

PARENT CIVIL UNIONS: RETHINKING THE NATURE OF FAMILY

Michele Goodwin*

Naomi Duke**

This Article explains why federal and state commitments to align transitions from foster care services with the two-parent, often heterosexual model undermines primary goals of child welfare services, including providing permanent, stable placements for abandoned, neglected, and abused children. Compelling empirical research demonstrates why the two-parent model may be overinclusive. This Article takes a different approach challenging the normative constructions of family and showing why the two-parent nuclear family model might be underinclusive. It considers the legal, economic, and social conundrums of child welfare services, unpacking the tragic outcomes and failures of the foster care system, which sets as its goal the two-parent family model. This Article combines a rigorous economic critique of the bureaucratic inertia in child welfare generally with a nuanced study of child welfare outcomes, exposing high incarceration rates, teen pregnancy, homelessness, and poverty. Despite these outcomes and significant economic waste in the foster care system, legal scholars offer very little by way of theory or prescription. Parental Civil Unions makes several important economic claims: the foster care funding structure bears little relationship to quality or outcomes, foster care promotes perverse economic incentives and rent-seeking behavior, and foster care funding is rooted in historic rather than

* Everett Fraser Professor of Law, University of Minnesota Law School and Professor of Medicine & Public Health, University of Minnesota. Professor Goodwin is the President of the Defense for Children International (USA) and Executive Director of the Institute for Global Child Advocacy. This project began as a thought experiment during my year as a Visiting Professor at the University of Chicago Law School. It benefited from the law school's roundtables and discussions with Lee Fennell, Richard Epstein, Mary Anne Case, Saul Levmore, Lior Strahlevitz, and others. Subsequent to those valuable "in-house" discussions, the project was well served by a student roundtable at Columbia Law School and workshops at the University of South London, the University of Minnesota Law School, the University of Maryland Law School and the University of Iowa Law School. I am grateful for helpful comments from Sheldon Kurtz, Thomas Gallanis, Jessica Clarke, Gregory Shaffer, Laura Cooper, Hope Lewis, Ruth Arlene Howe, Danne Johnson, Susanna Blumenthal, and William McGeeveren. I also thank Dorothy Roberts, Anita Allen, Martha Fineman, Naomi Cahn, Glenn Cohen, Patricia Williams, and Carol Sanger for ongoing conversation about the construction of family. Finally, I am grateful to my research assistant, Allison Whelan. Michele Goodwin©

** Assistant Professor of Pediatrics, University of Minnesota. Harvard, MD, Harvard, BA. Medical Director, West Suburban Teen Clinic, Excelsior, Minnesota.

programmatic ideology. The Article offers a nuanced proposal to transition foster children from child welfare services to permanent family placement through the legalization of Parental Civil Unions (PCU) or “baby cooperatives.”

PREFACE: TWO MOTHERS AND A FATHER, WHY NOT?

In 2009, M.C. was placed in child protective custody.¹ A fight between her parents turned deadly; M.C.’s biological mother, Melissa, was arrested and charged as an accessory to an attempted murder on M.C.’s “presumed” mother, Irene.² As Irene struggled for her survival and Melissa joined the ranks of inmates in the California prison system, M.C. became another statistic in the overcrowded child welfare system. She was placed in shelter care.³ Despite its more familiar trappings of domestic violence, M.C.’s saga is more complicated and nuanced than the typical dynamics that pull families apart or that bind them together. M.C. has three parents, although only two are legally recognized.⁴ For that reason, her father was denied custody because California courts reasoned that M.C. already had two mothers (although each was unavailable) and legally she could not possess any additional parents.⁵ The child was placed in shelter care.

On higher judicial review, the California Court of Appeals considered whether a child can have *three* presumed parents: “a biological presumed mother, a statutorily presumed mother and a constitutionally presumed father.”⁶ The Court answered in the negative.⁷ The California Court of Appeals reasoned that because M.C.’s mothers were a married couple, only they could retain legal status as her parents—not the biological father who possessed a steady job, “stable and adequate housing[,] and the support of his immediate family.”⁸ And, although the biological father promised to “care for his child and provide her with a loving and nurturing home,”⁹ the Court interpreted California law to forbid parentage that exceeds two people.¹⁰ Despite the father’s biological, emotional, and legal interests in becoming a “legal parent” of his genetically related child, the California Court of Appeals held that *only* two individuals can retain the status of legal parents.¹¹ The child’s immediate fate was left to the juvenile justice system.¹²

1. *In re M.C.*, 123 Cal. Rptr. 3d 856, 862 (Cal. Ct. App. 2011).

2. *Id.*

3. *Id.* at 863.

4. *Id.* at 866–68.

5. *Id.* at 870.

6. *Id.* at 867.

7. *Id.* at 878.

8. *Id.* at 865.

9. *Id.*

10. *Id.* at 876.

11. *Id.*

12. *Id.* at 866, 877.

This Article offers a pragmatic answer to the oversupply of children in foster care. The Article takes a solution-driven approach to a growing public policy concern. Over thirty years ago, Landes and Posner¹³ provocatively observed that a “glut” in black babies exists in the United States foster care system. Their controversially framed assessment attracted ardent criticism, including charges of racism. Nonetheless, Posner and his colleague touched on urgent and yet unresolved problems, including how to (1) provide more meaningful life opportunities for child wards of the state by transitioning them into permanent home placements, (2) reduce the prevalence of black children in foster care, and (3) decrease state expenditures on foster care, while not sacrificing quality of care.¹⁴ There were other questions of great importance that arose in response to their research. The use of economic terms as analytical tools to describe the collision of both a terrible racial phenomenon and family law crisis, however, launched the type of criticism that ultimately detracted from the authors’ pertinent thesis.¹⁵ As a result, Landes and Posner abandoned this line of inquiry.

Yet, the importance of studying the supply and demand imbalance of permanent home placement remains urgent. For all the scholarship concerning marriage and families, the race and law scholarship concerning poverty, the law and economics research on family decline, and the feminist jurisprudence concerning family structure(s), few sturdy theories offer an explanation for the persistence of a racialized glut in foster care and its connection with perverse economic incentives.¹⁶ More importantly, few politicians offer alternatives to this quagmire that reimagine the family model.

The supply of children in U.S. foster care far exceeds the demand for their adoption. Indeed, only one in five children is adopted from foster care in the United States.¹⁷ Not only do the circumstances leading to the surrender of children to the state continue unabated (negligence, abuse, poverty, and drug addiction of the parents), but the U.S. recession (home foreclosures, bankruptcies, and homelessness) further exacerbates these conditions.¹⁸ Children of color in the foster care system fare the

13. Elisabeth M. Landes and Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 324–25 (1978).

14. *Id.*

15. See, e.g., J. Robert S. Prichard, *A Market for Babies?*, 34 U. TORONTO L.J. 341, 352 (1984) (suggesting that “the special value we attribute to children depends in part on the fact they cannot be traded”).

16. With noted exception to an important, recent publication by Professor Dorothy Roberts. See Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474 (2012).

17. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., FOSTER CARE STATISTICS 2010, at 5 (2012) [hereinafter FOSTER STATS], available at <http://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

18. See Alice Park, *Side Effect of the Recession: An Increase in Child Abuse*, TIME, Oct. 4, 2010, <http://healthland.time.com/2010/10/04/side-effect-of-the-recession-an-increase-in-child-abuse/> (discussing research finding an increase in child maltreatment cases since the beginning of the recession in 2008).

worst because of reduced permanent placements, extended or permanent stays in “temporary” care, and fewer transitions out of the system.¹⁹ Empirical data confirm this point.²⁰ The challenges in overcoming these problems persist.

To explicate, the Adoption and Foster Care Analysis and Reporting System (AFCARS), which “collects information on all children in foster care for whom State child welfare agencies have responsibility for placement, care, or supervision,” captures this bleak picture in a 2012 report.²¹ AFCARS’s data reveal an open secret: nearly half a million children reside in foster homes or contemporary orphanages as wards of the state, while waiting to return to or to find a home.²² The life chances of these children are severely compromised: most will never attain a high school diploma because of soaring dropout rates.²³ High incarceration rates,²⁴ juvenile delinquency,²⁵ and sexual exploitation while under the state’s supervision²⁶ provide provocative counternarratives to the conventional wisdom that foster care serves as the best available option for children in need of homes. When closely studied, such outcomes provide further evidence of a system in distress. Factors contributing to this failing system include overcrowding,²⁷ poor oversight, mismanagement, and inadequate monitoring,²⁸ which independently and collectively result in substandard outcomes for children.

This glut that Posner and Landes earlier described manufactures far more pernicious outcomes than they presumed, as the externalities of contemporary foster care extend beyond economic inefficiencies to include extraordinarily poor welfare outcomes for children. Some of these externalities create cyclical norms²⁹ that undermine the long term stability and social health of communities. This Article does not take up the Landes and Posner theory; rather, it articulates a new approach to creat-

19. FOSTER STATS, *supra* note 17, at 9.

20. *Id.*

21. *Id.* at 1–3.

22. *Id.* at 3.

23. See National Working Group on Foster Care and Education, *Educational Outcomes for Children and Youth in Foster and Out-of-Home Care*, ESSENTIAL EDUCATOR (Mar. 3, 2011), <http://www.essentialeducator.org/?p=3007>.

24. Mark E. Courtney et al., *Foster Youth Transitions to Adulthood: A Longitudinal View of Youth Leaving Care*, CHILD WELFARE, Nov.–Dec. 2001, at 685, 709 (2001), available at http://www.thenightministry.org/070_facts_figures/030_research_links/060_homeless_youth/courtneystosteryouthtransitions.pdf.

25. *Id.* at 708–709.

26. *Id.* at 694–95.

27. See Logan Nakyanzi, *Foster Care System Faces Problems*, ABC NEWS (Dec. 19, 2011), <http://abcnews.go.com/Primetime/story?id=132011&page=1#.T0MiPifZCLI> (stating that “thousands of kids in foster care is a cause for concern”).

28. See generally John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child’s Right to Permanence*, 54 S. CAL. L. REV. 633, 635 (1981) (stating that “the American legislative and judicial system has failed to protect adequately the welfare of children”).

29. See, e.g., Edward L. Schor, *Foster Care*, PEDIATRICS IN REVIEW, Jan. 1989, at 209, 210 (discussing the cyclical patterns of placement decisions and the effect placement decisions have on society).

ing families by challenging the normative family framework, which federal and state officials use to determine suitability for adoption.

In re M.C. demonstrates that even as courts recognize non-traditional marriages and partnerships such as the case involving Melissa and Irene,³⁰ judges may be less creative and less flexible in recognizing multiple-parentage, thereby undermining the child's best interest. Why? On one hand, until recently, restrictive state laws precluded gay men and women from adopting;³¹ a few states continue to prohibit any gay adoption, using marriage as proxy for an entitlement or right to parent. Indeed, significant constraints continue in this domain with second parent adoption.³² In such cases only one gay parent is permitted legal guardianship while the other parent has no legal status in relation to the child. Most recently, the Fifth Circuit announced that the state of Louisiana need not provide full faith and credit to a gay couple who adopted a Louisiana-born child in New York and sought a Louisiana birth certificate.³³ The court opined that the couple's full faith and credit claim "is superficially appealing," but cannot be reconciled with U.S. Supreme Court jurisprudence.³⁴

On the other hand, implicit and explicit economic criteria often preclude working class and middle class black families from adopting children in foster care. According to the National Association of Black Social Workers, child welfare administrators and judges deploy class-based considerations to measure suitability such as domicile location (*safe neighborhood or not*), educational status, social affiliations, and material privilege (*does the family take vacations or belong to clubs?*).³⁵ Meanwhile, thousands of children age out of foster care into homelessness, teen pregnancy, and the criminal justice system.³⁶ Efforts to address this problem at the front-end make sense (i.e., from family planning strategies and reproductive counseling to family training), but a lack of serious consideration to the back-end, including adoption, persists. The two-parent traditional model has long been associated with success, but what contributes to the success of that model likely involves many factors other than heterosexual marriage. Equally, wealth and home ownership are relevant factors, but not dispositive of a social capacity to parent.

30. See *supra* notes 1–12.

31. See *infra* notes 317–18, 321.

32. *Id.*

33. See *Adar v. Smith*, 639 F.3d 146, 151–52 (5th Cir. 2011).

34. *Id.* at 151.

35. The Association has argued that adoption eligibility standards are "too rigorous for most black applicants and discriminate against low-income families who want to adopt." Darlene Addie Kennedy, *Question: Should Congress Facilitate Transracial Adoptions?: Yes: End the Foster-Care Ordeal for Black Children*, 11 INSIGHT MAG. 18 (1995); see also Twila L. Perry, *Transracial Adoption and Gentrification: An Essay on Race, Power, Family, and Community*, 26, 48 B.C. THIRD WORLD L.J. 25 (2006) ("In any process in which economic status increases importance, most Black families will not be able to compete with most white families . . .").

36. See *supra* notes 24–25.

This Article urges a radical rethinking of family and the values attached to its structure. This project provides descriptive and analytical critiques of the current foster care regime and articulates prescriptions for advancing a new model of family creation and placement. Specifically, this Article engages a thought experiment, the establishment of Parental Civil Unions (PCU) or *baby cooperatives* as mechanisms to address excessive crowding in foster care. The proposal fits within a complimentary, albeit limited range of policies to advance child welfare.

This Article urges a policy experiment based on its hypothesis that institutionalizing contracts between related adults (by family or friendship) to care for children (child cooperatives) will likely serve as a viable, if not best, “family” mechanism to transition children from ward status to permanent home placement. The idea is novel, but its fundamental principles can be found among ancient communities and borrowed in the ubiquitous political cliché, *it takes a village to raise a child*.³⁷ This project pragmatically unpacks that intuition and contends that legalizing cooperative arrangements by contract for people who intend to parent—much like domestic partnerships—will liberalize parentage and achieve important child welfare and social goals, while promoting economic efficiencies and utilitarian goals.

This Article proceeds in four Parts and is theoretically framed by two major Sections; the first half of the paper emphasizes the perverse economic incentives and mismanagement that captures the contemporary child welfare model, and its second half prescribes what should be done about it. Part II examines contemporary child maintenance, explaining how efforts to promote child welfare became institutionalized in the United States. Part III turns to foster care’s funding mechanisms and the externalities produced by its expenditure protocols. It argues that the current funding structure promotes perverse incentives, resulting in suboptimal outcomes. Part IV turns to the policy question presented: how legalized baby cooperatives or *parent-based domestic partnerships* might serve as a viable alternative to permanent temporary care for abandoned and neglected children. Part V concludes.

II. CONTEMPORARY CHILD MAINTENANCE

Part II proceeds in two empirical sections. Section A explains how efforts to promote child welfare became institutionalized in the United States. Such efforts, as we describe, were motivated by two coinciding influences: (1) concerns for public health and safety and (2) an intensifying women’s rights movement, which in turn focused its energies on a child welfare platform. Section A provides a succinct historical account of these coinciding movements, as in combination they help to explain the twentieth century philosophy and legacy that continues to influence

37. See generally HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE AND OTHER LESSONS CHILDREN TEACH US* 12 (1996) (discussing her views about America’s children).

subsequent federal policy on the care and treatment of vulnerable children. Section B takes up that sociological narrative to reveal how shifting ideologies reshaped child welfare policies and in turn influenced contemporary foster care and adoption dynamics. This Section unpacks key demographics that illuminate racialized trends in the placement of wards of the state to permanent homes, economic inefficiencies, and class gaps that persist in the child welfare system despite significant state and federal expenditures on child welfare.

A. *Child Welfare: A Nineteenth Century Movement*

The United States turned its attention to child welfare in the late nineteenth century as public health concerns gave rise to increased concern over destitute, sickly children roaming the streets in major cities. New York City's poverty at the time is tellingly captured by Charles Dickens who visited the Five Corners with police escorts.³⁸ Of the area, he noted, "all that is loathsome, drooping, and decayed is here."³⁹ Child welfare efforts became institutionalized during this period, resulting in part from broader political and social movements focused on public health and safety.⁴⁰ The era was marked by mass European immigration from poverty-stricken nations such as Ireland and Italy, as well as immigration from wealthier nations that provided limited opportunities for uneducated, working class families fleeing from destitution elsewhere. In England, for example, half of children never survived to age five.⁴¹ Frequently, children died in the streets from starvation.⁴² One historian compared dead children in the streets to road kill, observing not only the frequency of such occurrences, but the banality of child poverty during the Victorian era.⁴³ Imagine orphanages so crowded that they only accepted placements of children born to married couples or even the undetected mass murdering of babies born to unmarried mothers.⁴⁴ Such occurrences defined the period. Illegitimate babies and children were literally "farmed" out to individuals willing to house them for a fee.⁴⁵

38. CHARLES DICKENS, AMERICAN NOTES 116 (Modern Library ed., Random House 1996) (1842).

39. *Id.* at 119.

40. Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1736 (2000) (reviewing ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999)).

41. THOMAS W. GOODHUE, *CURIOUS BONES: MARY ANNING AND THE BIRTH OF PALEONTOLOGY* 10–11 (2002) (mentioning the high rates of childhood mortality in nineteenth century England).

42. Children of single mothers were particularly at risk; single motherhood "condemned" many women and their children "to lives of destitution and starvation." ALLISON VALE & ALISON RATTLE, *THE WOMAN WHO MURDERED BABIES FOR MONEY: THE STORY OF AMELIA DYER* 13 (2007).

43. *See id.*

44. VALE AND RATTLE, *supra* note 42, at 13.

45. *Id.*; Dorothy L. Haller, *Bastardy and Baby Farming in Victorian England*, STUDENT HIST. J. 1989–1990 (1990), available at <http://chn.loyno.edu/sites/chn.loyno.edu/files/Bastardy%20and%20Baby%20Farming%20in%20Victorian%20England.pdf>.

This “farming” served as the predecessor model to contemporary foster care.

1. *Origins*

The United States endured a similar period. In this country, as in England, poor, unhealthy children living on the streets posed a serious public health threat. Impoverished children roamed the streets of New York, Boston, Chicago, and other cities, begging during the day.⁴⁶ Some were prostituted, others provided cheap manual labor in sweatshops and slaughter houses, and all were uneducated.⁴⁷ Children slightly older than toddlers assisted their parents with sweatshop work, pulling “out basting threads” throughout the night.⁴⁸ Lewis W. Hine’s⁴⁹ haunting photographs capture children as young as three working hazardous jobs in glass factories, ten year old miners, and five year old fishermen.⁵⁰ Disease brought child welfare into focus—and not entirely as an altruistic matter. Poor infrastructural conditions, such as sewage and sanitation, heightened the risk that disease could spread and infect the wealthy elites of major cities (as indeed it did).⁵¹

Dr. Cecelia Tichi, Chair of Modern Culture in the John W. Kuge Center at the Library of Congress, describes this period in Chicago with chilling detail: “garbage was overflowing in the street in the garbage boxes and . . . children played with trash and waste, bones, orange peelings, and the like as if they were toys.”⁵² Dirt and dust polluted the air, killing animals and choking horses.⁵³ During periods of rain, “mud was up to and beyond a woman’s ankles.”⁵⁴ Such conditions burdened the civil infrastructure of America’s most prosperous cities, including Chicago, Philadelphia, New York, Cleveland, Milwaukee, and others. These conditions horrified the wealthy when they traveled to work or tended to civic affairs, but the unsanitary urban landscape ravaged the poor, facili-

46. See, e.g., JOHN E. B. MYERS, CHILD PROTECTION IN AMERICA: PAST, PRESENT, AND FUTURE 43 (2006) (commenting on the large numbers of children who “begged on the streets of American cities” in the late 1800s).

47. See, e.g., Tichi, *infra* note 48.

48. Cecelia Tichi, Chair of Modern Culture in the John W. Kluge Ctr. at the Library of Cong., Justice, Not Pity: Julia Lathrop, First Chief of the U.S. Children’s Bureau (Sept. 2007) (transcript of lecture) (“Children as young as 4 could pull out basting threads and were up half the night to do it. The families had to have the money. Every child in those families was employed along with the parents. The surface they ate on became the work surface. The surface they slept on was sometimes the work surface where bundles of clothing, one piece at a time, were worked on and returned in the morning. Chances were the father or mother staggering under the loads of those heavy woolens.”).

49. During the early part of the twentieth century, Lewis Hine photographed child workers. Some of the children were as young as three years old, working in factories, mines, glass factories, and fields. The children worked long hours and under arduous conditions.

50. RUSSELL FREEDMAN, KIDS AT WORK: LEWIS HINE AND THE CRUSADE AGAINST CHILD LABOR (1994).

51. Hamilton Cravens, *Social Welfare: History*, in 3 ENCYCLOPEDIA OF CHILDREN AND CHILDHOOD IN HISTORY AND SOCIETY 764, 765–66 (2003).

52. Tichi, *supra* note 48.

53. *Id.*

54. *Id.*

tating cholera outbreaks, the spread of tuberculosis, and thousands of untimely deaths.⁵⁵

If not for two converging movements culminating in a federal response to child poverty in the early twentieth century, such conditions might have persisted, accounting for more deaths and disease.⁵⁶ Unrelenting public outcry, however, pushed forward a social democracy movement to address twentieth-century urban decline.⁵⁷ As well, suffragists turned their attention to childhood deaths and brought about change at the federal level.⁵⁸ States sporadically adopted laws and organized child welfare campaigns.⁵⁹ In 1912, President Taft and Congress responded to escalating public pressure strategically organized by prominent women such as Julia Lathrop, Florence Kelley, and Jane Addams and established the Children's Bureau (CB) to coordinate federal support for state child welfare programming.⁶⁰

This victory for Lathrop and Addams ushered in a fundamental change in social democracy, establishing the needs of children as a primary concern of the U.S. government. Establishment of the CB must also be understood within the context of its time, however, because at its conception, protecting the interest of white, "legitimate" children served as its chief goal.⁶¹ Social workers sought widowed white mothers with the goal of preventing the removal of their children from the home.⁶²

Thus, despite child welfare's philosophical origins—working toward the "best interests" of children—early reforms were not impervious to legalized racial segregation and Jim Crow practices.⁶³ Equal opportunity for all groups of children remained more illusory than real. Reform programs excluded destitute black children—and ironically operated in parallel to the suffrage movement that spearheaded child reform efforts but excluded black women.⁶⁴ Black churches and women's groups filled the gap in services, providing care to homeless and sickly African American children from their communities.⁶⁵

55. *See id.*

56. *Id.*

57. *Id.*

58. *See id.* (noting the important role of women such as Julia Lathrop and Florence Kelley in advancing children's rights during this era). *See also* Peter Dreier, *Florence Kelley: Pioneer of Labor Reform*, 21 *NEW LABOR FORUM*, Winter 2012, at 70, 71–72 ("Kelley did more than any other twentieth-century American to rectify the awful conditions of child labor.").

59. Guggenheim, *supra* note 40, at 1736.

60. ADMIN. FOR CHILDREN & FAMILIES/CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE CHILD ABUSE PREVENTION AND TREATMENT ACT INCLUDING ADOPTION OPPORTUNITIES & THE ABANDONED INFANTS ASSISTANCE ACT 4 (2003), available at http://www.acf.hhs.gov/programs/cb/laws_policies/cblaws/capta03/capta_manual.pdf.

61. *See* Dorothy E. Roberts, *Black Club Women and Child Welfare: Lessons for Modern Reform*, 32 *FLA. ST. U. L. REV.* 957 (2005).

62. Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 *HOFSTRA L. REV.* 23, 31–32 (2005).

63. *Id.* at 23.

64. Roberts, *supra* note 61, at 958.

65. Roberts, *supra* note 62, at 31. Initially, women's groups sought to improve the welfare of mothers and children who were disadvantaged as a result of racial injustices. *Id.* at 32; *see also* Rob-

2. *Evolution*

Between the 1930s and 1960s, child welfare policies expanded as did federal funding;⁶⁶ child homelessness, illiteracy, malnutrition, and poverty served as a galvanizing platform under the broader war on poverty movement. The late 1960s, however, ushered in legal reforms that realigned the broader war on poverty agenda; new strategies were deployed to concentrate child welfare efforts on the prevention of abuse and child protection.⁶⁷ Despite particularly relevant and persuasive critiques that the post-Nixon reforms were an attack on families and bifurcated from broader antipoverty efforts,⁶⁸ important changes came about, including the recognition that child abuse was not a “private” family matter.

For example, the 1974 Child Abuse Prevention and Treatment Act (CAPTA) sought to prevent “the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child’s welfare under circumstances which indicate that the child’s health or welfare is harmed”⁶⁹ Nevertheless, critics suggest that by focusing state and federal resources on compromised child health (emotional or physical) as caused by or de-

erts, *supra* note 61, at 963–64 (stating that the women focused on three main objectives: (1) providing better access to education for children while also supporting mothers to become better caregivers, (2) definitive response to the needs of children denied access to mainstream institutions, and (3) the rescue of black children from punitive practices of white institutions).

66. See Kasia O’Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, PEW CHARITABLE TRUSTS 1 (2004), available at http://www.pewtrusts.org/uploadedFiles/www.pewtrusts.org/Reports/Foster_care_reform/LegislativeHistory2004.pdf. Government funding for child welfare was initially made possible through provisions in the Social Security Act of 1935, with some government monies set aside to support social work services for destitute families. Later, payments were also made to families for children in foster care and for supplemental child welfare services. FOSTER STATS, *supra* note 17, at 9; Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE, no. 2, 2008 at 125; see also, Patricia E. Erickson, *Federal Child Abuse and Child Neglect Policy in the United States Since 1974: A Review and Critique*, 25 CRIM. JUST. REV. 77, 78–79 (2000).

67. Guggenheim, *supra* note 40. Some commentators associate this period with the election of Richard Nixon as being the turning point in child welfare services moving from a poverty agenda to one that addressed abuse and family neglect.

68. Erickson, *supra* note 66, at 79–80.

69. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 3, 88 Stat. 4, 5 (1974); see ADMIN. FOR CHILDREN & FAMILIES/CHILDREN’S BUREAU, *supra* note 60, at 6–7 (“The Child Abuse Prevention and Treatment Act (CAPTA, Pub. L. No. 93-247) was originally enacted in 1974 and was later amended by the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 (P. L. 95-266). The law was completely rewritten in the Child Abuse Prevention, Adoption and Family Services Act of 1988 (P. L. 100-294, 4/25/88). It was further amended by the Child Abuse Prevention Challenge Grants Reauthorization Act of 1989 (P. L. 101-126, 10/25/89) and the Drug Free School Amendments of 1989 (P. L. 101-226, 12/12/89). . . . The Child Abuse Prevention and Treatment Act was amended and reauthorized by the Child Abuse, Domestic Violence, Adoption, and Family Services Act of 1992 (P. L. 102-295, 5/28/92) and amended by the Juvenile Justice and Delinquency Prevention Act Amendments of 1992 (P. L. 102-586, 11/4/92). CAPTA was amended by the Older American Act Technical Amendments of 1993 (P. L. 103-171, 12/2/93) and the Human Services Amendments of 1994 (P. L. 103-252, 5/19/94). CAPTA was further amended by the Child Abuse Prevention and Treatment Act Amendments of 1996 (P. L. 104-235, 10/13/96). . . . In 2003, CAPTA was reauthorized and amended by the Keeping Children and Families Safe Act of 2003 [(Pub. L. No. 108-36, 117 Stat. 800 (2003))].”; for bill text see also THE LIBRARY OF CONGRESS THOMAS, <http://thomas.loc.gov/home/thomas.php> (last visited August 6, 2011).

riving from parental neglect or abuse, the focus of child services shifted from “welfare” to “protection”⁷⁰ and from restoring the family unit to rescuing the child from the grasps of parents.

Federal funding followed this policy shift in three key ways. First, federal money available to states through the Aid to Families with Dependent Children (AFDC) Foster Care predicated funding on protection agents removing children from their homes.⁷¹ Second, federal foster care programs provided unlimited funding for out-of-home placement while providing capped, reduced funding for prevention of placement or reunification strategies.⁷² Third, foster care placement became the primary response by states for intervention in parent and family-child dysfunctional relationships.⁷³ Federal funding in this regard may have created perverse financial incentives to expand child welfare services as it created jobs and contributed to the local economy (through the employment of social workers and payments to foster families).

Indisputably, federal policy brought about more aggressive efforts at the state level to punish parents for their failure to properly care for their children. Critics suggest that federal efforts to reframe child welfare policy from its earliest mission—to reduce poverty—into one that addresses neglect caused an abundance or *glut* of babies and children in the foster care system.⁷⁴ Ultimately, an important question must be addressed: “Is the problem that too many children are not being adopted out of foster care or that too many children are entering foster care?”⁷⁵

B. Contemporary Foster Care: The Glut

Contemporary studies reveal that foster care is overburdened and undermined by large case loads, high staff turnover, data limitations, and constant influx and outflow of foster parents.⁷⁶ Such a system fails all youth but particularly aggravates the life chances of children of color, especially African Americans. For example, Black children comprise the majority of children on foster care rolls in many major cities, despite their overall ethnic population constituting less than a sixth of the total U.S. population.⁷⁷ Most children “age out” of the system ill-prepared for

70. Guggenheim, *supra* note 40, at 1737.

71. Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care Or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 142 (1999).

72. *Id.*

73. *Id.*

74. Guggenheim, *supra* note 40, at 1727–28.

75. Guggenheim, *supra* note 71.

76. Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE OF CHILD. 75 (2004); see also KARIN MALM ET AL., URBAN INST., RUNNING TO KEEP IN PLACE: THE CONTINUING EVOLUTION OF OUR NATION’S CHILD WELFARE SYSTEM, at vii (2001), available at http://www.urban.org/uploadedPDF/310358_occ54.pdf (noting that “most systems lack sufficient resources to protect and serve children and families adequately”).

77. *State and County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last revised Mar. 14, 2013).

a productive life.⁷⁸ Children raised in foster care are more likely to drop out of high school, become delinquent and involved with criminal activity, and experience difficulty transitioning into adulthood.⁷⁹

In a brilliant set of articles and books, Dorothy Roberts persuasively argues that despite the proffered rationale for child welfare reforms in the latter half of the twentieth century, the system has failed African American children.⁸⁰ Other scholars echo her concerns, raising alarm about the plight of black children in foster care, noting their disproportionate numbers in the child welfare rolls.⁸¹ The continued expansion of child welfare legislation, including the Welfare Reform Act of 1996, results in some children entering the child welfare system as a consequence of their parents' inability to meet rules, time limits placed on benefits, and related sanctions.⁸²

This is what the superfluity of children in foster care looks like thirty years after Judge Posner claimed there was a "glut" of black children in foster care. As of 2010, the most recent year for which statistics are available, there is an estimated 408,425 children in the foster care system.⁸³ Approximately one quarter (twenty-six percent) of children reside in kinship care and another forty-eight percent live in nonrelative homes.⁸⁴ In 2010, fifty-one percent of those who exited the system reunited with parents or primary guardians.⁸⁵ Only one in five kids in foster care, however, was adopted.⁸⁶ Thousands who exited lived in the system for more than five years and many thousands more who remain continue in the system beyond several years.⁸⁷ Some of the children exit the system as runaways, criminals, or by death. One-third of the children

78. See Marci McCoy-Roth et al., *Number of Youth Aging Out of Foster Care Continues to Rise; Increasing 64 Percent Since 1999*, FOSTERING CONNECTIONS RESOURCE CENT., Jan. 31, 2010, available at http://www.ilrinc.com/images/uploads/Jan_2010_stats_on_aging_out.pdf (noting that "[s]ince 1999, approximately 228,000 youth have 'aged out' of foster care nationally").

79. *Id.* at 1–2.

80. See Roberts, *supra* note 62, at 23.

81. Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 110 (2008).

82. Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 134 (1999); Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 73 (1999).

83. FOSTER STATS, *supra* note 17, at 1–3 (noting that foster care is defined as care for children outside of their homes over twenty-four hours; it includes settings such as non-relative homes, relative homes—otherwise known as kinship care, group homes, emergency shelters, residential facilities, and pre-adoptive homes. In the 2010 fiscal year, 254,375 children entered foster care and 254,114 children exited foster care).

84. *Id.* at 1, 4. The remaining placements included nine percent in institutions, six percent in group homes, five percent trial home visits, four percent in preadoptive homes, two percent on the run, and one percent in supervised independent living. *Id.*

85. *Id.* at 1.

86. *Id.* at 5. Of the children who transitioned from foster care, just under half (forty-six percent) had been in the system for less than a year; the median amount of time spent in out-of-home placement was 13.5 months.

87. *Id.* at 6–7.

trapped in the permanence of foster care without hope for adoption are African American.⁸⁸

Scholars correctly predicted and documented the gloomy prospects for children who lived in foster care, including transitioning from wards of child protective services to inmates of various states' prison systems, dropping out of school, teenage pregnancy, self-destruction, and depression.⁸⁹ Yet, proposals to enhance child welfare typically follow a traditional and uninspiring paradigm: establishing creative group homes, encouraging adoptions through churches, and creating semipermanent placements. These models rarely offer broad-scale success and direct appeals for adoption ultimately follow an impractical model: the search for the two-parent, economically resourceful household. Given the high risk of future poverty and low probability of human flourishing associated with long-term placement in foster care, a moral imperative exists to find a better solution that enhances children's life chances through adoption.

III. FINANCIAL INCENTIVES AND QUALITY OF CARE

Part III of this Article challenges the conventional view that correlates the quality of care received by children in foster care with the financial resources expended at the federal and state levels. It challenges the notion that if more funds were contributed to the currently organized foster care system, better outcomes would result. To the contrary, economic inefficiencies punctuate not only how federal funding expends to child welfare organizations but how child welfare organizations prioritize spending those resources. We argue that more frequently than not, federal foster care expenditures to child welfare organizations bear limited quantitative or qualitative relation to quality of life outcomes for child wards. Thus, the perception that poor quality of life outcomes for wards of the state and former foster children can chiefly be attributed to inadequate federal funding is inaccurate.

Part III identifies several fundamental weaknesses in the funding structure of U.S. foster care. Chief among our claims is that evaluation of the contemporary foster care system cannot be divorced from the financial expenditures authorized and utilized on its behalf. When closely examined, systemic weaknesses in the U.S. foster care system emerge that relate to the variability of funding across states, administrative inflexibility that prioritizes foster care placements over preventive services and permanent placement efforts, and fraud and economic mismanagement among other issues.⁹⁰ Section A briefly examines the financing

88. *Id.* at 9. These figures represent a decline in proportions of black, non-Hispanic youth from 2000, with relative increases in proportions of white, non-Hispanic youth and Hispanic youth.

89. *See supra* notes 79–80 and accompanying text.

90. LAURA RADEL, U.S. DEP'T OF HEALTH & HUMAN SERVS., FEDERAL FOSTER CARE FINANCING: HOW AND WHY THE CURRENT FUNDING STRUCTURE FAILS TO MEET THE NEEDS OF THE CHILD WELFARE FIELD (2005), *available at* <http://aspe.hhs.gov/hsp/05/fc-financing-ib/>.

structure associated with foster care, demonstrating that the funding model utilized by government agencies minimally relates to programmatic imperatives⁹¹ but instead reflects the old child welfare model.⁹² Section B turns from examining the economic inefficiencies present in the current U.S. foster care model to analyzing how such weaknesses undermine the child welfare system generally, and specifically the quality of services received by children in foster care.

*A. Foster Care Financing: Federalism, Old Paradigms,
and New Challenges*

Historically, the purpose of federal funding for foster care was to “pay[] a portion of States’ costs to provide care for children removed from welfare-eligible homes because of maltreatment.”⁹³ This means that for every child placed in a foster home or licensed institution, states may claim reimbursement.⁹⁴ Because the federal foster care program is authorized under Title IV-E⁹⁵ of the Social Security Act as an uncapped entitlement, it guarantees reimbursement or partial matching for “qualifying” state expenditures.⁹⁶ For example, in its statutory language, the law authorizes that whatever “sums . . . may be necessary to carry out the provisions” shall be “made available” to states.⁹⁷ As such, the Social Security Act provides the largest dedicated funding for foster care, “matching” and funding without limit or cap. Thus, federal funding of foster care was intended to promote flexibility, expand services, enhance quality, and discourage discrimination.

In reality, however, the federal foster care financing model functions as a system mired by serious inefficiencies, inflexibility, and bureaucratic redundancy. For example, the federal government mandates states to assume the costs of fostering children who do not qualify for welfare, which makes sense—abuse and neglect affect the wealthy, middle class, and poor. Title IV-E funding, however, only extends to chil-

91. *Id.*

92. *Id.*

93. *Id.* at 1.

94. *Id.* at 3.

95. Title IV provides in part:

[f]or the purpose of enabling each State to provide, in appropriate cases, foster care and transitional independent living programs for children who otherwise would have been eligible for assistance under the State’s plan approved under part A of this subchapter (as such plan was in effect on June 1, 1995) and adoption assistance for children with special needs, there are authorized to be appropriated for each fiscal year (commencing with the fiscal year which begins October 1, 1980) such sums as may be necessary to carry out the provisions of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans under this part.

42 U.S.C. § 670 (1997). Title IV appears in the United States Code as Title 42, Ch.7, Subch. IV, §§ 601–87. Regulations of the Secretary of Health and Human Services relating to Title IV are contained in Title 45, Code of Federal Regulations, chapter II, III, and XIII. Regulations of the Secretary of Labor relating to Title IV are contained in Title 29 Code of Federal Regulations subtitle A and Title 41, Code of Federal Regulations, chapter 29.

96. RADEL, *supra* note 90, at 1.

97. 42 U.S.C. § 670.

dren who qualify for welfare, thereby creating an unreasonable gap.⁹⁸ In addition, over the years each definition of which expenses qualify for reimbursement has been incorporated “in regulations and policy interpretations.”⁹⁹ Intuitively, such definitions would bring about enhanced clarity with the goal of enhancing the quality of services provided to children. In recent years, however, the Department of Health and Human Services (HHS) has come to recognize that the proliferation of definitions reflect “a level of complexity and burden that fails to support the program’s basic goals of safety, permanency, and child well-being”¹⁰⁰ as explained in this Section.

1. *Federalism and an Antiquated Model*

Federal foster care funding derives from an antiquated model—“income need standards”—from the old Aid to Dependent Children Program (ADC) and the now defunct AFDC.¹⁰¹ Specifically, states receive Title IV-E funding *only* for children whose biological families qualify for welfare.¹⁰² This type of programmatic rationing reflects the deep entrenchment of the foster care program to the old child welfare model. As a contemporary matter, this selective criterion disadvantages states and disservices vulnerable children.

Prior to 1961, “foster care was entirely a State responsibility,” although it was structurally linked from its inception to federal welfare benefits, more for historic than any well-conceptualized programmatic reasons.¹⁰³ Ironically, congressional authorization of federal funding for foster care emerged in direct response to states protesting new anti-discrimination rules issued by Arthur Flemming, then Secretary of Health and Human Services.¹⁰⁴ For decades, throughout the United States, states engaged in “child dumping,” whereby case workers plucked vulnerable children whom they discovered to be “illegitimate” from their welfare rosters.¹⁰⁵ The new rules required that states cease child dumping and provide services previously unextended to children of unwed parents.¹⁰⁶

Child dumping was an open, but unaddressed secret—a vestige of early bias in child welfare policy that qualified only “suitable homes” for

98. RADEL, *supra* note 90, at 6.

99. *Id.* at 2.

100. *Id.*

101. *Id.*; see Kasia O’Neill Murray, *The Child Welfare Financing Structure*, http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/MurrayPaper2%5B1%5D.pdf (noting that, together, these programs accounted for forty-two percent of total federal child welfare spending) (last visited May 25, 2013).

102. RADEL, *supra* note 90, at 6.

103. *Id.* at 3.

104. *Id.*

105. See STEVEN G. LIVINGSTON, *STUDENT’S GUIDE TO LANDMARK CONGRESSIONAL LAWS ON SOCIAL SECURITY AND WELFARE 105* (2002).

106. *Id.*

government assistance.¹⁰⁷ States were required to comply with federal rules honed through the New Deal and the ongoing civil rights movement, yet they were left to pay for foster care on their own, creating a race to the bottom and gaps in accountability.¹⁰⁸ Louisiana brought the issue to the forefront in 1961 by dumping 23,000 “illegitimate” children—expelling them from welfare services—because their parents were unwed.¹⁰⁹ The state of Louisiana declared the “homes” of poor, unwed parents morally “unsuitable” to receive welfare benefits.¹¹⁰

To be clear, this practice of child dumping was not unusual as other states either crafted discriminatory rules or imposed “selective” practices on the ground, which limited access to welfare benefits.¹¹¹ In Louisiana’s case, the extraordinary volume of children expelled from welfare benefits created an unavoidable federalism problem. Prior to exiting his term as Secretary of HHS, Flemming ordered states to immediately desist with practices that essentially created hierarchies among poor children.¹¹² Flemming’s Rule required states to provide welfare benefits to *all* poor families that met the income criteria for welfare *unless* the children’s homes were determined unsafe.¹¹³ As a result, a troubling, although unaddressed conundrum emerged. If the homes failed to meet certain minimum standards (i.e., determined unsafe), states were required to pay ADC to the families to help bring about improved conditions *or* place the children in foster care.¹¹⁴ This created two challenges: (1) states protested picking up the bill for this federally expanded welfare cohort, and (2) the actual expansion of foster care services.¹¹⁵ Congress resolved the issue by allocating federal funds for foster care.¹¹⁶

This legacy helps explain how federal funding for foster care became so deeply entwined with the welfare model—less by forethought and design than by circumstance. It does not, however, explain why foster care funding policy remains tethered to an obsolete model or why inequitable and sometimes amorphous eligibility criteria remain in place. For example, a policy designed to rescue children from Jim Crow era “state discrimination” that now perpetuates the same by class rather than race based inequity is difficult to justify. Indeed, there is no guiding principle or policy justification that explicates the “reason that the Federal Government should ‘care’ . . . more about children in imminent danger of maltreatment by parents who are poor than it does about children whose parents have higher incomes.”¹¹⁷ Children of working and middle

107. See RADEL, *supra* note 90, at 3.

108. See *id.*

109. See LIVINGSTON, *supra* note 105, at 105.

110. See RADEL, *supra* note 90, at 3.

111. See *id.*

112. See *id.*

113. See *id.*

114. *Id.*

115. See *id.*

116. *Id.*

117. *Id.* at 6.

class parents are no less impervious or vulnerable to neglect, sexual or physical abuse, and no less urgently deserving of the state and federal government's protection at their time of need.

Additionally, efforts to “get it right” in determining children's eligibility for Title IV-E funding incur an unusually high level of administrative involvement. Title IV-E administrators at the federal level emphasize accuracy at the state reimbursement level, starting with child eligibility criterion. Title IV-E's layered definitions for criteria, however, expose the system to weaknesses, including errors in determining who qualifies as an eligible recipient. Furthermore, because significant financial reimbursements are at stake, states willingly and proactively fight back when their clients' eligibility is rejected—and these fights often involve “procedural disputes, appeals, and protests from agency directors, legislators, and governors.”¹¹⁸ Nor can it be easily quantified or qualified how such administrative wrangling inures benefit to children or improves their outcomes.

Finally, this particular funding structure suffers from other serious flaws and idiosyncrasies. For example, the welfare model of 1961 is now obsolete, replaced in 1996 by Temporary Assistance for Needy Families (TANF).¹¹⁹ More problematically, the means test used under the old AFDC program “no longer parallels the income and asset limits for existing welfare programs.”¹²⁰ And because there were no income or asset adjustments for inflation, “[f]ewer children will be eligible for Title IV-E in the future as income limits for the program remain static while inflation raises both incomes and the poverty line.”¹²¹ Collectively, the selective financing criteria combined with layered eligibility criteria and definitions and an outmoded poverty index connected to the former welfare model illustrate not only serious systemic defects but an organizational model undermined from within by severe neglect and lack of coordination. Expectedly, then, negative externalities will emerge.

118. *Id.* at 6–7.

119. *Id.* at 3.

120. *Id.* at 6.

121. *Id.*

TABLE 1¹²²

Eligibility Requirements for Title IV-E Foster Care
Contrary to the welfare determination. A child's removal from the home must be the result of a judicial determination to the effect that continuation in the home would be contrary to the child's welfare, or that placement in foster care would be in the best interest of the child. Children in foster care as a result of a voluntary placement agreement are not subject to this requirement.
Reasonable efforts determination. The State agency must obtain a judicial determination within 60 days of a child's removal from the home that it has made reasonable efforts to maintain the family unit and prevent the unnecessary removal of a child from home, as long as the child's safety is ensured. In addition, there must be ongoing documentation that the State is making reasonable efforts to establish and finalize a permanency plan in a timely manner (every 12 months).
State agency placement and care responsibility. The State child welfare agency must have responsibility for placement and care of the child. Usually this means the child is in the State's custody. A tribal agency or other public agency may have responsibility for the child's placement and care if there is a written agreement to that effect with the child welfare agency.
Pre-welfare reform AFDC eligibility. The State must document that the child was financially needy and deprived of parental support at the time of the child's removal from home, using criteria in effect in its July 16, 1996 State plan for the Aid to Families with Dependent Children program. Income eligibility and deprivation must be redetermined annually.
Licensed Foster Family Home or Child Care Institution. The child must be placed in a home or facility that meets the standards for full licensure or approval that are established by the State.
Criminal background checks or safety checks. The State must provide documentation that criminal records checks have been conducted with respect to prospective foster and adoptive parents and safety checks have been made regarding staff of child care institutions.
Special Requirements in the Case of Voluntary Placements. If a child is placed in foster care under a voluntary placement agreement, Title IV-E eligibility rules apply slightly differently. Determinations that remaining in the home is contrary to the child's welfare and that reasonable efforts have been made to prevent placement are not required in these cases. However, if the child is to remain in care beyond 180 days, a judicial determination is required by that time indicating that continued voluntary placement is in the child's best interests.

(Courtesy of ASPE, HHS)

122. *Id.* at 7.

2. *Expenditures, Externalities, and System Byproducts*

Annual state and federal foster care expenditures derived from Title IV-E exceed \$9 billion.¹²³ But even that figure does not fully capture the total overall expenditure related to foster care services as funding derives from more than two dozen sources and can best be described as a mishmash or patchwork.¹²⁴ Equally, because of perverse financial incentives which lead to disparate claiming practices, there is no consistency as to how dollars follow children. A few years ago, HHS confirmed that “foster care funds received by States range from \$4,155 to \$33,091 per eligible child . . .”¹²⁵ How should these vastly different funding ranges be understood? Does this mean that the children for whom reimbursement was in excess of \$20,000 annually were made better off than those for whom less than \$5,000 per year was reimbursed? Were the children for whom \$5,000 per year was claimed less well off than their counterparts in other states (or in their state)? Likely not.

Nor is it likely that these disparities reflect dissimilarities in the type or quality of care provided to or experienced by children in foster care. After accounting for local cost of living differences by state and special needs children within a given foster care population, what this disparity reflects is a race to the bottom. States attempt to maximize the recoupment of costs or increase federal “matching” to balance their overall expenditures on foster care.¹²⁶ And because ambiguity pervades what administrative expenses qualify for reimbursement, agencies are incentivized to frame claims for reimbursement in ways that will more likely result in repayment.

Consider, for example, how Title IV-E administrators evaluate administrative expenses for case management and counseling reimbursement. Under Title IV-E protocols, case management expenses qualify for reimbursement, but not counseling.¹²⁷ Again, this policy may not be related to programmatic objectives. That said, the challenges associated with disentangling what is case management from counseling when both services may be provided in the same session, by the same social workers, in the same setting, becomes apparent. The rule is not ambiguous but clearly prone to error. The rule emphasizes clarity for services that can be indistinguishable, overlapping, and ambiguous. This frequently reoccurring scenario may result in states “over-claiming” expenses for case

123. Nicholas Zill, *Adoption from Foster Care: Aiding Children While Saving Public Money*, BROOKINGS INST. 2 (May 2011), http://www.brookings.edu/~media/research/files/reports/2011/5/adoption%20foster%20care%20zill/05_adoption_foster_care_zill.pdf.

124. Funding flows into foster care related services through multiple sources, including the John H. Chafee Foster Care Independence Program, Child Abuse Prevention and Treatment Act (CAPTA) State Grants, Community-Based Grants for the Prevention of Child Abuse and Neglect (CBCAP), and the Children’s Justice Act, to name just a few programs funded under the Children’s Bureau. *See also* Murray, *supra* note 101.

125. RADEL, *supra* note 90, at 1.

126. *See id.*

127. *Id.* at 6.

management. Indeed, “administrative costs are much more frequently the subject of disallowances than are other funding categories.”¹²⁸ Table 2 illustrates errors among states found not in compliance with Title IV-E. It highlights the high stakes nature of federal eligibility criteria, including how much money is at stake.

The protocols associated with foster care funding (described above) produce some predictable externalities and system gaming. More sophisticated frequent players—states skilled in the administrative process—may successfully claim more per child under Title IV-E, not necessarily because their clients are any more deserving of assistance but because the state players are more astute at justifying claims. Frequent players understand the importance of lobbying their government officials, have greater familiarity with the appeals processes, and are incentivized to recapture funds because they may have more to lose. Furthermore, more sophisticated state players understand how best to justify or frame requests for reimbursements, including how to detail administrative costs (i.e., case management versus counseling).

States that request lower payments per child may avoid pursuing reimbursement for “borderline” cases for any number of reasons, including the desire to avoid the cumbersome administrative appeals process should their claims be rejected. As well, some states—again repeat players—have developed sophisticated infrastructures designed to provide a broader selection of services to children for which Title IV-E funding will match. Indeed, “not all States have the financial means or budgetary inclination to invest in the full array of foster care related services”¹²⁹ Even so, no empirical data exists that supports a claim where states procure more financing for foster care services, better outcomes result for children.

128. *Id.*

129. *Id.* at 8.

TABLE 2¹³⁰

Distribution of Errors Among States Found Not in Substantial Compliance with Title IV-E Eligibility Rules										
State Found Not in Compliance	Number Cases Found Ineligible	Licensing Problems	Lacking Criminal Background Checks	Reasonable Efforts Violations	Missing Contrary to the Welfare Determinations	Child Welfare Agency Lacks Placement and Care Responsibility	Extended Voluntary Placement without Court Approval	1996 AFDC Criteria Not Met	Disallowance Amount	
New Jersey 2000 Initial Primary	44	33	0	14	0	4	3	3	\$269,903	
Kansas 2000 IP	16	6	0	6	7	0	0	10	\$74,265	
Maine 2001 IP	24	22	0	3	0	2	0	3	\$182,737	
Hawaii 2001 IP	25	0	18	1	0	2	1	3	\$238,432	
Iowa 2001 IP	22	0	3	6	6	0	0	15	\$156,915	
Vermont 2002 IP	26	2	0	4	7	4	0	14	\$312,918	
Maryland 2002 IP	37	3	1	36	1	0	0	1	\$601,820	
Wisconsin 2002 IP	23	3	0	13	4	2	2	1	\$206,833	
New York 2003 IP	31	0	0	26	7	4	2	5	\$806,811	
New Jersey 2003 Secondary	56	27	4	36	5	6	7	1	\$6,220,853	
District of Columbia 2003 IP	54	39	24	19	4	7	1	2	\$1,416,169	
Puerto Rico 2003 IP	70	17	7	98	7	0	0	26	\$271,056	
Montana 2003 Primary	22	1	0	28	2	1	1	0	\$317,752	
West Virginia 2003 P	25	4	0	20	0	0	1	0	\$451,305	
Alabama 2003 P	23	2	2	19	1	0	1	1	\$174,856	
Mississippi 2003 IP	10	9	0	3	1	0	0	0	\$8,133	
Arkansas 2003 IP	10	6	3	0	0	0	0	1	\$67,067	
Total Cases with Errors	518								\$11,777,825	
TOTAL ERRORS	757	174	62	332	52	32	19	86		
Percent of all errors		23%	8%	44%	7%	4%	3%	11%		

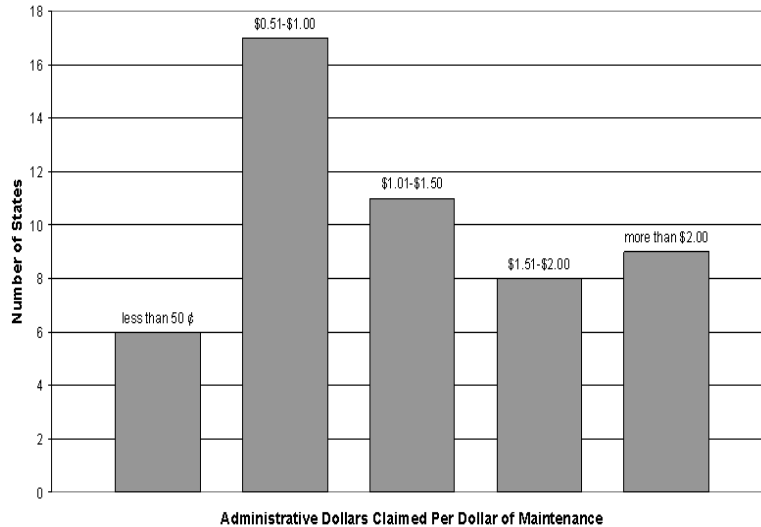
130. *Id.* at 14.

During 2000 to 2003, 50 states plus the District of Columbia & Puerto Rico were reviewed; of these 35 were found to be in substantial compliance and 17 not in substantial compliance. Six states (PA, MA, FL, TN, MN, & MI) have not been reviewed. Six states (KS, NJ, WV, AL, TX, & MT) have had an initial primary plus a primary or secondary review. Substantial compliance is defined as less than 8 errors for an initial primary review or 4 errors in a primary review. In secondary reviews substantial compliance is calculated as a percentage of cases and/or dollars. Ineligible cases may have more than one error reason.

Id. at 9.

Disparities also figure in the administrative dollars claimed per dollar of foster care maintenance. Again, it varies widely among states. The claims for child placement and administration range from four dollars and thirty-four cents (\$4.34) for every dollar down to ten cents (\$0.10) per dollar.¹³¹ To what can these differences be attributed? Very likely, inconsistent definitions of child placement along with administrative costs factor into this disparity, resulting in a broad financial gap. HHS suspects that “some States claim administrative expenses for non-IV-E children as ‘Title IV-E candidates’”¹³² Indeed, this could explain why some administrative costs are so disproportionately high in relation to the total Title IV-E payments. Table 3 highlights the differences in administrative dollars claimed per dollar.

TABLE 3: ADMINISTRATIVE DOLLARS CLAIMED PER DOLLAR OF FOSTER CARE MAINTENANCE (CALCULATED ON THE BASIS OF AVERAGE CLAIMS FY2001 THROUGH FY2003)¹³³



Finally, other perverse or unforeseen incentives may influence the amount claimed for foster care children generally. The National Coalition for Child Protection Reform points out, “some *private* agencies do indeed make money on foster care. These agencies are paid for every day they keep a child in foster care. If they return a child home—or get a child adopted—the reimbursement stops.”¹³⁴ As the organization explains, “That creates a strong incentive to let children languish in foster

131. *Id.* at 11.

132. *Id.*

133. *Id.*

134. *Financial Incentives*, NAT'L COAL. CHILD PROT. REFORM (updated Jan. 3, 2011), <http://www.nccpr.org/reports/12Financial.pdf>.

care.”¹³⁵ System manipulation occurs at many levels. Consider Medicaid, a program administered by states and overseen by HHS.¹³⁶ Medicaid pays for all prescription drug coverage for foster children.¹³⁷ In states that coordinate the program through fee-for-services (FFS) payments, a medical provider receives payment for every Medicaid eligible service she renders to a patient.¹³⁸ As payment for this type of arrangement follows the frequency of the services provided, the more services provided by the doctor, the more that she recoups or claims from Medicaid. Such services recently came under scrutiny by the Government Accountability Office (GAO).¹³⁹

A stunning report issued by the GAO documents the possible over-use or “over prescribing” of psychotropic medications to foster care children by FFS providers, including babies as young as one year old.¹⁴⁰ The report, *Foster Children: HHS Guidance Could Help States Improve Oversight of Psychotropic Prescriptions*, documents the findings of a study conducted in six FFS Medicaid states.¹⁴¹ As the report acknowledges, “Foster children have often been removed from abusive or neglectful homes and tend to have more mental health conditions than other children.”¹⁴² That might explain why some doctors prescribe medications to treat those traumas. It does not explain, however, why physicians prescribe very expensive (and not well understood) psychotropic medications at such high rates to foster children. The report makes clear that “no evidence supports the concomitant use of five or more psychotropic drugs” in children, but hundreds of foster children have such a drug regimen.¹⁴³

The GAO investigation found that “thousands of foster and nonfoster children were prescribed doses higher than the maximum levels cited in guidelines,” thereby increasing “the risk of adverse side effects” without enhancing efficacy.¹⁴⁴ Perhaps the most shocking finding relates to a little-known fact that foster children “under 1 year old were prescribed psychotropic drugs, which . . . have no established use for mental health conditions in infants . . .”¹⁴⁵ Indeed, providing infants psychotropic drugs “could result in serious adverse effects.”¹⁴⁶ This data indicates, and

135. *Id.*

136. U.S. GOV'T ACCOUNTABILITY OFFICE, *FOSTER CHILDREN: HHS GUIDANCE COULD HELP STATES IMPROVE OVERSIGHT OF PSYCHOTROPIC PRESCRIPTIONS* (2011).

137. *Id.*

138. *See id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

recent studies confirm,¹⁴⁷ that children may experience continued vulnerability within foster care.

Finally, there is no coherent theme or pattern to determine why such gross disparities exist with regard to state foster care claims per child. Funding levels do not correlate to quality of care, but rather are part of a complex matrix in which some states engage in strategizing, lobbying, appealing, and politicking to maximize payments. Yet, it remains uncertain whether and how such efforts benefit and promote healthy outcomes for foster children.

B. The Foster Care Trap: The Collision of Perverse Incentives and Inefficiencies

Section B turns from Part III.A.'s scrutiny of Title IV-E's eligibility criteria and the externalities produced by its funding protocols to an assessment of the quality of services provided to foster children in relation to the funding expended. In other words, it examines whether the multi-billion dollar annual funding structure results in high quality of services. Until about ten years ago, meaningful evidence of foster care system performance was difficult to trace. Internal investigations conducted by HHS,¹⁴⁸ external analysis by government offices such as the GAO,¹⁴⁹ as well as empirical studies launched by PEW,¹⁵⁰ the Brookings Institute,¹⁵¹ and other organizations¹⁵² now provide highly relevant information to analyze the overall functioning of the foster care system. Subpart III.B.1. examines whether Title IV-E claims are related to service quality or outcomes.

1. Quality of Services

At its inception, foster care emerged as the nation's best effort to protect abused and neglected children by temporarily removing them from dangerous family environments and temporarily placing them in protective and safe households. Title IV-E's uncapped funding reflects legislators' commitment at its inception to encourage flexibility, and more importantly reflects their interest in promoting and achieving *basic* outcomes for previously endangered children.¹⁵³ Foster care was not presumed to provide the equivalent of a boarding school life for neglected children; neither was it anticipated that a child would escape one dangerous environment at the risk of encountering another. The basic out-

147. See generally Delilah Bruska, *Children in Foster Care: A Vulnerable Population at Risk*, 21 J. CHILD & ADOLESCENT PSYCHIATRIC NURSING, 70, 70 (2008) (reviewing the literature and finding that most children in foster care experience confusion, sadness, anxiety, stress, and fear).

148. RADEL, *supra* note 90.

149. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 136.

150. See, e.g., Murray, *supra* note 101.

151. See, e.g., Zill, *supra* note 123.

152. See *supra* Part II.

153. RADEL, *supra* note 90, at 2.

comes standards for which states are evaluated reflect what child advocates describe as minimally reasonable expectations.¹⁵⁴ See Table 4. Indeed, this explains why numerous organizations, including HHS, express disappointment (and even dismay) and find it difficult to “name systems that are functioning well overall.”¹⁵⁵

TABLE 4: BASIC STANDARDS IN FAMILY SERVICES REVIEWS

<i>Basic Standards-Child Outcomes</i>	
▪	Children are first and foremost protected from abuse and neglect.
▪	Children are safely maintained in their homes whenever possible and appropriate.
▪	Children have permanency and stability in their living situations.
▪	The continuity of family relationships and connections is preserved for children.
▪	Families have enhanced capacity to provide for their children's needs.
▪	Children receive appropriate services to meet their educational needs.
▪	Children receive adequate services to meet their physical and mental health needs.

In 2000, the Children’s Bureau launched Child and Family Service Reviews (CFSRs) in all fifty states and the District of Columbia.¹⁵⁶ This detailed review process includes the collection of data and onsite review by federal staff with the goal of assessing the efficacy of state foster care systems.¹⁵⁷ The CFSR process includes lengthy data reviews and interviews with judges, case workers, and child care advocates, in addition to the review of a percentage of case files.¹⁵⁸ Nearly fifty factors are evaluated and rated during this process to determine whether “substantial conformity” with federal requirements is achieved in seven child outcomes (see Table 4) and seven systemic factors (see Table 5).¹⁵⁹

154. *Id.* at 12.

155. *Id.* at 11.

156. *Id.* at 12.

157. *Id.*

158. *Id.*

159. Systems found in non-compliance upon CFSR are charged with developing and implementing Program Improvement Plans (PIPs) to address the system failures.

TABLE 5: BASIC STANDARDS IN FAMILY SERVICES
REVIEWS-SYSTEMIC FACTORS

<i>Basic Standards-Systemic Factors</i>
▪ Statewide Information System
▪ Case Review System
▪ Quality Assurance System
▪ Training
▪ Service Array
▪ Agency Responsiveness to the Community
▪ Foster and Adoptive Parenting Licensing, Recruitment, and Retention

A 2005 snapshot (the most recent available) reveals that of the fourteen areas that a state could be determined in compliance, on average only six of fourteen basic standards were achieved.¹⁶⁰ As of that year, “States . . . have ranged from meeting standards in 1 area to 9 areas.”¹⁶¹ The data reveal how far removed states are, generally, from achieving basic success. Two states achieved success in only one of the fourteen categories.¹⁶² Two other states met two of the standards.¹⁶³ Twelve states met six of the basic standards.¹⁶⁴ However, only one state met nine standards.¹⁶⁵ See Table 6.

160. RADEL, *supra* note 90, at 12.

161. *Id.*

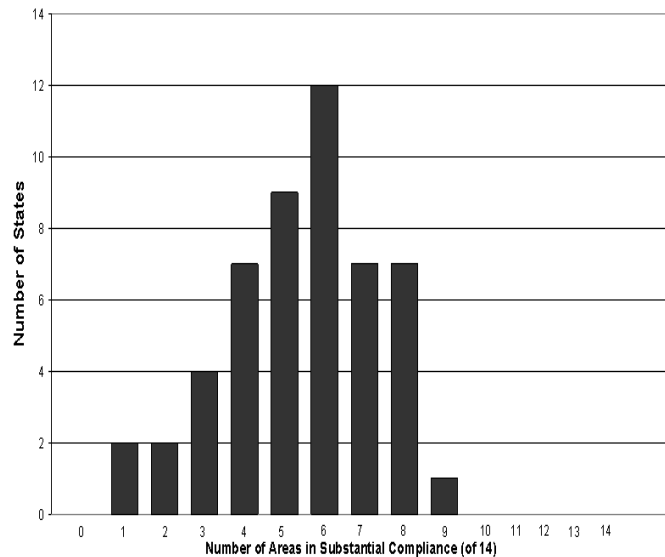
162. *Id.* at 13.

163. *Id.*

164. *Id.*

165. *Id.*

TABLE 6: SUMMARY OF RESULTS FOR CHILD AND FAMILY SERVICES REVIEWS FIFTY STATE ANALYSIS AND WASHINGTON, D.C.¹⁶⁶



Calibrating the areas in substantial compliance on a hundred point scale allows for “grading” the overall system and the level of compliance. Based on this data, a few conclusions can be drawn. First, broad systemic weaknesses exist at the basic level of services in the foster care system. Second, no state achieved above sixty-five percent in compliance (and only one state achieved above sixty-seven percent) on the most basic scale of standards.¹⁶⁷ Third, a quarter of all states met less than a third of basic child welfare standards.¹⁶⁸ Fourth, all states, including the District of Columbia, failed to achieve meaningful compliance (ten categories of fourteen).¹⁶⁹ Fifth, half of states scored at or below fifty percent competency in meeting basic child welfare standards.¹⁷⁰ But, perhaps the most important take away is this: “in the area of permanency and stability in their living situations . . . no State has yet met Federal standards . . .”¹⁷¹

States’ general low compliance in CFSR studies confirms long-held suspicions by child advocates that the foster care system has yet to achieve minimally satisfactory outcomes. Worse, minimal compliance comes at a significant cost. The federal government invests more than \$5 billion annually in states’ foster care systems through Title IV-E funding.¹⁷² And the stakes are high, as the true costs of system failure are

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at 12.

172. *Id.* at 2, 11. State Title IV-E spending on foster care programs and foster care maintenance payments totaled more than \$4 billion in fiscal year 2010. See KERRY DEVOOGHT ET AL., Child

borne on the children entrusted to these state-run systems. Consider the data collected by Mark Courtney and his University of Chicago colleagues who followed more than 600 young men and women¹⁷³ who “aged out” of Midwestern foster care systems in Wisconsin, Illinois, and Iowa. Their investigation found that at ages 23 and 24, in comparison to their peers, former foster care youth are more likely to be:

UNEMPLOYED—Less than half were employed.

HOMELESS—Almost twenty-five percent had been homeless since exiting foster care.

PREGNANT—More than seventy-five percent of young women had been pregnant since leaving foster care.

CONVICTED OF A CRIME—Nearly sixty percent of young men had been convicted of a crime, and more than eighty percent had been arrested.

UNEDUCATED—Only six percent had a 2- or 4-year degree.¹⁷⁴

The study, “Midwest Evaluation of the Adult Functioning of Former Foster Youth” (Midwest Study) represents the first of its kind to study that population.¹⁷⁵ The Midwest Study was the largest longitudinal study of youth “aging out of foster care and transitioning to adulthood since the passage of the John Chafee Foster Care Independence Act in 1999.”¹⁷⁶ A separate study, the National Longitudinal Study of Adolescent Health, provides a point of comparison and quasi control group as the Midwest Study based its questions on the national study.¹⁷⁷ The Midwest Study researchers collected data from “732 study participants when they were 17 or 18 years old. Study participants were re-interviewed at ages 19 (n = 603), 21 (n = 591), 23 or 24 (n = 602), and 26 (n = 596).”¹⁷⁸ The study’s lead author, Mark Courtney notes, “[t]hese

Trends, The Annie E. Casey Found., FEDERAL, STATE, AND LOCAL SPENDING TO ADDRESS CHILD ABUSE AND NEGLECT IN SFYS 2008 AND 2010, 46 (2012), available at http://childtrends.org/wp-content/uploads/2013/03/Child_Trends-2012_06_20_FR_CaseyCWFinancing.pdf.

173. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Conditions of Youth Preparing to Leave State Care*, CHAPIN HALL CTR. FOR CHILD. (2004), http://www.chapinhall.org/sites/default/files/ChapinHallDocument_8.pdf. Study demographics included:

[an] almost even[] split between male and female youth, and just fewer than 70 percent identified themselves as belonging to a racial minority group. Most youth came from single-parent families and the birth mother was the most common primary caregiver in their families of origin. Over 70 percent of the youth reported that their primary caregiver(s) experienced one or more problems that might have compromised their parenting, most commonly alcohol abuse, drug abuse, inadequate parenting skills, spousal abuse, and/or having a criminal record.

Id. at 2.

174. Pam Fessler, *Report: Foster Kids Face Tough Times After Age 18*, NPR (April 7, 2010, 12:01 AM), <http://www.npr.org/templates/story/story.php?storyId=125594259>.

175. The collaborative study involves the University of Chicago, the University of Wisconsin Survey Center, and child welfare agencies in Illinois, Iowa, and Wisconsin. Courtney, *supra* note 172, at 2.

176. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 23 and 24*, CHAPIN HALL CTR. FOR CHILD. (2010), http://www.chapinhall.org/sites/default/files/Midwest_Study_Age_23_24.pdf.

177. *Id.* at 4–5.

178. Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth*, CHAPIN HALL CTR. FOR CHILD., <http://www.chapinhall.org/research/report/midwest-evaluation-adult-functioning-former-foster-youth>.

comparisons indicate that young people who have aged out of foster care are faring poorly as a group relative to their peers across a variety of domains.”¹⁷⁹ According to Courtney, “[m]ost youth experienced considerable instability while living in” foster care.¹⁸⁰ Other studies and reports about youth exiting foster care corroborate their general findings.

Courtney’s 2011 update is equally disquieting. He describes the highly detailed report as follows:

The picture that emerges from the following chapters is disquieting, particularly if we measure the success of the young people in our study in terms of self-sufficiency during early adulthood. Across a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt and criminal justice system involvement, these former foster youth are faring poorly as a group. As we discuss in the conclusion of the report, our findings raise questions about the adequacy of current efforts to help young people make a successful transition out of foster care.¹⁸¹

These daunting outcomes for foster youth at adulthood combined with the discouraging findings from federal review assessments indicate systemic weaknesses. Unlike fifty years ago, systemic failures cannot be explained by a lack of federal support and funding. To the contrary, as discussed above, federal funding is uncapped. Quite tellingly, however, federal foster care funding appears to bear little relationship to service quality or outcomes.¹⁸²

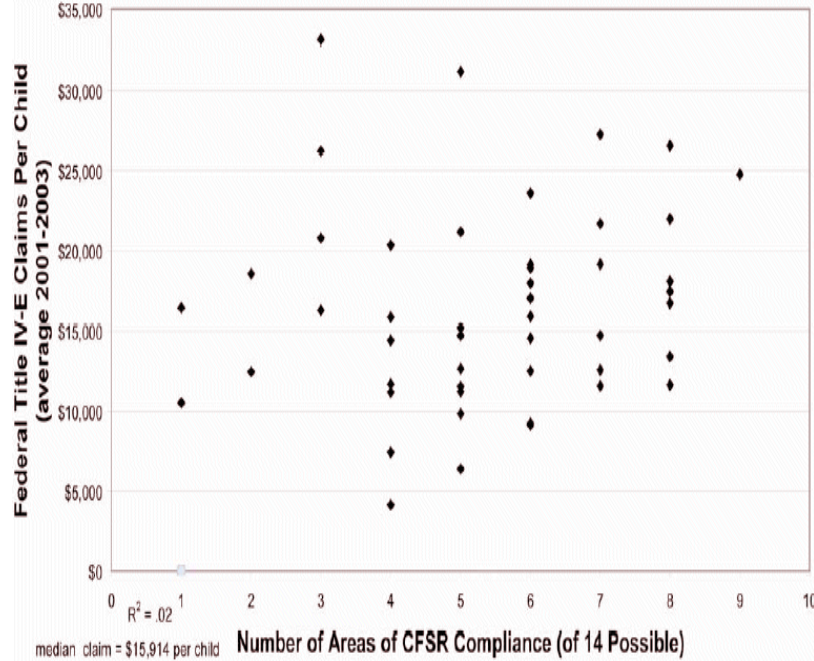
179. *Id.*

180. Courtney, *supra* note 173, at 3.

181. Courtney, *supra* note 176, at 5.

182. RADEL, *supra* note 90, at 13.

TABLE 7: CHILD AND FAMILY SERVICES REVIEW COMPLIANCE CALIBRATED FOR TITLE IV-E FOSTER CARE FUNDS CLAIMED PER ELIGIBLE CHILD (50 STATES AND WASHINGTON, DC)¹⁸³



Additionally, after analyzing the wide variation in claiming patterns among states, HHS concluded that “[c]laiming levels . . . bear little relationship to States’ performance in achieving permanency for children in foster care.”¹⁸⁴ For example, the highest performing state claims less per child than five other states.¹⁸⁵ Equally, several of the least compliant states claimed more funds on average per child than all other states.¹⁸⁶ Thus, compliance seems weakly if at all related to levels of federal funding to states for foster care reimbursement.

2. *Incentivizing Foster Care over Permanent Placement*

Child care advocates, whether pro-adoption or pro-family reunification, equally criticize what they perceive as a system bias which prioritizes foster care placement over achieving permanent home placements for foster children. They point to the federal financing structures for child welfare, including Title IV-E, which as discussed above provides unlimited matching funds for eligible children in foster care. Critics emphasize that no other federal program provides that level of support for achiev-

183. *Id.* at 14.

184. *Id.* at 13.

185. *Id.* at 14.

186. *Id.*

ing permanent placements or adoptions.¹⁸⁷ Indeed, “Title IV-E . . . funds foster care on an unlimited basis without providing for services that would either prevent the child’s removal from the home or speed permanency”¹⁸⁸

Child welfare advocates also point to compelling data to make their case, including the fact that funding expended for foster care is nearly 2:1 of that paid for prevention and treatment, and more than 20:1 of what is expended on adoption services.¹⁸⁹ Title IV-B, which supports transitions from foster care to adoption, is a capped funding program, which receives lower economic priority than foster care.¹⁹⁰ Indeed, Title IV-B and two major nondedicated funding streams, including “the Social Services Block Grant (SSBG) [and] the Temporary Assistance for Needy Families (TANF) block grant,”¹⁹¹ are each capped. In a report published by the National Coalition for Child Protection and Reform, the group reported that children “are removed from their families ‘prematurely or unnecessarily’ because federal aid formulas give states ‘a strong financial incentive’ to do so rather than provide services to keep families together.”¹⁹² In reality, these issues are more complex than child welfare advocates presume.

A recent report published by the Brookings Institute noted that economic costs associated with foster care “are difficult to disentangle,” because additional funding “is spent for publicly-subsidized medical care for foster children and food stamps, cash welfare, and child care payments to the families that care for them,”¹⁹³ as well as legal services. When those expenditures factor into foster care’s overall cost, the total annual spending for the entitlement program is more accurately captured. That said, numerous studies and data point to permanent placements enhancing the life possibilities for foster care children over sustained temporary care.¹⁹⁴ From an economic perspective, permanent placements achieve greater efficacy for children at lower cost to the government.¹⁹⁵

But, remember the “glut” problem pointed out by Richard Posner? African American children make up between one-quarter to one-third of children in foster care across the country, although they are only fifteen percent of the child population in the United States.¹⁹⁶ Traditional adop-

187. *Id.* at 15.

188. *Id.*

189. *See id.*

190. Murray, *supra* note 101, at 2.

191. *Id.* (noting that, together, these programs accounted for forty-two percent of total federal child welfare spending).

192. *Financial Incentives*, *supra* note 134.

193. Zill, *supra* note 123.

194. *Id.* at 4.

195. *Id.* at 4, 7.

196. *Facts About Children in Foster Care*, FOSTER CARE ALUMNI OF AM., [http://www.fostercarealumni.org/userfiles/file/FCM07_Fact_Sheet_\(national\).pdf](http://www.fostercarealumni.org/userfiles/file/FCM07_Fact_Sheet_(national).pdf) (last visited May 26, 2013). *See also supra* Part II.B.

tion models, even if added funds were available, might not transition this population to adoption. Moreover, permanent placement problems could possibly relate to other complicated social dynamics. Given the high percentage of African American males in the criminal justice system (incarcerated, on parole, waiting for sentencing, in juvenile detention, or in “half-way” houses), which is calculated to be twenty-five to thirty percent,¹⁹⁷ and other social dynamics that might befall African American women, permanent placement back home with a biological parent might be difficult to achieve at sufficiently impactful or high rates. By example, the Public Policy Institute of California (PPIC) notes that black children are overrepresented in foster care.¹⁹⁸

The PPIC reports that “the largest percentage decline in foster care has occurred among black children. Nevertheless, [c]ompared with other children, a higher fraction of black children enter foster care as a result of substantiated maltreatment reports, and black children remain in foster care for longer periods of time than other children.”¹⁹⁹ This provocative data cannot be ignored. In other words, attention must be paid to the unique features of African American child welfare. In large cities, these children are more likely to age out of foster care than be adopted.²⁰⁰ These challenges will persist unless new, viable, deployable strategies emerge.

IV: PARENTAL CIVIL UNIONS: RETHINKING THE NATURE OF FAMILIES

“Clearly, [they] never understood how important adoption was to me. They loved us. They wanted to keep us. They felt that was enough. I believe that their position was based on the notion—shared by many people involved in foster care—that adoption is pretty much an empty ritual, a bureaucratic step up from foster care with no deep meaning in and of itself. For me, nothing could have been further from the truth.”

-Charlotte Lopez, Miss Teen USA 1993²⁰¹

Is the current child-welfare model sustainable? We think not, particularly as problematic externalities continue to emerge in the delivery of foster care services and the outcomes for its participants. Thus, Part IV turns to an unexplored policy recommendation. We urge the legalization of alternative permanent placement families—parental civil unions.

Part IV begins by revisiting *In re M.C.*, highlighting the shortcomings of the “two legal parents” framework. Section B unpacks our paren-

197. See *supra* Part II.B.

198. *Just the Facts: Foster Care in California*, PUB. POLICY INST. CAL. (Mar. 2010), http://www.ppic.org/content/pubs/jtf/JTF_FosterCareJTF.pdf.

199. *Id.*

200. *Id.*

201. Ms. Lopez lived in foster care, experiencing seven placements prior to adoption. OR. DEP'T HUMAN SERVS., OREGON ADOPTION ASSISTANCE HANDBOOK 1 (2010), <https://apps.state.or.us/Forms/Served/de9050.pdf>.

tal civil union adoption proposal. In that Section, we urge rethinking of “legal family” and “legal parents.” The model provides a framework and policy guidance. It does not attempt, however, to over-articulate each detail; rather, it provides room for state adoption and adaptation. Section C builds from our first principle that adopting children from foster care makes them better off than those who remain in the system. It turns to the importance of promoting permanence in child placements, highlighting better outcomes as well as reducing federal and state costs. Section D makes the case for this model, arguing that it would be a mistake to organize child welfare, especially adoption, as an “all or nothing” or “one model fits all” approach. Rather, adoptive families must be evaluated on a comparative basis for the strengths they offer (as well as weaknesses) in relation to the children they are most likely to adopt and the circumstances/conditions to which those children were previously exposed.

A. In re M.C.: An Underinclusive Two Parent Model

Three parents or foster care; who should decide? Parents, legislatures, or courts? The extended family and nonbiological parental surrogacy models date back to antiquity. In the United States, extended family models date back to this nation’s earliest origins and proved essential to the health and welfare of children in this nation prior to its inception. Whether serving immigrants in New England, holding together slave communities in the U.S. south, or binding white and Asian pioneers on the West Coast, extended and nongenetically linked nuclear families provided economic, emotional, and cultural bonds impervious to the law’s narrow framings of parentage. Yet, these bonds served important social purposes in a rapidly developing nation: they afforded stability, order, kinship, and the protection of children. Indeed, this nation never outgrew its dependence on the extended family model, despite the emergence of the mid-century, nuclear, heterosexual family ideal.

In fact, a brief survey of women law professors revealed numerous cases of extended families being essential to the health and development of those scholars as children and young adults. In the spring of 2012, scholars in the Lutie Lytle Listserve were contacted via a general call for their extended or unique family stories.²⁰² Many responded regaling about grandmothers and aunts who served as second-mothers throughout important periods of childhood.²⁰³ To many of these scholars, the extended family model was critical to their development and a welcomed

202. The Lutie Lytle Listserve is a forum of African American women law professors in the United States. The participants on the listserv range in academic rank, from assistant professors to tenured professors with endowed chairs. The group provides a forum for scholarly interactions, including academic workshops and scholarly review, information sharing, and mentoring. Michele Goodwin, *Lutie Lytle Listserve Survey* (March 4, 2012) (Data on file with author).

203. *Id.*

part of their childhood experience.²⁰⁴ And, while those relationships carried no legal authority, the bonds were sometimes more influential than the bonds with their biological parents.²⁰⁵ At the very least, according to sociological data, strong extended family relationships can significantly complement the nuclear family model.

Likewise, *In re M.C.* illuminates why the two-parent model is sometimes underinclusive, disserving the best interest of children. Consider the following. Melissa and Irene met in 2006 and began a turbulent relationship, racked by emotional highs, lows, and violence.²⁰⁶ According to court documents, “[t]he relationship was stormy from the start, marked by physical and verbal abuse by both women”²⁰⁷ The women became registered domestic partners in February 2008 but separated months later in late May 2008.²⁰⁸ During their separation, Melissa began an intimate relationship with Jesus Perez, which resulted in a pregnancy and the birth of their child, “M.C.”²⁰⁹ The paternity of M.C. was never disputed; Perez supported the mother during her pregnancy, participated in prenatal care, and allowed Melissa to share his home.²¹⁰

Melissa and Irene reconciled in September 2008, however, at which time Melissa informed Perez that she would return to her legal spouse, Irene.²¹¹ Melissa did not inform Perez where she was going to live and Perez did not claim visitation rights or custody of M.C. after her birth, nor did he pay child support.²¹² Months later, Melissa reinitiated communication with Perez.²¹³ As a result, he provided child support, began visiting his daughter, and introduced her to extended family.²¹⁴

In September 2009, M.C. was taken into protective custody after Melissa’s new boyfriend attacked and stabbed Irene in the neck, causing severe injuries.²¹⁵ Melissa was arrested and charged as an accessory to attempted murder.²¹⁶ DCFS filed a petition asserting that Perez’s custody of M.C. was warranted because the child’s mothers were unavailable.²¹⁷ Irene—Melissa’s spouse and therefore M.C.’s presumed mother—was in the hospital unable to care for the child, and Melissa was incarcerated and had a history of substance abuse.²¹⁸ At a detention hearing, the court found Irene to be M.C.’s “presumed mother” under California law be-

204. *Id.*

205. *Id.*

206. *In re M.C.*, 123 Cal. Rptr. 3d 856, 861 (Cal. Ct. App. 2011).

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* at 862.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

cause she was married to Melissa.²¹⁹ The court also found Melissa was the biological mother, and Perez was determined to be an “alleged father.”²²⁰ After this hearing, M.C. was placed in shelter care rather than her father’s care.²²¹

Unlike Melissa and Irene, Perez was available and willing to take custody and care for M.C. He maintained a steady job, “stable and adequate housing and the support of his immediate family,” and told the court that he was ready and able to “care for his child and provide her with a loving and nurturing home.”²²² Indeed, court investigations confirmed Perez’s ability to care for M.C.²²³ DCFS recommended that the juvenile court find Perez to be M.C.’s “presumed father” and order an Interstate Compact for the Permanent Placement of Children in Oklahoma for Perez (Perez lived in Oklahoma).²²⁴

Despite DCFS’s recommendations, the compelling information regarding the father’s interest in caring for the child, the economic interest in placing children with their parents rather than federally subsidized care, M.C. was placed in a shelter. Perez lost his custody bid. *Why?* On appeal, the primary issue the court addressed was whether a child can have *three* presumed parents: “a biological presumed mother, a statutorily presumed mother and a constitutionally presumed father . . .”²²⁵ The court found that a child could not legally be granted three parents.²²⁶ Despite the obvious—Jose never married M.C.’s mother—this narrow reading of parentage serves no legitimate or compelling state purpose.

In fact, under current California law, even if three people satisfy the current legal definition of a parent, a judge can only recognize two legal parents, even if such a decision is not in the best interest of a child. Under Section 7601 of California’s Family Code,²²⁷ a “parent and child relationship” is defined as: “the legal relationship existing between a child and the child’s natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. The term includes the mother and child relationship and the father and child relationship.”²²⁸ Additionally, under Section 7611, a man is presumed to be the “natural father of a child” if “[h]e and the child’s natural mother are or have been married to each other and the child is born during the marriage, or within 300 days after the marriage is terminated . . .”²²⁹ The same presumption holds even if the mother and father merely attempted

219. *Id.* at 863.

220. *Id.*

221. *Id.*

222. *Id.* at 865.

223. *Id.* at 866.

224. *Id.*

225. *Id.* at 867.

226. *Id.* at 877.

227. CAL. FAM. CODE § 7601 (West 2011).

228. *Id.*

229. *Id.* § 7611(a).

to marry in apparent compliance with the law but for some reason the marriage could be declared legally invalid.²³⁰

Who benefits from California's parentage policy? Certainly not babies like M.C. Nor will thousands of other children languishing in the state's foster care system benefit from the state's current regime.

B. The Model: Civil Unions for Non-Traditional Families

In rethinking family ordering, this Article responds to contemporary demands of child placement, child need, and the morphing family model. By articulating an alternative family paradigm, we urge reconsideration of the two-parent, married, heterosexual unit as the foundation for family. The proposed model is simple: qualified individuals may be legally permitted to join in a parental civil union to co-parent. Such a rule can be facilitated through federal law, passage of individually tailored state laws, or through the adoption of a model law. Marriage and blood connection shall not be predicates upon which qualification for the civil union depends.

We propose an eight point test or guidelines to determine qualification for the civil union.

To qualify as an eligible PCU, individuals must:

- Have known each other for at least twenty-four months prior to application submission.
- Possess sufficient income to support their present households without relying on government assistance.
- Complete an orientation and pre-placement training program prior to civil union licensure.
- Provide references that can attest to the bond of the individuals applying for civil union.
- Provide references that can attest to the individual and collective character of the proposed civil union members.
- Undergo screening for criminal records and child protective service records.
- Undergo an assessment of their stability and their home's safety.
- Successfully complete a home study.

When charted, the distinguishing characteristics between the civil union model we propose, traditional adoption, and foster care can be studied. (See Table 8)

230. *Id.* § 7611(b)-(c).

No. 4]

PARENT CIVIL UNIONS

1373

TABLE 8

Foster Families	Traditional Adoption	Parental Civil Unions
Open to single persons and couples;	Historically the two parent model;	Emphasizes a cooperative family approach. Two to five adults;
No income requirements to become a foster parent;	Educated, heterosexual, married individuals of middle-upper income.	Minimum income requirements of the cooperative rather than the individual;
Provide transitional care on behalf of the state for a child in the care and custody of state;	Take care of their child without state oversight;	Assume responsibility for their child with minimal state oversight for two years and none thereafter;
Receive a maintenance payment that reimburses caregivers for their time and expenses;	No reimbursement from the state;	Two models: Model 1: can apply for maintenance support from the state; Model 2: no maintenance support, but can establish a state supported trust for college costs;
Additional funds (personal care and enhanced supervision) can also be paid to foster parents if a child qualifies after appropriate assessments have been completed.	No funds provided by the state.	Capped, additional funds may be applied for;
Legal relationship: temporary guardianship through license;	Legal relationship: state declaration of parentage conferred through birth certificate;	Legal relationship: state declaration of parentage conferred through license and birth certificate;
No expectation or requirement that emotional bonds will form;	Emotionally and financially incorporate their child as a permanent member of the family;	Emotionally, and financially, incorporate the child as a permanent member of the family;
Not expected to financially or emotionally invest in child's present development or future;	Perform ordinary parenting functions, including activities such as supervision, nurturing, monitoring and engagement of education, investment in the child's emotional and mental health;	Perform ordinary parenting functions, including activities such as supervision, nurturing, monitoring and engagement of education, investment in the child's emotional and mental health;
Mobility: Frequent. On average a child may live in 3-5 foster homes in 3 years.	Mobility: Permanency.	Mobility: Permanency within a legalized extended family.

We predict that PCUs will vary by contour, size, gender composition, cumulative income, biological relationship, and religion. States may also impose different application fees. These unions or cooperative families may be constituted with as few as two individuals and as many as five. As detailed in Table 8 and the eight-part qualification test, key priorities include promoting family permanence and child safety and securi-

ty, while minimizing or eliminating the potential for fraud, coercion, abuse, and exploitation of children. Current child welfare practices emphasize foster care at the risk of promoting explicit, cyclical child commodification, which we oppose. In other words, financial incentives may excessively dominate current foster care to such an extent that conflicts of interests arise in two distinct spheres: (a) financial interests overshadowing child welfare interests; and (b) overutilization of limited foster home resources (i.e., over-capacitating foster homes by maximizing the number of children in a home). In such instances, the best interest of children may be subordinate to or in competition with adult financial priorities and ill-served by states' impetus to remove children and ask questions later.²³¹ A 2011 National Public Radio special edition, *Incentives and Cultural Bias Fuel Foster System*, echoes these concerns.²³²

For example, most states do not require a minimum income standard to qualify individuals for foster care licensure.²³³ The upside of avoiding a minimum income standard includes promoting broader access and diversity among those individuals who provide foster care services. On the other hand, foster care services run the risk of tolerating, if not passively promoting, rent-seeking behavior among a significant minority of its providers who are reimbursed on a per child basis. One commentator notes, "[r]ather than working to ameliorate these hard realities, the foster care system runs a great risk of enabling them. It allows [foster parents] to accommodate, and even profit from, their dysfunctions."²³⁴ The current financing structure (uncapped Title IV-E funding) of foster care "reimbursements" coupled with financial incentives to maximize the allotment of children served in one home (usually up to six), may morph into "compensation."²³⁵

In other words, the line between reimbursement and payments may be more illusory than real in the foster care context. Incentive alignment trends toward maximum placement (*input*) and not quality (*output*) (i.e., foster parents are not "reimbursed" based on quality of care or child performance education or life-skills outcomes but simply providing shelter). From a market perspective, a more explicit private ordering in foster care might be less problematic or more tolerable if important child welfare benchmarks and state goals were achieved. Such is not the case; in

231. Jolene Abourezk, a former employee of South Dakota's Department of Social Services reflects on her seven years with the department, noting that officials praised her for removing children, "It's good, you are doing a good job for taking more kids. . . . It's just the norm here. It happens so often people don't question it. So you know if something happens all the time the same way, people don't question it anymore. It's just how it's done." *Incentives and Cultural Bias Fuel Foster System* (National Public Radio broadcast Oct. 25, 2011) (quoting Jolene Abourezk), available at <http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system>.

232. *Id.*

233. *Who May Adopt & Who May Be Adopted*, NAT'L CTR. FOR ADOPTION LAW & POLICY, http://www.adoptionchildwelfarelaw.org/faq_detail.php?id=97 (last visited May 26, 2013).

234. Heather Mac Donald, *Foster Care's Underworld*, CITY J., Winter 1999, available at http://www.city-journal.org/html/9_1_foster_cares.html.

235. *See id.*

an illuminating report on *Foster Care's Underworld*, Heather MacDonald chronicles, “with its traffic in abused and neglected children, [foster care] has become integral to the inner-city economy. Advocates, who should be horrified, are eerily calm.”²³⁶ One social worker interviewed by MacDonald observed that foster parents receive “a lot of money, . . . [t]hey’re not using it totally on the kids. If Section 8 pays for housing, and you’re getting public assistance—which is not taxed—you can’t spend \$500 a month on food [per child]. They don’t pay for the children’s clothing or their medical needs, and we reimburse transportation.”²³⁷ The social worker’s claim that foster care provides “an industry for quite poor people” resonates as a perception that should cause alarm.²³⁸

1. *Economic Structure: Best Interest of the Child Prioritized Over Payment*

By contrast, the PCU or Baby Cooperatives proposal emphasizes individual and collective commitment to the best interest of children over adult financial need. We are mindful of the challenges associated with disentangling “perverse” interest (financial or adult interest above children’s interest) and how adult interest and children’s interests may run parallel in child welfare service delivery. To be clear, not all financial incentives produce perverse outcomes, and the system we propose leverages some incentives. This proposal, however, attempts to avoid the economic interest model associated with contemporary foster care.

To that end, each family union must meet a minimum “child-focused” household income threshold to qualify for child placement to avoid the trappings of contemporary foster care. We do not calibrate that income level in this project, as states will be better suited for that task. We offer relevant guiding principles, however.

- Household income should relate to a minimum necessary to support a child residing in that state;
- Household income should be determined based on the collective rather than individual. *Example: Law Professor Aunt and retired Grandmother form a civil union to raise Kathy. Grandmother’s low income should not disqualify her from participating in the union. Rather the combined income of Grandmother and Law Professor will be considered in meeting the minimum “child-focused” household income.*

This model should not disadvantage loving, low-income blood-related family members. Thus, a carve-out should exist that allows individuals in this unique circumstance to apply for state maintenance. *Example: Retired Grandmothers decide to jointly raise Kathy and because of their low income, but proven intimate relationship with Kathy, may apply for maintenance from the state.*

236. *Id.*

237. *Id.*

238. *Id.*

In each example above, commitment to indefinite nurturing, caring, and best interests of the child should serve as the foundational and principle qualifications. Emphasizing financial criteria should not serve to exclude appropriately motivated but financially encumbered family members from forming a PCU. As well, our model proposes the redirection of state and federal funds currently expended to address administrative costs and foster care payments to be differently utilized to advance the life opportunities for children formerly in foster care. For example, PCUs can apply for a four-year supplement specifically earmarked for higher education.

2. *Legal Relationship & State Supervision*

This model confers full, legal parental status on all adult members of the PCU. Unlike foster care, the PCU provides long-term, indefinite care, legally, morally, and emotionally obligating it to perform typical parental duties (i.e., providing tangible care related to education, health care, clothing) as well as to emotionally and psychologically nurture the child. Concomitantly, states will grant entitlements to formalized PCUs, including conferring all privileges and rights generally associated with adoption, including (but not limited to) the right to choose the child's education, discipline the child, determine the child's religion, have contact with the child, agree to medical treatment, and appoint a guardian if necessary.

Foster care, unlike adoption, understandably involves consistent state monitoring for the protection of state wards. PCUs are distinguishable from foster care arrangements as detailed above. Nor are they typical two-parent adoptions, and because of this unique design, we urge a balancing approach that considers the privacy and independence of the PCU in harmony with the child's interest and state interest to promote the health and safety of the child. Thus we advocate quarterly monitoring for the first two years of the PCU.

3. *Other Considerations*

We leave to individual PCUs to work out details as to how families organize living, schooling, and visitation arrangements. Most importantly, we advocate *ex ante* screening: psychological screening, income assessment (based on the collective—not individual), education, criminal background checks (of each member), and home visits. Important questions will necessarily arise. Should disclosure of a criminal background or prior felony disqualify a potential “parent” from joining an PCU? Should prior incident of child neglect disqualify an individual from participating in an PCU? The answers to such questions may appear obvious, but on close inspection defy reductive logic. Consider the following: African American males may be overrepresented among felons for non-violent offences and a prohibition such as prior incarceration could re-

duce that group's potential participation. On the other hand, white males might be overrepresented among felonious white collar criminals. In either case, felony prohibitions might inequitably limit their participation for crimes that speak to a significant mistake but are not fully or exclusively dispositive of character or whether that individual can be a good father. These tough issues deserve public forum and evaluation.

A few other considerations will be important, including stability of the PCU. How did they meet? What are the bonds that bring them together? At what level is their emotional maturity (as individuals and as a collective unit)? This model requires a two-year period of knowledge among members of the PCU, but states would be well-served to impose a wait period after the application filing. Such waiting periods could be as few as three months and possibly as long as six months. Given the urgency to minimize children's exposure to foster care's frequent mobility and lack of stability, states may wish to require shorter rather than extended wait periods.

Finally, fragility of family must also be considered. What if a member of the PCU decides to separate or divorce? Heterosexual and gay couples encounter similar questions but with different legal results. Indeed, despite written manifestations and verbal agreements, upon dissolution of the relationship, courts are sometimes reluctant to enforce preexisting contract language regarding parental status and child support responsibilities in "nontraditional" families.²³⁹ We are mindful of these challenges. We answer them, however, by turning to family law, which has developed varying visitation and financial models to address this. Divorce of parents does not necessarily signify the desire of parents to divorce their child. Those assumptions hold true in PCUs. Should divorce take place, we anticipate the enforcement of contractual obligations, including responsibility to provide child support and entitlements to visitation, to ensure stability in parent-child cooperative arrangements. By examining factors at the individual as well as collective level, a better idea of what makes a strong, sustainable family will emerge.

C. Promoting Family and Permanence

In this Article, we do not attack current family preservation efforts. The intuition driving the project speaks to four important factors, however: (1) the realization that a significant minority of youth in foster care cannot be returned safely to their biological parent(s) and/or family, (2) extended "temporary" stays in foster care often outlast the *ex ante* presumptions about their duration, (3) extended "temporary" stays in foster care are more illusory than real, because some children of color, particularly African Americans in urban cities, tend to exit out of foster care in-

239. See Caroline P. Blair, Note, *It's More Than a One-Night Stand: Why a Promise to Parent Should Obligate a Former Lesbian Partner to Pay Child Support in the Absence of a Statutory Requirement*, 39 SUFFOLK U. L. REV. 465, 466 (2006).

to adulthood rather than return to their biological parents, and (4) criminal law trends such as the rise in female incarceration—particularly among poor African American and Latina women²⁴⁰—coupled by high incarceration rates among men of color, means that many of their children will be caught in the spiral of foster care without the hope of returning home to their parents. Thus, this project does not take up the case of family preservation.

Instead, we turn to the question of promoting family and permanent placement beyond the bloodline. Interviews, narratives, and stories from former foster care youth guide and influence our thinking in this project. Their “stories” inform our thinking on the importance of promoting family and permanence.

1. *Promoting Family Permanence: Looking to Kids*

To better understand why family permanence matters to youth, we turn to published qualitative data collected by the Pew Charitable Trusts, including the writings and discussions of youth participants in Project FYSH-Foster Youth Seen and Heard at the Children and Family Research Center, published telephone interviews, and other data, including our collective experiences working with child welfare youth.²⁴¹ One key recurring theme in foster child testimony is the importance of being heard but feeling disenfranchised and ignored.²⁴² And yet, their stories are powerful reminders about why the objective of child welfare systems should be to locate permanent homes for them. According to Luis, (a former foster youth in Massachusetts),

[I]f the government or those who are in power [want] to make the foster care system better, what they should do is just ask a foster kid. . . . They can tell you exactly what they need. What they need is what most children and even teens need . . . Someone who cares about them, someone who will listen to them and hold them when they are scared. What they need is what any child needs . . . a family who loves them.²⁴³

Luis’ concern makes sense. Children in foster care rarely settle in to one family; on average they move at least three times during placement, and some children move as many as ten times during their stay in foster care.²⁴⁴ Such frequent moves, according to foster children, make it virtually impossible to develop trust and meaningful relationships.²⁴⁵ One former foster youth, Kamika from California, explained it this way:

240. *Incarcerated Women*, THE SENTENCING PROJECT, http://www.sentencingproject.org/doc/publications/cc_Incarcerated_Women_Factsheet_Sep24sp.pdf (last revised Sept. 2012).

241. PEW CHARITABLE TRUSTS, TIME FOR REFORM: TOO MANY BIRTHDAYS IN FOSTER CARE 1 (2007), available at http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/TooManyBirthdays.pdf.

242. *Id.*

243. *Id.* at 2.

244. *Id.*

245. *Id.* at 1.

It is very hard in the foster care system. While living in these different places I had to transform myself and pretend to be someone I wasn't in fear that I would be moved again and unloved. I felt like I was constantly moving, and never had a place to call home. I was always wondering when someone was going to give me a chance and not give up on me as everyone has. I felt voiceless because everyone made decisions for my life without asking what I wanted, and would ignore me when I tried to speak up.²⁴⁶

Foster children and those who exit the system after adulthood confirm our intuitions about the importance of family and connection. As importantly, their experiences help to explain the haunting foster care outcomes. Kimberly lived in Illinois, and being a foster child was not only a secret that she wished to keep hidden, but a point of shame: "Out of all of my names . . . titles, labels, identities . . . foster child . . . hurt the most—it was my biggest secret . . . my biggest shame. It meant that I was unwanted. I was a foster child."²⁴⁷ Low self-esteem, depression, and feelings of worthlessness describe how too many view themselves and their peers in foster care. Lamarr, a young man from New York shares important insight about this:

My problem at the time was that I connected with people too quick. I got close to people and that was a problem when I had to leave. Even if you feel like you can trust that person—and you can—when the time comes for you to leave, you know you are never going to see them again.²⁴⁸

Lamarr's intuitions about the transience of foster care—the people and services are based on his personal experiences—are confirmed by numerous studies and thousands of other foster care children.²⁴⁹

In Melanie's case, she remembers moving at least twenty times prior to the age of twelve. She recalls, "Sometimes in the middle of night cop cars would show up and our stuff would be packed into garbage bags and we knew it was time to go."²⁵⁰ This type of moving made it impossible to establish bonds—even if the foster parents extended that type of affection. She explained to Pew Charitable Trusts researchers, "I never stayed anywhere long enough to connect with the people I lived with; besides, there is a big distinction between a home and a family."²⁵¹ Eventually, Melanie lived in shelters.²⁵² Along with 25,000 other children this year, she aged out of foster care.²⁵³

For some young people, like hundreds in New York City, a shelter is the "best" that child welfare has to offer. They arrive off the streets

246. *Id.*

247. *Id.* at 7.

248. *Id.* at 1.

249. *Id.* at 10–11.

250. *Id.* at 4.

251. *Id.*

252. *Id.*

253. *Id.* at 5, 8.

after school, hoping the beds are not full, that they can safely rest for the night, and return to school the next day. The ultimate goal in those cases is not a permanent home but a foster home. That New York City is slow to make progress in recruiting more foster families is the subject of a federal lawsuit filed by Children's Rights, a New York child advocacy organization.²⁵⁴ The dynamics found in New York City, however, are mirrored in southern, rural cities. Children wake up in shelters without their parents or any adult.²⁵⁵ Some shelters do not accept children; some shelters do not accept parents.

Thus, while it is presumed that foster children actually live in foster homes, as youth become older, they are more difficult to place and thousands live in some form of group home, shelter, or modern day orphanage. The conditions, safety, and security of these alternative "homes" vary. Sexual molestation, rape, and physical violence occur with some frequency at group homes and larger institutional settings.²⁵⁶ Group homes and shelters poorly substitute for foster care homes, and foster care homes are not preferable to permanent homes.

In fact, foster home settings, while often the best alternative in the current child welfare model, pose numerous problems, suffer from key weaknesses, and produce terrible outcomes for children. Given built-in incentives, it is difficult to police motivations that influence families to provide foster care services. For example, some families provide care and services purely in service of the best interests of children, but there are others who view child welfare services as primarily an economic opportunity *or* an economic opportunity *first* and child welfare *second*. Because cities like New York and Tulsa are desperate for foster homes, policing motivations might seem insignificant or certainly a low administrative priority. Better outcomes could certainly be expected if the priorities in foster care were truly about the children. Quite astutely, children in foster care recognize this conflicting interest. Michelle says,

I'm now staying with a foster parent who has another girl but she is away at school. I can't stay here long and they don't know where to put me. It's really sad to wake up thinking, 'Where are they going to move me to today? Will I be able to see my friends before I go?'²⁵⁷

So, what is it that foster care children want? These children want more than permanent placements—they want families. And despite the growing controversy and tension regarding returns to families versus other types of permanent placements, the children desire stability and bonding, typical of that associated with a "healthy" family. No matter

254. See *Where We're Fighting Hardest for Children Right Now*, CHILDREN'S RIGHTS, <http://www.childrensrights.org/news-events/alerts/> (last visited May 26, 2013).

255. *Id.*

256. See Larry Celona & Dan Mangan, *Group-Home Cleric Abused Teen: Cops*, N.Y. POST, Nov. 16, 2010, available at http://www.nypost.com/p/news/local/queens/group_home_cleric_abused_teen_cops_Uge3LPnKY5jC45ZTQhh9TM.

257. PEW CHARITABLE TRUSTS, *supra* note 241, at 5.

where they were born or which states they live in, foster children want families. When Nicholas, a former foster child from Illinois was interviewed as part of the Pew study, he recalled, “I remember when I was in a group home I told everyone the same thing: find me a family. I thought about it every day. Nothing else was as important to me as finding a family I could call my own.”²⁵⁸

Three important themes emerge when listening to and reading accounts from former foster children. First, the children desire belonging to families—and not simply a house to rest their heads. Second, they desire the trappings of what most people understand to be a family: stability, having a voice, being heard, and security. Third, the children desire permanence and connections. Kaylee, a foster child from Arkansas, explains, “It is hard to be moved around all the time. Permanency is important because then we can feel like we belong and settle, [r]ather than get moved around and feel worthless because we feel that no one wants us.”²⁵⁹

Given the urgent desire for permanent placement (expressed by children in foster care), why has public response been muted at best? This could be explained in part by Americans confusing or conflating material deprivation with deprivation generally. According to the National Center for Children in Poverty, “[m]aterial deprivation is not as widespread in the United States as it was 30 or 40 years ago,”²⁶⁰ and this can in part be explained by poor families and children having access to televisions, phones, cars, electricity, and other items socially considered “quasi luxury.” This may lead to a false perception that the poorest families (and children) are better off than in reality. As well, child hunger may be perceived as fully redressed by nutrition programs at public schools, food stamps to parents and foster parents, the economic supplement provided to guardians of poor children, and the Special Supplemental Nutrition Program for Women, Infants, and Children (otherwise known as WIC). Foster care is in a crisis, however, suffering from mild institutional neglect.²⁶¹

Three key changes distinguish early foster care efforts from those of the present: (1) an expanded bureaucracy with significant gaps in accountability mechanisms, (2) a realignment of its philosophy vis-à-vis parents and poverty, and (3) the expansion of its service population. As a cultural note, the bureaus providing child welfare services have desegregated, and are legally obligated to serve the needs of all children regardless of ethnicity. Despite the fact that the bureaucracy of child welfare services adapted to changing federal policies and national norms, the

258. *Id.* at 8.

259. *Id.* at 7.

260. *Ten Important Questions About Child Poverty and Family Economic Hardship*, NAT'L CTR. FOR CHILD. IN POVERTY, <http://nccp.org/faq.html> (last visited May 26, 2013).

261. PEW CHARITABLE TRUSTS, *supra* note 241, at 8–9.

development and institutionalization of strategies to service those children utilizing its services has not kept pace.

2. *Why Promoting Family Permanence Makes Sense*

Recent research confirms the importance of family.²⁶² Studies demonstrate that within families, adults (who are not always a “mother” or “father” in the traditional sense) assume significant responsibility consciously and subconsciously in supporting a young person by encouraging the development of individual assets and holding high expectations for success.²⁶³ Families and family structure facilitate the development of important, core youth competencies. These core competencies, including social, emotional, cognitive, behavioral, and moral reasoning, typically develop in the family setting.²⁶⁴ Indeed, some scientists argue that the purpose of the family is to develop these skill sets.²⁶⁵ These competencies can be “lost” or not develop in youth who are not exposed to or live in a family.²⁶⁶ But these skills are crucial to the development of a healthy life.

Social competence, for example, involves the reciprocal exchange of information and the ability to effectively problem solve.²⁶⁷ Without the development of social competence, an individual may be less adept at problem solving, working with others, and communicating. Equally, emotional competence signals an ability to manage internal feelings and to handle relationships.²⁶⁸ A consistent pattern heard among former foster care youth is their lack of self-confidence and ability to build meaningful relationships. As an empirical matter, foster care youth are more likely than their non-foster care cohorts to be involved as defendants and convicts in the criminal justice system.²⁶⁹ Families also help children develop cognitive competencies. These competencies result from subconscious modeling of self-talk, self-efficacy, and capacities for positive self-

262. See, e.g., HELEN Z. REINHERZ ET AL., SIMMONS COLL., FAMILY MATTERS: THE IMPORTANCE OF FAMILY SOCIAL SUPPORT, FEELING VALUED, AND FAMILY COHESION IN PROMOTING POSITIVE ADOLESCENT DEVELOPMENT 11 (2010) (finding that strong families and effective parenting are “critical . . . factors in childhood and adolescence both in enhancing strong positive functioning (e.g., academic successes) and in reducing the risk of negative outcomes (e.g., mental disorders)”); Elizabeth C. Hair et al., *The Continued Importance of Quality Parent-Adolescent Relationships During Late Adolescence*, 18 J. RES. ON ADOLESCENCE 187 (2008) (discussing the long-term influence of parents on child and adolescent development and well-being); Heather Weiss et al., *Family Involvement in Early Childhood Education*, HARV. FAM. RES. PROJECT, Spring 2006 (discussing the substantial research that supports family involvement and parenting in child development).

263. See sources cited *id.*

264. *Id.*

265. Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, FUTURE OF CHILD., Winter 2004, at 31.

266. “Children in foster care, as a result of exposure to risk factors such as poverty, maltreatment, and the foster care experience, face multiple threats to their healthy development, including poor physical health, attachment disorders, compromised brain functioning, inadequate social skills, and mental health difficulties.” *Id.*

267. *Id.* at 35, 44.

268. *Id.* at 33.

269. See Mark E. Courtney & Amy Dworsky, *Early Outcomes for Young Adults Transitioning From Out-Of-Home Care in the USA*, 11 CHILD & FAM. SOC. WORK 209, 216 (2006).

awareness.²⁷⁰ Finally, other competencies developed in the family environment impact child health. Perhaps most important among these is the development of empathy, which is facilitated by watching others demonstrate the behavior. Modeling empathy and ethical behavior provides the conduit for children to internalize the examples.²⁷¹

Beyond cognitive development, families also matter for legal and social reasons. Families are respected within the law. And with the role of parent(s) comes duties and responsibilities, which undoubtedly provide a sense of security for children, who understand that their parent(s) are obligated to care for them. The family model carries symbolic as well as legal meaning in the United States and rest of the world. Family as a rights-bearing legal construct is deeply ensconced in U.S. jurisprudence. From family privacy²⁷² to procreative liberty,²⁷³ custody debates,²⁷⁴ to the right(s) of parents to control interests in raising their children,²⁷⁵ a rights discourse anchors Americans' understanding about what entitlements and rights come with "family."

270. See, e.g., Harden, *supra* note 265 (discussing research that has found better academic performance among children with stable relationships and consistent caregivers).

271. *Id.* at 35.

272. See *Prince v. Massachusetts*, 321 U.S. 158, 158–59 (1944) (affirming the state's ability to interfere only in the event of a compelling interest; in this case, to regulate child labor and to protect a child from the dangers of preaching on a public road).

273. See *Roe v. Wade*, 410 U.S. 113, 165–66 (1973) (finding that pregnancy termination was within the scope of personal liberty protected by the due process clause of the Fourteenth Amendment); *Eisenstadt v. Baird*, 405 U.S. 438, 453–55 (1972) (holding that a Massachusetts statute that provided for differential access to contraceptives for married and unmarried persons violated the equal protection clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 495 (1965) (opining that a Connecticut statute prohibiting the dispensing or use of contraceptive methods to or by married couples represented an unconstitutional invasion of the right to privacy of married individuals and stating "[t]he home derives its pre-eminence as the seat of family life. And the integrity of that life is something so fundamental that it has been found to draw to its protection the principles of more than one explicitly granted Constitutional right. . . . The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.").

274. *Santosky v. Kramer*, 455 U.S. 745, 745–47 (1982) (ruling that a New York statute allowing for the termination of parental rights using a "fair preponderance of the evidence standard" violated the due process clause of the Fourteenth Amendment—due process required proof of "clear and convincing evidence" in such proceedings); *Stanley v. Illinois*, 405 U.S. 645, 646 (1972) (finding that an Illinois statute prohibiting an unwed father's right to a hearing prior to his children being taken away from him for being an unfit parent was a violation of the Due Process Clause of the Fourteenth Amendment; all parents are entitled to a hearing on fitness before their children are taken from their custody and thus the Illinois statute was also ruled a violation of the equal protection clause of the Fourteenth Amendment).

275. *Wisconsin v. Yoder*, 406 U.S. 205, 205–07 (1972) (ruling that Wisconsin's compulsory school attendance law violated Amish parents' First Amendment right of exercise of religion and their interests in the religious upbringing and education of their children). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232; *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (finding that the state of Nebraska, by invoking police power, could not interfere with guaranteed liberty interests, including the opportunities of students to acquire knowledge and the right of parents to control the education of their own children).

3. *Better Outcomes but Real Challenges*

A key purpose in studying alternatives to the foster care model is to promote greater efficiency in the delivery of care, quality of care, and cost savings. As described above, HHS's annual reviews illustrate that *basic* standards are not met by most states in the delivery of foster care services.²⁷⁶ In fact, states do a pretty poor job of fostering children. A Brookings Institute Report bluntly states,

Although children in long-term foster care represent only a small fraction of the total child population of the United States, they represent a much bigger portion of the young people who go on to create serious disciplinary problems in schools, drop out of high school, become unemployed and homeless, bear children as unmarried teenagers, abuse drugs and alcohol, and commit crimes.²⁷⁷

In one study, "81 percent of the long-term foster care males had been arrested at some point, and 59 percent had been convicted of at least one crime."²⁷⁸ By contrast, only seventeen percent of young men in the general population of the same age group (twenty-three or twenty-four year olds) had been arrested, and ten percent had been convicted of a crime.²⁷⁹ Equally daunting data sheds light on the future for young women who will age out of foster care: "57 percent of the long-term foster care females had been arrested and 28 percent had been convicted of a crime."²⁸⁰ By comparison, "all female young adults in the U.S. are 4 percent and 2 percent, respectively," likely to be arrested and convicted of a crime.²⁸¹ The Brookings Institute estimates "[t]he cost of incarcerating former foster youth was approximately \$5.1 billion per year."²⁸²

When comparing the experiences of youth who age out of foster care (described above) versus their counter parts that are adopted, however, a different story emerges: adopted youths experience more stability, greater wealth, and consistent exposure to college graduates.²⁸³ Again, children adopted from foster care are more likely to live in an environment "more favorable for child development and well being than children who remain in foster care."²⁸⁴ Former foster care children adopted into homes are more likely:

- to have at least one parent who is a college graduate: 43 percent of the adopted children had such a parent, compared with 21 percent of the foster children;
- to be in a financially-secure household (one whose annual income is at least 400 percent of the official poverty level):

276. See *supra* text accompanying notes 160–65.

277. Zill, *supra* note 123, at 2.

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.* at 4.

284. *Id.*

28 percent of the adopted children were in such households as opposed to 10 percent of foster care children; and

- to be living in a safe and supportive neighborhood: 81 percent of the adopted children lived in such neighborhoods, compared with 68 percent of the foster children.²⁸⁵

For children who never exit from foster care into permanent placement or adoption, scenarios like that described above are fantasies that are never realized, and it is important to consider why certain difficult-to-place children, including African American children, are more likely to remain in foster care. Indeed, the highly educated, two-parent families living in safe neighborhoods are more likely to pass them by. For decades, pundits faulted the National Association of Black Social Workers (NABSW) for contributing to the overrepresentation of black children in foster care.²⁸⁶ Critics point to the NABSW's decades-long platform that whites should not adopt black babies and urge that it may have contributed to the current resistance to adopt black children.²⁸⁷ That policy no longer exists, although it remains true that children of color will wait considerably longer for adoption than their white counterparts. For example, in Michigan, white children are three times more likely to be adopted from foster care than their black counterparts.²⁸⁸

Despite the fact that an “estimated 2 million American families” are looking to adopt, the majority will pass over black babies for children from abroad.²⁸⁹ A recent study published by the National Center for Health Statistics reveals the ways in which race matters in adoption.²⁹⁰ While 86.4 percent of black women would accept a white child, only 72.5 percent of white women would accept a black child and only 1.8 percent of white women expressed a preference for a black child.²⁹¹ Most notably, more white women expressed a preference for adopting a child with severe physical or mental disabilities than a preference for adopting a black child.²⁹² Adoption constitutes a multi-million-dollar transnational

285. *Id.*

286. See *Preserving Families*, NAT'L ASS'N BLACK SOC. WORKERS (Jan. 10, 2003), <http://www.nabsw.org/mserver/PreservingFamilies.aspx>.

287. *Id.*

288. See Richard P. Barth, *Effects of Age and Race on the Odds of Adoption versus Remaining in Long-Term Out-of-Home Care*, CHILD WELFARE, Mar.–Apr. 1997, at 285, 288 (noting that white children in the Michigan foster care system are three times more likely to be adopted than black children). Yet the adoption of white children may have less to do with early child welfare considerations and social altruism. Rather, adult desires factor significantly in this process, meaning children are not necessarily being adopted to simply provide a charitable service. If that were the case, fewer African American children would be bypassed for foreign adoptions. Because race matters in adoptions, child welfare may be secondary to the market constraints imposed by the costs of racism in the United States.

289. Rebecca Leung, *Born in USA; Adopted in Canada*, 60 MINUTES, Feb. 11, 2009, <http://www.cbsnews.com/stories/2005/02/11/60minutes/main673597.shtml>.

290. Anjani Chandra et al., *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, ADVANCE DATA, May 11, 1999, at 1.

291. *Id.* at 8.

292. *Id.*

service, in which aesthetics and genetic traits significantly factor.²⁹³ In U.S. adoptions, white children attain higher status and more demand than black children by both adoption agencies and, obviously, by those who seek to adopt them.²⁹⁴ According to the Department of Health and Human Services, many couples wait more than eighteen months and spend as much as thirty thousand dollars to adopt children from abroad,²⁹⁵ bypassing the less desired black babies.²⁹⁶ In fact, according to a recent report, adoption of black children can be facilitated in less than three weeks.²⁹⁷

Thus, the impact of the NABSW's urgent call against white families adopting African American children cannot be ignored. In the 1970s, the organization campaigned against transracial or interracial adoptions. The focus of their concern persists in international adoptions, namely, will the adopting parents prepare (or be capable of preparing) their new sons and daughters for healthy, well-adjusted lives in a racially divided society, where social interactions—even within their families—might sharply differ?²⁹⁸

On November 9, 2009, the Evan B. Donaldson Adoption Institute published what is likely to be the “most extensive” study on identity development in adopted adults in the United States.²⁹⁹ The study, which involved 468 adopted adults, sheds light on interracial and transnational adoption.³⁰⁰ Findings from the study immediately attracted the attention of reporters at the *New York Times* and other media, likely because the Donaldson study provided the first comprehensive adoption investigation focused on adults rather than children.³⁰¹ The study documented compelling narratives from adult adoptees from South Korea (179 partic-

293. Because the adoption process in the United States is not administered by any single entity, exact data relating to market values in the adoption industry are not known. See generally U.S. DEP'T OF COMMERCE, SOCIAL ASSISTANCE: 2002 (2004), available at <http://www.census.gov/prod/ec02/ec0262104.pdf> (data from the 2002 Economic Census estimate that the “child and youth services” industry, which includes adoption, has an annual payroll of 3.3 billion dollars. The data also indicate that revenue of the industry is nearly 9.5 billion dollars). See also Gabrielle Glaser, *The Price(s) to Adopt*, THE OREGONIAN, July 4, 2004 (“In 2001, Marketdata Enterprises . . . reported that adoption services were a \$1.4 billion industry in the United States . . .”).

294. See Mary Mitchell, *Adoption Swamp Grows Murkier with Drug Charges*, CHI. SUN-TIMES, Mar. 22, 2005, at 14 (noting that “the fees at a lot of adoption agencies [are based on] the color of the baby's skin”).

295. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., COSTS OF ADOPTING 5 (2011).

296. In researching for this article, the highest fee associated with black adoptions was nineteen thousand dollars. The lowest fees included nearly free permanent placements involving children from foster care. *Id.*; see, e.g., Glaser, *supra* note 293 noting that (a couple adopting an African American child can expect to wait between one to nine months and pay twelve thousand to nineteen thousand dollars).

297. Leung, *supra* note 289.

298. See *Preserving Families*, *supra* note 286.

299. See HOLLEE MCGINNIS ET AL., EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP: PROMOTING HEALTHY IDENTITY FORMATION IN ADOPTION 3 (2009), available at http://www.adoptioninstitute.org/research/2009_11_culture_camp.php.

300. *Id.* at 3–4.

301. *Id.* at 3.

ipated in the study).³⁰² Most of the study's Korean participants were adopted as babies or toddlers and grew up in two-parent, white families.³⁰³ Here is what the Donaldson Institute reported: "Eighty percent [experienced] discrimination from strangers and 75 percent from classmates. Nearly half (48%) reported negative experiences due to their race in interaction with childhood friends. A notable finding was that 39 percent of Korean respondents reported race-based discrimination from teachers."³⁰⁴ Nearly eighty percent of South Korean adoptees grew up thinking of themselves as, or wishing, they were white.³⁰⁵ The study's participants also disclosed considerable pushback from their white parents when they disclosed the desire to learn more about their ethnic identity.³⁰⁶ According to one woman, later interviewed by the *New York Times*, her adoptive parents regarded her desire to travel to Korea as a sign of rejection; she revealed, "My adoptive mother is really into genealogy, tracing her family to Sweden, and she was upset with me because I wanted to find out who I was."³⁰⁷ Her story echoed among other study participants.

Ironically, NABSW's early concerns about transracial adoptions reverberate subsequent to the 2009 Evan B. Donaldson Adoption Institute report. The Institute's recommendations map early statements issued by NABSW. For example, the Institute calls for the expansion of "parental preparation and post-placement support for those adopting across race and culture" and the "[d]evelop[ment of] empirically based practices and resources to prepare transracially and transculturally adopted youth to cope with racial bias."³⁰⁸

Nonetheless, NABSW's critics blame the organization's leadership for the low rates of black adoptions. The seemingly intractable problems that accompany black placements continue to alarm critics and the organization. On their website, NABSW reminds readers that African American children wait longer in foster care than all other ethnic groups and represent forty percent of all children in foster care, which is staggering considering that African Americans are less than fifteen percent of the total U.S. population.³⁰⁹

Measuring the impact of NABSW's position on contemporary adoptions remains difficult. In 1994, the federal government enacted the Multi-Ethnic Placement Act³¹⁰ and, soon after, the Interethnic Placement

302. *Id.* at 4.

303. *Id.* at 4, 24.

304. *Id.* at 5.

305. *Id.*

306. *See id.*

307. *See* Ron Nixon, *Adopted From Korea and in Search of Identity*, N.Y. TIMES, Nov. 9, 2009, at A9.

308. MCGINNIS ET AL., *supra* note 299, at 7.

309. *Preserving Families*, *supra* note 286.

310. 42 U.S.C. § 5115(a) (1994), repealed by Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755.

Act³¹¹ and the Adoption and Safe Families Act,³¹² in 1996 and 1997, respectively. These legislative efforts directly promote interracial adoption by requiring agencies to look beyond race and ethnicity in an effort to remove as many children from foster care as possible and place them in loving homes. Thus, as a matter of law, bold attempts by Congress further urge the placement of African American children into homes that will embrace them. That such aggressive efforts do not resolve the “glut” may point to a growing skepticism “about whether NABSW’s 1972 position detracts from whites adopting African American children.”³¹³ According to some scholars, white families simply do not want to adopt African American children even though they are abundantly available.³¹⁴

D. Parental Civil Unions: A New Version of Partnership

This Article urges a radical rethinking of family, much in the way that domestic partnership or civil union laws unconventionally legalized intimacy between gay couples and nontraditional heterosexual couples. As established earlier, families matter; they provide direction, support, love, and maintenance. Studies demonstrate, however, that traditional, two parent heterosexual households appear out of reach for most children in foster care, especially African American children.³¹⁵ Several factors may contribute to the patterns of delayed placement and permanence in foster care experienced by thousands of American children. Among these factors are income requirements that tend to exclude poor, working class, and lower-middle income families who most desire to adopt children of color;³¹⁶ discrimination against families of color;³¹⁷ state laws excluding gay men and lesbian women from adopting;³¹⁸ a fidelity to

311. The Interethnic Placement Act was contained within the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755.

312. Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115.

313. Michele Goodwin, *Baby Markets*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 1, 8 (Michele Goodwin ed., 2004).

314. *Id.*

315. *Id.* at 7.

316. See RANDALL B. HICKS, *ADOPTING IN AMERICA: HOW TO ADOPT WITHIN ONE YEAR* 12 (4th ed. 2004) (describing the importance of adoptive parents’ ability to demonstrate financial security to adoption agencies, including those agencies that place an emphasis on a permanent stay-at-home parent); Jehnna Irene Hanan, Comment, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 *GOLDEN GATE U. L. REV.* 167, 174 (1997); Gay Jervy, *Priceless: That’s how Adoptive Parents Describe Their Children. But Adoption Is Also a Financial Transaction. A look at the Intersection of Money and Miracles*, *MONEY*, Apr. 1, 2003, at 118 (a couple describes the lifestyle changes they underwent when they decided to adopt: “[My husband] took a ‘real job’ To adopt, we had to appear to be solid, and we also needed the money Unless you’re independently wealthy, you have to fit the norm.”); see also Shaila Dewan, *Two Families, Two Cultures and the Girl Between Them*, *N.Y. TIMES*, May 12, 2005, at A16 (quoting Amanda Crowell, lawyer for the couple petitioning to adopt Linda Berrera Cano).

317. Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 *COLUM. J.L. & SOC. PROBS.* 327, 359 (1997) (noting that “traditional standards governing parent eligibility are biased against minority parents,” which “may be one of the reasons why there is a dearth of minority parents available to adopt minority children”).

318. See, e.g., *MISS. CODE ANN.* § 93-17-3(5) (2012) (“Adoption by couples of the same gender is prohibited.”); *UTAH CODE ANN.* § 76B-6-117(3) (2012) (prohibiting adoption “by a person who is co-

the heterosexual two parent model,³¹⁹ which undermines the ability of single persons to adopt; and a lack of federal and state efforts to aggressively seek homes for children in foster care.³²⁰

Resolving how to transition children into permanent homes requires rethinking about what normatively constitutes family and considering the best options among a limited set of choices.³²¹ First, as we put forward, the traditional two-heterosexual-parent framework no longer serves as the exclusive model defining parentage in the United States. The political, legal, and social responses to these new norms vary. Some commentators and child welfare advocates who locate themselves as part of the “religious-right” challenge gay and sometimes single-parent adoption but stand silent on the use of assisted reproduction in the purchase of sperm and ova and the use of gestational surrogates. On the other hand, legislative support for nontraditional families is evident in the repeal of bans on gay adoption in states traditionally defined as “Red.”³²² This dichotomy can be interpreted as the shifting of both social and legal norms.

Second, it would be a mistake to organize child welfare, especially adoption as an “all or nothing” or “one model fits all” approach. Rather, adoptive families must be evaluated on a comparative basis for the strengths they offer (as well as weaknesses) in relation to the children they are most likely to adopt and the circumstances/conditions to which those children were previously exposed. If states align more realistic pairings between children and prospective parents, better outcomes may result. In other words, by “holding out” for “traditional couples” (or *suitable* couples as normatively defined by state welfare agency practice as white, upper-income, educated families) to adopt children from foster care, states undermine their task in attaining permanent placements, perpetuate inefficiencies, and ultimately disserve the children in their care. A National Urban League study on adoption in the United States tellingly supports this point. In a study of “800 African American families who applied to adopt,” only two of the eight-hundred were approved for adoption.³²³ Legal scholars, including Professors Ruth Arlene Howe, Angela Kupenda, Zanita Fenton, Twila Perry, and others suggest that

habiting in a relationship that is not a legally valid and binding marriage under the laws of this state.” Same-sex marriages are not currently recognized in Utah).

319. See Dewan, *supra* note 316.

320. See Ruth G. McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children: Culturally Sensitive Practice Approaches*, CHILD WELFARE, Jan.–Feb. 1997, at 89 (describing “a National Urban League study of 800 African American families who applied to adopt” in which a mere two of the eight hundred were approved for adoption).

321. Zanita E. Fenton, *In a World Not Their Own: The Adoption of Black Children*, 10 HARV. BLACKLETTER J. 39, 42–49 (1993) (describing the slavery origins of informal adoption by extended family members, which is still common within African American communities).

322. See *supra* note 318.

323. McRoy et al., *supra* note 320, at 89.

double standards are explicitly and implicitly built into U.S. adoption practices.³²⁴ Clearly, race continues to matter in U.S. adoptions.

Importantly, the two-parent heterosexual model cannot be the adoption standard for all children. Indeed, such a model should not stand as the standard. In part, two-parent heterosexual households are out of reach because those families bypass black domestic children to adopt abroad.³²⁵ That said, we challenge the notion that “family” can or should be defined exclusively within the two-parent heterosexual context, much as some courts and state legislatures defy exclusively defining marriage as between heterosexuals.

On inspection, domestic partnership law, specifically civil unions,³²⁶ serves as a pragmatic example of both the legal status that can be afforded baby cooperatives and the flexibility we urge in child welfare. Important lessons can be learned from the expanded view of family articulated by gay rights activists and supported most recently by legislatures legalizing same-sex marriage and courts overturning legislation banning the process. Among these lessons are the changing social and legal norms that define not only marriage, but also family. Equally important, civil union demographics provide an important counternarrative to the presumption that “nontraditional” families exist only in liberal enclaves. Rather, the modern family—blended by divorce, remarriage, single-parenting, adoption, and assisted reproduction—demonstrates the pitfalls associated with bracketing families with distinct clear boundaries; there are no bright lines that define twenty-first century families.

Thus, while the two-parent traditional family model defines one version of success, what contributes to the health and endurance of that model likely involves many factors other than heterosexual marriage: wealth, home ownership, education, safe neighborhoods, and social capacity are factors to consider other than matrimony. For decades, the two-parent family household served as the proximal or “ideal” family and remained entrenched in the law, including municipal zoning laws, in part because of race and immigration.³²⁷ In the U.S., the traditional, nu-

324. See Fenton, *supra* note 321; Ruth-Arlene W. Howe, *Adoption laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677 (1999); Angela Mae Kupenda, *Two Parents are Better than None: Whether Two Single, African-American Adults—Who Are Not in a Traditional Marriage or a Romantic or Sexual Relationship with Each Other—Should be Allowed to Jointly Adopt and Co-Parent African American Children*, 35 U. LOUISVILLE J. FAM. L. 703 (1997); Perry, *supra* note 35.

325. See Goodwin, *supra* note 313, at 9–10.

326. Civil Unions and domestic partnerships are often conflated terms. Socially there is little distinction between the two. For our purposes, we use the term civil unions to refer to a partnership granted legal status by states to protect the familial and intimacy interests of the individuals linked in the partnership.

327. See *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974) (finding that a zoning ordinance may restrict the number of unrelated individuals who can live together in single-family neighborhoods as long as it is reasonable and not arbitrary; the legislature was within its discretionary rights to define family as including no more than two unrelated persons); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 379 (1926) (ruling that municipalities have the authority to establish residential neighborhoods in relation to public health and safety of the community); see also Barbara J. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 15 WIS. WOMEN'S L.J. 93, 105–06 (2000) (discussing the Supreme Court's view that “segregat-

clear family defined as a husband (male) and a wife (female) pairing with biological children assumed primacy over other historical and concurrent successful models among immigrant and ethnic minority groups, such as extended family and kinship networks common in Asian and African American families.³²⁸ Legally, the two-parent, nuclear model provides a mechanism to legitimate children, reflecting prevailing beliefs about what is natural and desirable with regard to child-rearing, and it is a political unit, significantly courted by politicians, serving as a touch point in most electoral rhetoric.³²⁹

In the twenty-first century, however, the nuclear model is increasingly difficult to achieve and maintain given the frequency of divorce, weakening deference to traditional marriage, and the choice by some to parent alone. Furthermore, contrary to the notion that the conventional two-parent model serves as the ideal to realize, existing research suggests that family structure alone does not predict nor determine emotional adjustment, well-being, and relationship quality among family members; family process is most salient.³³⁰

Thus, as a starting point, we reject the notion that a two-parent household constitutes the proximal family unit for children in foster care or in non-foster care families. None of the critical functions and responsibilities outlined above (emotional adjustment, well-being, and quality relationships among family members) should be assumed as exclusive to (or fully reflective of) the two-parent, nuclear framework. Immigrant families, including highly successful Asian families (the least represented ethnic population in foster care), cling to an extended family model.³³¹ The case we make reflects the real implications of poor populations of color disproportionately represented on foster care rolls.³³² For example, in the absence of sweeping economic and social policy reform to address the social hierarchy and structural poverty, few traditional family models remain available to resolve the pressing problem of youth living in permanent “temporary families.”

ing residential, business and industrial buildings provided numerous advantages to a community . . . [such as] preserving a more favorable environment for rearing children”).

328. See Kris Franklin, “A Family Like Any Other Family:” *Alternative Methods of Defining Family in Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1991) (advocating a shift to increasing reliance on an individualized definition of family and the law’s recognition of a diversity of family forms); see also Richard F. Storrow, *Rescuing Children from the Marriage Movement: The Case Against Marital Status Discrimination in Adoption and Assisted Reproduction*, 39 U.C. DAVIS L. REV. 305, 308–48 (2006) (discussing the long-held view that children thrive when they are raised by a biological mother and father in a single household; heterosexual marriage, procreation, and parenthood in this context were previously deemed essential to societal integrity).

329. See, e.g., Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2184 n.9 (1995) (evaluating the responsive capability of the law to reflect changing dimensions of the family).

330. See generally Jennifer E. Lansford et al., *Does Family Structure Matter? A Comparison of Adoptive, Two-Parent Biological, Single-Mother, Stepfather, and Stepmother Households*, 63 J. MARRIAGE & FAM. 840 (2001) (stating that family processes outweighed family structure in importance to relationship quality and well-being).

331. See *Who May Adopt & Who May Be Adopted*, *supra* note 233.

332. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 178–81.

CONCLUSION

Predictably, among this generation of foster children, productive citizens will emerge; some will transition to college, develop healthy relationships, and lead industrious lives. Empirical evidence predicts that thousands, however, will exit foster care this year into homelessness, poverty, teen parenthood, and prison.³³³ Despite billions invested each year in foster care by states and the federal government, the tragic lives of the young adults and teens who exit reveal a system plagued by bureaucratic inertia, institutional inefficiency, and failure.³³⁴

Contemporary foster care represents collective institutional failures—that of parents, states (as overseers of child welfare organizations), and the federal government; it operates at high costs with the poorest social, cultural, and educational outcomes for its wards. Much like public education, it is a system in cardiac arrest, unrevitalized for decades and disserving the children it serves as well as the Americans who fund it. Its foundational utilitarian mission and goals articulated by Julia Thorpe, Jane Addams, and others³³⁵ remain apparent in principle, but lost in reality as the urgency to “save” the poorest children in our society from intergenerational poverty of mind, spirit, and body no longer carries the exigency of a century prior. Despite billions in federal dollars spent each year to support foster care, all states perform sub-optimally on the basic federal assessments. Federal spending bears no relationship to the quality of care received by children.

This Article proposes utilizing the tools of civil unions to create parental civil unions or baby cooperatives as a pragmatic means to permanent placement *or* creating families. The project does not purport to be a panacea. It is experimental by nature, which makes it ripe for the type of empirical scrutiny that can only occur with trial. We urge that type of inquiry to formally test this model. The goal of this project is to find improvement for the lives of children cared for as wards of the state. In this capacity, we offer a pragmatic solution that resists acceptance of traditional legal and social norms that define family. Instead, we point to important legal and cultural trends that redefine family: gay parent adoption, assisted reproduction, and single parenting. Fitting within the broader spectrum of parenting should also be multi-adult units as in some instances those models will serve the best interests of children.

Children adopted from foster care avoid many of the pitfalls that ensnare their counterparts who remain in the system. Empirical evidence supports our claim. For example, research³³⁶ confirms that fostering rarely provides permanence, but more importantly, adoption provides emotional security, a stronger sense of belonging, and an enduring

333. See Courtney et al., *supra* note 173, at 6–9.

334. See Murray, *supra* note 101.

335. ADMIN. FOR CHILDREN & FAMILIES/CHILDREN'S BUREAU, *supra* note 60, at 1, 4.

336. PEW CHARITABLE TRUSTS, *supra* note 241, at 4; Musewicz, *supra* note 28, at 635–36.

No. 4]

PARENT CIVIL UNIONS

1393

psychological base for children who cannot return to their birth families.³³⁷ Innovative solutions on the front end must be deployed to reduce the number of children entering the system and on the back end to place children in families that support their growth and development. This Article introduces an intervention directed at the back end: the placement of children in cooperative families to offer loving families and permanent homes.

337. John Triseliotis, *Long-term Foster Care or Adoption? The Evidence Examined*, 7 CHILD & FAM. SOC. WORK 23, 31 (2002) (confirming that fostering rarely provides permanence and finding that, in general, adoption provides emotional security, a stronger sense of belonging, and an enduring psychological base for children who cannot return to their birth family).

