The Road to a Federal Family Court

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INTRODUCTION: THE PROCESS BEGINS

The federalization of child protection policy and the family court began with the so-called discovery of child abuse by Dr. C. Henry Kempe in 1962. Dr. Kempe and his colleagues labeled the emerging documentation of physical abuse of children under three as "battered child syndrome" and provided an explanation for injuries that had previously been inadequately or inconsistently explained. The country was shocked by Kempe's findings, spurring the federal Children's Bureau to propose model child-abuse-reporting laws.[1] By 1966, only four years after Kempe's hospital study, all fifty states had adopted legislation to regulate child abuse; by 1968 all states had adopted mandatory child-abuse-reporting laws, first for physicians but soon expanding to teachers and other professionals working with children.[2]

When Dr. Kempe and his associates reported their findings about serious physical abuse in 1962, they intended to warn health professionals to be on the lookout for a small number of parents who were severely harming their children. They believed that these egregious cases numbered in the hundreds and that reporting to public authorities would keep this small number of children safe. The swift actions of states to promulgate reporting laws reflected the assumption that a limited number of children were involved since only one state appropriated additional resources for the reporting system.[3] But Dr. Kempe was wrong. While fewer than 10,000 reports were filed in 1967, by 1979 almost a million reports were filed.[4] Today, investigations have become commonplace in marginalized communities; poor, Black and Native American families disproportionately come into contact with child protective services. Over one in three children nationwide—and over half of Black children—experience a child maltreatment investigation by age 18.[5]

Equally pivotal to the federalization of family court proceedings was the passage in 1974 of the first federal child protection legislation: the Child Abuse Prevention and Treatment Act (CAPTA). CAPTA defined child abuse and neglect as "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 or threatened thereby."[6] For states to receive federal funding to assist them with their burgeoning child protection systems, they had to adopt this broader definition. They all did.[7] Unlike physical injury, "mental injury, negligent treatment, or maltreatment" that harms or threatens to harm a child's welfare or health is far harder to define. The CAPTA definition required child protection systems to think about parents (and other guardians and caretakers) who were not abusive. These are parents who could use corporal punishment legally as long as it wasn't excessive; parents who might not meet their basic parental responsibilities because of poverty, marginalization, mental illness, or substance use; parents who tried but were unable to take sufficient care of their children, often for reasons far beyond their control.

CAPTA's incorporation of definitions of neglect drew from another strand of federal policy concerning child welfare: providing financial assistance to children whose families were impoverished. At the beginning of the 20th century, the Juvenile Court had been tasked with providing Mothers' Aid to assist "suitable" – and almost exclusively—white women whose children were at risk of becoming dependent, destitute, or delinquent, the bases for bringing children to the original juvenile court.[8] By the Great Depression, it was clear to the federal Children's Bureau that this limited state and local funding system was insufficient and instead a child welfare program should be incorporated into the Social Security Act of 1935 "to establish, extend, and strengthen public-welfare services ... for the protection and care of homeless, dependent, and neglected children, and children in danger of becoming delinquent." Aid to Dependent Children (ADC) was created.[9]

The initial establishment of ADC as an income source was complicated by the history of oppressive racism toward Black mothers and children. While the federal government supplied a significant amount of the funding, states were permitted to set their own "suitability" standards for mothers applying for ADC.

Footnotes

1. Duncan Lindsey, The Welfare of Children 121–122 (2004); Lela Costin et al., The Politics of Child Abuse in America 113–117 (1996) (as well as earlier radiologists' and hospital social workers' discoveries during the 1950s).
2. Jane Waldfogel, The Future of Child Protection: How to Break the Cycle of Abuse and Neglect 72 (1998); Lindsey, *supra* note 1, at 122–23.
3. Gary Melton, *Mandated Reporting: A Policy Without Reason*, 29 Child Abuse & Neglect 9, 9–11 (2005).
4. Waldfogel, *supra* note 2, at 7.
5. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 Am. Soc. Rev. 610, 615 (2020).
6. Child Abuse Prevention and Treatment Act (CAPTA), P.L. 93–247, 88 Stat. 4 (1974), *amended by* P.L. 104–235, 110 Stat. 3063 (codified as amended at 42 U.S.C. §§ 5101 to 5119c (1996)).
7. Michael S. Wald, *Taking the Wrong Message: The Legacy of the Identification of the Battered Child Syndrome*, *in* C. Henry Kempe: A 50 Year Legacy to the Field of Child Abuse and Neglect 91 (Richard D. Krugman & Jill E. Korbin eds., 2012).
8. Dorothy E. Roberts, Shattered Bonds: The Color of Child Welfare 174–76 (2002).
9. Marguerite G. Rosenthal, *The Children's Bureau and the Juvenile Court: Delinquency Policy*, 60 Soc. Servs. Rev. 303, 313 (1986); Miranda Lynch Thomas, *One Hundred Years of Children's Bureau Support to the Child Welfare Workforce*, 6 J. Pub. Child Welfare 359–60 (2012).

Relying on local white norms and prejudices, African-American homes—in particular throughout the South—were considered immoral for having living arrangements that did not meet white middle-class "standards." In the wake of *Brown v. Board of Education* and other civil rights efforts, southern states intensified suitable home rules to withhold ADC benefits to force Black families further into poverty with the explicit intention that they would flee the states and integration mandates would be minimized.[10] In 1960, Louisiana tossed 23,000 Black children off the roles because their parents were not married, an action which followed mass expulsions in other southern states. The federal government finally responded with a rule requiring some greater definition of "unsuitable" and some services to the alleged unsuitable families. The rule was later incorporated into federal law, shifting the focus away from the unsuitability of the parent to concern with whether there was neglect because the parent could not properly shelter, feed, and clothe the child. Parents could no longer just decide to withdraw their requests for ADC and keep their children at home. Now if the child was identified as neglected during the ADC application process, removal became the norm.[11] Tens of thousands of Black children were removed from their homes. As Professor Laura Briggs has written, this policy "transformed ADC and foster care from a system that ignored Black children to one that acted vigorously to take them."[12]

An unintended consequence of this funding policy was that thousands of children across the country remained in foster care since there were no federal rules governing foster care stays and no financial incentives to get children home.[13] The ADC program—soon to be renamed Assistance for Families with Dependent Children (AFDC)—was not constructed as a foster care program but only a funding source for placement of children removed from parents who otherwise qualified for AFDC financial support. A broader policy of requiring social service assistance to families so they could remain together had yet to be developed. The result came to be known as "foster care drift" in the 1950s and 1960s, with hundreds of thousands of children nationwide spending years in foster care with no plan to return home to their families. One fifth of these children were away from their parents for longer than six years; between 30% and 40% of children who entered foster care never returned home to their parents.[14]

The mandatory reporting laws enacted in the late 1960s refocused attention on what was happening to all children at risk of maltreatment, including those already in foster care. By categorizing both neglect and abuse as priorities for national attention in 1974, CAPTA set in motion the consolidation of the two strands of child protection policy that would lead to a significant federal presence in shaping and monitoring how states addressed these issues and reshaping the role and the processes of the family court to respond to federal mandates. CAPTA also minimized the connection between poverty and maltreatment by emphasizing the universality of potential abuse and neglect and shifting the emphasis from societal responsibility to support families to the alleged failures of parents.[15] Yet the primary focus in the passage of CAPTA was still investigating child abuse and serious child maltreatment and not the myriad and complex components of alleged neglect that would soon engulf the child protection system.[16]

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THE NEXT STEP: THE ADOPTION ASSISTANCE AND CHILD WELFARE ACT

By 1977 nearly 500,000 children nationwide were languishing in foster care.[17] Congress began to realize that open-ended funding for foster care and dysfunctional state child welfare systems had condemned hundreds of thousands of children to living in state care with little hope of returning to their families. The result was a new law based on the concept of so-called permanency planning: The Adoption Assistance and Child Welfare Act (AACWA).[18] AACWA now required states to work for their federal foster care funding. Child welfare agencies would have to employ "reasonable efforts" to keep children safely at home with their parents and avoid unnecessary removals or if children could not remain safely at home, "reasonable efforts" were also required to try to reunify families. If a child remained in care for eighteen months, a family court review was mandated to determine a permanent resolution rather than permitting endless stays in foster care.[19]

10. Laura Briggs, *Twentieth Century Black and Native Activism Against the Child Taking System: Lessons for the Present*, 11 COL. J. RACE & L. 611, 621–627 (2021).
11. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 CHILD WELFARE 11–21 (1997) (describing how this practice was known as the Flemming Rule for Arthur Flemming, the Secretary of the U.S. Department of Health, Education, and Welfare in the Eisenhower administration).
12. Briggs, *supra* note 10, at 618–627.
13. Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 55–56, 61–62 (2002).
14. David L. Chambers & Michael S. Wald, *Smith v. Offer, in* IN THE INTEREST OF CHILDREN: ADVOCACY, LAW REFORM, AND PUBLIC POLICY 70 (Robert H. Mnookin ed., 1985).
15. MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 184–85 (2005).
16. WALDFOGEL, *supra* note 2, at 72; U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, CREATING CARING COMMUNITIES: A BLUEPRINT FOR AN EFFECTIVE FEDERAL POLICY ON CHILD ABUSE AND NEGLECT 19 (1991) (the original version of the CAPTA bill would have provided a more comprehensive array of services and coordination).
17. Sanders, *supra* note 13, at 62.
18. In 1980, as part of the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.) [hereinafter P.L. 96-272], Congress amended the Social Security Act by creating Title IV–E, which provides for "reimbursement to the states" of part of the "foster care maintenance and adoption assistance payments made by the states on behalf of eligible children" when the states satisfy the requirements of the Act.
19. P.L. 96-272; David Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAM. L. Q. 329, 332–333 (2000).

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Despite Congress initially allocating funds to implement reasonable efforts and the development of promising preventive programs, when the Reagan administration swept into office in 1981, support for major demonstration projects ended along with significant reductions in federal spending on social programs.[20] Only foster care remained an open-ended mandate for eligible children.[21] In anticipation of well-funded community supports for families under the AACWA, child protection workers had left children at home or began reuniting them with their parents. The foster care population plummeting by half from 1977 to 1983. When the funding was cut and the families failed to get the anticipated assistance, "permanency planning became a revolving door" with children being placed in foster care, sent home, and replaced in care.[22]

Family courts also failed to hold the timely and meaningful placement reviews required by the AACWA. During a Congressional hearing in 1988, under questioning by Rep. George Miller, a longtime child advocate in the House, Jane Burnley, the Associate Commissioner for the Children's Bureau, acknowledged that in the federal case file reviews to determine whether reasonable efforts had been made by state child welfare agencies in individual cases, all her office could tell was that the form had been filled out by the judge, not that reasonable efforts had in fact been used to eliminate the need for placement.[23] In New York City, that became apparent ten years later in a Vera Institute of Justice study of the Bronx and New York Counties' family courts. The study found that services were discussed in fewer than one quarter of the 18-month review cases and that judicial hearings held to determine whether a child should remain in foster care, return to her parents, or be freed for adoption, and what efforts were needed to be taken to accomplish the chosen goal, took on average five minutes in New York County and ten minutes in the Bronx.[24] This lack of judicial oversight combined with significant funding cuts resulted in another explosion of children in foster care. By 1997, the foster care numbers had shot back up to their pre-AACWA levels.[25]

FINALLY, THE ADOPTION AND SAFE FAMILIES ACT

One provision in CAPTA created the U.S Advisory Board on Child Abuse and Neglect (Advisory Board). As the Clinton Administration began in the early-1990s, the Advisory Board was issuing a series of research and policy reports warning that "child abuse and neglect in the United States now represents a national emergency" and asking the federal government to replace "the existing child protection system with a new, national, child-centered, neighborhood-based child protection strategy [because] only such a strategy has any ultimate hope of eliminating this national scourge."[26] The Clinton Administration and Congress rejected those recommendations and chose instead a time-limiting remedy that accelerated the responsibility of everyone involved—child welfare agencies, parents and family courts—to accomplish the goal of getting children out of foster care on an accelerated schedule and with far more emphasis on terminating parental rights. This was the Adoption and Safe Families Act (ASFA).[27]

ASFA was characterized as having four broad goals: (1) moving children promptly to permanent families; (2) ensuring that child safety is paramount; (3) making child well-being a central focus of child welfare agencies; and (4) improving innovation and accountability throughout the system.[28] Permanency meant first and foremost termination of parental rights and adoption for the thousands of children who had been living in foster care for much of their lives. ASFA required states to begin termination of parental rights (TPR) for children who had spent 15 of the last 22 months in foster care with limited exceptions.[29] The priority was not to return children home to their birth families. Reunification of children with their families began to drop before ASFA but as a proportion of exits from care, the number of children being reunified with their parents decreased steadily from 60% to 52% by 2011, and the percentage of reunifications for Black children was even smaller.[30]

The central safety component of ASFA was the re-conceptualization of the AACWA's "reasonable efforts" requirement. Under the AACWA, the federal government had failed to fund preventive and reunification services that would have supported the reasonable efforts mandates to keep families together or to reunify them, either leaving children at risk at home or at risk of entering and staying in foster care. Many in Congress feared that maintaining the reasonable efforts requirements in ASFA would continue to place children's safety at risk. The solution chosen was not to fund the proven or promising programs identified by

20. LINDSEY, *supra* note 1, at 83.
21. SHEILA B. KAMERMAN & ALFRED J. KAHN, BEYOND CHILD POVERTY: THE SOCIAL EXCLUSION OF CHILDREN 83 (2002); GUGGENHEIM, *supra* note 15, at 188.
22. COSTIN, *supra* note 1, at 123-24.
23. Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT'L L.J. 259, 285 (2003). OFFICE OF INSPECTOR GENERAL, DEPARTMENT OF HEALTH & HUMAN SERVICES, OEI-01-92-00770 OVERSIGHT OF STATE CHILD WELFARE PROGRAMS iii, 22 (1994).
24. Molly Armstrong et al., Vera Inst. of Just., *New York State Family Court Improvement Study 23*, 2002 WISC. L. REV. 331 n.56 (1997) (demonstrating that services were discussed in fewer than one-quarter of the cases observed in New York and Bronx counties).
25. LINDSEY, *supra* note 1, at 84–85; Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997*, 11 COL. J. RACE & L. 711, 722 n.45 (2021).
26. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY 1–10 (1990).
27. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.).
28. Olivia Golden & Jennifer Macomber, *Framework Paper*, *in* INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 10 (2009).
29. *Id.* at 18–19.
30. *Id.* at 28; Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 J. L. & CONTEMP. PROBS. 221, 242 n.129 (2014).

the Advisory Board, which would support reasonable efforts, but instead to narrow the reasonable efforts requirements, exempting certain parents from receiving any reasonable efforts (mostly in extreme circumstances such as when a parent had previously killed a child) and enabling states to add other exceptions, which many states did.[31] ASFA's permanency and safety provisions, reinforced by federal funding choices, were sending children increasingly in one direction away from their families. To get there, they and their families were spending more and more time in family court.

ASFA completed the transformation of Family Court from an independent judicial body whose jurisdiction was to determine whether the state had rightly intervened in a family's life to protect a child—and, if so, to decide an appropriate disposition—into a willing partner in administering federal child welfare policy on a vast scale. This is because the obligations that ASFA placed on the court re-oriented the court's decision making around the issues of permanency and safety and incorporated the federal meaning of those concepts into state law. Judges would still make case-by-case determinations about whether a parent had mistreated a child and whether that child would remain at home or be placed in foster care but now they were under tremendous pressure to find that reasonable efforts were made to prevent removal or provide reunification services within shorter time frames and with a greater concern that children were at risk at home. ASFA further required them to decide whether agencies had created effective "concurrent" permanency plans so that if reunification with parents failed, plans that prioritized adoption would be implemented.[32]

Judges would be making these decisions knowing or being concerned about several things: that most of the families appearing before them were poor and disproportionately families of color, especially Black families; that broad societal supports for poor families raising children were increasingly limited; that the new Clinton "welfare reform" measures promulgated in 1996 were yet unproven to advance the financial well-being of those families; that the targeted resources to keep children at home or reunify them remained unfunded or underfunded (and often unproven) and yet breakable families would be expected to utilize them in shorter and shorter periods of time.[33] Moreover, judges were also aware that federal Title IV-E Foster Care and Eligibility Reviews and subsequent Child and Family Services Reviews—both of which determine whether state child and family service programs are in conformity with federal funding requirements—would be affected by judges who declined to find that reasonable efforts were made to support families. Such findings could potentially have a significant fiscal impact on state child welfare services or stymie the state's ability to fulfill their ASFA obligation to move children more rapidly toward permanency.[34]

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ASFA's clarification that reasonable efforts required agencies to spend less time and effort trying to reunify families not only changed courts' interpretations of reasonable efforts but more fundamentally changed the focus of courts' decision making. Courts were now interpreting the meaning of ASFA during TPR proceedings, rather than determining whether sufficient evidence existed to sever the constitutionally protected child-parent bonds. As some state supreme courts have acknowledged, ASFA, like the AACWA before it, may be a federal appropriations law requiring states to conform to its mandates to receive reimbursement but it has nevertheless fundamentally altered agency and court decision making.[35] The language in an Iowa appellate court case, *In re N.J.,* a few years after ASFA's enactment, illustrates this profound effect.[36]

A young girl, Nicole, had been sexually abused by one of her older brothers. Her mother, Sherry (as she was referred to in the court case), was advised not to allow Nicole to play unsupervised with her brothers. Sherry allowed them to play together outside their home and while Nicole wasn't abused again, the children were removed from Sherry's and her husband's care. When Nicole was later returned home, a female babysitter also sexually abused Nicole; neither Sherry nor her husband was ever accused of sexual abuse or of knowing that the babysitter was a sexual predator. When Nicole was replaced in foster care, Sherry attended twice weekly supervised visits with Nicole and underwent a psychological evaluation and counseling along with her children. Nevertheless, CPS moved to terminate her parental rights, believing that she could not keep Nicole safe and relying on ASFA's mandate to begin termination proceedings more quickly. The juvenile court terminated Sherry's rights and she appealed, arguing that the agency had not made reasonable

31. Golden & Macomber, *supra* note 28, at 18–19; *See also,* Josephine Gittler, *Efforts to Reform Child and Family Services: The Political Context and Lessons to be Learned, in* TOWARD A CHILD CENTERED, NEIGHBORHOOD-BASED CHILD PROTECTION SYSTEM: A REPORT OF THE CONSORTIUM ON CHILDREN, FAMILIES, AND THE LAW 116–41 (Gary B. Melton et al. eds., 2002).
32. 42 U.S.C. § 671(a)(15) (2018).
33. LINDSEY, *supra* note 1, at 170–172, 310–312.
34. Crossley, *supra* note 23 at 284-88; *CB Fact Sheet*, CHILDREN'S BUREAU, https://www.acf.hhs.gov/sites/default/files/documents/ cb/cfsr_general_factsheet.pdf (last visited Jan. 13, 2022); WILLIAM G. JONES, DEP'T OF HEALTH & HUMAN SERVS., WORKING WITH THE COURTS IN CHILD PROTECTION (2006). Judges at that time didn't know the states would rarely be penalized for failing to have reasonable efforts findings for their federal reviews. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-333, CHILD AND FAMILY SERVICES REVIEWS: BETTER USE OF DATA AND IMPROVED GUIDANCE COULD ENHANCE HHS OVERSIGHT OF STATE PERFORMANCE 11 (2004); Overall, there have only been a few instances where states have been fiscally sanctioned through the CFSR/PIP process. Those were not based on judicial determinations of reasonable efforts. Pursuant to Title IV-E Foster Care Eligibility Reviews, some states have been sanctioned when judicial determinations were not located in the case records but not for the substance of the court's determinations. (Email 12-10-2021 from David Kelly, former special assistant to Jerry Milner, former Associate Commissioner at the Children's Bureau.)
35. Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 334–38 (2004).
36. In re N.J., 2001 WL 488067 (Iowa Ct. Appeals 2001).

"[P]arents were now expected to resolve their difficulties more quickly..."

efforts to return Nicole home and it was in Nicole's best interests to be reunited with her mother. In upholding the termination, the appellate court practically scolds Sherry for not understanding how ASFA had changed the agency's and the juvenile court's decision-making processes:

> What Sherry ignores is the shift in priorities mandated by [ASFA]…Long-term efforts at family reunification are no longer required or even recommended…the law focuses [instead] on "time-limited reunification services"…[where] the new law places "greater emphasis on the health and safety of the child, and mandates a permanent home for a child as early as possible."

Nicole's safety was considered endangered by her youngest brother, Brandon, still living at home. Brandon had never sexually abused Nicole but had also engaged in sexual misconduct. Since CPS did not trust Sherry or her husband to supervise Nicole sufficiently to protect her from Brandon's potential misconduct, the juvenile court relieved CPS of making further efforts toward reunification. But was this in Nicole's best interests?

Everyone agreed Nicole and Sherry had a close bond. Sherry regularly visited and had used parent counseling to improve her parenting skills since Nicole's second placement, making "great strides in managing Nicole's behavior during supervised visits. She was asserting her role as parent and Nicole was responding positively." The concerns expressed by a psychologist about Sherry's parenting abilities soon after Nicole was replaced in care were being addressed successfully. The only evidence cited by the appellate court that Sherry couldn't keep Nicole safe occurred *before* Nicole's second placement and *before* Sherry had been provided with parent counseling and guidance. Given this progress and the strong bond between mother and child, why couldn't, indeed why wouldn't, the agency continue to try to reunify Sherry and Nicole, maintaining its successful efforts to improve Sherry's parenting and Nicole's safety?

The juvenile court rejected the recommendation of Nicole's guardian ad litem (GAL) of a continued stay in foster care with increased family visiting—and the potential of Nicole returning home—because that would violate ASFA's permanency requirement. The judge noted instead that adoption would give Nicole the stability she needed. But Nicole was living in a foster family unwilling to adopt her. She would have to be moved at least once more, losing both her biological mother and her foster family in the name of permanency and stability. Neither Sherry's right to raise her child nor Nicole's right to be raised by her mother were protected by this decision. Nor was the decision in Nicole's best interest; severing the one parental bond she had for a yet-unidentified new parent. The juvenile court found, and the appellate court agreed, that Nicole "will ultimately be happier with the stability and permanency of adoptive parents as opposed to having a biological mother whom she sees only occasionally," based on nothing more than aspiration. The Iowa courts holding this young girl's fate in their hands had followed ASFA's mandates, regardless of whether they actually provided "permanency, safety and well-being," and were in Nicole's best interests, or whether, crucially, they had protected her right to be raised by her mother.

Iowa courts may have made the same determination about Nicole pre-ASFA, but in her sweeping review of case law a few years after ASFA had been established in state policies and practices, Professor Kathleen Bean found state courts had shifted their analyses to give greater weight to the health and safety of the child and had redefined reasonable efforts to reduce both the length and nature of those efforts.[37] Well-intentioned parents had less time to reunify with their children with the same or fewer services; parents were now expected to resolve their difficulties more quickly, even if agency efforts to assist them were delayed.

Family courts issue far fewer opinions on the reasonableness of agency work with parents when children are at risk of being removed from their parents' care or soon after they've been placed in foster care.[38] Instead, case law about reasonable efforts usually tells the story at the end of the journey, when the question before the court is whether parental rights should be terminated. Courts may admonish agencies for their failure to provide timely services as they review agency efforts but because these admonitions occur when the court is more focused on a child's permanency, these failures are less likely to stop a termination.[39] Worried about timeliness after ASFA, courts allowed for shorter and shorter periods of time for parents to benefit from assistance, justifying even several months as enough time to comply with agency case plans.[40] For parents who seem unable or unwilling to change, a sense of futility tinges the courts' discussions of reunification efforts, often excusing or shortening the agencies' responsibilities.[41] This is particularly disturbing when futility is used to justify clear failure on the part of agencies to assist in reunifying families and instead becomes an excuse for finding that reasonable efforts were made. While Bean found closer scrutiny of both parents and agencies in the post-ASFA decisions she cites, agencies far more than parents seem to receive the benefit of the doubt. Post-ASFA courts used the language of reasonable efforts for parents as well as the state *although this is a requirement on the state, not on the parent*.[42] Of course, parents have an obligation to work toward reunification but the means to do so is often hampered by the very problems that led to placement in the first place—and for which many families received little or no assistance before the child was removed. Even today, many fam-

37. Bean, *supra* note 35
38. *For examples see* RESTATEMENT OF CHILDREN AND THE LAW Pt. I, Ch. 2. State Intervention for Abuse and Neglect, PROTECTING FAMILY INTEGRITY 1 § 2.30. Obligation of the State to Make Reasonable Efforts to Keep a Child in the Care of a Parent or Guardian § 2.30 (AM. LAW INST. 2021). *This source is currently in the publication process and unavailable to the public.*
39. Bean, *supra* note 35, at 352–55; also Kurtis A Kemper, Annotation, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing State Statutes*, 10 A.L.R.6th 173 (2006).
40. Bean, *supra* note 35, at 351–53 n.240.
41. *Id.* at 337–38.
42. *Id.* at 362 (emphasis added).

ilies investigated don't receive services during an investigation or after substantiating some evidence of maltreatment.[43]

Once a child is removed, whether a family receives the right services or uses them effectively is not always a measure of the child's safety. Nevertheless, if parents don't show quick improvement, courts are far more willing to excuse agency mistakes, lapses in services, and half-hearted efforts in the post-ASFA world.[44] Bean found that courts generally take for granted "the State's ability to provide adequate services is constrained by its staff and dollar limitations," while sometimes the court even explicitly notes that in tough economic times the "state has a legitimate interest in making the best use of its limited resource."[45] Courts today continue to excuse states because of fiscal constraints.[46]

The family court judge—and the appellate judges reviewing that judge's decision—has to decide whether the state intervened to protect a particular child and assist a particular family in a manner that conforms with our understanding of when the state can intervene appropriately in a family's' life. As the Supreme Court observed when determining that the standard of proof in a TPR case required clear and convincing evidence, "In appraising the nature and quality of a complex series of encounters among the agency, the parents, and the child, the court possesses unusual discretion to underweigh probative facts that might favor the parent. Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, such proceedings are often vulnerable to judgments based on cultural or class bias."[47] Judges thus have a duty to be particularly diligent when weighing the state's efforts to assist families before permanently severing legal bonds. These judges should not be in the business of excusing the state for not doing its job well or spending its money wisely if that standard isn't met. Nor is the family court a child protection agency that makes choices about where to spend its resources. If the state and local child welfare system makes the wrong choices, the court should not be empowered to condone those choices but instead has the duty to protect the interests of the child or family affected by the mistake.

Many believed that ASFA gave the family court exactly that duty by expanding the court's supervision in individual cases to enforce the safety standards and timelines already described but also to insert itself more fully into determining whether the plans developed to keep the child safe, move the child toward permanency, and protect the child's well-being are the right plans. Remember, the AACWA had had a similar goal. To eliminate foster care drift, the AACWA required the court to review the child's placement after eighteen months and make a decision about whether the child should remain in foster care after determining whether reasonable efforts had been made toward reunification or another placement goal.

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Despite that failure on the part of the family courts to enforce AACWA's reasonable efforts requirements, ASFA mandated even more heightened court involvement. Family courts would now be expected to hold review hearings—renamed permanency hearings—within twelve months of placement. If reasonable efforts are suspended under one of ASFA's exceptions, a court can hold a permanency hearing as early as 30 days after a child has been removed from her family to begin a process toward adoption or another permanency goal other than reunification.[48] ASFA's permanency requirements became a death knell for families enmeshed in what I now term the family regulation system. While exact figures are hard to obtain for the number of children whose parental rights have been terminated yearly since ASFA's enaction, over two million is a fair estimation.[49] By last count, over 71,000 children are awaiting adoption after termination of their parents' rights.[50] Like Nicole, whose story was described earlier, many children have a goal of adoption but have no adoptive parents. In most years, twice as many children wait to be adopted as are adopted; children wait for a new family on average for two years.[51] This wait and the likelihood and time to adoption have all fallen disproportionately harder on Black children. Since 2000, their adoption rate has fallen dramatically as a percentage of the foster care population.[52]

The young people who leave foster care after parental rights have been terminated are now called "legal orphans" by the system that created them. Many will linger in foster care for years, eventually becoming part of about 10% of the foster care population that ages out every year—about 24,000 young people—with no permanent homes.[53] If Nicole was one of them, she may have found her way back to Sherry, as many young people do.[54] One study found that over a quarter of the youth without a legal

43. U.S. Dep't of Health & Human Servs., Admin. for Child. & Families, Child. Bureau, Child Maltreatment 2019: Summary of Key Findings at 7 https://www.childwelfare.gov/pubPDFs/canstats.pdf (last visited Jan. 13, 2022); U.S. Dep't of Health & Human Servs., Admin. for Child. & Families, Child. Bureau, Child Maltreatment 2018, Chapter 6 Services, 68-72, https://www.acf.hhs.gov/sites/default/files/documents/cb/cm2018.pdf#page=83 (last visited Jan. 13, 2022).
44. Bean, *supra* note 35, at 358.
45. *Id.* at 365–66.
46. *See* Draft Restatement of Children and the Law Pt. I, Ch. 2. State Intervention for Abuse and Neglect, Protecting Family Integrity 1 § 2.30. Obligation of the State to Make Reasonable Efforts to Keep a Child in the Care of a Parent or Guardian § 2.30 cmt. m (Am. L. Inst. 2021). *This source is currently in the publication process and unavailable to the public.*
47. Santosky v. Kramer, 455 U.S. 745, 763 (1982).
48. Pub. L. No. 105-89, 111 Stat. 2115 (1997).
49. Guggenheim, *supra* note 25, at 722 n.48.
50. U.S. Dep't Of Health & Human Servs., Child. Bureau, The AFCARS Report (2018), http://s3.amazonaws.com/ccai-website/AFCARS_26.pdf (last visited Jan. 13, 2022).
51. Meredith L. Schalick, *Bio Family 2.0: Can the American Child Welfare System Finally Find Permanency for "Legal Orphans" with a Statute to Reinstate Parental Rights?* 47 U. Mich. J. L. Reform 467, 473 n.25 (2014).
52. *Id.* at 475-77.
53. Cynthia Godsoe, *Permanency Puzzle*, 2013 Mich. St. L. Rev. 1113, 1120 (2013).
54. *See* Cynthia Godsoe, *Parsing Parenthood*, 17 Lewis & Clark L. Rev. 113 (2013).

relationship to their birth parents return to them anyway after they age out of foster care.[55] So do many young people who have been adopted by other parents. This has led to one of the most bizarre responses by states and judges: recreating parental rights.

As of 2017, nearly half the states have enacted statutes to reinstate or restore parental rights when a child has never been placed for adoption, an adoption has never been finalized, or it has failed.[56] These statutes struggle to balance the correctness of the earlier judicial decision to sever the legal relationship between parent and child with the current petition to recreate that same family. Termination of parental rights is the most serious civil consequence to befall a family, requiring proof by clear and convincing evidence and often subject to appellate review before being finalized. To have to recreate such a family—to eliminate what has come to be called the family death penalty—underscores ASFA's destructive impact.[57]

Even before these statutory remedies started to be drafted, judges began to entertain petitions from birth parents to vacate termination orders, to grant parental custody, or even to allow these parents to adopt their own children.[58] Yet, undoing such a momentous decision will neither solve the problems of thousands of legal orphans nor create trust in the court processes. Weighing in on the problem in 2012, the National Council of Juvenile and Family Court Judges (NCJFCJ) passed a resolution urging various steps for judges to take to reduce the risk of legal orphans aging out of foster care. Their recommendations included consideration of reinstating parental rights as well as not making reasonable efforts findings if agencies were not actively trying to secure a permanent place for a legal orphan with a safe and caring adult.[59] What was missing from the NCJFCJ's resolution was a call for judges to refuse to make reasonable efforts findings unless specific and ongoing efforts were being made to reunify the child with her parents before a termination proceeding. That judicial determination would likely have far more impact on preventing legal orphans.

CONCLUSION

In recent years, advocates, impacted parents, and legislators have called for the repeal of ASFA or at least its most onerous timelines and provisions.[60] Such calls would certainly provide family court judges with more flexibility and autonomy in their decision making and hopefully decrease the number of children in foster care, increase the number of family reunifications, decrease the number of terminations, and reduce the number of legal orphans. Those calls will not, however, address the central problem of the family court enforcing federal funding mandates instead of performing its core responsibility of protecting family integrity. While the federal government has underfunded the material resources and services necessary to support families, that is not an excuse for the court to sanction family destruction. Each time a new federal law has been created to require family court to review and monitor federal directives, more families have been shattered and most children have not been protected. What is needed is the paradigm urged by the Advisory Board over 25 years ago; a system not built on reporting and surveilling but a system built on strengthening families, neighborhoods, and communities so children can live fully and happily at home. This means shrinking the family regulation system by providing material resources and services to reduce poverty, creating preventive services untethered to child protection surveillance, and eliminating all but the clearest instances of maltreatment from court jurisdiction. These would be vital steps in diminishing the destructive imprint federal mandates have had on poor and marginalized families and would certainly lead to a court with fewer cases and a clearer mission. Whether the family court could then truly protect family integrity remains unknown.

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55. *Id.* at 17 n.87; LaShonda Taylor Adams, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 Va. J Soc. Pol. & L. 318, 320 n.3–5 (2010).
56. Schalick, *supra* note 51, at 472; LaShanda Taylor Adams, *Legal Orphans Need Attorneys to Achieve Permanency*, 33 A.B.A. Child L. Prac. 225 (2014); Casey Family Programs, How Have States Implemented Parental Rights Restoration and Reinstatement? (2018), *available at* https://www.casey.org/how-have-states-implemented-parental-rights-restoration-and-reinstatement/ (last visited Jan. 13, 2022).
57. *See* Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 Col. J. Race & L. 861 (2021).
58. Adams, *supra* note 55, at 338–344.
59. National Council of Juvenile and Family Court Judges, Resolution Calling for Judicial Action to Reduce the Number of Legal Orphans at Risk of Aging Out of Foster Care in the United States (2012), *available at* https://www.ncjfcj.org/wp-content/uploads/2019/08/calling-for-judicial-action-to-reduce-the-number-of-legal-orphans-at-risk-of-aging-out-of-foster-care-in-the-united-states.pdf (last visited Jan. 13, 2022).
60. Upend Movement, https://upendmovement.org/ (last visited Jan. 13, 2022); Repeal ASFA, https://www.repealasfa.org/ (last visited Jan. 13, 2022); *Rep. Bass Introduces 21st Century Children and Families Act to Improve Stability for Kids in Foster Care*, Representative Karen Bass, https://bass.house.gov/media-center/press-releases/rep-bass-introduces-21st-century-children-and-families-act-improve (last visited Jan. 13, 2022).