

The Client: How States Are Profiting from the Child's Right to Protection

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“[S]omehow in the midst of this barrage of laws and code sections and motions and legal talk the kid was supposed to know what was happening to him. It was hopelessly unfair.” – John Grisham, *The Client*¹

I. INTRODUCTION

John Grisham’s *The Client* introduces the reader to eleven-year-old Mark Sway, a street-smart kid from a broken home who thinks he can handle anything until he witnesses the suicide of lawyer W. Jerome “Romey” Clifford.² Mark is in the woods behind his home teaching his eight-year-old little brother, Ricky, how to smoke cigarettes when Romey drives his shiny black Lincoln to a nearby spot, hooks a hose to his exhaust pipe, and runs it through a crack in his left rear window.³ Romey means to kill himself because he has become a liability to his client, a mobster who has murdered a Senator, but Mark thwarts his plans by loosening the hose from the exhaust pipe.⁴ Drunk and distraught, Romey catches and imprisons Mark in his car and, just before he puts a gun to his mouth and takes his own life, burdens Mark with a deadly secret: the location of the Senator’s body.⁵ In the aftermath, Mark must deal with a catatonic little brother who saw too much; law enforcement officials who deduce that the lawyer told Mark

1. JOHN GRISHAM, *THE CLIENT* 251 (1993).

2. *See id.* at 1–4, 14–17, 20, 146, 225, 239.

3. *Id.* at 1–5.

4. *Id.* at 6–10, 25–27, 74–75.

5. *Id.* at 9, 11, 13–17, 20.

his secret and want him to divulge the information; and members of the Mafia, who also surmise that Mark knows too much and want to permanently silence him.⁶ Mark has to dodge both law enforcement and the Mafia to keep his secret, and he is running scared. It is an engrossing tale and a fun read.

As *The Client* progresses, the reader is caught up in Mark's struggle: he wants to disclose his secret to the law enforcement officials, but the Mafia burning his house down and physically threatening him dissuades him.⁷ When he refuses to tell anyone what he knows, the officers investigate his background and find a poor kid from a trailer park whose single mother often leaves him and his brother alone while she works long hours at a factory. To make him talk, the law enforcement officials attempt to use the legal system to their advantage. They plot to haul Mark before the juvenile court and allege either that his refusal to assist the investigation constitutes misconduct or to report that his mother neglects him and he needs court protection "for his own safety."⁸ Either way will force a hearing in Juvenile Court, and the officials can use the time before the judge rules to corner Mark while he is alone in detention and make him talk.⁹ Luckily, Mark finds Reggie Love, a shrewd attorney who graduated from Memphis State Law School¹⁰ only four years prior, who has made it her mission to help abused and neglected kids.¹¹ For a nominal \$1 fee, Reggie protects Mark from the overreach of the law enforcement officers throughout the court proceedings and eventually helps to guide his family free from harm into the witness protection program.¹² Without Reggie, Mark would have faced the child protection system on his own, and probably to a different outcome.

Because of changes in child welfare legislation since Grisham published *The Client*, Mark might also have faced a different result if his story took place today. Mark's ordeal occurred in 1993, at a time

6. *Id.* at 1, 28, 58, 67–71, 95, 136–37, 281–86.

7. *Id.* at 136–37, 198–200, 213–14, 281–86.

8. *See id.* at 169 ("[T]he petition must classify the child as . . . in need of supervision. . . . The same can be done for . . . neglected children.").

9. *See id.*

10. Memphis State Law School has since been renamed the University of Memphis Cecil C. Humphreys School of Law.

11. GRISHAM, *supra* note 1, at 79–80, 84, 97–101, 106, 108, 139.

12. *See id.* at 402–03, 406–07, 418–22.

when the Adoption Assistance and Child Welfare Act¹³ was in effect. That Act favored family preservation and required states to use “reasonable efforts” to keep biological families intact.¹⁴ But things have since changed. If officials hauled Mark into court today, he would likely face removal from his family because of their troubled history. He would likely spend time in the foster care system, an industry that exploits the very persons in its care for financial profit. That is because now the Adoption and Safe Families Act,¹⁵ which mandates speedier hearings and termination of parental rights, controls. Under the current framework, “child protection” often outweighs family preservation efforts, as more than 250,000 children annually become new wards of the state.¹⁶ But society has too often equated poverty with neglect, and the circumstances surrounding poverty have served as the basis for the removal of children from their families, even as States have the financial means to keep poor families together.¹⁷ Poverty, however, should never be the reason families are torn apart—especially when the State benefits from the child’s removal, and not the child.

Part II of this Article highlights the fact that children have historically had very few rights. The gradual recognition of those rights has led to competing concerns, and this section examines both the “rescue” efforts toward children as well as the child’s interest in family preservation. It traces the evolution of the foster care system in this country from informal “boarding out” arrangements to an overburdened organization that sought stable homes for children, but in many cases, merely shepherded them through a series of placements with no real attachments until they eventually “aged out.”

Part III examines how Congress tried to address the issue of permanency through a series of child welfare legislative measures. This Part shows that the Adoption Assistance and Child Welfare Act

13. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in various sections of 42 U.S.C.).

14. *See infra* Part III.

15. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

16. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2016 ESTIMATES 1 (Oct. 20, 2017) [hereinafter 2016 AFCARS REPORT], <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf>.

17. *See infra* Parts IV–V.

focused on family preservation and required states to use “reasonable efforts” to keep biological families intact. But when the number of children entering foster care continued to increase, Congress passed the Adoption and Safe Families Act, currently in force, which effectually favors adoption over family preservation. Despite its lofty goals, the hope that adults would adopt more children from foster care has not materialized; instead, children are entering foster care at the pre-legislation rates.

Part IV discusses the resulting poverty industry. In many instances, poverty has become synonymous with neglect, which serves as the primary reason children are being removed from their homes and placed in foster care. At the same time, states are financially profiting from the very ones in their care. Part V argues that child protection is trumping family preservation, even as states have the means to keep poor families together. It examines the challenges the Sway family faced and their plight in the context of both the Child Welfare Act and the Adoption and Safe Families Act. The Article concludes with the premise that poverty should never be the reason that the State tears families apart and suggests that the Adoption and Safe Families Act should not disregard the child’s interest in family preservation in its haste to “protect” the child from its poor family.

II. THE CHILD’S RIGHTS: THE COMPETING CONCERNS OF CHILD RESCUE AND FAMILY PRESERVATION

When Thomas Paine penned “all men being originally equals” in his influential work, *Common Sense*,¹⁸ it was an idea so radical for its time that children’s author and educator Hannah Moore ridiculed it as absurd.¹⁹ She scoffed that reformers would next “begin to discuss the rights of women, and then (even more ridiculously) ‘our enlighteners [. . .] will illuminate the world with grave descants on the rights of youth, the rights of children, the rights of babies.’”²⁰

18. See Pauline Maier, *The Strange History of “All Men Are Created Equal,”* 56 WASH. & LEE L. REV. 873, 883 & n.54 (1999) (quoting 1 THE WRITINGS OF THOMAS PAINE 4, 13 (Philip Foner ed., 1969)).

19. Marah Gubar, *The Victorian Child, c. 1837–1901* 1 (unpublished manuscript), http://www.representingchildhood.pitt.edu/pdf/victorian_child.pdf.

20. *Id.* (quoting JAMES WALVIN, *A CHILD’S WORLD: A SOCIAL HISTORY OF ENGLISH CHILDHOOD 1800–1914*, at 45 (1982)).

Certainly, “[t]he idea that children have rights that the state should protect” has been a relatively late one.²¹ Ironically, the growing acknowledgement of those rights has served as the justification for removing children from their homes and families and pitting a child’s right to protection against a recognized preference for family preservation.²²

A. Children as Laborers

The view that childhood is a time of innocence shielded from adult cares and concerns is a relatively recent ideal. For example, Charles Dickens’ childhood ended when, at the age of twelve, he began working in a blacking factory while his father remained in debtor’s prison.²³ Industrialization in England created such a demand for factory workers that children as young as five commonly worked up to sixteen hours a day alongside family members in textile mills and coal mines.²⁴ Efforts to reduce children’s workloads to just ten hours a day did not succeed until 1847.²⁵ Indeed, in Victorian England, children

21. *Id.*

22. See LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES xvi (1989) (explaining some of the purposes of child removal).

23. Gubar, *supra* note 19, at 2. *Oliver Twist* (1837) and *Jo the street-sweeper* in *Bleak House* (1852–53) highlighted the plight of destitute children forced to work in perilous conditions for their survival: “[I]nspired by the theories of utilitarian philosopher Jeremy Bentham[, the New Poor Law of 1834] relegated the needy to prison-like institutions called workhouses, splitting up families and subjecting them to repugnant living conditions and hard labor.” *Id.* See also generally MICHAEL ALLEN, CHARLES DICKENS AND THE BLACKING FACTORY (2011).

24. Gubar, *supra* note 19; see also David Cody, *Child Labor*, VICTORIAN WEB, <http://www.victorianweb.org/history/hist8.html> (last modified Sept. 11, 2017).

25. Even after reform, the hours for children were grueling:

Ineffective parliamentary acts to regulate the work of workhouse children in factories and cotton mills to 12 hours per day had been passed as early as 1802 and 1819. After radical agitation, notably in 1831, when “Short Time Committees” organized largely by Evangelicals began to demand a ten hour day, a royal commission established by the Whig government recommended in 1833 that children aged 11–18 be permitted to work a maximum of twelve hours per day; children 9–11 were allowed to work 8 hour days; and children under 9 were no longer permitted to work at all (children as

possessed neither status nor rights well into the 19th century.²⁶ Prince Albert, Queen Victoria's husband, regarded working-class children as merely "part of his productive power,' an indispensable source of family income."²⁷

Similarly, the young nation of America changed rapidly, transforming into "an industrialized giant."²⁸ For example, in the forty years between 1860 and 1900, the United States Patent Office issued 676,000 patents for new inventions.²⁹ Moreover, "[t]he telephone came into wide use; a transatlantic cable was laid in 1866; copper mines were opened in Montana; oil fields were developed in Texas, Oklahoma, Illinois, and other states; and coal mining was expanded in Pennsylvania and West Virginia."³⁰ Whereas Thomas Jefferson had once envisioned America as a leading agrarian nation, the United States that emerged in the latter years of the 19th century was more industrial in nature and demanded labor not only from adults, but also from children.³¹

young as 3 had been put to work previously). This act applied only to the textile industry, where children were put to work at the age of 5, and not to a host of other industries and occupations. Iron and coal mines (where children, again, both boys and girls, began work at age 5, and generally died before they were 25), gas works, shipyards, construction, match factories, nail factories, and the business of chimney sweeping, for example (which Blake would use as an emblem of the destruction of the innocent), where the exploitation of child labor was more extensive, was to be enforced in all of England by a total of four inspectors. After further radical agitation, another act in 1847 limited both adults and children to ten hours of work daily.

Cody, *supra* note 24.

26. Gubar, *supra* note 19.

27. *Id.* at 2–3 (quoting PAMELA HORN, *THE VICTORIAN TOWN CHILD* 100 (1997)).

28. DAVID C. GROSS, *A JUSTICE FOR ALL THE PEOPLE: LOUIS D. BRANDEIS* 37 (1987).

29. *Id.*

30. *Id.*

31. *Id.* The urban population of the United States grew from 3.97% of the total populace at the beginning of the 19th century to 29.12% by the end of the century. See JACOB A. RIIS, *THE CHILDREN OF THE POOR* 1 (Arno Press & The N.Y. Times 1971) (1892). The 1891 Sanitary census showed 1.225 million lived in 37,358

Children worked to help support their families,³² and the prevailing attitude during the 19th century was that industrial labor for even the very young was preferable to vagrancy in the streets.³³ Work was so commonplace to the very young that it framed their notions of government and the world. For example, when a teacher asked the class what happened when “the Americans could no longer put up with the abuse of the English who governed the colonies,” a little girl who worked in a sweater shop called out, “A strike!”³⁴ Still, child labor and poverty were inextricably linked,³⁵ and laws making education

city tenements, comprised of 276,565 families and 160,708 children under the age of five. *Id.* at 94.

32. Riis, *supra* note 31, at 38–39, 52–53. The legal age for shop employment in New York was 14, yet many shops worked a “number of diminutive wage-earners who were invariably ‘just fourteen.’” *Id.* at 38–39, 95–98. However, “[t]he habit of saying fourteen or sixteen—the fashion varies with the shops and with the degree of the child’s educational acquirements—soon becomes an unconscious one with the boy.” *Id.* at 96.

There were three boys at work in the room who said “sixteen” without waiting to be asked. Not one of them was fourteen. . . . While occupied with these investigations I once had my boots blacked by a little shaver, hardly knee-high. . . . While he was shining away, I suddenly asked him how old he was. “Fourteen, sir!” he replied promptly, without looking up.

Id. Some produced age certificates that the employers knew to be false. *Id.* at 103. One bookkeeper told the following story:

[A] boy who had been bounced there three times in one year, upon his return each time had presented a sworn certificate giving a different age. He was fifteen, sixteen, and seventeen years old upon the records of the shop, until the inspectors caught him one day and proved him only thirteen. I found boys at work, posing as seventeen, who had been so recorded in the same shop three full years, and were thirteen at most. . . . Some of these boys were working at power-presses and doing other work beyond their years.

Id. Some worked for their families. One nine-year-old girl, asked to describe her work that consisted of cooking and housework, replied, “I scrubs.” *Id.* at 60–61. She lived with her older sister and two brothers, who all lived together and worked at a hammock factory, earning wages of \$1.50 to \$4.50 a week. *Id.* at 60.

33. *Id.* at 108–09.

34. *Id.* at 53.

35. *Id.* at 92. “The one begets the other. Need sets the child to work when it should have been at school and its labor breeds low wages, thus increasing the need.” *Id.*

compulsory and prohibiting the employment of young children in factories were considered mere paper barriers that went unenforced.³⁶

B. *Gradual Recognition of Children's Rights*

Following the publication of Charles Dickens' works, "writers and artists began to produce increasingly sentimentalized images of children, emphasizing their angelic, adorable qualities."³⁷ Victorians began to think of children as "innocent creatures who should be shielded from the adult world and allowed to enjoy their childhood."³⁸ Thus began a period of child-welfare activism: legislatures enacted laws to protect children at work, at school, and in the home.³⁹

Louis Brandeis similarly became concerned that the "rapid economic change in America would be carried out at the expense of millions of ordinary Americans, who, he feared, would be exploited by huge corporations."⁴⁰ Determined to help the working population of America from being "overworked, underpaid, and employed in hazardous surroundings,"⁴¹ he championed the cause of "poverty and social ills, such as child labor that, to his mind, cried out for reform."⁴²

36. *Id.* At the end of the 19th century, New York laws regarding children required:

All between eight and fourteen years old must go to school at least fourteen weeks in each year. None may labor in factories under the age of fourteen; not under sixteen unless able to read and write simple sentences in English. These are the barriers thrown up against the inroads of ignorance, poverty's threat. They are barriers of paper.

Id.

37. Gubar, *supra* note 19.

38. *Id.*

39. *Id.* But see *supra* note 25 and accompanying text (explaining that even after the reform, hours were still grueling for children).

40. GROSS, *supra* note 28, at 37. Later nominated to the United States Supreme Court, Brandeis was first known as the "People's Attorney." See generally LETTERS OF LOUIS BRANDEIS, VOL. II (1907-1912): PEOPLE'S ATTORNEY (Melvin I. Urofsky & David W. Levy eds., 1972).

41. GROSS, *supra* note 28, at 37.

42. *Id.* at 26. Children made up many of the "huge numbers of people . . . needed to work in the mines, the mills, and the factories":

Children, some of them no more than seven or eight years old, were put to work for long hours in textile mills. In the dark and often

The National Child Labor Committee, formed in 1907, brought national exposure to the brutal conditions under which children labored.⁴³ In 1912, Congress created the federal Children's Bureau to "investigate and report . . . upon all matters pertaining to the welfare of children and child life among all classes of our people."⁴⁴ The Children's Bureau was responsible for many early-20th-century reforms targeting infant mortality and child labor.⁴⁵

Globally, after millions died in World War I and left many orphans, President Woodrow Wilson proposed a "general association of nations" as part of his Fourteen Points for an equitable peace plan.⁴⁶

dangerous coal mines, young boys of ten or twelve worked alongside the adult miners. It was not unusual for them to work twelve hours a day, seven days a week. Cave-ins, explosions, and coal dust [ended many of their] lives.

Id. at 40.

43. JAMES A. HENRETTA ET AL., *AMERICA: A CONCISE HISTORY*, VOL. 2: SINCE 1865, at 615 (2011). The Committee hired Lewis Hine to photograph the children's working conditions in mines and factories. *Id.* This work came to the attention of President Theodore Roosevelt, who initiated the White House Conference on Dependent Children in 1909. *Id.*; see also *infra* notes 72–76 and accompanying text (discussing the White House Conference on Dependent Children in greater detail).

44. Children's Bureau Act of 1912, Pub. L. 62-116, § 2 (1912). The legislation was drafted by Lillian Wald, who was involved in the founding of American community nursing, the Henry Street Settlement, and the National Association for the Advancement of Colored People (NAACP), and Florence Kelley, who served as the first general secretary of the National Consumers League and also helped form the NAACP. LETTERS OF LOUIS BRANDEIS, *supra* note 40, at 249 n.3 (citing Lillian Wald, Henry Street Settlement, Address at the Annual Meeting of the National Conference of Social Work: The Idea of the Federal Children's Bureau 33–37 (1932), <https://quod.lib.umich.edu/n/ncosw/ach8650.1932.001/56>).

45. See generally Children's Bureau Act of 1912, Pub. L. 62-116, 37 Stat. 79 (1912). Social workers had pressed for a federal children's bureau for years. LETTERS OF LOUIS BRANDEIS, *supra* note 40, at 249 n.3. President Taft appointed child welfare reformer Julia Lathrop of Hull House as the Bureau's first director. *Id.*

46. U.S. Office of the Historian, *Milestones: 1914–1920, The League of Nations, 1920*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1914-1920/league> (last visited May 16, 2018) [hereinafter *The League of Nations*]. On January 18, 1918, President Wilson presented his program of fourteen points to a joint session of Congress. U.S. Office of the Historian, *Milestones: 1914–1920, Wilson's Fourteen Points, 1918*, U.S. DEP'T OF STATE, <https://history.state.gov/milestones/1914-1920/fourteen-points> (last visited May 16, 2018).

This led to the creation of the League of Nations, arguably the first modern attempt at a global international organization aimed at protecting basic human-rights standards through intergovernmental cooperation.⁴⁷ In 1924, it adopted the Geneva Declaration on the Rights of the Child, which called for the provision of a child's basic human needs.⁴⁸ One of the central tenets of that Declaration was that:

The child must be given the means requisite for its normal development The child that is hungry must be fed; the child that is sick must be nursed; the child that is backward must be helped; the delinquent child must be reclaimed; and the orphan and the waif must be sheltered and succored.⁴⁹

Thus began a policy shift that saw children no longer as laborers who contributed to the workforce alongside adults, but as innocents who required proper development and protection so that they someday could become productive members of society.⁵⁰ As societal attitudes

Eight of the fourteen points treated specific territorial issues among the combatant nations. Five of the other six concerned general principles for a peaceful world: open covenants (i.e. treaties or agreements) openly arrived at; freedom of the seas; free trade; reduction of armaments; and adjustment of colonial claims based on the principles of self-determination. The fourteenth point proposed what was to become the League of Nations to guarantee the 'political independence and territorial integrity [of] great and small states alike.'

Id.

47. *The League of Nations*, *supra* note 46. Despite its popularity, the United States never became a member of the League of Nations. *Id.*

48. *Geneva Declaration of the Rights of the Child*, in 21 LEAGUE OF NATIONS O.J. SPEC. SUPP. 43 (1924). It also provided that, "[t]he child must be given the means requisite for its normal development, both materially and spiritually." *Id.*

49. *Id.*

50. The Keating-Owen Act, pushed by Democrats and signed by President Wilson in 1916, effectively abolished child labor. *See generally* Keating-Owen Child Labor Act of 1916 (Wick's Bill), Pub. L. No. 64-249, 39 Stat. 675. It was struck down, however, in 1918 by the Supreme Court and child labor continued. *See generally* *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (concluding that the law overstepped the purpose of the government's powers to regulate interstate commerce). It was not until the enactment of the Fair Labor Standards Act by President Franklin D. Roosevelt that child labor was abolished for good. Fair Labor

toward children changed, a theme of rescuing neglected children emerged.

C. Rescuing the Neglected Child: The Emergence of Foster Care

Foster care, in theory, is a “temporary period during which the state will provide the child and parent with services designed to resolve the problems that forced their separation.”⁵¹ It derives from the old English doctrine of *parens patriae*, which provides for the inherent role of the state as the protector for those who are unable to care for themselves.⁵² Early American courts adopted this doctrine, and subsequent state laws, regulations, and policies have incorporated this duty to protect and serve its most vulnerable citizens.⁵³ This saddles a state with a fiduciary duty to serve the “best interests” of the child over that of the state.⁵⁴

Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. §§ 201–219 (2016)); *U.S. v. Darby Lumber Co.*, 312 U.S. 100 (1941) (reversing *Hammer v. Dagenhart* and upholding the constitutionality of the Fair Labor Standards Act); *see also* Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 15 (2001) (quoting WINIFRED BELL, AID TO DEPENDENT CHILDREN 5 (1965)) (explaining that one goal of partnership between mothers and the state was “to ensure that ‘a small group of needy children would remain in their own homes and be so supervised and educated as to become assets, not liabilities, to a democratic society.’”); *accord infra* note 80 and accompanying text (discussing state partnerships with parents to protect children).

51. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 428 (1983). “Legal custody includes the ‘right to the care, custody [and] control . . . of [the child] . . . [and] the duty to . . . provide food, clothing, training, shelter, medical care and education’” *Id.* at 427 n.21 (quoting CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR FOSTER FAMILY SERVICES 21 (1974)).

52. DANIEL L. HATCHER, THE POVERTY INDUSTRY 17 (2016). Ironically, the king used this power benevolently toward some vulnerable populations, but he exploited the children of the landed gentry by imposing wardships and selling marriage rights for his financial gain of their estates. *Id.* at 18.

53. *Id.* at 18–19.

54. *Id.* at 19.

1. The Disproportionate Removal of the Poor

Some scholars have argued that modern-day foster care is merely a descendant of the English poor laws.⁵⁵ Indeed, as people came to view dependency and neglect as “one and the same,” they dubbed the foster care system “the family law of the poor.”⁵⁶ Colonial America also had poor laws; if a child’s indigent parents could not care for him, he was indentured as an apprentice until adulthood.⁵⁷ Likewise, in the first half of the 19th century, poor houses and children’s institutions tended to the children whom the state removed from their impoverished families’ homes.⁵⁸ Many of these poor houses required children to “work for their keep” in conditions that more closely resembled a reformatory than a home.⁵⁹

Although the term “neglect” officially replaced “poverty” as the legal basis for removing children from their homes in the latter half of the 19th century, people still equated neglect with poverty.⁶⁰ For example, private humane societies, such as the Society for the Prevention of Cruelty to Children, organized to rescue dependent, neglected, and abused children.⁶¹ They removed children from their homes and placed them in institutional care or informally boarded them with other families.⁶² Yet, in the Society for the Prevention of

55. Garrison, *supra* note 51, at 433–34 (citing, inter alia, Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status, Part I*, 16 STAN. L. REV. 257, 262 (1964)); see also *supra* note 23 and accompanying text.

56. PELTON, *supra* note 22, at xiii.

57. Garrison, *supra* note 51, at 434 & n.55, 438.

58. *Id.* at 435.

59. *Id.* at 439–40.

60. *Id.* at 435.

61. PELTON, *supra* note 22, at xi. The New York Society, established in 1875, was the first of its kind. COMM. ON THE HISTORY OF CHILD-SAVING WORK, NAT’L CONFERENCE OF CHARITIES AND CORR., HISTORY OF CHILD SAVING IN THE UNITED STATES 199 (Patterson Smith 1971) (1893) [hereinafter HISTORY OF CHILD SAVING]. The Society attempted to rescue children from “abuses such as kidnapping, abduction, abandonment, improper guardianship, begging, the use of unnatural violence, the endangering of the health or morals, etc.” *Id.*

62. PELTON, *supra* note 22, at xi–xii; Garrison, *supra* note 51, at 436 & n.60, 438. “The term implied that foster parents, almost always nonrelatives, were reimbursed for the expenses of caring for dependent children in private households under the assumption that the arrangement was temporary.” Patrick A. Curtis,

Cruelty to Children's first ten months of operation, only twenty of the seventy-two "cruelty" cases it processed involved any form of cruelty while more than forty were cases of poverty.⁶³

To these child rescuers, a child needed saving from his environment, including his parents.⁶⁴ The humane societies presumed that the parents would not have been in poverty—and the children not neglected—but for the parents' "moral defects."⁶⁵ Thus, the "rationale for removing dependent children from their parents was to prevent the children from being contaminated by their parents' moral defects."⁶⁶ That is how Charles Loring Brace could carry out the infamous Orphan Trains that scooped up the poor children from the city streets and carried them by rail to families in the Midwest, sometimes only to be used as family laborers much like the indentured Colonial children.⁶⁷ To Brace and the Children's Aid Society, moving the children of "unfortunates" into their new western environments allowed them to overcome their "inherited tendencies" and become "industrious and decent members of society."⁶⁸

Introduction: The Chronic Nature of the Foster Care Crisis, in THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE 1, 2–3 (Patrick A. Curtis et al. eds., 1999). The Children's Aid Society of Pennsylvania paid "two dollars per week in the country and three dollars in the city." HISTORY OF CHILD SAVING, *supra* note 61, at 145–46.

63. Garrison, *supra* note 51, at 435 n.58.

64. *Id.* at 435–36.

65. PELTON, *supra* note 22, at xiii.

66. *Id.*

67. See DeLeith Duke Gossett, *If Charity Begins at Home, Why Do We Go Searching Abroad? Why the Federal Adoption Tax Credit Should Not Subsidize International Adoptions*, 17 LEWIS & CLARK L. REV. 839, 842 (2013). Brace and the Children's Aid Society "found safe country homes for 84,318 poor city children." RIIS, *supra* note 31, at 248. "The average age of children sent to Western homes in 1891 by the Children's Aid Society was nine years and forty days, and in 1892 nine years and eight months, or an average of nine years, four months, and twenty days for the two years." *Id.* at 249. For many years, "few children but those who were able to help about the farm could be sure of a welcome . . . as a cheap substitute for a paid servant." *Id.* Interestingly, the placing out societies of Pennsylvania had a similar program, but instead of sending children out west, they sent boys to Delaware and New Jersey. HISTORY OF CHILD SAVING, *supra* note 61, at 148. However, the boys, aged twelve to eighteen, were mainly indentured and expected to work and it became "altogether too much of a business." *Id.*

68. RIIS, *supra* note 31, at 252. Equating poverty with the need for reform,

Although the neglect laws supported temporary removal and theoretically allowed for the eventual reunion of a child with his family, the parents generally could not demonstrate their fitness to care for their children ever again.⁶⁹ In other words, the parents were still poor and “[t]he same attitude that encouraged the child’s ‘rescue’ from his natural parents discouraged his return.”⁷⁰

2. Family Preservation Amidst Foster Care Expansion

In the late 1890s, policy began shifting toward a “preference for preserving the original family over removing children from the family.”⁷¹ The famous 1909 White House Conference on the Care of Dependent Children formalized that policy.⁷² At that time, approximately 170,000 children were living in some form of out-of-home care.⁷³ Led by President Theodore Roosevelt, conference participants endorsed actual family preservation when possible over

Often they are brought to its office by parents who are unable to take care of them. Provided they are young enough, no questions are asked. . . . That it comes from among bad people is the best reason in the world why it should be put among those that are good. That is the one care of the Society. Its faith that the child, so placed, will respond, and rise to their level, is unshaken after these many years. Its experience has knocked the bugbear of heredity to all finders.

Id. at 250. Brace viewed poor children as a burden on society:

These boys and girls, it should be remembered, will soon form the great lower class of our city. They will influence elections; they may shape the policy of the city; they will assuredly, if unreclaimed, poison society all around them. They will help to form the great multitude of robbers, thieves, and vagrants, who are now such a burden upon the law-respecting community.”

HISTORY OF CHILD SAVING, *supra* note 61, at 3.

69. Garrison, *supra* note 51, at 437. Parents were often unable to escape poverty, which had served as a proxy for neglect. *Id.* (citing MASS. SOC. FOR THE PREVENTION OF CRUELTY TO CHILD., SEVENTH ANNUAL REPORT (1887), *quoted in* DEPENDENT CHILDREN, *infra* note 76, at 208).

70. Garrison, *supra* note 51, at 437.

71. PELTON, *supra* note 22, at xii.

72. *Id.* at xii; Adler, *supra* note 50, at 14.

73. Curtis, *supra* note 62, at 4. Of those, “95,000 [resided] in orphanages and institutions for the developmentally disabled, 50,000 in foster care, and 25,000 in juvenile correctional facilities.” *Id.*

“the approximation of family life,” or the fostering of children by boarding them out.⁷⁴ Recognizing the role that poverty played in neglect,⁷⁵ the conference specifically denounced poverty as a reason to break up a home.⁷⁶ Indeed, one of the first case histories of children in institutions concluded that the “great majority” of children “never should have been removed from their homes in the first place.”⁷⁷ This companion piece to a Pittsburgh survey of poverty conducted around 1910 “represent[ed] the first published evidence of longstanding problems in child welfare, such as the failure to preserve family connections.”⁷⁸

In response, many states adopted “mothers’ pensions” in the first two decades of the 20th century to assist single mothers in remaining at home with their children.⁷⁹ By partnering in this way with the parent, the state hoped to support “a small group of needy children [that] would remain in their own homes and be so supervised

74. Adler, *supra* note 50, at 14. See also PELTON, *supra* note 22, at xii.

75. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 161 (1994). “Beginning in the Progressive era the new social science theory that poverty was not a symptom of a corrupt or criminal character encouraged the state to provide financial support to poor parents to maintain their children rather than removing them.” *Id.* See also HENRETTA ET AL., *supra* note 43, at 615 (referencing journalist Robert Hunter’s landmark 1904 study, *Poverty*). “Social scientists . . . argued that unemployment and crowded slums were not caused by individual laziness and ignorance, as elite Americans had long believed. . . . [but] resulted from ‘miserable and unjust social conditions.’” *Id.*

76. DEPENDENT AND NEGLECTED CHILDREN: WHITE HOUSE CONFERENCE ON CHILD HEALTH AND PROTECTION (D. Appleton-Century Co. ed., 1933), *reprinted in* 2 CHILDREN AND YOUTH: SOCIAL PROBLEMS AND SOCIAL POLICY 3 (Robert H. Bremer et al. eds., Arno Press 1974) [hereinafter DEPENDENT CHILDREN]. “Home life is the highest and finest product of civilization. It is the great moulding force of mind and . . . should not be broken up for reasons of poverty.” *Id.*

77. Curtis, *supra* note 62, at 4. The study, conducted by Florence Lattimore, included statistics and case studies of children living in institutions in Allegheny County, Pennsylvania. *Id.*

78. *Id.*

79. Adler, *supra* note 50, at 14–15 (citing THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS 424–79 (1992) (“observing inter alia that pensions were adopted in spite of resistance from Catholic and Protestant charities, which tended to favor removal of neglected children from their homes”)). See also DEPENDENT CHILDREN, *supra* note 76, at 10–12.

and educated as to become assets, not liabilities, to a democratic society.”⁸⁰ But akin to the moralism that Brace and the humane societies exhibited toward the poor, the pensions came with “suitable home” provisos that required certain conditions upon receipt.⁸¹ For example, only mothers who attended church and refrained from using tobacco were deemed “proper and competent custodians of their children” and thus eligible to receive financial support.⁸²

The juvenile courts assumed responsibility for child welfare in the early decades of the 20th century.⁸³ While the notion of family preservation guided their determinations, the juvenile courts accepted “much of the function from the humane societies” and “removed large numbers of dependent and neglected children” from their homes.⁸⁴ Most states did not have county boards of child welfare until 1929,⁸⁵ and the greater needs of the country subsumed child welfare in the wake of the Depression and the New Deal.⁸⁶ Public assistance during that time was “both an income-maintenance and child welfare measure,” which continued to rely on “suitable home” requirements to ensure that homes that received assistance were not substandard.⁸⁷

The model for today’s public foster care system originated with the Social Security Act of 1935.⁸⁸ “That legislation authorized the first

80. Adler, *supra* note 50 (quoting WINIFRED BELL, AID TO DEPENDENT CHILDREN 5 (1965)).

81. *Id.*

82. *Id.* (quoting WINIFRED BELL, AID TO DEPENDENT CHILDREN 5 (1965)).

83. PELTON, *supra* note 22, at xi. Juvenile courts were first organized in 1899. DEPENDENT CHILDREN, *supra* note 76, at 24.

84. PELTON, *supra* note 22, at xi–xii. “About sixteen hundred institutions and four hundred child placing agencies cared for approximately two hundred and eighty-seven thousand children in 1930, nearly two-fifths of the children being in foster families.” DEPENDENT CHILDREN, *supra* note 76, at 26.

85. PELTON, *supra* note 22, at xi. Of the 400 child protection agencies that existed in 1933, most were local agencies that spent more time on the protection of animals than children. DEPENDENT CHILDREN, *supra* note 76, at 24–25.

86. Adler, *supra* note 50, at 16. “At the same time scientific concepts of proper child raising provided the state with authority to remove children from their homes when parental behavior fell below acceptable standards.” MASON, *supra* note 75, at 161.

87. Adler, *supra* note 50, at 16.

88. Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301–1397mm).

federal grants for child welfare and served as an impetus for states to establish child welfare agencies and to develop local programs to deliver child welfare services.”⁸⁹ Participating states received a set amount of money and Congress apportioned the remaining funds among participating states based on their relative share of the rural population.⁹⁰ This served as the basic model until the 1950s when child welfare transformed into the federally mandated, but state-funded, child-welfare agency model that remains standard.⁹¹

While public agencies overtly voiced a preference for family-preservation policies during that time period, they still devoted 72% of their child welfare budgets to funding foster care services for children removed from their homes.⁹² Indeed, states continued to allocate the majority of their child welfare budgets to foster care services until the late 20th century.⁹³ As society gained a better understanding of the social and structural causes of poverty, child welfare determinations began requiring more evidence of a child’s neglect—beyond a mere display of poverty—before removing a child from his home.⁹⁴ Even

89. Gossett, *supra* note 67, at 842–43. The Act authorized an annual allotment of \$1.5 million

for the purpose of enabling the United States, through the Children’s Bureau, to cooperate with State public welfare agencies in establishing, extending, and strengthening, especially in predominantly rural areas, public [child] welfare services . . . for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent.

Social Security Act § 521, 49 Stat. at 633. In 1967, amendments to the Social Security Act moved Title V to Subpart I of Title IV-B, Child Welfare Services. Social Security Amendments of 1967, Pub. L. No. 90-248, §§ 240, 241, 81 Stat. 821, 911–17 (1967).

90. Social Security Act § 521, 49 Stat. at 633. The base amount was \$10,000. *Id.*

91. Social Security Act Amendments of 1958 § 601, Pub. L. 85-840, 72 Stat. 1013, 1052–55 (1958); PELTON, *supra* note 22, at xi. Congress increased funding to \$17 million, and raised each state’s base amount to \$60,000. Social Security Act Amendments of 1958 § 601, 72 Stat. at 1052–53. Instead of the remainder being apportioned by rural population, the funds were distributed based on a state’s proportion of children under 21 and per capita income. § 601, 72 Stat. at 1053.

92. PELTON, *supra* note 22, at xiii.

93. *Id.*

94. *Id.*

these efforts, however, did not prevent the disproportionate removal of impoverished children from their homes.⁹⁵

The 1960s ushered in public awareness of child abuse that led to further federal legislation and increased the “demand” for foster care services.⁹⁶ In 1961, the federal government took on a traditional state role because it learned that some states were denying welfare payments to children in some homes the states deemed “unfit.”⁹⁷ Accordingly, the federal government began providing payment assistance to states to provide for the care of children whom a child welfare agency had placed outside of their homes.⁹⁸ Congress gave the states an ultimatum: they could either continue the welfare payments while making efforts to improve home conditions, or they could place children in out-of-home care.⁹⁹ This federal funding ensured that the states had the necessary resources to protect the children in either situation.

By 1962, Congress had permanently included foster care as part of child welfare services under the 1962 Public Welfare Amendments.¹⁰⁰ Additionally, Dr. C. Henry Kempe’s widely read

95. *Id.*

96. *Id.* at xiii–xiv; Curtis, *supra* note 62, at 4; Mark Courtney, *Foster Care and the Costs of Welfare Reform*, in *THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE* 132–33 (Patrick A. Curtis et al. eds., 1999).

97. Courtney, *supra* note 96, at 129.

98. *Id.* This was instituted under Title IV-A of the Social Security Act, which was then known as Aid to Dependent Children (“ADC”), and later became Aid to Families with Dependent Children (“AFDC”). *Id.* Title IV-E of the Social Security Act has authorized separate foster care funding since 1980. *See infra* note 123 and accompanying text. From 1980 through 1996, before welfare reform, a portion of foster care expenditures could be reimbursed to the States based on a child’s eligibility for the AFDC program. In 1996, Congress overhauled AFDC in favor of Temporary Assistance to Needy Families (“TANF”). *See infra* notes 203–205 and accompanying text. States are reimbursed in-kind for the federal share of foster care expenses based on pre-welfare reform AFDC criteria. *Id.*

99. Courtney, *supra* note 96, at 129.

100. *See generally* Public Welfare Amendments of 1962, Pub. L. 87-543, 76 Stat. 172. Congress defined “Child Welfare Services” as:

public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children, (2) protecting and caring for homeless, dependent, or neglected

Journal of the American Medical Association article, "The Battered-Child Syndrome,"¹⁰¹ suggested that many "accidents" presented by children were, in fact, products of abuse.¹⁰² In reaction, states expanded their child welfare departments to accommodate investigations resulting from new mandatory reporting requirements that compelled citizens to report their suspicions of child abuse and neglect.¹⁰³ Reports of abuse surged,¹⁰⁴ and the number of children removed from their homes dramatically increased.¹⁰⁵ Alarmed at the

children, (3) protecting and promoting the welfare of children of working mothers, and (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible or, where needed, the provision of adequate care of children away from their homes in foster family homes or day-care or other child-care facilities.

Public Welfare Amendments of 1962 § 102(d)(2), 76 Stat. at 184. Congress also increased funding for Child Welfare Services from \$25 million to \$30 million for 1969 and increasing incrementally to \$50 million in 1969 and thereafter. § 102(a), 76 Stat. at 182. The state base amount was raised to \$70,000, with additional funds reserved for day care. § 102(c)(1)(B), 76 Stat. at 183.

101. C. Henry Kempe, M.D., et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS'N 17-24 (July 7, 1962). "Dr. Kempe's rediscovery of child abuse in a medical context has been held responsible for contributing to the 'myth of classlessness' that surrounded child welfare policy in the 1960s and 1970s." Adler, *supra* note 50, at 17 (quoting BARBARA NELSON, MAKING AN ISSUE OF CHILD ABUSE 15 (1984)).

102. Adler, *supra* note 50, at 17.

103. PELTON, *supra* note 22, at xiv. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, which provided federal funds to states for the reporting, investigating, and treating of child abuse. *See generally* Pub. L. No. 93-247, 88 Stat. 4 (codified as amended in scattered sections of 42 U.S.C. (1998)). The Act provided federal funding for states for the prevention and treatment of child abuse. Curtis, *supra* note 62, at 4-5. To be eligible for the funds, the Act "required professionals, usually physicians and teachers, to report child abuse and neglect to local child welfare agencies, resulting in a dramatic impact on the out-of-home care system." *Id.*; *see also* Courtney, *supra* note 96, at 132-33.

104. *See* Adler, *supra* note 50, at 18. The number of reports grew from 10,000 in 1967 to nearly 670,000 in 1976. *Id.*; Courtney, *supra* note 96, at 133. The number of reports grew exponentially, to 1.2 million in 1980 and to 3.1 million in 1995, a 258.3% increase. Curtis, *supra* note 62, at 10.

105. PELTON, *supra* note 22, at xiv. "By 1977 the number of children living in out-of-home care had reached approximately 502,000, almost 8 children out of every 1,000 in the U.S. population." Curtis, *supra* note 62, at 5.

number of removals, critics began arguing that the “foster care system had gotten out of hand.”¹⁰⁶

The “foster care crisis” refers to “the reality that too many children [were] staying in foster care for too long a time.”¹⁰⁷ Even though family preservation has remained the stated ideal for at least a century, courts have yet to recognize a constitutional right to family preservation with the biological family.¹⁰⁸ But because family preservation has remained the ideal, agencies for many years did not invest in making quality foster care placements.¹⁰⁹ Instead, they warned foster parents not to become too attached to their “charges,” even though the agencies did little to maintain the child’s connection to the biological family.¹¹⁰ Children in foster care were thus “left to drift in long term temporary placements with little hope of any stable parental relationship.”¹¹¹ Foster care “drift” became synonymous with the “shepherding of children through a series of foster homes,

106. PELTON, *supra* note 22, at xv.

107. Curtis, *supra* note 62, at 1. The author noted that the “real crises are, among other factors, how child welfare is funded by the federal government, poverty, the growing number of single-mother households, the misuse of alcohol and other drugs, homelessness, and the ever-increasing number of children reported as victims of child abuse and neglect.” *Id.*

108. Deseriee A. Kennedy, *Children, Parents & The State: The Construction of a New Family Ideology*, 26 BERKELEY J. GENDER L. & JUST. 78, 119 & n.241 (2011). Scholars have conflicting views on the constitutional rights of children to preserve bonds with their natural families. *Id.* (first citing Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, “Bad” Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL’Y & L. 176, 177–78 (2004) (“A child may have an interest in preserving a relationship with a neglectful parent.”), and then citing James G. Dwyer, *A Taxonomy of Children’s Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 976 (2003) (“Only one of the nine Justices in *Troxel* [*v. Granville*, 530 U.S. 57 (2000)], Justice Stevens, contended that children, too, have a (as-yet-unrecognized) constitutionally protected ‘liberty interest’ of some sort in connection with their relationships.”)).

109. Garrison, *supra* note 51, at 441.

110. *Id.* This attitude was altered somewhat by the 1973 publication of *Beyond the Best Interests of the Child*, which advocated that continuity of care by foster parents could serve as the basis for terminating the rights of biological parents. *Id.* at 446–49 (citing J. GOLDSTEIN, A. FREUD, & A. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 7, 98–100 (2d ed. 1981)).

111. *Id.* at 442.

sometimes for years, while state agencies attempt[ed] to provide the services necessary to enable safe family reunification.”¹¹² Children sometimes endured frequent and multiple placements with no permanent home until they eventually “aged out” of the system.¹¹³

Child welfare advocates argued that long periods of time spent in various foster care placements threatened a child’s “future ability to form attachments.”¹¹⁴ Supporting studies showed that the absence of “a continuous, permanent relationship” to a parental figure caused lack of attachment and contributed to “higher rates of juvenile delinquency and psychological disturbance.”¹¹⁵ Thus, advocates began advancing permanency as the solution to the foster care drift.¹¹⁶

III. THE PERMANENCY MOVEMENT

The permanency planning movement was a direct result of the burgeoning numbers of children in foster care.¹¹⁷ Defined as when “a child has a safe, stable, custodial environment in which to grow up, and a lifelong relationship with a nurturing caregiver,” permanency became the focus of child welfare reformers.¹¹⁸ Beginning in the

112. Adler, *supra* note 50, at 2, 18 (citing Garrison, *supra* note 51, at 426–42; Roger J.R. Levesque, *The Failures of Foster Care Reform: Revolutionizing the Most Radical Blueprint*, 6 MD. J. CONTEMP. LEGAL ISSUES 1, 5 (1995); Jill Sheldon, Note, *50,000 Children are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 76–80 (1997)). The 1959 Maas and Engler national survey of foster care first studied the problem of foster care drift. Garrison, *supra* note 51, at 442 n.87 (citing HENRY S. MAAS & RICHARD E. ENGLER JR., CHILDREN IN NEED OF PARENTS 422 (1959)).

113. See Adler, *supra* note 50, at 18; Gossett, *supra* note 67, at 846–49.

114. Adler, *supra* note 50, at 2 (citing David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 144–50 (1992)).

115. Garrison, *supra* note 51, at 424.

116. Adler, *supra* note 50, at 2.

117. PELTON, *supra* note 22, at xv.

118. DONALD N. DUQUETTE & MARK HARDIN, CHILDREN’S BUREAU, DEP’T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT’S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN I-3 (1999), <https://archive.org/stream/guidelinesforpub00duqu#page/n13/mode/2up>.

1980s, Congress passed “a series of legislative measures aimed at helping those children ‘in the system’” in an attempt to address the permanency issues facing children in foster care.¹¹⁹ Rather than trying to “fix” foster care, these laws focused on getting as many children as possible out of foster care. The first law focused on increasing efforts to keep children with their biological families.¹²⁰ For the children who could not return to their biological families, the second law required speedier termination of parental rights to free the child for adoption.¹²¹ Instead of providing a clear policy directive, however, the resulting pieces of legislation have produced two competing—and opposing—child welfare goals: family reunification versus the “expeditious termination of parental rights.”¹²²

A. *The Adoption Assistance and Child Welfare Act*

In 1980, Congress enacted the Adoption Assistance and Child Welfare Act (“Child Welfare Act”)¹²³ and “institutionalized the goal of permanency in child placements.”¹²⁴ The Child Welfare Act promoted efforts to keep children with their biological family members when possible; in other words, “permanency” meant emphasizing family preservation.¹²⁵ The “psychological parent” theory, which

119. Gossett, *supra* note 67, at 840.

120. Garrison, *supra* note 51, at 442. *See infra* Section III.A; *see also generally* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in various sections of 42 U.S.C.).

121. Garrison, *supra* note 51, at 443. *See infra* Section III.B; *see also generally* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

122. Adler, *supra* note 50, at 3; *see also* Courtney, *supra* note 96, at 139 (noting the conflict between the two positions).

123. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in various sections of 42 U.S.C.). This law “transferred the foster care program from Title IV-A to a new Title IV-E.” Courtney, *supra* note 96, at 133.

124. Frances A. DellaCava et al., *Adoption in the U.S.: The Emergence of a Social Movement*, 31 J. SOC. & SOC. WELFARE 141, 153 (2004).

125. Adler, *supra* note 50, at 3; *see also* Madelyn Freundlich, *Expediting Termination of Parental Rights: Solving a Problem or Sowing the Seeds of a New Predicament?*, 28 CAP. U.L. REV. 97, 98 (1999) (noting a three-pronged approach by the Child Welfare Act: “to prevent the unnecessary placement of children in foster

posited that children suffered emotional damage when the state disrupted the parent-child relationship, influenced states and agencies to seek permanent placement for children with families—preferably biological but also adoptive—over long periods in foster care.¹²⁶ The Child Welfare Act mandated that juvenile courts hold a “dispositional hearing” within eighteen months of a child’s placement into state custody to discuss the child’s “future status.”¹²⁷ Periodic follow-ups determined whether the temporary placement continued to be in the child’s best interest.¹²⁸ Further, the Child Welfare Act mandated that states and their agencies make “reasonable efforts” to prevent a child’s removal from the child’s biological family, or if a placement out of the home became necessary, that they make “reasonable efforts” to reunify the child with the child’s biological family.¹²⁹

Congress, however, did not define what “reasonable efforts” toward reunification meant. While the Child Welfare Act called on each state to create a plan for the Secretary of Health and Human Services to approve before the state could receive federal foster-care funding, this undefined term allowed the states to exercise discretion when determining what efforts to reunite children with their biological families were “reasonable.”¹³⁰ This led to inconsistent placement decisions; one federal court even held that the vagueness of the term rendered it unenforceable.¹³¹ Further, although federal regulations

care; reunify families whenever possible; and reduce the time that children spend in foster care by encouraging adoption when reunification [is] not possible.”).

126. Adler, *supra* note 50, at 19–20.

127. Child Welfare Act § 101, 94 Stat. at 511.

128. Adler, *supra* note 50, at 7 (citing Patricia Tate Stewart, *Keeping Families Together/Reasonable Efforts*, 12 DEL. LAW. 9 (1994)).

129. Child Welfare Act, 94 Stat. at 503 (codified as amended at 42 U.S.C. § 671).

130. Adler, *supra* note 50, at 5 (citing Herring, *supra* note 114, at 143; Jessica A. Graf, Note, *Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement*, 30 SUFFOLK U. L. REV. 81, 100 (1996)). Regarding state plans, the Child Welfare Act merely maintained that, “in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home.” Child Welfare Act § 101(a)(1), 94 Stat. at 503 (codified as amended at 42 U.S.C. § 671(a)(15)(B)(i)–(ii)).

131. See *Del A. v. Roemer*, 777 F. Supp. 1297, 1308 (E.D. La. 1991).

listed “services that states *might* include in their plans, such as day care, vocational rehabilitation, homemaker services, and substance abuse counseling,” neither the Child Welfare Act nor any other federal regulations actually required the states to provide any of the services.¹³²

Meanwhile, even as states struggled to comply with reunification efforts, homelessness and HIV cases contributed to sending more children into the foster care system.¹³³ Still, because federal authorities discouraged the termination of parental rights unless the relationship put the child in peril, the prevailing regime often left children to languish in the system in hopes of family reunification.¹³⁴ The Child Welfare Act placed no time limits on a child’s length of stay in foster care.¹³⁵ Thus, the hearings could go on indefinitely with no resolution—and no permanency—until the child ultimately aged out of the system, never having been reunited with the biological family before reaching adulthood.¹³⁶

Ultimately, the legislation failed to produce the results that Congress sought; more than 552,000 children remained in the system nearly two decades after the Child Welfare Act’s passage, and for at least 100,000 of those children, reunification with their families was not an option.¹³⁷ This occurred despite the fact that Congress also

132. Adler, *supra* note 50, at 5–6 (citing 45 C.F.R. § 1357.15(e)(2)(1995)).

133. *Id.* at 23. By 1995, 483,000 children were living in some form of foster care: “49% were living in family foster care, 23% in kinship care, 15% in residential group care, 1.7% in therapeutic foster care, and 11.3% in other facilities such as emergency shelters and psychiatric hospitals.” Curtis, *supra* note 62, at 4.

134. Adler, *supra* note 50, at 3, 7 (citing 143 CONG. REC. S12,668-73 (daily ed. Nov. 13, 1997) (statement of Sen. Chuck Grassley)). The average length of stay in foster care under the Child Welfare Act was three years. *Id.*

135. *Id.*

136. *Id.*

137. U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: FINAL ESTIMATES FOR FY 1998 THROUGH FY 2002 1, 8 (2006), http://archive.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.pdf; see also HILLARY RODHAM CLINTON, LIVING HISTORY 433 (2003); Steven M. Cytryn, Note, *What Went Wrong? Why Family Preservation Programs Failed to Achieve Their Potential*, 17 CARDOZO J.L. & GENDER 81, 92–94 (2010). Through the Omnibus Budget Reconciliation Act of 1986, Congress amended Title IV-E of the Social Security Act to add section 479, which called for the creation of the Advisory Committee on Adoption and Foster Care Information, to develop an adoption and foster care data collection system. Raymond Collins, *The Adoption and Foster Care*

created the Family Preservation and Support Services Program to provide additional support to families that might prevent the removal of children from their homes.¹³⁸ This program provided funding for community-based programs aimed at preventing child abuse and neglect in an effort to strengthen families.¹³⁹ But it was too little, too late. After some reunification efforts led to highly publicized incidents of child abuse and unrepaired family dysfunction,¹⁴⁰ advocates pushed for a re-examination of the Child Welfare Act and its requirements.¹⁴¹

Speaking before the Senate, Senator Mike DeWine expressed that the law, as written, required judges and caseworkers and others involved with children in foster care to use efforts to reunite families that were “families in name only.”¹⁴² He noted that the “law has been misinterpreted in such a way that no matter what the particular circumstances of a household may be, it is argued that the State must make reasonable efforts to keep that family together and to put it back

Analysis and Reporting System: Implications for Foster Care Policy, in *THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE* 47 (Patrick A. Curtis et al. eds., 1999). That led to the creation of the Adoption and Foster Care Analysis and Reporting System (“AFCARS”), which “collect[s] comprehensive, uniform, case-level information on all children in the foster care system nationwide” and reports that information to the Children’s Bureau of the U.S. Department of Health and Human Services. *Id.* at 45. It aimed to provide “[r]eliable and in-depth longitudinal information about foster care . . . to illuminate the interrelationships of social policies and programs, such as the relationship between child abuse and neglect, on the one hand, and social interventions, such as welfare reform, family preservation, and foster care, on the other hand.” *Id.*

138. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993) (amending Title IV-B of the Social Security Act).

139. *Id.* § 13711(a)(1).

140. In 1995, a high-profile murder served as one of the triggers for reform. Telephone Interview with Maureen Flatley, Child Welfare Expert (Nov. 30, 2017). Elisa Izquierdo had been living with her aunt until a legal services attorney became involved and forced the mother to take her back. *Id.* The mother had pleaded for them not to return the child, because the mother suffered from schizophrenia. *Id.* Tragically, Elisa was murdered by her mother after she was reunited with her mother against her mother’s will. *Id.*

141. Adler, *supra* note 50, at 3 (citing, e.g., James M. McCoy, *Reunification—Who Knows the Child’s Best Interests?*, 53 J. MO. BAR. 40 (1997); Alexandra Dylan Lowe, *New Laws Put Kids First: Reforms Stress Protection Over Preserving Families*, 82 AM. B. ASS’N J. 20 (1996).

142. Adler, *supra* note 50, at 6 (quoting 143 CONG. REC. S12,668-69 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine)).

together if it falls apart.”¹⁴³ He argued, however, that “too often, reasonable efforts, as outlined in the [Child Welfare Act], have come to mean unreasonable efforts.”¹⁴⁴ It was time for change.¹⁴⁵

B. The Adoption and Safe Families Act

To reduce the number of children in foster care and encourage adoption into permanent homes without needless delay, Congress passed the Adoption and Safe Families Act of 1997.¹⁴⁶ Begun as a bipartisan effort between First Lady Hillary Clinton and Wendy’s Founder Dave Thomas, this was the first major federal child welfare legislation since the passage of the Child Welfare Act in 1980.¹⁴⁷ Signed into law by President Clinton, the Adoption and Safe Families Act aimed to remedy some of the permanency problems that the Child Welfare Act left unresolved.¹⁴⁸ Still in force, the Adoption and Safe Families Act makes the health and safety of the child the “paramount concern”¹⁴⁹ and lists “permanency ‘in a safe and stable home . . . [as] the goal for all children who enter foster care.’”¹⁵⁰ Additionally, it

143. 143 CONG. REC. S12,668-69 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine)).

144. Adler, *supra* note 50, at 6 (quoting 143 CONG. REC. S12,668-69 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine)).

145. *Id.*

146. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.); see John D. Rockefeller IV, *Foreword* to THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE ix (Patrick A. Curtis et al. eds., 1999).

147. Gossett, *supra* note 67, at 844-46. Hillary Clinton shepherded the Adoption and Safe Families Act through the legislative process, meeting with U.S. Department of Health and Human Services officials, private foundation executives, and the public; it passed with a strong bipartisan vote and support by “[b]oth the conservative Heritage Foundation and the liberal Children’s Defense Fund.” Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 637 (1999).

148. Rockefeller, *supra* note 146, at ix.

149. Adoption and Safe Families Act of 1997 § 101(a), 111 Stat. at 2116 (codified as amended at 42 U.S.C. § 671(a)(15)) (“[I]n determining reasonable efforts to be made with respect to a child . . . the child’s health and safety shall be the paramount concern.”); see also §§ 201, 301-02; Rockefeller, *supra* note 146, at ix.

150. Kennedy, *supra* note 108, at 104 (quoting Ross, *supra* note 108, at 178); see also Rockefeller, *supra* note 146, at ix.

seeks to achieve permanency through “encouraging more adoptions out of the foster care system . . . [t]he development of best practice guidelines for expediting the termination of parental rights . . . [and] the development of special units and expertise in moving children toward adoption as a permanency goal.”¹⁵¹ Indeed, through his *Adoption 2002* initiative, signed simultaneously with the Act’s passage, President Clinton sought to double the number of children adopted from foster care within five years.¹⁵²

The enactment of the Adoption and Safe Families Act signaled a “fundamental shift in the philosophy of child welfare, from a presumption that the chief consideration ought to be returning a child to his biological parents.”¹⁵³ While the Adoption and Safe Families Act retained the “reasonable efforts” wording found in the Child Welfare Act,¹⁵⁴ Congress clarified that these “reasonable efforts” no longer require the state to return a child to its family under certain

151. Adoption and Safe Families Act of 1997 § 201, 111 Stat. at 2124 (codified as amended at 42 U.S.C. § 673b(i)(2)(A), (C) (1997)). Further, “the Secretary [of HHS] may, directly or through grants or contracts, provide technical assistance to assist States and local communities to reach their targets for increased numbers of adoptions and, to the extent that adoption is not possible, alternative permanent placements, for children in foster care.” *Id.*

152. Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), <http://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html>. Through an executive memorandum, President Clinton initiated *Adoption 2002* as an accompaniment to the Adoption and Safe Families Act, to be implemented and managed by the United States Department of Health & Human Services. *Id.*; Curtis, *supra* note 62, at 12. The initiative sought to increase adoptions from 27,000 to 54,000 within five years. Curtis, *supra* note 62, at 12.

153. CLINTON, *supra* note 137, at 434 (quoting Judith Havemann, *Congress Acts to Speed Adoptions; Foster Care Overhaul Shifts Focus From Biological Ties to Health, Safety*, WASH. POST, Nov. 14, 1997, at A17). Before the Act passed on the Senate floor by a voice vote, Senator John H. Chafee (R-RI), expressed, “We will not continue the current system of always putting the needs and rights of the biological parents first. Although that is a worthy goal . . . ‘it’s time we recognize that some families simply cannot and should not be kept together.’” Seelye, *supra* note 152 (quoting Rhode Island Senator John H. Chaffee).

154. Adoption and Safe Families Act of 1997 § 101, 111 Stat. at 2116; Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, § 471(a)(15), 94 Stat. 501, 503 (1980). However, states and agencies are allowed to define what serves as “reasonable efforts.” Kennedy, *supra* note 108, at 104.

occurrences.¹⁵⁵ For instance, if a parent subjects a child to aggravated abuse or injurious felony assault, murders a child, or the state involuntarily terminated his or her parental rights to another child, the Adoption and Safe Families Act does not require a state to make reasonable efforts to reunify the family.¹⁵⁶

Further, the Adoption and Safe Families Act imposes timelines on reunification efforts.¹⁵⁷ Congress revamped the timing of the Child Welfare Act's dispositional hearings and mandated that "permanency hearings" occur on a much faster timetable: no later than twelve months of removal from the child's home, or within thirty days if a court determined that the law or circumstances did not require

155. See Adoption and Safe Families Act of 1997 § 101(a).

156. Specifically, the Act provided that:

[R]easonable efforts . . . shall not be required . . . if a court of competent jurisdiction has determined that—

(i) the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse);

(ii) the parent has—

(I) committed murder . . . of another child of the parent;

(II) committed voluntary manslaughter . . . of another child of the parent;

(III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or

(IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent;

or

(iii) the parental rights of the parent to a sibling have been terminated involuntarily.

Id.

157. Adoption and Safe Families Act of 1997 §§ 103(b), 201(a), 111 Stat. at 2118–19, 2122–25.

reasonable efforts.¹⁵⁸ The purpose of the permanency hearing is to develop a “permanency plan,”¹⁵⁹ toward which parents can show they are making “significant measurable progress” and “diligently working toward reunification.”¹⁶⁰

While these permanency hearings are occurring, the Adoption and Safe Families Act incorporates “concurrent planning” as a strategy to place children in adoptive homes sooner than the Child Welfare Act required.¹⁶¹ Concurrent planning replaced “the more traditional ‘sequential planning’ where one permanency plan, such as reunification, is ruled out before an alternative plan is developed.”¹⁶² Instead, even as the child welfare agency makes reasonable efforts toward reuniting children in foster care with their biological family, it simultaneously considers other permanency plans, such as adoption.¹⁶³ In effect, the Adoption and Safe Families Act requires the fast-tracking of adoptions, as states must decide within twelve months of a child entering foster care “whether [the] foster child’s case will end in family reunification or termination of parental rights.”¹⁶⁴ Further, the

158. Adoption and Safe Families Act of 1997 § 101(a), (b), 111 Stat. at 2116–17. The Child Welfare Act only mandated periodic hearings to consider the child’s status. *See* Child Welfare Act § 101(a)(1), 94 Stat. 500, 511 (1980).

159. Adoption and Safe Families Act of 1997 § 302, 111 Stat. at 2128–29. The Adoption and Safe Families Act considers four outcomes: (1) the child is returned to the parent, (2) the parental rights are terminated, and the child is placed for adoption, (3) the child is referred for legal guardianship, and (4) the child is placed in an alternative living arrangement. *Id.*

160. Adler, *supra* note 50, at 8–9 (quoting Foster Care Eligibility Reviews and Child and Family Services State Plan Reviews, 63 Fed. Reg. 50,058, 50,072 (Sept. 18, 1998)).

161. *See* Adoption and Safe Families Act of 1997 § 201(a) 111 Stat. at 2124.

162. DeLeith Duke Gossett, *Take Off the [Color] Blinders: How Ignoring the Hague Convention’s Subsidiarity Principle Furthers Structural Racism Against Black American Children*, 55 SANTA CLARA L. REV. 261, 298 (2015) [hereinafter Gossett, *[Color] Blinders*] (citing U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD. BUREAU, CHILD WELFARE INFO. GATEWAY, CONCURRENT PLANNING: WHAT THE EVIDENCE SHOWS 1–2 (2012), https://www.childwelfare.gov/pubPDFs/concurrent_evidence.pdf).

163. *Id.*

164. Adler, *supra* note 50, at 8. “At the point that a decision is reached not to reunite, the child can immediately move forward to adoption.” Elizabeth Bartholet, *International Adoption: The Human Rights Issues*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 107 (Michele Goodwin ed., 2010).

Adoption and Safe Families Act requires that children “be held for no longer than fifteen of the prior twenty-two months”¹⁶⁵ before the state terminates parental rights,¹⁶⁶ to reduce a child’s waiting time for what some adoption advocates call a “real home.”¹⁶⁷ The goal was that “the ‘sweeping changes in federal adoption law would speed up the placement of thousands of foster children . . . into safe and permanent homes’ rather than being held on an ongoing basis in the foster care system” with unrealized hopes of reunification.¹⁶⁸ Advocates hoped that encouraging the expeditious termination of parental rights would allow children to move away from “foster limbo”¹⁶⁹ with their biological family and toward permanency through adoption.¹⁷⁰

To accomplish its objectives, the Adoption and Safe Families Act established federal incentives for the states that moved children from foster care into adoption.¹⁷¹ It re-authorized the Family Preservation and Support Services Program but renamed it the Promoting Safe and Stable Families Program, omitting the reference

165. Academics whom lawmakers consulted during the process arbitrarily picked the fifteen to twenty-two months’ time period. Flatley, *supra* note 140. They agreed that the time period should be less than twelve months, but not more than two years. *Id.*

166. Adoption and Safe Families Act of 1997 § 103(a)(3), 111 Stat. at 2118 (codified as amended at 42 U.S.C. § 675(5)(E) (2012)) (noting that the State “shall file a petition to terminate the parental rights of the child’s parents” if the child has spent fifteen of the last twenty-two months in foster care). States could make exceptions to these mandatory timelines if the child was placed with a relative, or another permanency route was planned, or the State had not yet implemented planned services. *Id.*

167. Elizabeth Bartholet, *International Adoption: The Child’s Story*, 24 GA. ST. U. L. REV. 333, 376 (2007) [hereinafter Bartholet, *Child’s Story*].

168. Gossett, *supra* note 67, at 845–46 (quoting CLINTON, *supra* note 137, at 434).

169. “Many children found themselves ‘in limbo,’ not able to return home, but not yet free to be adopted.” Gossett, *supra* note 67, at 845 n.32 (citing Deb Riechmann, *Child’s Status in Foster Care Limbo Highlights Rising National Dilemma*, L.A. TIMES (May 18, 1997), http://articles.latimes.com/1997-05-18/news/mn-60153_1_most-foster-care).

170. Bartholet, *Child’s Story*, *supra* note 167, at 359.

171. Adoption and Safe Families Act of 1997 § 201, 111 Stat. at 2122. The “Adoption and Safe Families Act of 1997 . . . for the first time provided financial incentives for states to move children from foster care to permanent adoptive homes.” CLINTON, *supra* note 137, at 365.

to family preservation.¹⁷² This revised program requires states to develop an outcome-based incentive funding system to evaluate improved performance.¹⁷³ As an incentive, states receive “adoption incentive payments” for each adoption out of foster care.¹⁷⁴ Beginning at \$4,000, the bonuses may increase depending on an increasing annual number of adoptions.¹⁷⁵ To receive the maximum amount of Title IV-E funds, states must terminate parental rights within fifteen months of the child’s entry into foster care.¹⁷⁶ If an agency can change a child’s plan from family reunification to adoption, it can also claim additional federal funds for adoption administrative and training costs.¹⁷⁷ Following the adoption, the adoptive parents may also receive adoption bonuses, and federal adoption subsidies are available for “special needs” children, a label that applies to most children in foster care.¹⁷⁸

172. Adoption and Safe Families Act of 1997 § 305, 111 Stat. at 2131.

173. Adoption and Safe Families Act of 1997 § 203, 111 Stat. at 2126–27. Renamed the Adoption and Legal Guardianship Incentive Payments program, Congress has reauthorized the program several times since establishing it as part of the Adoption and Safe Families Act. *See, e.g.*, Preventing Sex Trafficking and Strengthening Families Act of 2014 § 202(c)(2), Pub. L. No. 113–83, 128 Stat. 1919, 1936.

174. *See* HATCHER, *supra* note 52, at 72; *see also* Adoption and Safe Families Act of 1997 § 201, 111 Stat. at 2122–25 (setting forth requirements for receiving adoption incentive payments).

175. Adoption and Safe Families Act of 1997 § 201, 111 Stat. at 2123. Each state is assigned a baseline number of expected adoptions based on population. § 201, 111 Stat. at 2122. Each bonus is then multiplied by the percentage that the state has exceeded its baseline number of adoptions. § 201, 111 Stat. at 2123. Specifically, “\$4,000 [will be] multiplied by the amount (if any) by which the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year.” *Id.* States receive an additional \$2,000 for each adoption of a child with special needs. *Id.*; *see also* Press Release, HHS Awards First Adoption Bonuses (Sept. 24, 1999) [hereinafter HHS Press Release], <http://www.hope4kids.org/HHSBonuses.htm>.

176. Adoption and Safe Families Act of 1997 § 305, 111 Stat. at 2131; HATCHER, *supra* note 52, at 72.

177. HATCHER, *supra* note 52, at 72.

178. 42 U.S.C. § 673(a)(1)(A)–(B) (2012). Parents receive the bonuses until the child turns 18, or 21 “if the State determines that the child has a mental or physical handicap which warrants the continuation of assistance.” 42 U.S.C. § 673(a)(4)(A)(i)(II) (2012). *See also* Gossett, *supra* note 67, at 881 (“States broadly defined special needs to include those children that are hard to place or have a barrier

On September 24, 1999, nearly two years after President Clinton signed the Adoption and Safe Families Act into law, the U.S. Department of Health and Human Services (“HHS”) awarded \$20 million in adoption bonuses to thirty-five states that increased the number of children adopted from foster care.¹⁷⁹ At a White House celebration with President and Mrs. Clinton, HHS Secretary Donna Shalala reported that the President’s Adoption 2002 initiative resulted in more children obtaining permanent homes and pronounced, “We are well on the way to meeting the President’s goal of doubling the number of children adopted from foster care by the year 2002.”¹⁸⁰ Within five years of its enactment, the number of children adopted from foster care more than doubled, exceeding President Clinton’s goals.¹⁸¹

While initially considered a success because of the increased numbers of adoptions from foster care, the Adoption and Safe Families Act has also engendered criticism. In the haste to terminate parental rights, proponents of the program failed to account for a downturn in adoptive homes.¹⁸² States speedily severed children’s legal ties with their biological families without securing corresponding adoptions into the hoped-for “real homes.”¹⁸³ Thus, children continued to languish in

to placement, such as older children, minority children, sibling groups, and those who have medical conditions or physical, mental, or emotional disabilities.”).

179. HHS Press Release, *supra* note 175.

180. *Id.*

181. CLINTON, *supra* note 137, at 434. “Foster care adoption increased 78 percent from 1996 to 2000.” Kennedy, *supra* note 108, at 118 n.234 (quoting *Foster Care Facts*, EVAN B. DONALDSON ADOPTION INST., <https://www.adoptioninstitute.org/old/research/fostercare.php> (last visited May 16, 2018)).

182. Mark E. Courtney & Anthony N. Maluccio, *The Rationalization of Foster in the Twenty-First Century*, in *THE FOSTER CARE CRISIS: TRANSLATING RESEARCH INTO POLICY AND PRACTICE* 230–31 (Patrick A. Curtis et al. eds., 1999). Some of this is perhaps explainable to the desire of couples to conceive biological children rather than adopting. “The rapid growth of fertility treatments, surrogate parenting, and now the brave new world of genetic engineering is likely to put downward pressure on the demand for adoption by couples and individuals who in the past would have had no other option.” *Id.*; see also Gossett, *supra* note 67, at 851–53 (identifying the rise of international adoption during this time period as an additional factor in the lack of adoptions from American foster care).

183. Kennedy, *supra* note 108, at 106; see also Bartholet, *Child’s Story*, *supra* note 167 and accompanying text.

the foster care system without permanent homes, the very problem that the Adoption and Safe Families Act set out to address.¹⁸⁴

IV. THE PROFIT-DRIVEN FOSTER CARE INDUSTRY

In addition to amending Title IV-B of the Social Security Act, which provides federal funding to the states for social services,¹⁸⁵ the Adoption Assistance and Child Welfare Act also created Title IV-E to establish subsidies and reimbursements for state foster care expenditures.¹⁸⁶ This was the first time Congress provided federal funds as an incentive to encourage the exodus of children from foster care.¹⁸⁷ These incentives, however, also created what Professor Daniel L. Hatcher calls the “poverty industry . . . a partnership of government and private companies,” that has worked to exploit poor families.¹⁸⁸ Children are only eligible for Title IV-E funds if they are removed from impoverished homes that are eligible to receive welfare assistance.¹⁸⁹ Thus, these financial incentives encourage states to remove children from the poor as the states look to increase their “penetration rate”—the percentage of children in foster care who come from poor families and are eligible for the Title IV-E dollars—to

184. See Kennedy, *supra* note 108, at 106.

185. The Adoption and Assistance and Child Welfare Act “altered the funding mechanism for foster care by retaining its entitlement status but linking it to Title IV-B (Child Welfare Services) spending in order to encourage states to use their IV-B monies for prevention of out-of-home placement and rehabilitation of families.” Courtney, *supra* note 96, at 133. Title IV-B provides funds for both in-home and out-of-home child welfare services. Curtis, *supra* note 62, at 11. “Services may include case management, counseling, or specialized services such as treatment for alcohol and other drugs.” *Id.*

186. 42 U.S.C. §§ 601, 670–679a (2012); 63 Fed. Reg. 50,058, 50,061 (1998); see also Adler, *supra* note 50, at 20–21 (discussing the creation of the Adoption Assistance and Child Welfare Act). “From 1986 to 1995 Title IV-E federal foster care expenditures grew from \$605 million to \$3.05 billion, a hefty 504% increase.” Curtis, *supra* note 62, at 11. The federal government has granted Title IV-E waivers to states to allow the use of federal foster care funds to subsidize kinship care, a guardianship arrangement with extended family. Courtney & Maluccio, *supra* note 182, at 229.

187. HHS Press Release, *supra* note 175.

188. HATCHER, *supra* note 52, at 1–2, 7.

189. *Id.* at 70; Curtis, *supra* note 62, at 11.

subsidize state coffers.¹⁹⁰ In effect, states are implementing strategies that private contractors developed to maximize revenue *from*—not *for*—foster care children.¹⁹¹

A. Poverty's Impact on Foster Care

Child poverty is an increasing problem in the United States, yet poverty is often “overlooked in the analysis of foster care.”¹⁹² Near the time of the Adoption and Safe Families Act’s passage, half of all children living in out-of-home care came from families eligible for welfare.¹⁹³ From 1980 to 1995, “the number of children living in poverty increased 27.8%, from 11.5 million to 14.7 million.”¹⁹⁴ Also during that time frame, the number of single-mother households increased by 39.7%—from 6.3 million to 8.8 million households—and were twice as likely to experience poverty as other family structures.¹⁹⁵ Since the new millennium, the child poverty rate has grown by over 20%;¹⁹⁶ while children only account for 23% of the total population, they make up 33% of the total population of people living in poverty.¹⁹⁷

190. HATCHER, *supra* note 52, at 1–2, 70–71. Family and juvenile court judges have expressed their concerns that tying federal resources to “poverty level limits financially encourages children from the poorest of the poor families to be placed in foster care.” *Id.* at 70 (quoting NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, CHILD WELFARE FINANCE REFORM POLICY STATEMENT (2011)).

191. *Id.* at 72.

192. Curtis, *supra* note 62, at 6; FIRST FOCUS CAMPAIGN FOR CHILDREN, CHILD POVERTY REDUCTION ACT OF 2015 (2015) [hereinafter FIRST FOCUS], <https://campaignforchildren.org/wp-content/uploads/sites/2/2015/05/Child-Poverty-Reduction-Act-of-20151.pdf>.

193. Curtis, *supra* note 62, at 6.

194. *Id.* at 6–7.

195. *Id.* at 8. “Approximately 16.3% of all households are living below federal poverty guidelines, compared to 41.5% of single-mother households and 19.7% for single-father households.” *Id.*

196. FIRST FOCUS, *supra* note 192. In 2000, 16.2% of children lived below the poverty line. *Id.* By 2014, 21.1% of children, or 15.5 million, lived in poverty. *Id.*; HATCHER, *supra* note 52, at 13. Professor Hatcher argues that the poverty line is likely outdated because it is based on how much money families spent on food in the 1950s. HATCHER, *supra* note 52, at 13.

197. FIRST FOCUS, *supra* note 192.

During his tenure, President Ronald Reagan began demonizing poverty and blaming the poor for their own circumstances.¹⁹⁸ He blamed public assistance programs for “the breakdown of the American family” and derided those receiving help as “welfare queens.”¹⁹⁹ As a result, policymakers lauded personal responsibility over social responsibility for poverty, and they justified child removal as serving “as a warning to other poor people to manage their Aid to Families with Dependent Children (AFDC) grants better, to get married, to not have too many children, etc.”²⁰⁰ Indeed, some commentators have noted that it was not coincidental that Congress passed the Adoption and Safe Families Act—with its “calls for personal responsibility, child rescue, and family values”—the year after it enacted the Personal Responsibility and Work Opportunity Reconciliation Act of 1996²⁰¹ (“Personal Responsibility Act”).²⁰²

Making good on President Clinton’s promise four years earlier to “end welfare as we know it,” the Personal Responsibility Act sought to dismantle federal welfare through “personal responsibility” and “work opportunity” and sever aid to adult recipients who were not working within two years of receiving aid.²⁰³ The Personal

198. Adler, *supra* note 50, at 21, 23.

199. *Id.* at 21 (quoting LeROY ASHBY, *ENDANGERED CHILDREN: DEPENDENCY, NEGLECT, AND ABUSE IN AMERICAN HISTORY* 166–67 (1997)).

200. PELTON, *supra* note 22, at xiv–xv; Adler, *supra* note 50, at 23.

201. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). Congress passed the legislation, and President Clinton signed it into law in August 1996. Collins, *supra* note 137, at 46. The Personal Responsibility Act suggested a list of requirements, such as “keep[ing] school age children in school, immuniz[ing] children, and attend[ing] parenting and money management classes” on Individual Responsibility Agreement forms. Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 246 (2000).

202. Adler, *supra* note 50, at 23 & n.184. In 1994, Newt Gingrich infamously commented that poor people’s children should be consigned to orphanages. Michael Wines, *Team in Place, Gingrich Comes Out Slugging*, N.Y. TIMES (Dec. 7, 1994), <https://www.nytimes.com/1994/12/07/us/team-in-place-gingrich-comes-out-slugging.html>. Several years later, he said that poor children should work as janitors. Jordan Weissmann, *Newt Gingrich Thinks School Children Should Work as Janitors*, THE ATLANTIC (Nov. 21, 2011), <https://www.theatlantic.com/business/archive/2011/11/newt-gingrich-thinks-school-children-should-work-as-janitors/248837/>.

203. Section 103 stated the purpose of the Act as:

Responsibility Act focused its ire on the negative consequences of out-of-wedlock births and the related aid to single parents.²⁰⁴ But the Personal Responsibility Act ignored the “working poor”: those parents who face “the paucity of quality jobs available to those on public assistance and the obstacles faced by the working poor in sustaining employment,” such as lack of adequate and affordable child care.²⁰⁵

Modern welfare policy continues to demonize poor parents. There is “no assumption of parental fitness; to the contrary, there is a presumption that children in welfare families are in need of state supervision.”²⁰⁶ And attitudes about welfare and poverty die slowly. For example, Senate Democrats introduced the Child Poverty Reduction Act of 2015 (“Child Poverty Reduction Act”) to institute a federal goal of reducing child poverty.²⁰⁷ A broad initiative, the Child Poverty Reduction Act sought to halve the number of children living

(a) IN GENERAL.—The purpose of this part is to increase the flexibility of States in operating a program designed to—

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.

Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 103, 110 Stat. at 2113 (codified at 42 U.S.C. § 601 (2012)); Peter Pitegoff & Lauren Breen, *Affordable Housing and Community Development Law: Child Care Policy and the Welfare Reform Act*, 2 AM. BAR ASS’N 1 (1998), https://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_index/pitegoff.html.

204. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.). Section 101 specifically found, “The increase in the number of children receiving public assistance is closely related to the increase in births to unmarried women.” Personal Responsibility and Work Opportunity Reconciliation Act of 1996 § 101(5)(C), 110 Stat. at 2110; Pitegoff & Breen, *supra* note 203.

205. Pitegoff & Breen, *supra* note 203.

206. Brito, *supra* note 201, at 246.

207. Child Poverty Reduction Act of 2015, S. 2224, 114th Cong. (2015). Senators Bob Casey (D-PA), Tammy Baldwin (D-WI), and Sherrod Brown (D-OH) sponsored the legislation. *See id.*

in poverty within ten years and to eliminate child poverty completely in twenty years.²⁰⁸ To achieve this, the Child Poverty Reduction Act would have created a Federal Interagency Working Group on Reducing Child Poverty that would have worked in conjunction with the National Academy of Sciences to develop a plan and accompanying legislation aimed at reaching its target.²⁰⁹ The bill, however, failed to attract any bipartisan support and died in committee.²¹⁰ The same senators recently reintroduced the bill in the current session, but it looks likely to suffer the same fate as before.²¹¹

Studies show a connection between poverty and foster care; the greater number of “dependent and neglected children . . . rescued” from their families are those from the poorest families.²¹² For example, the Third National Incidence Study of Child Abuse and Neglect showed that poor families are much more likely to experience maltreatment.²¹³ But rather than physical or mental abuse, neglect is the most common form of maltreatment, which often results directly from poverty.²¹⁴ Indeed, neglect is the stated reason for 61% of

208. *Id.*

209. *Id.*

210. *See S. 2224 (114th): Child Poverty Reduction Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/s2224> (last updated Oct. 29, 2015). The companion House bill, *Child Poverty Reduction Act of 2015*, H.R. 2408, 114th Cong. (2015), also died in committee. *H.R. 2408 (114th): Child Poverty Reduction Act of 2015*, GOVTRACK, <https://www.govtrack.us/congress/bills/114/hr2408> (last updated May 19, 2015).

211. *Child Poverty Reduction Act of 2017*, S. 1630, 115th Cong. (2017); *Child Poverty Reduction Act of 2017*, H.R. 3381, 115th Cong. (2017). Govtrack shows both pieces of legislation as having a 1% chance of passage. *S. 1630: Child Poverty Reduction Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/s1630> (last updated July 25, 2017); *H.R. 3381: Child Poverty Reduction Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr3381> (last updated July 25, 2017).

212. HATCHER, *supra* note 52, at 14, 167; *see also* PELTON, *supra* note 22, at xiv.

213. HATCHER, *supra* note 52, at 14, 167. “[C]hildren in families with annual incomes below \$15,000 were much more likely to experience maltreatment than those in families making \$30,000 or more—not just twice as much, but 22 times more likely.” *Id.* at 14.

214. *Id.* at 14, 167; Courtney, *supra* note 96, at 143. A federal report showed that 78.3% of maltreated children experienced neglect as opposed to abuse.

children entering foster care.²¹⁵ Thus, for the most part, poverty has simply been “equated with neglect,” which allows the circumstances of poverty to serve as grounds for a child’s removal.²¹⁶ As Professor Hatcher bluntly stated, “[f]oster children don’t come from rich families.”²¹⁷

B. The Poverty Industry: Fiscal Federalism and Foster Care Incentives

Since 1961, the federal government has provided assistance to states to care for children in foster care; in many cases, however, states are diverting funds from their human services agencies to add to the state’s general revenues rather than providing for the children’s individual needs.²¹⁸ Fiscal federalism is “an economic theory that seeks cooperation between states and the federal government in financing and administering government programs for the vulnerable.”²¹⁹ It reflects a partnership of strengths, as the federal government is in a superior position to provide fiscal capacity and economic stability, while the state and local governments understand how best to distribute those funds to their regional citizenry.²²⁰ In its purest form, this theory expects that “federal, state, and local governments will each seek to maximize the social welfare of their respective populations.”²²¹ Indeed, states have contracted with revenue consultants to find ways to maximize the federal funding while minimizing state expenditures.²²² Professor Hatcher argues, however, that federalism in the child welfare realm ignores the effect

HATCHER, *supra* note 52, at 14. “Children in poor families are forty-four times as likely to experience some form of neglect.” *Id.*

215. 2016 AFCARS REPORT, *supra* note 16, at 2. Neglect accounted for the removal of 166,679 children. *Id.* The next largest category for removal was parental drug use at 34%, which affected 92,107 children. *Id.*; *see also infra* note 273 and accompanying text.

216. HATCHER, *supra* note 52, at 14, 167; Adler, *supra* note 50, at 13 (quoting Garrison, *supra* note 51, at 435).

217. HATCHER, *supra* note 52, at 167.

218. *Id.* at 27; *see also supra* notes 97–100 and accompanying text.

219. HATCHER, *supra* note 52, at 33.

220. *Id.* at 26, 28, 33.

221. *Id.* at 33.

222. *Id.* at 35.

of the poverty industry, an interconnectedness between governments, child welfare agencies, and private contractors that place their own interests over the best interests of the children they serve.²²³

With the guidance of large private contractors,²²⁴ child welfare agencies are using foster care children as a source of funds and appropriating the children's individual resources to maximize their profits.²²⁵ The Adoption and Safe Families Act provides a federal matching grant initiative using Title IV-E funds.²²⁶ Through this grant-in-aid program, the federal government matches state expenditures for foster care services and reimburses administrative costs.²²⁷ But while the federal funds are considered income to the individual children, the children do not receive the funds personally; rather, the states receive the payments directly.²²⁸ Thus, these revenue consultants encourage states to create penetration-rate strategies focused on increasing the number of children eligible for funding entering foster care.²²⁹ Describing the children as "units," these companies use "data match

223. *Id.* at 1–2, 7, 28–29, 55–56.

224. *Id.* at 28–31, 46, 82–92. One such contractor, MAXIMUS, Inc., started in the founder's basement in 1975; the 13,000-employee company is now one of the world's leading private contractors for government health and human services programs. *Id.* at 28. The company has also been the subject of U.S. Department of Justice Investigations, however, and it agreed to pay \$30.5 million for "causing knowingly incorrect Medicaid claims as a revenue maximization consultant for the District of Columbia in which foster children were used to claim federal Medicaid funds." *Id.* at 30. Notwithstanding this settlement, MAXIMUS has won subsequent revenue maximization contracts with other governments, including its previous prosecutor, the U.S. Department of Justice. *Id.*

225. *Id.* at 26–27.

226. *Id.* at 29, 34, 171. Under Title IV-E, states receive federal reimbursement for a portion of the costs expended for children's care in foster care. *See supra* notes 123, 186 and accompanying text.

227. HATCHER, *supra* note 52, at 35, 58. Administrative costs have not only equaled, but have exceeded, expenditures on actual child maintenance services in 22 states. *Id.* at 71. This money goes to pay state employees, overhead costs, statewide computer systems, and other expenses broadly related to child welfare. *Id.*

228. *Id.* at 35, 59.

229. *Id.* at 46, 71–72. A Texas Comptroller report showed that the state's child welfare administrative costs were only 20% of its expenditures for services, and suggested that the state increase this amount so that it could claim more federal dollars. *Id.* at 71–72.

algorithms” and “predictive analytics” to “data mine” and prioritize foster care children in terms of maximization of profit.²³⁰

Foster care agencies are collecting over a quarter of a billion dollars each year from foster care children’s assets, such as their Social Security disability and survivor benefits.²³¹ With help from the private contractors, agencies have developed strategies to identify which foster care children may be eligible for benefits.²³² They then apply—without telling the child—to become the child’s representative payee and directly receive the federal payments.²³³ Despite the fact that federal regulations rank state agencies as the *least* preferred of all possible payees, the federal government nevertheless almost always chooses the agencies as the representative payees for foster care children.²³⁴ This imposes a fiduciary responsibility upon the agency and triggers federal regulations that compel the agency to use the

230. *Id.* at 4, 65, 68.

231. *Id.* at 2, 80. Supplemental Security Income (“SSI”) is available to low-income children with a qualifying disability to offset the direct and indirect costs associated with the disability. *Id.* at 80. “Those children must have marked and severe functional limitations and usually must live in a household with low income and few assets.” *Eliminate Supplemental Security Income Benefits for Disabled Children*, CONG. BUDGET OFFICE (Dec. 8, 2016), <https://www.cbo.gov/budget-options/2016/52183>. The Congressional Budget Office estimated in 2016 that 15% of SSI recipients were disabled children under age 18 who received an average monthly benefit of \$664. *Id.* Old-Age, Survivors, and Disability Insurance (“OASDI”), is a “survivor benefit” intended to help eligible children whose parents have died or become disabled. HATCHER, *supra* note 52, at 80. Both types, SSI and OASDI, are considered as income belonging to the child. *Id.* SSI benefits reduce child poverty rates, but families with disabled children are typically more susceptible to economic hardship than other families because of both direct and indirect costs associated with children’s disabilities.

232. HATCHER, *supra* note 52, at 2, 80. To maximize revenue, agencies have also appropriated survivor benefits from children whose parents have died, Veteran’s Assistance benefits from those whose parents were in the military, and Medicaid payments from those eligible for health services and related administrative costs. *Id.* at 73–74, 79–80. Several states will take other income and property from the foster children, including cash, stocks, bonds, investments, real estate, household goods and other personal effects, and even burial spaces. *Id.* at 76–77.

233. *Id.* at 73, 79–80.

234. *Id.* at 80–81, 94.

child's funds "only for the use and benefit of" and in a manner "to be in the best interests of" the individual child.²³⁵

Further, the Social Security Act makes certain that representative payees understand the fiduciary nature of the relationship and "that benefits belong to the beneficiary and are not the property of the payee."²³⁶ The federal regulations propose more: the representative payees must ensure that the benefits are "conserved or invested on behalf of the beneficiary" if they are not needed for the children's "current maintenance or reasonably foreseeable needs."²³⁷ To comply with both directives, states should put the monies—which is the children's income—in trust funds for the children. This would safeguard some funds for the children who are aging out of foster care as they enter adulthood on their own.²³⁸ This would give them a "safety net" to mitigate against some of the negative life outcomes these children are otherwise almost sure to face.²³⁹

These agencies, however, are using their payee status to take the children's benefits and use them to offset the costs of foster care.²⁴⁰ They point to another federal regulation that allows the payee to use funds for "current maintenance" needs, including costs "incurred in obtaining food, shelter, clothing, medical care, and personal comfort items."²⁴¹ The foster care agencies argue that because they spend state money for foster care expenses, they should be able to use the children's income for reimbursement of those costs.²⁴² As Professor Hatcher argues, however, because "states are already legally required

235. *Id.* at 80–81. "The fiduciary role is clear: Representative payees should assess the various options for how to use the child's money and decide what is best for the child based on the child's individualized circumstances." *Id.* at 81.

236. *Id.* at 107.

237. *Id.* at 81–82; *see also* 20 C.F.R. § 416.645(a) (2017).

238. *See* HATCHER, *supra* note 52, at 97.

239. Gossett, *supra* note 67, at 847–49 (highlighting the results of the Midwest Study that showed a number of children that aged out of the system faced lives of homelessness, early parenthood, incarceration, and poverty).

240. HATCHER, *supra* note 52, at 81.

241. *Id.* "We will consider that payments we certify to a representative payee have been used for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance. Current maintenance includes cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items." 20 C.F.R. § 404.2040(a)(1) (2017).

242. HATCHER, *supra* note 52, at 81.

to provide and pay for foster care services for abused and neglected children . . . taking foster children's resources to pay the costs of their own care cannot possibly be in the children's best interests."²⁴³

In response to the contention that each state is responsible for providing foster care services to neglected and abused children, states argue that pooling funds provides better care to all children within the foster care system.²⁴⁴ The states contend that using the individual children's benefits to reimburse foster care costs helps the greater good: it allows them to help all foster care children with greater resources.²⁴⁵ Even if that is so, many agencies are not even keeping that revenue for the benefit of the children, as evidenced by the states' demand for inclusion of those funds in their larger general revenue budgets.²⁴⁶ The agencies use poor children as a funding source, and the states, in turn, use the agencies as a funding source.²⁴⁷ And even as they are confiscating the children's Social Security benefits, the states are reducing agency funding.²⁴⁸

The Social Security Administration's Office of Inspector General has noted that federal regulations explicitly prohibit states from using a child's Social Security benefits for reimbursement of the state's share of Title IV-E costs.²⁴⁹ Despite this, states continue applying the children's benefits unchecked as, to date, the courts are not addressing whether the foster care agencies, and not the children, are legally obligated to pay the costs of foster care.²⁵⁰ Although foster care exists to serve some of the most vulnerable members of our society, it has become an industry that exploits the very children in its care for financial profit.²⁵¹ As a National Center for Policy Analysis

243. *Id.* at 81.

244. *Id.* at 93.

245. *Id.*

246. *Id.* at 27, 93.

247. *Id.* at 27.

248. *Id.* at 27, 93.

249. *Id.* at 105.

250. *Id.* at 106.

251. *Id.* at 47. Concerned about the role consultants were playing with appropriating children's Medicaid benefits, Sen. Grassley commented to the secretary of the U.S. Department of Health and Human Services: "I am extremely disconcerted that Medicaid monies intended to benefit low-income Americans, pregnant women and poor children, may instead be lining the coffers of consulting firms." *Id.*

report concluded, “[t]he way the federal government reimburses States rewards a growth in the size of the program instead of the effective care of children.”²⁵²

C. Privatization for Profit: The Business of Foster Care and Lack of Sufficient Oversight

States also have increasingly contracted with private entities, not just for consultation, but to administer their foster care programs.²⁵³ National for-profit companies and nonprofit charities have formed a vast, national, private foster-care-provider network that consumes a portion of the annual multi-billion dollar budget the federal government spends to fund foster care.²⁵⁴ The state and local governments pay the companies to run all or part of their foster care systems for hundreds of thousands of children.²⁵⁵ No one knows, however, what proportion of these children received outsourced foster care services, because the federal Administration for Children and Families does not collect information from the states regarding the outsourcing of foster care services.²⁵⁶ Thus, statistics remain elusive as the law allows companies to operate with little monitoring or oversight.²⁵⁷

252. Nev Moore, *Adoption Bonuses: The Money Behind the Madness*, MASS. NEWS (May 27, 2000), <http://www.fact.on.ca/news/news0004/mn000427.htm>.

253. Aram Roston, *U.S. Senate Probing Privatized Foster Care*, BUZZFEED NEWS (Apr. 27, 2015, 1:39 PM), <https://www.buzzfeed.com/aramroston/us-senate-probing-foster-care>.

254. *Id.*

255. *Id.* “In 2015, 671,000 children in the United States were provided out-of-home foster care services.” STAFF OF U.S. S. COMM. ON FIN., 115TH CONG., AN EXAMINATION OF FOSTER CARE IN THE UNITED STATES AND THE USE OF PRIVATIZATION 1 (Comm. Print 2017) [hereinafter FOSTER CARE AND PRIVATIZATION]; see also Press Release, U.S. Senate Committee on Finance, Hatch, Wyden Respond to Significant Need to Improve Government Oversight Following Foster Care Investigation (Oct. 17, 2017) [hereinafter Hatch, Wyden Respond], <https://www.finance.senate.gov/chairmans-news/hatch-wyden-respond-to-significant-need-to-improve-government-oversight-following-foster-care-investigation>.

256. Roston, *supra* note 253.

257. *Id.*; see also FOSTER CARE AND PRIVATIZATION, *supra* note 255, at 11–12.

After several media reports of murder and sexual abuse in the homes these organizations run, however,²⁵⁸ Senate Finance Committee Chairman Sen. Orrin Hatch and ranking member Sen. Ron Wyden launched a bipartisan investigation in 2015.²⁵⁹ Sen. Wyden expressed his concern that “foster care has become a business” and demanded accountability for the country’s most vulnerable children.²⁶⁰ He stressed that lawmakers have an obligation to ensure the safety and well-being of children whom the state has removed from the custody of their parents for reasons of abuse or neglect.²⁶¹ Invoking its jurisdiction over federal child welfare and foster care funding, the Senate Finance Committee sought “the names of all private foster care providers, state inspection and accreditation practices, financial information, and child abuse rates.”²⁶² The inquiry particularly focused on the MENTOR Network, the for-profit company to which

258. Aram Roston & Jeremy Singer-Vine, *Fostering Profits*, BUZZFEED NEWS (Feb. 20, 2015, 11:52 AM), <https://www.buzzfeed.com/aramroston/fostering-profits>; see also Brian Joseph, *The Brief Life and Private Death of Alexandria Hill*, MOTHER JONES (Feb. 26, 2015, 11:00 AM), <https://www.motherjones.com/politics/2015/02/privatized-foster-care-mentor/>. The Senate Finance Committee initiated its investigation after the publication of these articles. Compare Roston & Singer-Vine, *supra*, and Joseph, *supra*, with FOSTER CARE AND PRIVATIZATION, *supra* note 255, at 276 (Letter from Orrin G. Hatch, Chairman, Senate Comm. on Fin., & Ron Wyden, Ranking Member, Senate Comm. on Fin., to Bruce F. Nardella, President, The MENTOR Network (June 17, 2015) [hereinafter Hatch & Wyden Letter]), <https://bit.ly/2vGy3qb>. “According to these media stories, at least six children have died while in the custody of foster parents recruited or trained by Mentor. Others have been abused, neglected and physically injured by foster parents who were wholly unqualified to hold such a prominent position of trust in the lives of these children.” Hatch & Wyden Letter, *supra*.

259. FOSTER CARE AND PRIVATIZATION, *supra* note 255; Roston, *supra* note 253; Hatch & Wyden Letter, *supra* note 258.

260. Elishah Oesch, *Foster Care Has Become a Business*, DONALDSON ADOPTION INST. (May 1, 2015), <https://www.adoptioninstitute.org/news/foster-care-has-become-a-business/>.

261. Roston, *supra* note 253.

262. *Id.* Title IV of the Social Security Act grants jurisdiction over the federal foster care and adoption programs to the Senate Finance Committee. Hatch & Wyden Letter, *supra* note 258; see also *supra* notes 88, 185–186 and accompanying text.

media accounts referred, to determine the national condition of foster care and its growing dependence on private providers.²⁶³

The two-year investigation, which included data from thirty-three states, recognized that “the need for specialized foster care services and the shortage of foster care homes in recent years has led to the privatization of many core foster care services.”²⁶⁴ The Committee’s findings, however, painted a dismal picture: negligent screenings of the foster care families led to the placement of children in homes with individuals who had criminal convictions or other warning signals that the companies overlooked or simply ignored, and approved foster care providers neglected, abused, and killed their foster children.²⁶⁵ The evidence persuaded the Senate Finance Committee that “the child welfare system does not always protect children” and that “profits are prioritized over children’s well-being.”²⁶⁶

The traumatic experiences that the children in these foster care placements faced convinced the Committee that Congress needed to improve the system in two ways: “ensure that foster care is an intervention used only when in the best interest of the child,” and “ensure that when foster care is necessary, that it is of the highest quality possible and promotes normalcy.”²⁶⁷ The investigation’s findings and resulting Senate Finance Committee recommendations also led to the introduction of the Child Welfare Oversight and Accountability Act of 2017.²⁶⁸ Sponsored by Sen. Hatch and Sen.

263. See generally FOSTER CARE AND PRIVATIZATION, *supra* note 255; Hatch, Wyden Respond, *supra* note 255. National Mentor Holdings, which trades on the New York Stock Exchange under the name Civitas Solutions, Inc., is the nation’s largest for-profit foster care company. Roston, *supra* note 253. It withdrew its business from Illinois after an inspector general report alleged the company maintained a “culture of incompetence.” *Id.*

264. FOSTER CARE AND PRIVATIZATION, *supra* note 255. Many states are reporting increasing entries into foster care due to opioids and a corresponding lack of foster care homes for the same reason. *Id.* at 12–13. See *infra* Section V.A.

265. *Id.* at 3.

266. *Id.* at 5.

267. *Id.*

268. S. 1964, 115th Cong. (2017); Kristian Foden-Vencil, *Wyden And Hatch Push Bill To Make Foster Care System More Accountable*, OPB.ORG, <https://www.opb.org/news/article/foster-care-accountability-bill-oregon-ron-wyden/> (last updated Oct. 17, 2017).

Wyden, the bill emphasized accountability for foster care providers and sought to strengthen federal oversight of state child welfare systems.²⁶⁹ It proposed a public website where the public could view government contracts with private foster care companies, including information on their nonprofit or for-profit status, and provided financial incentives for more children in foster care to be placed with family members.²⁷⁰ The Committee recommended to Congress, among other things, that Title IV-E funds be used to support “evidence-based services aimed at safely preventing foster care entries” in the first place.²⁷¹

V. CHILD RESCUE TRUMPS FAMILY PRESERVATION

The number of children entering foster care is increasing each year and is nearing the levels that existed when Congress enacted the

269. S. 1964. The bill also mandated performance reporting to the U.S. Department of Health and Human Services and attached penalties for a state’s noncompliance with federal child welfare requirements, including a private right of action for foster care children. S. 1964; Foden-Vencil, *supra* note 268. Further, the bill required collection of data surrounding a child’s death while in foster care to be compiled in an annual review of child fatalities. S. 1964.

270. Foden-Vencil, *supra* note 268. The bill amends Section 422(b) of the Social Security Act (42 U.S.C. § 622(b), as amended by section 7(c)(2)(A)) as follows:

- (20) provide that the State shall make publicly available on a website maintained by the State, in accordance with such procedures as are necessary to maintain the confidentiality and privacy of children and families provided assistance under this part or part E—
 - (A) any agreement with a private foster care provider (as defined in section 479A(e)) that relates to the provision of services to children under this part or part E; and
 - (B) with respect to each such provider with such an agreement, information as to whether the provider is a for-profit or not-for-profit entity.

S. 1964.

271. FOSTER CARE AND PRIVATIZATION, *supra* note 255, at 32.

Adoption and Safe Families Act.²⁷² The overwhelming majority of these children are entering foster care because of neglect.²⁷³ And each year, the number of children waiting in foster care for adoption because the state has terminated their biological family's parental rights increases, as does the number of children aging out of the system.²⁷⁴

A. Neglect and the Opioid Crisis

According to 2011 findings by the Centers for Disease Control and Prevention ("CDC"), forty people died every day in America due to opioid overdoses.²⁷⁵ By 2017, the CDC reported the number of deaths from opioid overdose had risen to 140 Americans daily.²⁷⁶ As

272. 2016 AFCARS REPORT, *supra* note 16, at 1; *see also* Press Release, Admin. for Children and Families, U.S. Dep't of Health & Human Servs., Number of Children in Foster Care Continues to Increase (Nov. 30, 2017) [hereinafter Number of Children] (quoting Jerry Milner, acting commissioner of the Administration on Children, Youth and Families and associate commissioner at the Children's Bureau), <https://www.acf.hhs.gov/media/press/2017/number-of-children-in-foster-care-continues-to-increase>. The number of children in foster care was 396,966 for FY 2012, 400,911 for FY 2013, 414,435 for FY 2014, 427,444 for FY 2015, and 437,465 for FY 2016. 2016 AFCARS REPORT, *supra* note 16, at 1.

273. 2016 AFCARS REPORT, *supra* note 16, at 2. Neglect accounted for 61% of the circumstances associated with a child's removal. *Id.* That category included 166,679 children. *Id.* The next highest reason was parental drug use at 34%, affecting 92,107 children. *Id.* The report notes that the figures are not precise, and the categories overlap. *Id.*; *see also supra* note 215 and accompanying text.

274. *See id.* at 1. The number of children awaiting adoption whose parental rights were terminated during the fiscal year was 58,240 in FY 2012, 58,681 in FY 2013, 61,012 in FY 2014, 62,093 in FY 2015, and 65,274 in FY 2016. *Id.*

275. Press Release, CDC, Prescription Painkiller Overdoses at Epidemic Levels: Kill More Americans than Heroin and Cocaine Combined (Nov. 1, 2011), https://www.cdc.gov/media/releases/2011/p1101_flu_pain_killer_overdose.html. Opioids include "narcotic pain medicines like hydrocodone (Vicodin), methadone, oxycodone (OxyContin), and oxymorphone (Opana)." *Id.* Drug Enforcement Administration data showed an increase of over 300% of these drug sales to pharmacies and health care providers since 1999. *Id.*

276. Greg Allen & Amita Kelly, *Trump Administration Declares Opioid Crisis a Public Health Emergency*, NPR (Oct. 26, 2017, 5:02 AM), <https://www.npr.org/2017/10/26/560083795/president-trump-may-declare-opioid-epidemic-national-emergency>. Some reports estimate that 64,000 people died in 2016 from drug use. Alex Mallin, *Despite Gains, Trump Administration Response to Opioid Crisis Still Faces Criticism*, ABC NEWS (Mar. 4, 2018, 1:08 PM),

lawmakers tightened the rules on prescription drugs, users increasingly turned to heroin, the illicit near-chemical mirror of opioid painkillers.²⁷⁷ Worse, fentanyl, “an opioid up to 100 times more powerful than morphine,” began turning up in the heroin supply.²⁷⁸ In late 2017, President Trump declared the “opioid crisis” a public health emergency.²⁷⁹ His critics, however, charged that his unfunded pronouncement did little to combat the epidemic and pushed him to declare a national emergency.²⁸⁰ While he did not go that far, Trump signed in early 2018 the congressional bipartisan budget deal that allocated \$6 billion over two years toward the drug crisis and proposed another \$13 billion to HHS over the next two years in his own budget.²⁸¹

<http://abcnews.go.com/Politics/gains-trump-administration-response-opioid-crisis-faces-criticism/story?id=53475960>.

277. Julia Lurie, *Children of the Opioid Epidemic Are Flooding Foster Homes. America Is Turning a Blind Eye.*, MOTHER JONES (July/Aug. 2017), <https://www.motherjones.com/politics/2017/07/children-ohio-opioid-epidemic/>; Andrew Joseph, *26 Overdoses in Just Hours: Inside a Community on the Front Lines of the Opioid Epidemic*, STAT (Aug. 22, 2016), <https://www.statnews.com/2016/08/22/heroin-huntington-west-virginia-overdoses/>.

278. Lurie, *supra* note 277; Joseph, *supra* note 277.

279. Allen & Kelly, *supra* note 276.

280. *Id.* Early in his presidency, Trump appointed New Jersey Gov. Chris Christie to head a newly created commission to study the opioid crisis. *Id.* The commission released an interim report that “called on the president to declare a national emergency under either the Public Health Service Act or the Stafford Act.” *Id.* Doing so “could free up funds for treatment, ensure wider access to the anti-overdose drug naloxone and improve monitoring of opioid prescriptions to prevent abuse.” *Id.* Despite his repeated pledges to follow the report’s suggestion, Trump simply called the crisis a public health emergency, which critics charged did not go far enough. *Id.* Part of the criticism levied against him was that he allowed fourteen months to pass “without a permanent ‘drug czar’ tasked with leading the Office of National Drug Control Policy (ONDCP), which in previous administrations was described as essentially a command center for coordinating agencies’ responses to drug control efforts.” Mallin, *supra* note 276.

281. Mallin, *supra* note 276; *but see* Lurie, *supra* note 277 (noting that Trump’s 2018 budget also proposes substantial cuts to programs related to foster care such as the Administration for Children and Families, the Substance Abuse and Mental Health Services Administration, and the Temporary Assistance for Needy Families program). He also overshadowed this news by his recommendation at a White House summit that the drug sellers should receive the death penalty. Mallin, *supra* note 276.

The opioid crisis has directly impacted the foster care system, as states remove children from the homes of parents whose struggles with addiction can render them unfit parents.²⁸² Indeed, the current epidemic has been compared to the earlier crack and meth crises, where large numbers of children entered child welfare systems that did not have the capacity to care for them.²⁸³ Over 270,000 children entered foster care last year—the highest number since 2008.²⁸⁴ Parental drug abuse accounted for 92,000 removals in 2016, although many substance abuse allegations are also reported as neglect, which comprises a much larger number.²⁸⁵ How many of those removals directly relate to opioids is uncertain; the data is imprecise as not all states capture the exact type of drug the parent uses.²⁸⁶ Even so, the Associated Press found a correlation between counties that suffered from a greater number of opioid prescriptions and deaths and those that had a greater number of children in foster care because of reasons related to drugs.²⁸⁷

282. Jake Harper, *Heroin, Opioid Abuse Put Extra Strain on U.S. Foster Care System*, NPR (Oct. 27, 2015, 4:28 PM), <https://www.npr.org/sections/health-shots/2015/10/27/451991809/heroin-opioid-abuse-puts-extra-strain-on-u-s-foster-care-system>; Shefali Luthra & Michael D. Regan, *Opioid Crisis Strains Foster Care System; Programs Aim to Keep Kids with Mom*, PBS NEWSHOUR (Aug. 20, 2017, 11:42 AM), <https://www.pbs.org/newshour/health/opioid-crisis-strains-foster-care-system-programs-aim-keep-kids-mom>.

283. Assoc. Press, *Opioid Crisis Straining Foster System as Kids Pried from Homes*, NBC NEWS (Dec. 12, 2017, 3:53 PM), <https://www.nbcnews.com/storyline/americas-heroin-epidemic/opioid-crisis-strains-foster-system-kids-pried-homes-n828831>; Luthra & Regan, *supra* note 282.

284. Compare 2016 AFCARS REPORT, *supra* note 16, at 1 (reporting 273,539 children entering foster care in 2016), with Harper, *supra* note 282 (reporting 265,000 children entering foster care in 2014).

285. 2016 AFCARS REPORT, *supra* note 16, at 2; Byard Duncan, *As Opioid Crisis Strains Foster Care, States Aren't Tracking the Damage*, REVEAL (Jan. 8, 2018), <https://www.revealnews.org/article/as-opioid-crisis-strains-foster-care-states-arent-tracking-the-damage/>; Lurie, *supra* note 277.

286. Duncan, *supra* note 285.

287. Assoc. Press, *supra* note 283; Duncan, *supra* note 285. “West Virginia has the highest rate of fatal drug overdoses of any state and the highest rate of babies born dependent on opioids among the 28 states that report data.” Joseph, *supra* note 277. Officials estimate that up to 10% of Huntington, West Virginia’s 50,000 residents use opioids improperly. *Id.* “Ohio also has one of the nation’s highest overdose rates. In 2016, at least 4,149 Ohioans died of drug overdose—a 36 percent

What is certain is that the current crisis is burdening an already overwhelmed foster care system.²⁸⁸ For example, annual foster care costs in Ohio have risen more than \$100 million since 2011 due to the dramatic increase in the number of children entering foster care.²⁸⁹ The state has pleaded for more foster families to accommodate the many children whom it has removed from their homes due to parental substance abuse.²⁹⁰ Between 2011 and 2016, Massachusetts's removal of more than 2,000 children from their homes increased the state's annual foster care budget by nearly \$68 million.²⁹¹ Since 2010, New Hampshire has removed twice as many children from their homes, and the number of child removals caused by substance abuse has nearly quadrupled.²⁹² In Indiana, the opioid epidemic has caused the number of children who are in need of foster care to more than double in the last three years.²⁹³ The state has increased its budget from \$793 million to more than \$1 billion and added more than 1,200 workers to keep pace with the demand.²⁹⁴ Indiana, Georgia, and West Virginia showed the largest one-year increase in their foster care populations, but many other states have also seen a dramatic increase in the number of foster care children because of parental drug abuse.²⁹⁵ For example, children

jump from the year before, according to the Columbus Dispatch. In 2015, 1 in 9 US heroin deaths occurred in Ohio.” Lurie, *supra* note 277.

288. Harper, *supra* note 282; Luthra & Regan, *supra* note 282.

289. Duncan, *supra* note 285.

290. *Id.*

291. *Id.* In 2016 alone, nearly 2,200 Massachusetts citizens died of opioid overdoses. *Id.*

292. *Id.* Between 2012 and 2016, the number of drug-exposed births tripled. *Id.*

293. Scott Simon, *The Foster Care System Is Flooded with Children of the Opioid Epidemic*, NPR (Dec. 23, 2017, 8:11 AM), <https://www.npr.org/2017/12/23/573021632/the-foster-care-system-is-flooded-with-children-of-the-opioid-epidemic>.

294. Assoc. Press, *supra* note 283. “Foster parent training sessions, once held monthly, are now weekly; advertising to attract new families has been ramped up. It takes at least three months to recruit, screen and train foster parents, but as soon as they get their state license, the need for help is so great they often receive an immediate call [for] ‘two or three children placed in their home.’” *Id.*

295. Assoc. Press, *supra* note 283; Duncan, *supra* note 285. “In 14 states, from New Hampshire to North Dakota, the number of foster kids rose by more than a quarter between 2011 and 2015, according to data amassed by the Annie E. Casey Foundation.” Lurie, *supra* note 277.

in Texas, Florida, Oregon, and other states have been forced to sleep in government buildings and cars because of the lack of foster homes.²⁹⁶

The strict time limits of the Adoption and Safe Families Act mandate that states terminate parental rights when the children have been in foster care for fifteen of the previous twenty-two months.²⁹⁷ In many cases, however, the drug-addicted parents cannot stay rid of the drugs long enough to have the children returned to them or to keep them once returned.²⁹⁸ Further, while the Adoption and Safe Family Act still retains the requirement that states make “reasonable efforts” at family reunification, judges say that the child’s safety should be more of a priority.²⁹⁹ With an opioid addiction recidivism rate near 70%, the cost to taxpayers outweighs attempts to reunify families.³⁰⁰ The problem has led some states to rethink their approach to substance abuse in families. For example, Kentucky has pioneered an effort to keep families together even as parents undergo drug treatment.³⁰¹ Known as START, for “Sobriety Treatment and Recovery Teams,” the program emphasizes substance abuse treatment and targets at-risk parents with “frequent home visits, vouchers for child care and transportation and mentorship from people in recovery.”³⁰² Ohio has just launched a similar initiative, and Indiana and North Carolina have

296. Lurie, *supra* note 277; Christopher O’Donnell, *DCF Review Seeks to “Get to Bottom” of Hillsborough Foster Care Missteps*, TAMPA BAY TIMES (Feb. 9, 2018), http://www.tampabay.com/news/DCF-review-seeks-to-get-to-bottom-of-Hillsborough-foster-care-missteps_165332552.

297. See *supra* note 166 and accompanying text.

298. Assoc. Press, *supra* note 283. In Indiana, the agencies used to return 60% of children to their birth families; the opioid epidemic has reduced that number nearly in half. *Id.*

299. See Simon, *supra* note 293. One Indiana judge pointedly remarked, “[H]ow much in the way of resources should be devoted to trying to reunify children with parents who cannot conquer their addiction[?]” *Id.*

300. See *id.*

301. Luthra & Regan, *supra* note 282.

302. *Id.* “Under the Kentucky model, when child protection specialists learn a child is at risk, authorities specifically assess whether substance abuse could be a factor. If so, the parent is fast-tracked into treatment and assigned a ‘recovery team,’ which coordinates among agencies such as children’s aid, mental health, social services and recovery mentors.” *Id.*

plans for family-based programs, too.³⁰³ But the programs are expensive, and even as the foster care population increased 8% from 2011 to 2015, the federal government cut assistance in 2016 for Title IV-E foster care and Title IV-B related services by 2%.³⁰⁴ Thus, states seek alternative means for funding³⁰⁵ or pursue other priorities.³⁰⁶

B. Available Funds to Keep Poor Families Intact

Poverty remains the greatest indicator of whether a state will remove a child from his home.³⁰⁷ Over a four-year period, Cornell University conducted an income inequality-child maltreatment study in all 3,142 United States counties and concluded that those “localities where the gap between rich and poor is greatest” face a higher risk of child maltreatment.³⁰⁸ The study concluded that “reducing poverty and inequality would be the single most effective way to prevent maltreatment of children,” but it also noted that a multifaceted strategy to include “proven programs that work to support parents and children and help to reduce the chances of abuse and neglect” is needed.³⁰⁹

Recent studies have correlated unemployment with opioid use,³¹⁰ and high-poverty counties have registered more drug-related deaths.³¹¹ Funds are available to families to help keep them intact so

303. *Id.* Ohio’s state attorney general allocated \$3.5 million for the program. *Id.*

304. Lurie, *supra* note 277.

305. *See supra* Sections IV.B–IV.C.

306. *See infra* Section V.B.

307. *See* H. Roger Segelken, *Child Abuse and Neglect Rise with Income Inequality*, CORNELL CHRON. (Feb. 11, 2014), <http://news.cornell.edu/stories/2014/02/child-abuse-and-neglect-rise-income-inequality> (connecting child abuse and neglect with poverty issues).

308. *Id.* Researchers conducted the study between 2005 and 2009. *Id.*

309. *Id.*

310. *See* Olga Khazan, *The Link Between Opioids and Unemployment*, THE ATLANTIC (Apr. 18, 2017), <https://www.theatlantic.com/health/archive/2017/04/joblessness-and-opioids/523281/>. “[A]s the unemployment rate increases by one percentage point in a given county, the opioid-death-rate rises by 3.6 percent, and emergency-room visits rise by 7 percent.” *Id.*

311. *See, e.g.*, Elizabeth Kneebone & Scott W. Allard, *A Nation in Overdose Peril: Pinpointing the Most Impacted Communities and the Local Gaps in Care*,

that they can remain together and keep children from entering foster care in the first place.³¹² Under the Title IV-B Child Welfare Services and Promoting Safe and Stable Families program, federal funds are available for struggling families facing hardships such as the loss of a home, lack of food, or addiction, but the law caps those funds at a low amount, and the states receive fewer dollars in matching funds if the child welfare agencies choose this route.³¹³ In other words, the state must spend more money to enable children to remain with their families; or, simply stated, more incoming federal funds mean less state spending.³¹⁴ Therefore, agencies often disregard family preservation services in favor of placing the child in foster care and receiving the non-capped Title IV-E federal funds.³¹⁵

Judges have expressed concern that “the lack of funding and services provided to help families stay intact, paired with uncapped funding to place low-income children in foster care—results in government fiscal interests trumping the interests of children and families.”³¹⁶ When pitted against each other, the “reasonableness of efforts to prevent removal and to reunify the child with his or her family may be defined by financial considerations rather than by the needs of the child and family.”³¹⁷ As one child welfare expert summarized, “[t]he federal funding of out-of-home care services, although crucial to the protection of children, tends to discourage prevention and family preservation efforts.”³¹⁸

BROOKINGS (Sept. 25, 2017), <https://www.brookings.edu/research/pinpointing-opioid-in-most-impacted-communities/>.

312. HATCHER, *supra* note 52, at 69.

313. *Id.*

314. *Id.*

315. *Id.* Showing that family preservation was not a spending priority, Title IV-E expenditures grew 504% from 1986 to 1995, while Title IV-B funding during the same time period was substantially less, “from \$198 million to \$292 million, a 47.5% increase.” Curtis, *supra* note 62, at 11. “Separate allocations for family preservation services, funds allocated specifically for the purpose of preventing foster care and supporting families, did not exist until 1994; in 1995 funding was set at \$150 million, or approximately 5% of the total cost of Title IV-E foster care.” *Id.*

316. HATCHER, *supra* note 52, at 70.

317. *Id.* (quoting Nat’l Council of Juvenile and Family Court Judges, *Child Welfare Fin. Reform Policy Statement* 3 (Mar. 2011), <https://www.ncjfcj.org/sites/default/files/childwelfarefinancereform.pdf>).

318. Curtis, *supra* note 62, at 11.

While the Administration on Children, Youth and Families acknowledges that states remove more children from their homes each year, and that adoptions from foster care are on the rise, it maintains that “reuniting or preventing a child from entering foster care is always [the] number one goal.”³¹⁹ Congress, however, did not write the law to favor biological families. The Adoption and Safe Families Act, which attempts to achieve permanency through termination of parental rights following short timelines,³²⁰ effectually presumes that children are better off without their biological families. But as Professor Marsha Garrison argues, “this presumption is no more than a modern variant of the nineteenth century child rescue fantasy.”³²¹

C. The Family First Prevention Services Act of 2017

Recently, Congress passed the Family First Prevention Services Act of 2017 (“Family First Act”)³²² as part of the legislative funding to avoid a government shutdown.³²³ Sponsored by Sen. Wyden, the

319. Number of Children, *supra* note 272 (quoting Jerry Milner, acting commissioner of the Administration on Children, Youth and Families and associate commissioner at the Children’s Bureau).

320. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.) (laying out technical assistance that promotes adoptions for the best interests of children).

321. Garrison, *supra* note 51, at 472–73; *see supra* Section II.C.

322. H.R. 253, 115th Cong. (2017). This legislation was initially introduced as the Family First Prevention Services Act of 2016. H.R. 5456, 114th Cong. (2016); S. 3065, 114th Cong. (2016). It was sponsored by Rep. Vern Buchanan (R-FL) in the House, and by Sen. Hatch and Sen. Wyden, with support from House Ways and Means Committee Chairman Kevin Brady (R-TX) and Ranking Member Sander Levin (D-MI). *Id.* The House of Representatives passed the legislation by voice vote on June 21, 2016, but it stalled in the Senate. *Id.*; *see also* FOSTER CARE AND PRIVATIZATION, *supra* note 255.

323. Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64. Sponsored by Rep. Vern Buchanan (R-FL), the Family First Act was incorporated into the merged Further Extension of Continuing Appropriations Act, 2018; Department of Defense Appropriations Act, 2018; SUSTAIN Care Act of 2018; Honoring Hometown Heroes Act Enacted, H.R. 1892, 115th Cong. (2017–2018). While the spending bill signed by President Trump funded the government only through March 23, 2018, the legislation permanently changed the federal entitlement provisions for foster care. John Kelly, *One Month of Spending, Years of Child Reform*, CHRON. OF SOC. CHANGE (Feb. 9, 2018),

Family First Act merges the proposed Family Stability and Kinship Care Act of 2015, which reallocated Title IV-E funds to focus on preventive services for family preservation,³²⁴ and Sen. Hatch's Improving Outcomes for Youth At Risk for Sex Trafficking Act, which sought to reduce the reliance on foster care group homes and the use of congregate care.³²⁵ Proponents of the measures hoped that reallocated federal funding would both provide substance abuse treatment for parents who suffered from opioid and other addictions but who were not otherwise a danger to their children; and at the same time, that federal funding restrictions on congregate care settings would pressure states to rely more on relatives and foster homes for those children who could not remain with their families.³²⁶

Commentators have hailed the Family First Act as a bill that “has significantly altered the child welfare financing landscape” by providing funding for up-front, time-limited services to prevent the use of foster care.³²⁷ Indeed, this legislation, now the law of the land, represents the largest overhaul of federal child welfare finance since the Child Welfare Act established Title IV-E entitlement in 1980.³²⁸ Signed by President Trump on February 9, 2018, the Act's stated purpose is to:

<https://chronicleofsocialchange.org/child-welfare-2/one-month-spending-years-child-welfare-reform>.

324. Family Stability and Kinship Care Act of 2015, S. 1964, 114th Cong. (2015-2016). The bill's stated purpose was “[t]o amend parts B and E of title IV of the Social Security Act to invest in funding prevention and family services to help keep children safe and supported at home with their families.” *Id.*

325. Improving Outcomes for Youth At Risk for Sex Trafficking Act of 2013, S. 1518, 113th Cong. (2013-2014).

326. Kelly, *supra* note 323. Prior to the Family First Act, Title IV-E funding placed no time limits on congregate care placements. *Id.* The Family First Act provides guaranteed support for only two weeks. *Id.* In other words, the “Family First Act injects into that situation fiscal pressure to keep youth out of congregate care, where the feds won’t help pay for it, and into foster homes, where the feds will.” *Id.* The Act provides an exemption for “qualified resident treatment placements.” *Id.* California opposes the measure. *Cf.* Jeremy Loudanback, *Family First Act Would Harm California's Foster Care Reforms, Groups Say*, CHRON. OF SOC. CHANGE (Feb. 8, 2018), <https://chronicleofsocialchange.org/news-2/california-is-again-the-voice-of-resistance-to-the-family-first-act>.

327. Kelly, *supra* note 323.

328. *Id.*; see *supra* notes 185–187 and accompanying text.

enable States to use Federal funds available under parts B and E of title IV of the Social Security Act to provide enhanced support to children and families and prevent foster care placements through the provision of mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services.³²⁹

The Family First Act allocates Title IV-E funds for twelve months of in-home parenting skills programs, drug-addiction treatment, and mental health services to keep families intact and children out of foster care.³³⁰ The child must have a “prevention plan” that identifies a strategy to allow the child to remain in his home and a list of services to accomplish that goal.³³¹ Child welfare advocates are optimistic because of the “great potential to add in new post-reunification and adoption services as well as up-front intervention services.”³³²

But the knowledge that the legislation is a “work in progress” tempers this optimism: “The Family First’s prospects to keep more families together is contingent on states’ willingness to put in their own funds for substance abuse, mental health and parenting services,” as well as federal willingness to fund certain state programs.³³³ The legislation does not compel states to provide services using Title IV-E funds; they must “elect” to do so, and the federal government will

329. H.R. 253. The Family First Act extends the Preventing Sex Trafficking and Strengthening Families Act to 2021. *See supra* note 173.

330. H.R. 253. Before the enactment of the Family First Act, states could only spend Title IV-E funds on foster care and adoption assistance. *See supra* Part IV.

331. H.R. 253. The Family First Act also incorporates a provision from the Child Welfare Oversight and Accountability Act of 2017, which Sens. Hatch and Wyden introduced following the Senate Finance Committee’s investigation into foster care privatization. *Id.*; *see supra* Section IV.C. The Family First Act requires states to conduct under Title IV-B of the Social Security Act an annual review of child fatalities. H.R. 253. The states must compile data on the circumstances surrounding the death of a child in foster care and the child’s background in the report. *Id.*; *see supra* note 269 and accompanying text.

332. Kelly, *supra* note 323 (quoting John Sciamanna, Child Welfare League of America vice president of public policy).

333. *Id.*

match a state's contribution 50% from 2019 until 2026.³³⁴ This will mean more federal contribution, especially in states with the greatest concentration of poor families. But that is only true if the states decide to participate, and if they do not, the status quo presumably will continue.

D. Due Process Concerns and the (Lack of) Right to Counsel

Due process deals with the notion of fundamental fairness.³³⁵ The United States Supreme Court has recognized that an inherent due process concern exists when a court terminates parental rights and has held that “[s]tates may not constitutionally terminate [parental] rights without [a] showing of parental unfitness.”³³⁶ The Court has further recognized that “even when a child’s natural home is imperfect, permanent removal from that home will not necessarily improve his welfare.”³³⁷ The judiciary has not, however, found a corresponding right to counsel for an indigent parent in termination proceedings because the parent does not face a possibility of a physical liberty loss.³³⁸ For example, in *Lassiter v. Department of Social Services*,³³⁹ the United States Supreme Court reasoned in a 5-4 decision that “the right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation,” which the Court found was not present in parental-rights termination proceedings.³⁴⁰ This seems at odds with the Court’s

334. H.R. 253.

335. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 24–25 (1981).

336. Kennedy, *supra* note 108, at 107 (citing *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (Stewart, J., concurring) (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’”)). *See also* *Santosky v. Kramer*, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting) (“[T]he interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests protected by the Fourteenth Amendment.”)).

337. *Santosky v. Kramer*, 455 U.S. 745, 765 n.15 (1982).

338. Kennedy, *supra* note 108, at 121–22.

339. 452 U.S. 18 (1981).

340. *Id.* at 25–27.

decision in *In re Gault*,³⁴¹ in which the Court found a right to counsel exists for children in civil juvenile proceedings.³⁴² There, the Court reasoned that “it is the defendant’s interest in personal freedom, and not simply the special Sixth and Fourteenth Amendments right to counsel in criminal cases, which triggers the right to appointed counsel.”³⁴³ The Court opined that,

“the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile’s freedom is curtailed,” the juvenile has a right to appointed counsel even though proceedings may be styled “civil” and not “criminal.”³⁴⁴

Under the standard that the Court established in *In re Gault*, it is hard to reconcile why jurisprudence does not consider the forcible and physical removal of a child from a parent’s home and the “total and irrevocable” termination of parental rights as curtailments of freedom and a physical liberty loss for both the parent and child.³⁴⁵ Indeed, the Court in *Lassiter* made a point of stating that the parent’s interest was a “commanding one.”³⁴⁶

Because of the nature of the private interest at stake and the permanency of the threatened loss, the United States Supreme Court has held that trial courts must judge parental unfitness in termination proceedings under the heightened standard of clear-and-convincing evidence.³⁴⁷ Once a fact-finder makes an unfavorable determination

341. 387 U.S. 1 (1967).

342. *Id.*

343. *Lassiter*, 452 U.S. at 25.

344. *Id.* (quoting *In re Gault*, 38 U.S. 1, 41 (1967)).

345. *Id.* at 39–40 (Blackmun, J., dissenting) (“Surely there can be few losses more grievous than the abrogation of parental rights.”).

346. *Id.* at 27 (majority opinion).

347. Kennedy, *supra* note 108, at 108–09 (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48, 753–54, 758, 760 (1982) (opining that because the “fundamental liberty interest of natural parents” is “far more precious than any property right,” a state could not terminate permanently the parent-child relationship without providing the parents with “fundamentally fair procedures,” including supporting allegations of neglect with “clear and convincing evidence”)). The Indian Child Welfare Act of 1978 requires an even higher standard of “evidence beyond a reasonable doubt” to terminate parental rights. 25 U.S.C. § 1912(f) (2012); *Santosky*, 455 U.S. at 749–50.

that a parent is unfit, however, courts may consider the best interests of the child under the less burdensome preponderance-of-the-evidence standard.³⁴⁸ This affords great discretion to the states and their agencies to “ensure flexibility in application” of the best interests standard.³⁴⁹ But it can also lead to bias and prejudice, as the test is inherently subjective.³⁵⁰ Further, the fact that states and agencies may determine what satisfies reasonable efforts to preserve and reunify families has led to critiques that “overworked and understaffed child protection agencies often make insufficient and inconsistent efforts [that] pit these agencies against the families and communities they are charged with helping.”³⁵¹

Ironically, while not constitutionally requiring a right to counsel in such proceedings, the Court in *Lassiter* still recommended the appointment of counsel as wise public policy³⁵² because termination cases mainly involve poor parents without counsel.³⁵³ The Court recognized that court findings often reflected uneducated parents’ lack of counsel.³⁵⁴ Most impoverished families, however, lack the resources to hire an attorney to navigate the complex child welfare system.³⁵⁵ Further, the Court implicitly acknowledged that, without counsel, poor parents play against a stacked deck.³⁵⁶ Nevertheless, the

348. Kennedy, *supra* note 108, at 109.

349. *Id.* at 120.

350. *Id.* at 119–20.

351. *Id.* at 104–05 (citing *Suter v. Artist M.*, 503 U.S. 347, 360 (1992) (noting that “there is ‘no guidance as to how ‘reasonable efforts’ are to be measured,’ and within broad limits, the state may decide how to comply with the directive”)).

352. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 33–34 (1981).

353. Kennedy, *supra* note 108, at 123.

354. *Lassiter*, 452 U.S. at 30. The Court conceded that parents are likely to be people with little education, who have had uncommon difficulty in dealing with life, and who are, at the hearing, thrust into a distressing and disorienting situation. That these factors may combine to overwhelm an uncounseled parent is evident from the findings some courts have made.

Id.

355. *HATCHER*, *supra* note 52, at 23. *But see In re Gault*, 387 U.S. 1, 16–19 (1967) (recognizing the child’s constitutional right to counsel in juvenile delinquency proceedings).

356. *Id.* at 28. The Court stressed,

Lassiter Court refused to recognize a constitutional right to counsel for indigent parents facing termination of their parental rights.³⁵⁷ Reviving an ad hoc approach that had been “thoroughly discredited nearly 20 years [before that] in *Gideon v. Wainwright*,”³⁵⁸ the Court left it to the trial courts to determine due process concerns regarding the appointment of counsel in such cases.³⁵⁹

Many times, poor parents lack the resources needed to battle the child welfare system that favors the termination of parental rights over family preservation.³⁶⁰ When poor parents *do* attempt to assert their rights in court on their own, they frequently face an “unequal contest” as they encounter agency resistance that they simply lack the resources to fight.³⁶¹ Asserting *parens patriae*, states often argue that they, through their agencies, are in a superior position than the parents when it comes to the care of children.³⁶² As one child welfare expert summarized, “foster care is a government program that takes over primary child-rearing responsibilities from poor parents based on the assumption that it can and must do better.”³⁶³

[i]f, as our adversary system presupposes, accurate and just results are most likely to be obtained through the equal contest of opposed interests, the State’s interest in the child’s welfare may perhaps best be served by a hearing in which both the parent and the State acting for the child are represented by counsel, without whom the contest of interests may become unwholesomely unequal.

Id.

357. *Id.* at 31–32.

358. *Id.* at 35 (Blackmun, J., dissenting) (citing *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (rejecting the reasoning in *Betts v. Brady*, 316 U.S. 455, 471 (1942), that counsel for indigent criminal defendants was “‘not a fundamental right, essential to a fair trial’”)).

359. *Id.* at 31–32.

360. HATCHER, *supra* note 52, at 23–24.

361. *Id.* at 24–25.

362. *Id.* at 18–19, 24–25.

363. Courtney, *supra* note 96, at 131. One judge even lamented that the laws are antiquated and treat children as their parents’ chattel, saying, “Sadly, in some cases, the law has determined that parents have a due process right to their children.” Simon, *supra* note 293.

E. The Client: A Case Study

The Client portrays Mark Sway as a poor kid who found himself in a bad situation through no fault of his own.³⁶⁴ From a broken home and primarily raised on the streets, he is a tough kid, having had to protect himself and his mother from his alcoholic and abusive “ex-father.”³⁶⁵ But he is also a smart kid and “wise beyond his years.”³⁶⁶ He has a special bond with his mother, as they have “consoled each other and conspired to survive” years of abuse.³⁶⁷ It was Mark who convinced her to file for divorce, and who testified in court about the beatings they received.³⁶⁸ For the five years since then, he has been the father figure in the house and the teacher and protector of his little brother.³⁶⁹ They live in Tucker Wheel Estates in a mobile home that is “twelve feet wide and sixty feet long, and parked on a narrow strip on East Street with forty others.”³⁷⁰ The suburb kids classify them as “trailer park kids,” and regard them as their “lesser neighbors . . . the implications being obvious.”³⁷¹ With little money, few possessions, and no health insurance, they have been called “[l]ow-class white people.”³⁷²

The novel depicts Dianne Sway, Mark’s mother, as a good mother who is young, just a bit naïve, and beset by many problems.³⁷³ She is away from home a lot because she works long hours in a lamp factory for \$6 an hour.³⁷⁴ She is as attentive as she can be while working nine hours per day and requires her sons to leave her a note as to their whereabouts when they are out.³⁷⁵ Her pay barely allows her to feed her boys, and dinner usually consists of microwave meals

364. GRISHAM, *supra* note 1, at 146, 239.

365. *Id.* at 1–2, 83, 146, 239.

366. *Id.* at 146; *see also id.* at 2, 4, 239.

367. *Id.* at 4.

368. *Id.* at 4, 153–56.

369. *Id.* at 2.

370. *Id.* at 28.

371. *Id.* at 32.

372. *Id.* at 40, 67, 95, 156.

373. *Id.* at 1, 39.

374. *Id.* at 29–30, 59, 131, 164–65.

375. *Id.* at 29, 32.

on TV trays because she is often too tired to cook.³⁷⁶ But their home is clean, and their trailer park is a decent one with trees and reasonably clean streets.³⁷⁷ When Ricky is admitted to the hospital with a severe case of post-traumatic stress disorder, Dianne hardly leaves his side, and she is there when he comes out of his coma.³⁷⁸ She is a strong woman for all that she has endured and a good mother who loves her sons.³⁷⁹

Romey put Mark in an impossible situation when he unloaded his conscience on the kid. The Mafia is after Mark: one of their thugs accosts Mark in the hospital elevator and delivers a warning as he slices off one, and then another, of Mark's belt loops with a switchblade.³⁸⁰ He shows Mark a school picture taken from the Sway's living room and tells him that he will slice up his whole family if he tells anyone, including his lawyer, about what Jerome Clifford told him.³⁸¹ Mark believes the mobster; he has watched enough movies to know that it is never good when the mafia knows where somebody lives.³⁸² Sure enough, a bomb detonates at the Sway trailer, burning it to the ground.³⁸³ Mark knows he cannot talk, but he also is facing pressure from law enforcement officials who will not give up until he does, so he seeks help.³⁸⁴

The Client exemplifies the lack of resources available to impoverished families in need.³⁸⁵ When Mark tells his mother that he has hired Reggie Love, she exclaims, "[l]awyers don't work for free, Mark. You know we can't afford a lawyer."³⁸⁶ She is leery because previously they have had bad experiences with lawyers.³⁸⁷ Her former divorce attorney, "Hack," was self-important and treated them "like

376. *Id.* at 184.

377. *Id.* at 28–29.

378. *Id.* at 58, 73, 89, 110.

379. *Id.* at 39, 90, 178.

380. *Id.* at 136–37.

381. *Id.*

382. *See id.* at 111, 309, 323, 418.

383. *Id.* at 198–200.

384. *Id.* at 86, 146–47.

385. *See HATCHER, supra* note 52, at 23.

386. GRISHAM, *supra* note 1, at 121.

387. *Id.* at 153–57.

dirt.”³⁸⁸ He barely gave them the time of day during office visits, making them wait for two hours to see him and then rushing them out of his office in a big hurry after ten minutes.³⁸⁹ After the trial, he badgered Dianne with phone calls until he finally threatened to sue her for nonpayment.³⁹⁰ His fees ended up causing her to file for bankruptcy, and she lost her job.³⁹¹ Mark called the bankruptcy lawyer a “real bozo too.”³⁹²

The Sways know the system is stacked against them. The U.S. Attorney from New Orleans, Roy Foltrigg, travels to Memphis.³⁹³ His murder trial against Barry “The Blade” Muldanno for the murder of the Senator stalls because he does not have a body, and he needs Mark to talk.³⁹⁴ He is convinced that Jerome Clifford knew where the body was buried and shared that information with Mark when he was inside Clifford’s car.³⁹⁵ Appointed by Reagan, Foltrigg seemingly shares similar views on welfare;³⁹⁶ he and his colleagues view Mark’s family as lower-class white people, and they try to find ways to exploit the Sways’ socio-economic status for their own purposes.³⁹⁷ When Mark refuses to tell anyone what he knows, Foltrigg files a proceeding in the juvenile court in the name of “protecting” Mark, and he expects the

388. *Id.* at 153.

389. *Id.*

390. *Id.* at 156.

391. *Id.*

392. *Id.* at 157.

393. *Id.* at 48–49, 66.

394. *Id.* at 21, 23, 238, 319.

395. *Id.* at 67–69, 114–15, 131, 169–71.

396. *Id.* at 121; *see supra* notes 198–200 and accompanying text.

397. GRISHAM, *supra* note 1, at 67, 169–71, 193. White children now comprise the largest racial category in the foster care population. 2016 AFCARS REPORT, *supra* note 16, at 1 (showing that 191,433 white children make up 44% of the total foster care population). The opioid crisis has arguably caused much of that growth. *See supra* Section V.A.; *but see* Sherry Lachman, *The Opioid Plague’s Youngest Victims: Children in Foster Care*, N.Y. TIMES (Dec. 28 2017), <https://www.nytimes.com/2017/12/28/opinion/opioid-crisis-children-foster-care.html> (noting that “[b]lack children are twice as likely as white children to wind up in foster care and face its devastating effects, a symptom of our country’s disparate treatment of black and white families who experience similar challenges”); Gossett, *[Color] Blindness*, *supra* note 162, at 313–14 (discussing disproportionality of black children in foster care).

judge to lean on the boy so that he will talk.³⁹⁸ But the Honorable Harry Roosevelt, a well-seasoned jurist who wrote the book on juvenile proceedings, is hardly intimidated by blustering attorneys.³⁹⁹

When Mark appeared before Judge Roosevelt in 1993, the Child Welfare Act, with its emphasis on family preservation and reunification, was still the controlling law.⁴⁰⁰ Foltrigg and his band of attorneys framed the issue as being for “Mark’s own protection,” and Judge Roosevelt initially took Mark into custody, but he was not keen on keeping a child locked up for an extended period.⁴⁰¹ Further, Mark had a good lawyer who just happened to specialize in child abuse and neglect cases in juvenile court—not just in any court, but Judge Roosevelt’s court.⁴⁰² Most poor families lack the resources to hire an attorney to navigate the complex court system,⁴⁰³ but Reggie Love was not your typical lawyer. She took his case for \$1 because the money was not important to her.⁴⁰⁴ Formerly known as Regina Cardoni, she had spent time in a mental institution after her husband, a prominent doctor, divorced her for a younger trophy wife and then played hardball with his army of lawyers to take custody of her kids and have her committed.⁴⁰⁵ She slowly put her life back together and went to law school, where she suffered bouts of depression, and even dropped out for a time, before finishing strong.⁴⁰⁶ She works hard, but money

398. *Id.* at 67, 169–71, 193, 207–12.

399. *Id.* at 205–07, 209, 246–47.

400. *See supra* Section III.A.

401. GRISHAM, *supra* note 1, at 193, 212, 231. At first, Judge Roosevelt was not inclined to issue a custody order, because Reggie had taken Mark to her house. *Id.* at 210. “‘That sounds like Reggie,’ Harry said with affection. ‘I see no need to take him into custody.’” *Id.* It was only after the lawyers and the FBI emphasized the great danger Mark was in because of the mob connections, and their “fear for his safety,” that the judge reluctantly agreed. *Id.* at 211–12.

402. *Id.* at 208. Speaking of Reggie, Judge Roosevelt said, “Reggie Love is a regular in my court. A very competent attorney. Sometimes a bit overprotective of her clients, but there’s nothing wrong with that.” *Id.*

403. HATCHER, *supra* note 52, at 23. *See supra* Section V.D.

404. GRISHAM, *supra* note 1, at 84, 91, 121–22, 139. “She had money once, lots of it, and it had brought nothing but misery.” *Id.* at 139.

405. *Id.* at 107, 186.

406. *Id.* at 107–08, 187. “And then she decided one day that the nightmare was over, that she would pick up the pieces and move on, and that she would create a new life.” *Id.* at 187.

does not motivate her.⁴⁰⁷ Instead, her calling is to help abused and neglected children, and she does so with “great skill and passion.”⁴⁰⁸ The Juvenile Court often appoints her as appointed counsel, and she is a “zealous advocate” for young clients who cannot defend themselves.⁴⁰⁹ She does not stand on ceremony and calls everyone by their first names, even the judge and the Director of the FBI.⁴¹⁰ And she is effective.⁴¹¹ She is able to negotiate with the attorneys for the location of the body in exchange for entry of Mark’s family into the witness protection program.⁴¹² She is exactly what the *Lassiter* Court envisioned, but did not compel.

Had Mark’s ordeal happened *after* the passage of the Adoption and Safe Families Act, with its predilection for separating families based on neglect, he might not have found a judge as sympathetic as Judge Roosevelt. That is because Mark fits the bill of the typical kid who finds himself in foster care. He endured a childhood of abuse, with a father who not only beat them, but once stripped the clothes from Mark and his mother before throwing them naked outside of the trailer home.⁴¹³ The beatings were so intense that Mark knocked his dad out with a baseball bat in retaliation.⁴¹⁴ While he has not had to deal with that situation for the last five years, the family is still poor, and his mother is often absent.⁴¹⁵ As a single parent and one of the “working poor,” she stays in a job that is akin to a sweatshop and where she has had to endure sexual harassment because she is unskilled and

407. *Id.* at 108. More often than not, she would not take a fee when she believed in her client. *Id.* at 188.

408. *Id.* at 139. “Her mission as a lawyer was to protect abuse and neglected children, and she did this with great skill and passion.” *Id.* She was also compassionate: “Though she’d seen it many times, the sight of a child scared and suffering was unbearable. She couldn’t keep from crying, too.” *Id.* at 243.

409. *Id.* at 139.

410. *Id.* at 114, 237, 239, 260–62, 406.

411. *Id.* at 161–66. When Mark’s mother was fired because she had to stay at the hospital with Ricky, Reggie threatened Dianne’s employer with a lawsuit such that she was able to successfully negotiate reinstatement of Dianne’s job, a raise, payment while she was in the hospital, and a bouquet of flowers. *Id.*

412. *Id.* at 402–03, 406–07, 418–22.

413. *Id.* at 154.

414. *Id.* at 4, 154.

415. *Id.* at 4.

without many opportunities.⁴¹⁶ She sacrifices much of her time and energy to feed her boys and provide a roof over their heads.⁴¹⁷ When Ricky is taken to the hospital, she is doting and dutiful; she never leaves his side and follows the directives of the doctors and specialists.⁴¹⁸

Nevertheless, under the current law, a caseworker might argue that, had Dianne not been so absent, her boys would not have had so much freedom to roam around the neighborhood unsupervised. Mark would not have been teaching his eight-year-old little brother how to smoke in the woods, and they would not have had the occasion to have been in the situation caused by Jerome Clifford's suicide. Ricky would not have been in the hospital suffering from severe post-traumatic stress. The Mafia would not have been after Mark, and the courts would not have had to step in for his safety. The argument that her neglect put her boys at risk in the first place might serve as a basis for their removal from the home, leaving her to fight a system that disfavors the poor and removes the majority of children from their homes for reasons of neglect.

Interestingly, the events in *The Client* occurred in the same year that Congress created the Family Preservation and Support Services Program.⁴¹⁹ Congress designed the program to prioritize family preservation.⁴²⁰ It sought to strengthen families and provide support to prevent the placement of children outside of their homes, furthering the goals of the Adoption Assistance and Child Welfare Act.⁴²¹ But Congress soon shifted gears, specifically blaming single mothers for

416. *Id.* at 59, 164–65.

417. *Id.* at 1, 39.

418. *See id.* at 58–59.

419. *See supra* notes 138–139, 172 and accompanying text. First Lady Hillary Clinton spoke of the program:

The President's budget plan also included funding for family preservation programs like the one I recently visited in Los Angeles. That church-run program receives state and federal funds to help families stay together. The success stories I heard were impressive, and so was the fact that the work being done was cheaper than any foster care or orphanage could ever be.

Newsweek Staff, *The Fight Over Orphanages*, NEWSWEEK (Jan. 15, 1995, 7:00 PM), <http://www.newsweek.com/fight-over-orphanages-181934>.

420. *See supra* notes 138–139, 172 and accompanying text.

421. *See supra* notes 138–139, 172 and accompanying text.

their own ills during the era of welfare reform.⁴²² Today, the circumstances of poverty are often equated with neglect, and state agencies regularly remove children like Mark Sway from their homes, supposedly “for their own protection.”

VI. CONCLUSION

The Adoption and Safe Families Act recently celebrated the twentieth anniversary of its enactment. The Act specifically aimed to provide loving and stable homes for abused children who had been removed from their homes but were languishing in foster care.⁴²³ Instead of accomplishing its stated permanency goals, however, the foster care population continues to grow, with the majority of children coming from poor families under the guise of neglect.⁴²⁴ The Act’s financial incentives have disrupted families permanently by the speedy termination of parental rights, without the accompanying move from foster care to adoptive homes.⁴²⁵ Thus, the programs that the Adoption and Safe Families Act govern thwart its very purpose as children continue to languish in foster care waiting for permanent adoptive homes, often until they age out of the system into negative life outcomes.⁴²⁶ The United States Supreme Court has acknowledged that the system is weighted against poor parents who try to fight it, but so far the Court has failed to find a corresponding right to counsel even in the face of the termination of their parental rights.⁴²⁷

422. See *supra* notes 138–139, 172, 203–205 and accompanying text.

423. See *supra* Section III.B.

424. Michael S. Wald, *State Intervention on Behalf of “Neglected” Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 629 (1976).

425. Maureen Flatley, *Liberal Hypocrisy in Adoption* (Sept. 4, 2013) (unpublished manuscript) (on file with the author). “Children legally free for adoption . . . remained system bounded . . . due to the perverse financial incentives states had to keep them in care as each child was a ‘profit center’ bringing various state and federal supports that would disappear if the child left the system for permanent adoptive homes.” *Id.* The longer a child remains in foster care, the more money the state receives. HATCHER, *supra* note 52, at 71.

426. 2016 AFCARS REPORT, *supra* note 16, at 3 (showing 20,532 children aged out of the foster care system in FY 2016); Gossett, *supra* note 67, at 846–49.

427. See *supra* Section V.D.

Child care advocates have suggested ways in which to improve the Adoption and Safe Families Act, including providing more oversight and outcome measurement.⁴²⁸ Further, some scholars have suggested that Congress could improve the Adoption and Safe Families Act by extending the mandatory time periods before instituting proceedings for the termination of parental rights.⁴²⁹ These measures, however, do not address the underlying issue for which states remove poor children from their homes: poverty leads to findings of neglect, which the state then uses to justify removal.⁴³⁰ Or stated another way,

[y]et even if it were true that our child welfare system has primarily served the function of regulating poor families by removing children from some of them, and that this function is supported by a deeply rooted need to blame the victim, the fact remains that child welfare policies have been stated otherwise. These policies, in rhetoric at least, have had a different thrust, namely, toward family preservation.⁴³¹

Indeed, as early as 1909, the White House Conference on the Care of Dependent Children noted “the elemental importance and value of the family as the basic institution of society for child care.”⁴³² The conference declared that “the great task of all those concerned with child welfare is to secure, whenever practicable, continuous care for

428. Flatley, *supra* note 140. Some recommendations are to advocate with governors, and not Congress, as the lynchpin between the federal government and the states; have states provide mandatory Child Welfare Report Cards and Senate Finance Committee Privatization Reports; and mandate penalties for a state’s non-reporting. *Id.* See also Hatch, Wyden Respond, *supra* note 255; Section IV.C.

429. Kennedy, *supra* note 108, at 124 (first citing Katherine P. Luke, *Mitigating the Ill Effects of Maternal Incarceration on Women in Prison and Their Children*, 81 CHILD WELFARE 929, 942 (2002); and then citing Antoinette Greenaway, *When Neutral Policies Aren’t So Neutral: Increasing Incarceration Rates and the Effect of the Adoption and Safe Families Act of 1997 on the Parental Rights of African American Women*, 17 NAT’L BLACK L.J. 247, 263 (2004)).

430. See Kennedy, *supra* note 108, at 124 (using the same rational in incarceration cases).

431. PELTON, *supra* note 22, at xv.

432. DEPENDENT CHILDREN, *supra* note 76, at 3.

children within their own families.”⁴³³ Thus, the White House formally pronounced family preservation as favorable over child-rescue efforts, and that policy remained for nearly a century. The fundamental problem with the Adoption and Safe Families Act, however, is that it favors child rescue over family preservation.⁴³⁴

Congress should reform the law, but instead of looking at simply reporting on the existing foster care population, or changing timelines, it should focus on ways to prevent so many children from entering foster care in the first place. There is no doubt that states should remove some children from their families in cases of physical or sexual abuse. But the majority of children removed from their homes are removed for neglect, which is a subjective term at best and one closely associated with the circumstances of poverty, including substance abuse. Indeed, as one child welfare advocate expressed, “if child welfare agencies uncritically acquiesce in removing children from homes rendered unsafe mainly for reasons of poverty, they will have largely abandoned the strengths-based, family centered perspective that child and family advocates have fought so long to bring into child welfare agencies.”⁴³⁵

Child protection is currently trumping family preservation, and lawmakers must rethink initiatives that further that policy. States currently receive money for each of the nearly 438,000 children in foster care⁴³⁶ and use private contractors to find ways to maximize revenue from the children. But children should not be a means of profit for the state, and poverty should not serve as a funnel for a profit-driven foster care industry. Further, the Adoption and Safe Families Act provides financial incentives to foster care agencies for the swift termination of parental rights and finalized adoptions, with no corresponding incentives to preserve or reunify families.⁴³⁷ Congress

433. *Id.*

434. HATCHER, *supra* note 52, at 171. “The goal of assisting family reunification in foster care cases was not eliminated,” but it shifted the focus from family preservation and “toward promoting adoptions due to concern about children languishing in foster care.” *Id.*

435. Courtney & Maluccio, *supra* note 182, at 233.

436. 2016 AFCARS REPORT, *supra* note 16, at 1; *see also supra* note 272 and accompanying text.

437. *See supra* Section III.B.

should eliminate the incentives that favor adoption and direct the monies instead toward keeping families intact.

Perhaps the newly enacted Family First Prevention Services Act of 2017, with its focus on prevention and substance abuse services, will accomplish this.⁴³⁸ After all, as one scholar noted, “the conflict that exists between the policy of family preservation and the reality of child rescue tactics itself demonstrates a cognitive dissonance in our collective thinking that could become a force for change.”⁴³⁹ Until then, the circumstances of poverty should not serve as the basis for a child’s removal nor the termination of parental rights—especially when the State is the beneficiary, and not the child.

438. See *supra* Section V.C.

439. PELTON, *supra* note 22, at xv.