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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*<sup>1</sup>

## 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> 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

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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.



when the Adoption Assistance and Child Welfare Act<sup>13</sup> was in effect. That Act favored family preservation and required states to use “reasonable efforts” to keep biological families intact.<sup>14</sup> 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,<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup> 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

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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*,<sup>18</sup> it was an idea so radical for its time that children’s author and educator Hannah Moore ridiculed it as absurd.<sup>19</sup> 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.’”<sup>20</sup>

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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](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.<sup>21</sup> 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.<sup>22</sup>

### 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.<sup>23</sup> 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.<sup>24</sup> Efforts to reduce children’s workloads to just ten hours a day did not succeed until 1847.<sup>25</sup> Indeed, in Victorian England, children

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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.<sup>26</sup> Prince Albert, Queen Victoria's husband, regarded working-class children as merely "part of his productive power,' an indispensable source of family income."<sup>27</sup>

Similarly, the young nation of America changed rapidly, transforming into "an industrialized giant."<sup>28</sup> For example, in the forty years between 1860 and 1900, the United States Patent Office issued 676,000 patents for new inventions.<sup>29</sup> 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."<sup>30</sup> 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.<sup>31</sup>

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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





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

### *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."<sup>37</sup> Victorians began to think of children as "innocent creatures who should be shielded from the adult world and allowed to enjoy their childhood."<sup>38</sup> Thus began a period of child-welfare activism: legislatures enacted laws to protect children at work, at school, and in the home.<sup>39</sup>

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."<sup>40</sup> Determined to help the working population of America from being "overworked, underpaid, and employed in hazardous surroundings,"<sup>41</sup> he championed the cause of "poverty and social ills, such as child labor that, to his mind, cried out for reform."<sup>42</sup>

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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.<sup>43</sup> 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."<sup>44</sup> The Children's Bureau was responsible for many early-20th-century reforms targeting infant mortality and child labor.<sup>45</sup>

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.<sup>46</sup>

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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.<sup>47</sup> 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.<sup>48</sup> 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.<sup>49</sup>

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.<sup>50</sup> As societal attitudes

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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.”<sup>51</sup> 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.<sup>52</sup> 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.<sup>53</sup> This saddles a state with a fiduciary duty to serve the “best interests” of the child over that of the state.<sup>54</sup>

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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.<sup>55</sup> 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.”<sup>56</sup> 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.<sup>57</sup> 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.<sup>58</sup> Many of these poor houses required children to “work for their keep” in conditions that more closely resembled a reformatory than a home.<sup>59</sup>

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.<sup>60</sup> For example, private humane societies, such as the Society for the Prevention of Cruelty to Children, organized to rescue dependent, neglected, and abused children.<sup>61</sup> They removed children from their homes and placed them in institutional care or informally boarded them with other families.<sup>62</sup> Yet, in the Society for the Prevention of

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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.<sup>63</sup>

To these child rescuers, a child needed saving from his environment, including his parents.<sup>64</sup> The humane societies presumed that the parents would not have been in poverty—and the children not neglected—but for the parents' "moral defects."<sup>65</sup> Thus, the "rationale for removing dependent children from their parents was to prevent the children from being contaminated by their parents' moral defects."<sup>66</sup> 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.<sup>67</sup> 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."<sup>68</sup>

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*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.<sup>69</sup> 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.”<sup>70</sup>

## 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.”<sup>71</sup> The famous 1909 White House Conference on the Care of Dependent Children formalized that policy.<sup>72</sup> At that time, approximately 170,000 children were living in some form of out-of-home care.<sup>73</sup> Led by President Theodore Roosevelt, conference participants endorsed actual family preservation when possible over

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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.<sup>74</sup> Recognizing the role that poverty played in neglect,<sup>75</sup> the conference specifically denounced poverty as a reason to break up a home.<sup>76</sup> 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.”<sup>77</sup> 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.”<sup>78</sup>

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.<sup>79</sup> 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

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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.”<sup>80</sup> 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.<sup>81</sup> 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.<sup>82</sup>

The juvenile courts assumed responsibility for child welfare in the early decades of the 20th century.<sup>83</sup> 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.<sup>84</sup> Most states did not have county boards of child welfare until 1929,<sup>85</sup> and the greater needs of the country subsumed child welfare in the wake of the Depression and the New Deal.<sup>86</sup> 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.<sup>87</sup>

The model for today’s public foster care system originated with the Social Security Act of 1935.<sup>88</sup> “That legislation authorized the first

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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).







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

The “foster care crisis” refers to “the reality that too many children [were] staying in foster care for too long a time.”<sup>107</sup> 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.<sup>108</sup> But because family preservation has remained the ideal, agencies for many years did not invest in making quality foster care placements.<sup>109</sup> 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.<sup>110</sup> Children in foster care were thus “left to drift in long term temporary placements with little hope of any stable parental relationship.”<sup>111</sup> Foster care “drift” became synonymous with the “shepherding of children through a series of foster homes,

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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.









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.<sup>132</sup>

Meanwhile, even as states struggled to comply with reunification efforts, homelessness and HIV cases contributed to sending more children into the foster care system.<sup>133</sup> 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.<sup>134</sup> The Child Welfare Act placed no time limits on a child’s length of stay in foster care.<sup>135</sup> 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.<sup>136</sup>

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.<sup>137</sup> 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](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.<sup>138</sup> This program provided funding for community-based programs aimed at preventing child abuse and neglect in an effort to strengthen families.<sup>139</sup> But it was too little, too late. After some reunification efforts led to highly publicized incidents of child abuse and unrepaired family dysfunction,<sup>140</sup> advocates pushed for a re-examination of the Child Welfare Act and its requirements.<sup>141</sup>

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.”<sup>142</sup> 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

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*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)).







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

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.<sup>161</sup> Concurrent planning replaced “the more traditional ‘sequential planning’ where one permanency plan, such as reunification, is ruled out before an alternative plan is developed.”<sup>162</sup> 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.<sup>163</sup> 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.”<sup>164</sup> 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](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”<sup>165</sup> before the state terminates parental rights,<sup>166</sup> to reduce a child’s waiting time for what some adoption advocates call a “real home.”<sup>167</sup> 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.<sup>168</sup> Advocates hoped that encouraging the expeditious termination of parental rights would allow children to move away from “foster limbo”<sup>169</sup> with their biological family and toward permanency through adoption.<sup>170</sup>

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

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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](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.<sup>172</sup> This revised program requires states to develop an outcome-based incentive funding system to evaluate improved performance.<sup>173</sup> As an incentive, states receive “adoption incentive payments” for each adoption out of foster care.<sup>174</sup> Beginning at \$4,000, the bonuses may increase depending on an increasing annual number of adoptions.<sup>175</sup> 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.<sup>176</sup> 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.<sup>177</sup> 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.<sup>178</sup>

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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.<sup>179</sup> 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.”<sup>180</sup> Within five years of its enactment, the number of children adopted from foster care more than doubled, exceeding President Clinton’s goals.<sup>181</sup>

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.<sup>182</sup> States speedily severed children’s legal ties with their biological families without securing corresponding adoptions into the hoped-for “real homes.”<sup>183</sup> Thus, children continued to languish in

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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.





During his tenure, President Ronald Reagan began demonizing poverty and blaming the poor for their own circumstances.<sup>198</sup> He blamed public assistance programs for “the breakdown of the American family” and derided those receiving help as “welfare queens.”<sup>199</sup> 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.”<sup>200</sup> 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 1996<sup>201</sup> (“Personal Responsibility Act”).<sup>202</sup>

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.<sup>203</sup> The Personal

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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.<sup>204</sup> 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.<sup>205</sup>

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.”<sup>206</sup> 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.<sup>207</sup> A broad initiative, the Child Poverty Reduction Act sought to halve the number of children living

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(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](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.*















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.”<sup>252</sup>

*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.<sup>253</sup> 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.<sup>254</sup> The state and local governments pay the companies to run all or part of their foster care systems for hundreds of thousands of children.<sup>255</sup> 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.<sup>256</sup> Thus, statistics remain elusive as the law allows companies to operate with little monitoring or oversight.<sup>257</sup>

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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.







Adoption and Safe Families Act.<sup>272</sup> The overwhelming majority of these children are entering foster care because of neglect.<sup>273</sup> 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.<sup>274</sup>

### 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.<sup>275</sup> By 2017, the CDC reported the number of deaths from opioid overdose had risen to 140 Americans daily.<sup>276</sup> As

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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](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.<sup>277</sup> Worse, fentanyl, “an opioid up to 100 times more powerful than morphine,” began turning up in the heroin supply.<sup>278</sup> In late 2017, President Trump declared the “opioid crisis” a public health emergency.<sup>279</sup> His critics, however, charged that his unfunded pronouncement did little to combat the epidemic and pushed him to declare a national emergency.<sup>280</sup> 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.<sup>281</sup>

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<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.<sup>282</sup> 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.<sup>283</sup> Over 270,000 children entered foster care last year—the highest number since 2008.<sup>284</sup> 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.<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup>

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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.<sup>288</sup> 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.<sup>289</sup> 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.<sup>290</sup> 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.<sup>291</sup> 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.<sup>292</sup> 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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup> For example, children

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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.





















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

Many times, poor parents lack the resources needed to battle the child welfare system that favors the termination of parental rights over family preservation.<sup>360</sup> 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.<sup>361</sup> 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.<sup>362</sup> 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.”<sup>363</sup>

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[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.<sup>364</sup> 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.”<sup>365</sup> But he is also a smart kid and “wise beyond his years.”<sup>366</sup> He has a special bond with his mother, as they have “consoled each other and conspired to survive” years of abuse.<sup>367</sup> It was Mark who convinced her to file for divorce, and who testified in court about the beatings they received.<sup>368</sup> For the five years since then, he has been the father figure in the house and the teacher and protector of his little brother.<sup>369</sup> 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.”<sup>370</sup> The suburb kids classify them as “trailer park kids,” and regard them as their “lesser neighbors . . . the implications being obvious.”<sup>371</sup> With little money, few possessions, and no health insurance, they have been called “[l]ow-class white people.”<sup>372</sup>

The novel depicts Dianne Sway, Mark’s mother, as a good mother who is young, just a bit naïve, and beset by many problems.<sup>373</sup> She is away from home a lot because she works long hours in a lamp factory for \$6 an hour.<sup>374</sup> 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.<sup>375</sup> Her pay barely allows her to feed her boys, and dinner usually consists of microwave meals

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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.<sup>376</sup> But their home is clean, and their trailer park is a decent one with trees and reasonably clean streets.<sup>377</sup> 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.<sup>378</sup> She is a strong woman for all that she has endured and a good mother who loves her sons.<sup>379</sup>

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.<sup>380</sup> 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.<sup>381</sup> Mark believes the mobster; he has watched enough movies to know that it is never good when the mafia knows where somebody lives.<sup>382</sup> Sure enough, a bomb detonates at the Sway trailer, burning it to the ground.<sup>383</sup> 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.<sup>384</sup>

*The Client* exemplifies the lack of resources available to impoverished families in need.<sup>385</sup> 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.”<sup>386</sup> She is leery because previously they have had bad experiences with lawyers.<sup>387</sup> Her former divorce attorney, “Hack,” was self-important and treated them “like

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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.”<sup>388</sup> 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.<sup>389</sup> After the trial, he badgered Dianne with phone calls until he finally threatened to sue her for nonpayment.<sup>390</sup> His fees ended up causing her to file for bankruptcy, and she lost her job.<sup>391</sup> Mark called the bankruptcy lawyer a “real bozo too.”<sup>392</sup>

The Sways know the system is stacked against them. The U.S. Attorney from New Orleans, Roy Foltrigg, travels to Memphis.<sup>393</sup> 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.<sup>394</sup> 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.<sup>395</sup> Appointed by Reagan, Foltrigg seemingly shares similar views on welfare;<sup>396</sup> 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.<sup>397</sup> 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

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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.<sup>398</sup> But the Honorable Harry Roosevelt, a well-seasoned jurist who wrote the book on juvenile proceedings, is hardly intimidated by blustering attorneys.<sup>399</sup>

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.<sup>400</sup> 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.<sup>401</sup> 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.<sup>402</sup> Most poor families lack the resources to hire an attorney to navigate the complex court system,<sup>403</sup> but Reggie Love was not your typical lawyer. She took his case for \$1 because the money was not important to her.<sup>404</sup> 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.<sup>405</sup> 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.<sup>406</sup> She works hard, but money

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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.<sup>407</sup> Instead, her calling is to help abused and neglected children, and she does so with “great skill and passion.”<sup>408</sup> The Juvenile Court often appoints her as appointed counsel, and she is a “zealous advocate” for young clients who cannot defend themselves.<sup>409</sup> She does not stand on ceremony and calls everyone by their first names, even the judge and the Director of the FBI.<sup>410</sup> And she is effective.<sup>411</sup> 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.<sup>412</sup> 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.<sup>413</sup> The beatings were so intense that Mark knocked his dad out with a baseball bat in retaliation.<sup>414</sup> 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.<sup>415</sup> 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

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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.<sup>416</sup> She sacrifices much of her time and energy to feed her boys and provide a roof over their heads.<sup>417</sup> 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.<sup>418</sup>

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.<sup>419</sup> Congress designed the program to prioritize family preservation.<sup>420</sup> 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.<sup>421</sup> But Congress soon shifted gears, specifically blaming single mothers for

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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.<sup>422</sup> 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.<sup>423</sup> 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.<sup>424</sup> 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.<sup>425</sup> 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.<sup>426</sup> 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.<sup>427</sup>

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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.<sup>428</sup> 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.<sup>429</sup> 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.<sup>430</sup> 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.<sup>431</sup>

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.”<sup>432</sup> The conference declared that “the great task of all those concerned with child welfare is to secure, whenever practicable, continuous care for

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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.”<sup>433</sup> 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.<sup>434</sup>

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.”<sup>435</sup>

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 care<sup>436</sup> 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.<sup>437</sup> Congress

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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.<sup>438</sup> 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.”<sup>439</sup> 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.

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438. *See supra* Section V.C.

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