology*, 2016, 1-8; McCann, J.B., Wilson, S., Dunn, G. “Prevalence of psychiatric disorders in young people in the care system,” *BMJ*, 1996; 313:1 529-530.

There is another important reason why relative care should be a preferred placement. As noted above, one problem that has plagued child welfare systems across the country is the limited amount of visitation or family time once a child is removed from parental care.<sup>42</sup> If children are placed with relatives, family time can be significantly increased and in a more relaxed atmosphere. For example, in Allegheny County, the director of placement services stated:

“Because we place so many children with relatives, we are able to provide more visitation between parents and their children.”<sup>43</sup>

As Regional Administrator, Jennifer Lopez of the Santa Fe Springs Office in Los Angeles stated:

“Because we place so many children with relatives, we are able to be much more flexible with visitation. The parents are able to see their children much more than if the children were placed in foster care. Also, it is much less traumatic for the children and a lot of the fathers who are non-offending have the opportunity to be in their children’s lives.”<sup>44</sup>

Using the reasonable efforts mandate, child welfare systems should be required to use the most effective means of locating and engaging relatives early in a child welfare case. Engaging families and permitting them to make decisions about their children has been the practice of indigenous peoples for centuries. These peoples convene the larger family or tribe and determine what the plan should be for the child. The Fostering Connection Act identified Family Group Conferencing as a best practice.<sup>45</sup> Unfortunately, Family Group Conferencing has not flourished in the United States, although some states have legislation mandating family team meetings and similar procedures to engage the family.<sup>46</sup> To the extent that social service agencies conduct these family meetings, their impact is reduced as it is the family time without strangers that is the most effective procedure.

<sup>42</sup>See material referenced in footnote 19.

<sup>43</sup>Email from Dr. Sharon McDaniel. A copy is available from the author.

<sup>44</sup>Email from Jennifer Lopez. A copy is available from the author. The Los Angeles experience with family finding has resulted in from 17% to 20% of placements with non-custodial parents, usually with fathers.

<sup>45</sup>Public Law No. 110-351, §102(a)(3).

<sup>46</sup>See California Welfare and Institutions Code Section 16501(a)(4)



## ADOPTION PLACEMENT AGREEMENT



ment between \_\_\_\_\_, an agency duly authorized to place child  
 ed agency, and \_\_\_\_\_ and \_\_\_\_\_, his wife, residing at \_\_\_\_\_  
 ts:

... placement made by the foster parents agency places in the

The studies of children placed outside of family care send a clear message. The child welfare system should take aggressive steps to increase relative placements when children must be removed from parental care. The benefits are significant. Families belong together, even when they are not perfect; it seems that generational healing has become a luxury left to those who have been left alone by social workers who want to “fix” them in the name of child safety. Families who are allowed to work through alcoholism, family violence, and mental illness using community and faith-based support, get to demonstrate to their children that families can heal. That is how cycles of violence, poverty, and addiction are broken. A family that is forever broken apart by the government only teaches one thing to a child—if you are experiencing the human condition, you may lose everything that you love.

## Conclusion

ASFA has been a failure. It has unnecessarily broken up families and left many children in stranger care with a negative lifetime of consequences. What can be done to address the negative consequences of ASFA? First, the law must be modified so there is no mandate to terminate parental rights after 15 months of placement, particularly if reasonable efforts have not been provided to the parents.<sup>47</sup> Second, the aggravated circumstances portion of ASFA should be narrowed, and states should not be permitted to expand

the circumstances that permit the bypass of efforts to provide reunification services.<sup>48</sup> Third, child welfare agencies must increase the number of children placed with relatives or kin. Model counties in several states have demonstrated that this can be done. Studies

conclusively show that placing them with strangers may result in a lifetime of harm.<sup>49</sup> Fourth, the law should be modified to allow federal reimbursement only when removal is necessary to protect children from imminent risk of serious harm. This change would not include children experiencing poverty and would encourage child welfare agencies to take intensive steps and provide increased resources to maintain the family unit. Fifth, the law should make it possible for the parents to petition the court to have their

parental rights reinstated, should the new placement not work out or if the youth remains in foster care without a permanent plan.<sup>50</sup> Sixth, the law should make it possible for the parents to have continued contact with their child even after parental rights have been terminated.<sup>51</sup> This is particularly important when the child remains in foster care without a permanent plan in place. Seventh, the law should permit post-adoptive sibling contact where the juvenile court judge finds that contact would be in the best interests of both the siblings.<sup>52</sup> Finally, the Children’s Bureau and judicial training should make it clear that judges are the final decision-makers on what reasonable efforts are in their community and that judges should take their role seriously.

A common theme through most of these recommendations is the important connection between children, their parents, and their relatives. Our laws and policies should prioritize the maintenance and strengthening of these connections. In this regard, ASFA should be repealed or substantially modified.

<sup>47</sup>That is what the appellate court did in the following cases. See *In re Dino E.*, (1992) 6 Cal. App. 4th 1768; *in re, In re D.N.*, (2020) 56 Cal. App. 5th 74.

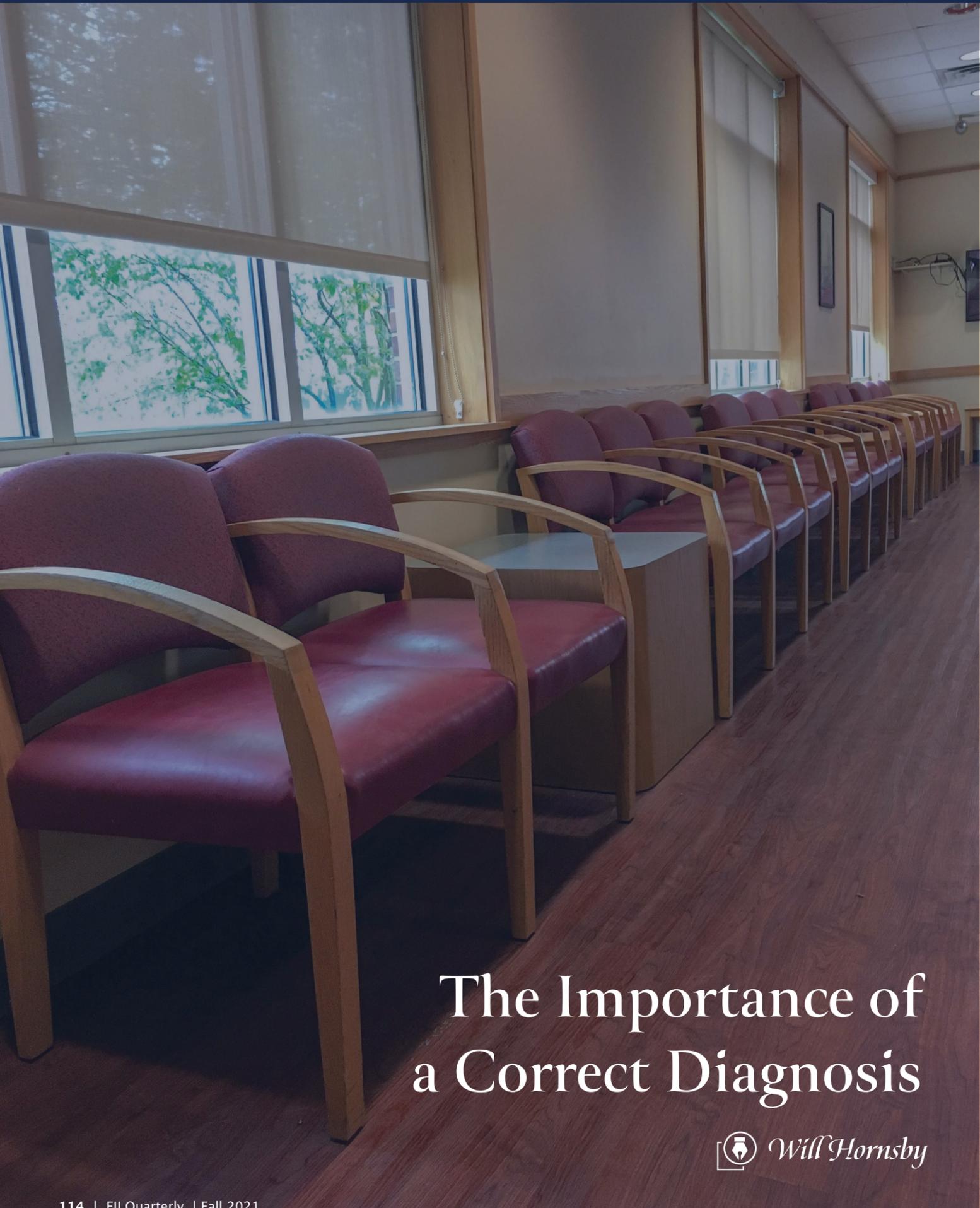
<sup>48</sup>For example, California added three sections to its list of factors identified in the ASFA that would permit the court to bypass family reunification services. Welfare and Institutions Code §§ 361.5 (b) (10), (11) & (13). These sections, and particularly 361.5 (b)(11) are the most frequently used when the county attempts to deny reunification services to a parent.

<sup>49</sup>Edwards, L., “The Urgency of Placing Children with Relatives,” *The Guardian*, a publication of the National Association of Counsel for Children (NACC), vol 42, No. 4 Winter 2020.

<sup>50</sup>California Welfare and Institutions Code section 366.26(i)(3), West, 2021.

<sup>51</sup>This recommendation comes from several family time experts all noted in the publication referenced in footnote 15. See also *In re David D.*, (1994) 28 Cal. App. 4th 941.

<sup>52</sup>See California Welfare and Institutions Code §366.29 and Trividi, S., “Adoption and Safe Families Act is the ‘Crime Bill’ of Child Welfare,” *The Imprint*, 1/28/2021.



# The Importance of a Correct Diagnosis

 Will Hornsby

After the startling surprise of viewing a “clean” PET scan image showing no lymphoma and the resulting celebratory fist bumps and high fives, my oncologist said that he is already using me as a case example with his medical students to illustrate the importance of a correct diagnosis.

In early May 2021, I received a diagnosis of a very rare type of cancer that has a paucity of clinical evidence and medical knowledge available; the type of diagnosis that prompted my oncologist during our first appointment to seriously recommend that I should make sure I have my affairs in order. The number of people with this type of cancer is so small that there are no prospective studies, and what is known about this rare cancer is based on retrospective explorations of small numbers of patients.

But then a ray of hope emerged because my oncologist said their pathologists wanted to take a closer look at the original diagnosis due to nagging questions. After further exploration and tests in late May 2021, my oncologist excitedly informed me that there was consensus among the pathologists that the rare cancer diagnosis was not correct. He informed me that I have a more treatable form of lymphoma with a much better prognosis, and the body of knowledge and evidence about how best to treat this new diagnosis is rich and well-researched.

While I’m unbelievably thankful my treatment regimen has been much less severe than

it would have been if the original diagnosis persisted, I’m mostly grateful the pathologists and oncologist took the extra time and effort to come to a consensus about the correct diagnosis. The correct diagnosis resulted in a less rigorous treatment regimen (that has been tested and utilized since the 1990s), and the intervention is proving to be effective thus far, as evidenced by the “clean” PET scan in August 2021.

It did not take me long to translate my oncologist’s reported use of me as a case example with his medical students into thinking about how this experience applies to my life work involving child welfare.

To begin with, the pathologists at the institution where I’m being treated were willing to raise questions and do the in-depth work to reconsider the original diagnosis I received from the local pathologist and oncologist. Their professional curiosity and thoroughness pushed them to conduct further

tests and gather additional evidence to reconsider the original diagnosis because they were not convinced the original diagnosis was correct. Conversely, I wonder how often maltreatment is misidentified within the child welfare system and how frequently the full circumstances surrounding a presenting problem and possible people who could be involved to support the family are not explored. Often, a young caseworker (with little support from a supervisor or colleagues) makes a determination regarding a family or child’s presenting issues that may not be based on a full understanding of the underlying conditions, and caseworkers are frequently operating under strict time pressures to move a case along. These initial misidentified determinations, often accompanied by labels (parent is non-compliant, uncooperative, aggressive), are then noted in the casefile and begin to take on a life of their own without being further questioned or reconsidered. How often are a child’s or





family's trauma and fear misidentified and ascribed as a manifestation of an individual deficit or deficiency?

Within the child welfare system, there are numerous examples where a checklist mentality or “rubber stamp” approach pervades decision-making processes involving investigations of abuse or neglect, reasonable efforts determinations, and case planning activities. This type of mentality or approach frequently results in a family or child being stuck with a “cookie-cutter” label or initial determination that is not individualized. This does not encourage a thorough understanding of the reasons why the family is involved with the child welfare system or acknowledge that families and children do change—which should prompt consistent assessment and re-consideration.

There are ample instances of jurisdictions that experience child welfare crises marked by:

- High rates of worker turnover
- Backlogs of investigations
- Sharp increases in the number of children entering the foster care system
- Children spending the night in office lobbies or hotels due to lack of placement options
- Siblings separated
- Parents, children, and relatives not visiting or connecting in a meaningful manner

From a macro-perspective, how well are child welfare professionals and governmental officials diagnosing the root causes for the above types of symptoms? Are the voices and perspectives of those with lived experience and expertise in forming an understanding of these problems? Does honoring the power of families and communities ever come up as a preventative measure? What role do poverty and institutional racism play in driving these crises symptoms? What will it take to arrive at correct diagnoses of the causes of these crises' symptoms that far too many jurisdictions experience?

And finally, we must reflect on how often our laws, policies, and funding align behind the wrong diagnosis. When we know most calls to child abuse hotlines across the country are made for neglect, it stands to reason that we should be investing in efforts to prevent neglect. The Adoption and Safe Families Act (ASFA) is the wrong treatment for neglect, yet it is the treatment that is provided across the board for families where a child has been removed from the home and placed in a state's custody. Whether it be medicine or child welfare, erroneous diagnoses and determinations lead to wrong treatment decisions and too frequently result in serious harm to someone in need.



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