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Court Review

Volume 58, Issue 1

THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

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Court Review

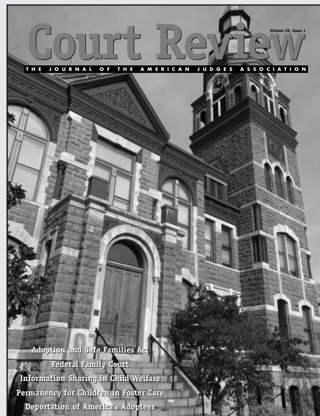
THE JOURNAL OF THE AMERICAN JUDGES ASSOCIATION

Volume 58, Issue 1 2022

EDITOR'S NOTE

Greetings from your non-judge co-editor of *Court Review*. As a professor in psychology and law, I am grateful for the past seven years of opportunities to solicit and edit submissions for *Court Review* related to relevant social science research. For the current issue, I took the lead in developing a special issue to commemorate the 25th anniversary of the passage of the 1997 Adoption and Safe Families Act (ASFA). I was nostalgic to have an opportunity to think about ASFA again. My first publication was a law review article on termination-of-parental-rights cases and the role of parents' court plan compliance under the then-new ASFA.

The first article in the current issue provides a historical look at ASFA and is based on an interview I conducted with Maureen Flatley, who worked with Congress in developing ASFA in 1997. Ms. Flatley gives an insider's look into how the law came to be. Ms. Flatley also provides her insights into the unintended consequences of the law and where she sees the need for updates and changes moving forward.



Next, Jane Spinak provides the general history of child protection in the United States. Professor Spinak begins with the first federal legislation in response to early definitions of child abuse. Though these early efforts were intended to prevent and treat child abuse, they had the unintended consequences of increasing the number of children in foster care. ASFA was enacted with a primary goal of reducing the amount of time a child spent in foster care and therefore reducing overall the number of children in foster care. Unfortunately, this shorter time frame meant parents had less time to resolve their issues, which leads Professor Spinak to argue a complete restructuring of the family court system to instead focus on systemic issues to reduce poverty and strengthen families.

Dr. Sarah Beal and her colleagues turn our attention to the current healthcare needs of children in foster care. In particular, Dr. Beal and colleagues address the need for a way to provide continuity of care and records for children within child protective services. They describe an automated software platform that allows for the exchange of healthcare and child welfare information between the child welfare and healthcare systems. The authors note that the ability to share vital healthcare information between systems and have more complete information available to the courts allows for better decision making and improved child outcomes.

Drs. Sarah Font and Lindsey Palmer address two important questions about child welfare. First, are children harmed by delays to permanency (remaining in foster care indefinitely)? And do the forms of permanency (reunification, adoption, or guardianship) confer different risks and benefits? Drs. Font and Palmer conclude that there is much the courts can do to improve outcomes for children who find themselves within child protective services.

Finally, Professor DeLeith Gossett switches our focuses to international adoptions and the U.S. citizen status of foreign-born adoptees. Some of these

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Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to be encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work. Guidelines for the submission of manuscripts for *Court Review* are set forth on page 6 of this issue. *Court Review* reserves the right to edit, condense, or reject material submitted for publication.

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On the cover: The Pulaski County Courthouse, in Little Rock, Arkansas was built in 1889 and designed by Maximilian A. Orlopp. The flamboyant style of this original courthouse design was replicated often thereafter throughout Arkansas and the building is on the U.S. national Register of Historic Places. Photograph taken by Eve Brank.

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President's Column

Yvette Mansfield Alexander

Greetings my esteemed colleagues and *Court Review* readers, 2021 was yet another challenging year. We all have learned lessons from it about how to adapt and how to embrace the people and things that are most important. After not traveling for over two years, we look forward to our in-person midyear conference in Napa Valley, California, April 26-27, 2022, and our in-person annual conference in the city of brotherly (and sisterly) love—Philadelphia, Pennsylvania August 28-31, 2022. We value you as an American Judges Association member, and believe that this organization has demonstrated its adaptability and value during the pandemic. I encourage you to renew your American Judges Association membership and to become active in this great organization. I assure you the value of this membership far outweighs the cost.

To our newly elected judges, I am excited to welcome you to this association. There is much work to be done. We need your enthusiasm and energy to carry on this great legacy of the American Judges Association. I strongly encourage each of you to join a committee, chair a committee, suggest a committee, or do whatever you deem necessary to enhance this awesome association. We welcome your knowledge, new ideas, and resources. We are expecting great things from you!

As we begin 2022, it is my singular honor and high privilege to serve as your 60th president. These ten months are flying by; however, along the way I have been privileged to represent this Association on many occasions and gather some lifelong memories. The occasion that stands out for me the most this quarter is the one I attended in New Orleans on January 5, 2022.

Now, 125 years after the landmark civil rights Supreme Court decision of *Plessy v. Ferguson,* which codified the Jim Crow-era "separate but equal" doctrine, Homer Plessy, the principal in that famous case, has been pardoned posthumously. The New Orleans District Attorney, Jason Williams, helped initiate the pardon. The Louisiana Board of Pardons voted unanimously in favor of a full pardon for Plessy, who died in 1925. I had the privilege to witness the signing of the pardon on January 5, 2022 by John Bel Edwards, the Governor of the State of Louisiana. The ceremony was held at the exact location where Homer Plessy purchased his train ticket. We stood on the same tracks where he boarded the train. There was even a train there that left after the ceremony. It was my honor to meet the descendants of Homer Plessy, Judge John Howard Ferguson (the judge in the landmark case) and Justice John Marshall Harland (the lone dissenter in the case at the United States Supreme Court).

On June 7, 1892, at the age of 30, Homer Plessy purchased his first-class train ticket for the 4:15 p.m. train from New Orleans, Louisiana, to nearby Covington, Louisiana, only 46 miles away. He boarded the "whites only" first-class car. There are two versions as to which question was asked of Plessy that day. One version has the conductor asking him, "Are you a white man?" to which Plessy responded, "No". The other version has the conductor asking, "Are you a colored man?" to which Plessy replied, "Yes". Either version finds Plessy not sitting in the correct car according to the conductor. When asked to retire to the colored car by the conductor, Plessy replied, "I am an American citizen, I paid for this ticket, and I intend to enjoy the ride to Covington in the car I paid for," The train was stopped and Plessy was arrested. Within hours, the New Orleans Citizen's Committee bailed him out. The entire ordeal was orchestrated by the New Orleans Citizen's Committee to challenge the separate car act. The New Orleans in which Plessy was raised was a much freer place than the city he encountered as an adult, according to Keith Weldon Medley in his book, "We as Freemen: *Plessy v. Ferguson.*"

Homer Plessy, an ordinary man, a shoemaker, was chosen by the Citizen's Committee to take on this extraordinary challenge. As I sat and watched Governor Edwards sign Homer Plessy's posthumous pardon , I became filled with emotion. I remember discussing *Plessy v. Ferguson* in law school in 1978 with my Louisiana State University law professor quickly acknowledging that it had been overturned by *Brown v. Board of Education* in 1954. But had it been? I began to imagine the kind of courage and sacrifices it took for Justice John Marshall Harland to dissent in 1899. To boldly acclaim that the separate car law was not a constitutionally sound principle; that it violated the Constitution of the United States of America. The ridicule and pressures must have been overwhelming. But Justice Harlan stood steadfast and alone. He was absolutely right, everything branded legal is not just. Today as judges, we must boldly stand steadfast to the principles of fairness, justice and equality, even if we must stand alone!

In 2022, 125 years after Homer Plessy paid his $25 fine on January 11, 1897, and 25 years after Keith Plessy, Homer's descendent, in 1997 started his journey to recognize his ancestor, I pose this question—"Has the "separate but equal" doctrine of *Plessy v. Ferguson* really been overturned?" One might suggest that it has been overturned *de jure* but not *de facto*. One hundred twenty-five years later, we are still righting the wrongs of yesterday. This lets us know that it is never too late to do the right thing and that there is still work to be done! The Judiciary was the gate holder then and continues to be the gate holder today.

The Plessy and Ferguson Foundation was formed in 2004 by Keith Plessy and Phoebe Ferguson, descendants of the principals Homer Plessy and Judge John Ferguson to honor the work of Homer Plessy and the Citizen's Committee for their courage, commitment, and sacrifices in their decades-long pursuit of justice and equality. Together they have worked to have five historical markers honoring Homer Plessy added to the New Orleans landscape, including renaming the intersection where Plessy was removed from the train to Plessy Way. And now Homer Plessy has been pardoned. It feels like Dr. King's dream coming to fruition- "when the sons of former slaves and the sons of former slave owners sit down together…Let freedom ring!"

Twenty-Five Years of the Adoption and Safe Families Act

An Interview with Maureen Flatley by Eve M. Brank

The year 2022 marks the 25th anniversary of President Clinton signing into law the Adoption and Safe Families Act (ASFA). Enacted in November of 1997, ASFA was a bipartisan federal law intended to address concerns with the foster care and adoption systems.[1] With fiscal incentives attached, states quickly adopted complementary ASFA legislation.[2]

At its core, ASFA changed the primary objective from family reunification to the child's health and safety. In doing so, ASFA sought to decrease the amount of time a child spent without a permanent home by limiting how long a child could spend in foster care. Referred to as the 15/22 timeline, ASFA required a state to file or join a petition to terminate parental rights (TPR) when a child had been in out-of-home placement for fifteen of the most recent twenty-two months.

Exceptions to the 15/22 ASFA rule include when a child is in kinship care, the state can document that a TPR is not in the best interest of the child, or the state has not done what is needed to attempt reunification. In addition to the 15/22 timeline, other ASFA provisions provide clear and supported paths toward encouraging adoptions such as financial incentives for states to improve adoption rates,[3] requiring states to address geographic barriers to adoptions between states, and not requiring family reunification efforts when aggravated circumstances exist. *Aggravated* circumstances were to be defined by state law and could include "but need not be limited to abandonment, torture, chronic abuse, and sexual abuse."[4]

Although research suggests that the number of foster children has decreased and adoptions increased since the implementation of ASFA,[5] not everyone believes it has been a complete success. In particular, the 15/22 timeline can be challenging, if not impossible, to meet when the parents and family need extensive and lengthy services[6] or if the case plan is not relevant to the parents' needs.[7] And just because a TPR has occurred does not mean an adoption will automatically follow. Many children are legal orphans because their biological parents' rights have been terminated, but it is unlikely they will ever be adopted.[8]

To get some firsthand insights into how ASFA came to be and where it stands today, I had the privilege of sitting down with Maureen Flatley. Ms. Flatley is an independent government relations consultant who specializes in representing children, families, and the programs that serve them. Using this expertise, Ms. Flatley worked with members of Congress to develop ASFA and continues to focus attention on how to improve the child welfare system.

Eve Brank (EB): How did you get involved in working on ASFA?

Maureen Flatley (MF): I have to say, I have a nontraditional path to child welfare work. I'm not an attorney and I'm not a social worker. But I had the great privilege of working for many years with my father who was a retired FBI agent. My dad spent most of his career on Capitol Hill doing oversight investigations. When he retired, he started a consulting business, and I went to work for him. We had some very interesting and very high-profile cases, that taught me to not only recognize that there was a problem, but how to fix the problems and use Congress to support those efforts. My dad died very suddenly and unexpectedly, and I was left to continue his good work.

I really had no intention of getting into child welfare, but I was called upon, by a childhood friend who was a priest in California. My friend had a parishioner whose child was taken away from her in a dispute over medical treatment and my friend did not know what to do. I knew how to investigate matters, so he flew me out to California, and we discovered very quickly that the county involved had been putting kids in care and then giving them multiple Social Security numbers to make multiple claims. It turned out to be a criminal fraud case and I knew exactly what to do with that. I went back to Washington, D.C., and started having conversations with people about the underlying issues. At the same time, one of the families that had given me information about the fraud case hired me to develop a strategy to reform foster care.

Footnotes

1. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115.
2. Eve M. Brank et al., *Parental Compliance: Its Role in Termination of Parental Rights Cases,* 80 Neb. L. Rev. 335 (2001).
3. Mary Eschelbach Hansen, *Using Subsidies to Promote the Adoption of Children from Foster Care,* 28 J. Fam. & Econ. Iss. 377 (2007).
4. *See* 111 Stat. at 2116.
5. Emilie Stoltzfus, Cong. Rsch. Serv., R43025, Child Welfare: Structure and Funding of the Adoption Incentives Program along with Reauthorization Issues, (2013), https://sgp.fas.org/crs/misc/R43025.pdf.
6. Lenore M. McWey, Tammy L. Henderson & Susan N. Tice, *Mental Health Issues and the Foster Care System: An Examination of the Impact of the Adoption and Safe Families Act,* 32 J. Marital & Fam. Therapy 195 (2006).
7. Esme Noelle DeVault, *Reasonable Efforts Not So Reasonable: The Termination of the Parental Rights of a Developmentally Disabled Mother*, 10 Roger Williams U. L. Rev. 763, 775 (2005).
8. Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity,* 56 Harv. C. R.-C.L. L. Rev. 267, 288 (2021); *See also* Shanta Trivedi, *Adoption and Safe Families Act is the "Crime Bill" of Child Welfare,* The Imprint: Youth and Fam. News (Jan. 28, 2021), https://imprintnews.org/adoption/adoption-safe-families-act-crime-bill-child-welfare/51283.

It was sort of like being struck by lightning. On the one hand, I thought this was an opportunity to work with kids where I can do a lot of good but, on the other hand, I very quickly discovered that this was a system that was filled with fraud, waste, and abuse. The issues were very complex and really had not been addressed in any kind of meaningful way. At the same time, adoption and child welfare are almost exclusively state law issues. The problem is that dating back to the orphan trains in the 1850s adoption was fundamentally interstate activity. By 1995 when we started working on ASFA, millions and millions of federal dollars were flowing into the states to support child welfare programs. That juxtaposition of state laws versus federal dollars snapped things into focus for me.

I had done a lot of work just prior to this time with the House Republicans; this was when Newt Gingrich was the Speaker of the House of Representatives. Bill Clinton had recently been elected president. The conversation was beginning to start about child welfare reform. There was broad consensus among the members of Congress that something had to happen to avoid children spending their lives in foster care. Everyone agreed that we could do a better job with permanence. So, in late 1995, early 1996 robust and reciprocal communications between a Democratic White House and a Republican Congress started taking place.

EB: Were you pleased with how that communication went and the resulting final version of ASFA?

MF: I was very happy with the final version. We had this big thing that needed to be changed and there were lots of different views about how that should happen. There were several different bills in the House, and there were a couple of ideas percolating in the Senate. A few basic trends were clear. First, people did not want to see kids spending a lifetime in foster care and that is how the ASFA timelines were born. Second, people were tremendously concerned about kids being in one state not being allowed to cross the border to go to another state. That concern led to a focus on geographical barriers. Finally, the overall tension between family preservation and termination of parental rights garnered a great deal of attention. We were trying to develop something that would bolster safety, but not be totally at odds with family preservation and so that's how the aggravated circumstances elements were developed.

And so, bit by bit, one bill here one bill there, one idea here one idea there, it really started to come together relatively quickly. The bill passed the House with little opposition. It passed unanimously in the Senate. It moved quickly; the entire package moved from start to finish in about eleven months. That speed indicated there was a tremendous appetite for change and there was a tremendous concern about the system.

EB: How did the state courts react to this new law?

MF: I did some implementation training soon after its passage and found the judicial community really understood in very vivid terms what was at stake and why these reforms more important. In a very real way, it was kind of up to the courts to make sure that this law worked. ASFA created a baseline for everybody and removed the ambiguity that could result in kids staying in the system far too long. It really began to feel like for the first time that the system had a little more structure. The ASFA timelines worked well from the standpoint of permanence.

EB: Did you have concerns about ASFA and how it was implemented?

MF: I think the name of the bill kind of stigmatized it in the sense that everybody viewed it as just an adoption bill. Adoption was certainly a large part of the bill, but there was much more to it. Also, it still troubles me that for every child that was adopted, we had two kids left behind that were legally free for adoption, but who did not get adopted. And a substantial number of those kids aged out of the system. That to me, is a failure.

Another concern I have is the number of failed adoptions and that we do not really know that much about why they are failing. More funding for services will not help if the adoption was not a good idea from the outset and proper home studies were not completed. I am not sure we fully understand trauma and all the ways it impacts children.

I think ASFA is a constructive tool. I think it moved a lot of kids out of the system. I think it certainly got the attention of the states. It also started a serious conversation about how much the federal government should be able to tell the states what to do.

EB: What do you see as some current issues in child welfare?

MF: Obviously, the states have an extremely difficult job, but in a lot of ways, it feels to me like it is made harder by the lack of similar infrastructure across states. All the States have different technology systems and different case management systems with different levels of adequacy and different abilities to work across state lines. In my view, the big downside of letting the states develop their own case management tools is that they all end up doing something different.

Another issue is the lack of oversight and real consequences when problems do occur. Nothing really happens when states fail to meet the goals of ASFA.

EB: What do you think law makers should focus on in any future updates to ASFA?

MF: I would like to see a focus on the youth aging out of the system. They leave the state's care with nothing but the clothes on their backs. They have no money and sometimes the state has kept what little Social Security money they may have been entitled to. There is no way that we can call that a success. I think that part of the challenge is to figure out how do we make every single child important. The evidence is incontrovertible for these youth who age out of the system—they are homeless, they are pregnant, they are mentally ill, they are substance abusing, and they are in jail. Many do not graduate from high school and very few go to college.

I also believe we need to think more about extended family relationships in creating permanency for children. I think we could consider ways to divert kids from the system if they are concretely moved in the direction of something else like a family member.

I do believe we should treat these kinds of laws as living breathing things and see what is working and not working. We need to revisit them occasionally. At the same time, we need to be looking at what is working and what has not worked. We should think about how we can avoid similar pitfalls moving forward.

To keep child welfare moving forward in constructive and responsible ways we need more research. When I started looking

at this issue, I was flabbergasted at how little truly objective research there was. We just don't know nearly enough about what works and what does not work and how these kids are really doing. There is no way that we'll ever get our arms around what is going on in the system without much, much more research.

EB: Any final thoughts for our judge readers?

MF: The judges really are the oversight and the enforcers of everything. I think most of the good things that have happened because of ASFA have happened because judges all over America could see the problems and helped create solutions.

EB: Thank you so much for your time. I am grateful for sharing your insights with the readers of *Court Review.*

MF: Getting to do this work and focus on child welfare has been the great privilege of my life. Even though I did not plan this line of work, it is a good example of life putting something in your path and then walking down the path and seeing what happens. There are so many great and smart people working in the field and I appreciate all the opportunities I have had to work with them.

Maureen Flatley is a government relations and strategic consultant with subject matter expertise in child welfare and adoption. She provides expert consultation to policy makers, attorneys, nonprofits, families and individuals on a wide range of related issues. She is currently involved in major campaigns to ensure consistent national home study standards for foster care and adoption; to expand recruitment for permanent families for older children in foster care; to ban private rehoming in adoption and to ensure more accurate reporting in the child welfare and adoption systems.

Eve Brank, J.D., Ph.D., is a Professor of Psychology, Courtesy Professor of Law, and Director of the Center on Children, Families, and the Law. Dr. Brank's research primarily focuses on the way the law intervenes (and sometimes interferes) in family and personal decision making. She is the author of The Psychology of Family Law *(2019, NYU Press), which was the 2021 Winner of the Lawrence S. Wrightsman Book Award bestowed by the American Psychology-Law Society.*

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Court Review, the quarterly journal of the American Judges Association, invites the submission of unsolicited, original articles, essays, and book reviews. *Court Review* seeks to provide practical, useful information to the working judges of the United States and Canada. In each issue, we hope to provide information that will be of use to judges in their everyday work, whether in highlighting new procedures or methods of trial, court, or case management, providing substantive information regarding an area of law likely to encountered by many judges, or by providing background information (such as psychology or other social science research) that can be used by judges in their work.

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Essays: Essays should be submitted in the same format as articles. Suggested length is between 6 and 12 pages of double-spaced text (including any footnotes).

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The Road to a Federal Family Court

Jane M. Spinak

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]

"An unintended consequence of this funding policy was that thousands of children across the country remained in foster care..."

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).

> **"The central safety component of ASFA was the re-conceptualization of the AACWA's "reasonable efforts" requirement."**

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

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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]

"[T]he obligations that ASFA placed on the court re-oriented the court's decision making..."

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.

"[M]any children have a goal of adoption but have no adoptive parents."

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.

Jane M. Spinak is the Edward Ross Aranow Clinical Professor of Law at Columbia Law School. *Deep thanks to Abby E. Shamray, CLS '22, for her spectacular research assistance.* *For purposes of this essay, family court refers to any court adjudicating neglect and abuse cases. This essay is drawn from her forthcoming book, provisionally titled,* Family Court: When a Great Idea Fails *(N.Y.U. Press).*

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).

EDITOR'S NOTE

Continued from page 2

adoptees are finding themselves in a situation where they are at risk of deportation because their parents did not fully complete the immigration process. Professor Gossett outlines some key needed legislation that could address this problem and grant citizenship to these adoptees.

Judge Gorman in our "Thoughts from Canada" column describes two recent Canadian Court of Appeal decisions, which considered the appropriate approach when sentencing individuals who are members of a group that have been the subject of historical racism and discrimination. Of course, the current issue would not be complete without a message from the AJA president, the "Resource Page," and the crossword.

I happened to be in Little Rock, Arkansas at the end of 2021 and snapped the cover photo. It seemed fitting to feature a courthouse from Little Rock given former President Bill Clinton, who signed ASFA into law, started his political career in Little Rock. Further, Hillary Clinton had written and spoken about foster care and adoption reform leading up to ASFA. In fact, in the Clinton Presidential Library there is a section devoted to Hillary Clinton's work as an attorney for abused and neglected children and her work related to ASFA.

Thank you for reading *Court Review*! — Professor Eve Brank

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The Role of Information Sharing to Improve Case Management in Child Welfare

Sarah J. Beal, Paul DeMott, Rich Bowlen & Mary V. Greiner

Congress enacted the Adoption and Safe Families Act to improve outcomes concerning the permanency, safety, and wellbeing of children in the care of child welfare agencies. However, achieving its goals for the more than 700,000 children who spend time in the custody of child protective services (CPS) every year in the United States is made more difficult by their poorer health compared to the general population.[1] Common health concerns among children in CPS custody include developmental delay (e.g., intellectual delay or disability, gross or fine motor delay, speech delay), infections diseases, mental and behavioral health concerns, and medical concerns. Higher levels of healthcare compared to other children who live in poverty are often required.[2] While health concerns may have been identified before children entered CPS custody, connections to healthcare providers and services are disrupted when children are removed from their families of origin and placed in out-of-home care. Efforts to collect a child's complete medical history upon entering care may be difficult, and incomplete histories negatively impact health and disease management. Moreover, disruptions in healthcare can continue even after children enter CPS custody and out-of-home care—for example, when children change placements or caseworkers—leading to additional challenges managing children's health needs and increasing healthcare use.[3]

The Adoption and Safe Families Act has been instrumental in ensuring that children in CPS custody have adequate access to healthcare services, monitored through child and family service reviews.[4] While this has been beneficial, it has not addressed challenges around disruptions in healthcare access and the sharing of healthcare information with entry into CPS custody or with placement changes while children are in out-of-home care. Better sharing of health information and coordination of healthcare services to address health concerns is essential to close these gaps. This coordination must, at a minimum, span the duration of a child's time in CPS custody.

Cincinnati's Children's Hospital Medical Center and Hamilton County Job and Family Services have worked together to improve health outcomes for children in CPS custody by developing an automated software platform to exchange healthcare and child welfare information between these organizations. In this article, we will discuss why the exchange of information is important, when information exchange can be difficult due to legal and institutional barriers, and how we have overcome these barriers with an automated software platform called "IDENTITY."[5] Finally, we will discuss the benefits of sharing information through this software platform and areas for future development.

HEALTHCARE ACCESS AND UTILIZATION WHILE CHILDREN ARE IN OUT-OF-HOME CARE

Children in CPS custody and out-of-home care (e.g., foster care, kinship care) can have their already elevated health risks compounded when they enter out-of-home care due to disruption of healthcare services and discontinuity with every placement change. This lack of coordination and consistent healthcare means preventive care is missed and chronic disease management is poor due to limited availability of records and lack of follow-up with a consistent healthcare provider. Instead of preventative care, foster and kinship caregivers rely on urgent and emer-

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Footnotes

1. *See* U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *The AFCARS Report: Preliminary FY 2019 estimates as of June 23, 2020*, https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf; Laura Gypen et al., *Outcomes of Children Who Grew Up in Foster Care: Systematic-review,* 76 CHILD. & YOUTH SERVS. REV. 74, 74-83 (2017).
2. Amy D. Engler et al., *A Systematic Review of Mental Health Disorders of Children in Foster Care,* 23 TRAUMA, VIOLENCE, & ABUSE 255, 255-264 (2020); Rebecca R. Seltzer et al., *Medical Complexity and Placement Outcomes for Children in Foster Care,* 83 CHILD. & YOUTH SERVS. REV. 285, 285-293 (2017).
3. Mary V. Greiner & Sarah J. Beal, *Developing a Healthcare System for Children in Foster Care,* 19 HEALTH PROMOTION PRAC. 621, 621-628 (2018); Sarah J. Beal et al., *Effects of Child Protective Custody Status and Health Risk Behaviors on Healthcare Use among Adolescents,* ACAD. PEDIATRICS (2021).
4. Adoption and Safe Families Act of 1997, Pub. Law. No. 105-89, 111 Stat. 2115; Zlotnik et al., *Improving Child Well-Being: Strengthening Collaborations between the Child Welfare and Healthcare Systems,* CHILD.'S HOSPITAL PHILA.'S POL'Y LAB & SAFE PLACE (2014).
5. Mary V. Greiner et al., *Improving Information Sharing for Youth in Foster Care,* 144 PEDIATRICS at 1 (2019), https://publications.aap.org/pediatrics/article/144/2/e20190580/38518/Improving-Information-Sharing-for-Youth-in-Foster.

gency care, which is the easiest and quickest to obtain, particularly when these children are limited to Medicaid providers and may face other psychosocial challenges, such as transportation barriers. Use of emergency and urgent care over preventive care can contribute to duplicative care (e.g., multiple administrations of the same immunizations), missed care (e.g., missed vision and hearing screens), poor chronic disease management (e.g., uncontrolled asthma), and overtreatment (e.g., overuse of antipsychotic prescriptions).

These identified risks have resulted in several measures intended to improve healthcare delivery for youth in CPS custody. First, youth in and formerly in CPS custody are now eligible for Medicaid. Most children in CPS custody are eligible for Medicaid due to title IV-E eligibility through age 21. The Chafee Optional Medicaid Group for Independent Foster Care Adolescents provides Medicaid eligibility for youth in CPS custody at age 18 and for those who are no longer in custody and between ages 19 and 21, depending on the state. The Patient Protection and Affordable Care Act (ACA) extended Medicaid coverage to age 26 for youth currently in CPS custody and those who were previously in CPS custody and remained in care until their 18th birthday to provide parity to children who can stay on their parents' health plans until age 26.[6]

In addition to providing eligibility for health insurance through Medicaid, federal law requires state child welfare agencies to provide health screening and assessments to children entering and living in CPS custody through the Fostering Connections to Success and Increasing Adoptions Act of 2008. While the law does not give healthcare delivery timetables, it requires CPS to develop a healthcare plan for the children in their custody. The Children's Bureau of the federal Administration for Children and Families then conducts biennial Child and Family Services Reviews (CSFR) of the state CPS agencies to ensure that children receive appropriate Medicaid benefits, including Early and Periodic Screening, Diagnosis, and Treatment (EPSDT).

Almost all states have responded to these requirements with mandated initial health screenings and assessments.[7] While they vary in timetables for healthcare delivery (from 1 day to no timeframe depending on the state), 46 states require physical health screenings, 38 states require behavioral health screenings, and 38 states require oral health screenings when a child enters CPS custody.

Medical professional societies also support these requirements for healthcare.[8] The American Academy of Pediatrics (AAP), through the Healthy Foster Care America initiative, recommends a health screening within 72 hours of a child's placement into CPS custody, a comprehensive evaluation within 30 days, to include assessment of mental health, oral health, and developmental and academic needs, and a follow-up health visit 60-90 days after placement.

"[F]ederal law requires state child welfare agencies to provide health screening and assessments..."

The healthcare system has answered the federal and state requirements and AAP recommendations with multiple models for specialized healthcare for children in CPS custody.[9] These programs are often (but not always) located at large medical centers affiliated with an academic institution and vary in personnel and scope of care delivery. Some programs host specialized clinics to deliver healthcare services to children in CPS custody, and others monitor the health of this population. Often referred to as "foster care clinics," these programs use multiple approaches or models to provide healthcare. Foster care consultation/evaluation models provide specialized evaluations when a child enters CPS custody or changes placement. Medical home models provide ongoing well and sick care for a child while in CPS custody. Some foster care clinics focus on developmental milestones, while others focus on mental health. In other healthcare systems, children in CPS custody are cared for by standard pediatric practices alongside those not in CPS custody. In those foster care clinic models, children in CPS custody receive an extra layer of monitoring and support through healthcare coordination or medical case management. Across all foster care clinic configurations, the goal of the healthcare program is to ensure coordinated and consistent healthcare, leading to improved primary care and chronic disease management, and ultimately, improved child health outcomes.

INFORMATION SHARING BETWEEN HEALTHCARE, CPS, AND LEGAL PARTIES

While caregivers, healthcare providers, CPS personnel, and legal professionals who support children in CPS custody all desire to ensure children are healthy and have access to the services they need, the process by which information is shared is less straightforward. Rules addressing procedures for health information exchange, how it is documented, and what pieces of data can be exchanged are complex. Each member of a child's support system must navigate those challenges along with meeting the other high-stakes demands introduced by children and their families while children are in CPS custody. Federally, policies that guide information sharing for children in CPS custody include the following:

1. The Health Insurance Portability and Accountability Act of 1996 (HIPAA).[10] HIPAA limits sharing of protected health information (past, present, or future health conditions, healthcare services, payment information, personal identifiers) without patient (or legal representatives for the patient) permission. Under HIPAA, only a

6. *See* U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, Child Welfare Inofrmaiton Gateway, *Health-Care Coverage for Youth in Foster Care—and After,* Issue Brief, May 2015, https://www.childwelfare.gov/pubpdfs/health_care_foster.pdf.
7. Kamala Allen, *Health Screening and Assessment for Children and Youth Entering Foster Care: State Requirements and Opportunities,* Ctr. Healthcare Strategies (November 2010), https://www.chcs.org/media/CHCS_CW_Foster_Care_Screening_and_Assessment_Issue_Brief_111910.pdf.
8. Healthy Foster Care America, *Requirements for Health Screenings in Foster Care,* Am. Acad. Pediatrics (Nov. 21, 2015), https://www.healthychildren.org/English/family-life/family-dynamics/adoption-and-foster-care/Pages/Requirements-for-Health-Screenings-in-Foster-Care.aspx.
9. *See* Greiner & Beal, *supra* note 3.
10. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 [hereinafter HIPPA].

"[L]ittle information between healthcare and education systems is shared unless CPS facilitates that information exchange..."

limited set of covered entities can exchange protected health information without the patient's permission or their legal representative's written consent. These entities include individual and group health insurance plans, healthcare providers, and business associates who provide services to health insurance plans and healthcare providers. As a result, except for information related to abuse or neglect concerns, healthcare providers cannot provide comprehensive health information (e.g., diagnoses, current medications) to children's services or the court without permission from the parent or guardian unless a child is in CPS custody. When a child is placed in CPS custody, CPS stands in locos parentis to the child. Accordingly, CPS can access a child's medical information and share it with assigned caseworkers, foster caregivers, and placement providers who have a need to know such information. In addition, HIPAA allows guardians ad litem to access a child's otherwise confidential medical information while the child is in CPS custody when a court order is provided.

2. The Family Educational Rights and Privacy Act (FERPA).[11] FERPA limits information sharing for all education systems receiving U.S. Department of Education funds and requires written permission from a parent or legal guardian to share protected education data unless the information is shared a) among school officials for the educational interests of the child; b) for audit, evaluation, or accreditation purposes; c) to support financial aid; or d) to address health and safety emergencies, comply with a judicial order, or support youth with juvenile justice system involvement. Thus, like the healthcare system, education systems generally cannot exchange information about a child without a parent's written consent before a child has entered CPS custody. Further, healthcare and education systems are not permitted to share information unless a parent or legal guardian has granted permission for them to do so. As a result, little information between healthcare and education systems is shared unless CPS facilitates that information exchange for children in CPS custody.
3. Child protective services and confidentiality. Federal law requires that all states have a comprehensive child welfare information system to store all relevant case information for families with child protective services involvement. Data stored in those systems are available to CPS agencies to assist with quality improvement and other programmatic and service delivery purposes.[12] In addition, these information systems must be designed to a) comply with federal reporting requirements, b) assist with decision making in child welfare, and c) improve cross-system collaboration and coordination of care. For those reasons, child welfare information can be made available to other stakeholders when necessary. Simultaneously, children and their families retain rights to privacy and confidentiality about abuse and neglect, with the Child Abuse Prevention and Treatment Act (CAPTA).[13] This act restricts access to identified child abuse and neglect reports to the individual(s) who are the subject of a report, the court or other entities involved in child protection, or individuals authorized to have access for specific purposes (e.g., citizen review panels, child fatality reviews). Importantly, existing legislation does not entirely prohibit information sharing; instead, it regulates when and how information exchange can occur. Acknowledging this, the Administration for Children and Families has provided a Confidentiality Toolkit to guide children's services agencies in establishing information exchanges and other technologies that enhance interoperability within the boundaries outlined by CAPTA.[14]
4. Court oversight and information sharing.[15] Federal law regulates the context and frequency with which CPS must communicate with the court about removals of children from their parents, placement into least restrictive settings, and reunification or permanency for children in CPS custody. In addition, many states have independently extended those regulations to expand court oversight. Across all states, CPS is required to communicate critical information about children's safety, permanency, and wellbeing with the court. This is accomplished primarily through hearings. Guidelines to facilitate that information sharing have been developed, which support judicial information gathering during review hearings. Those guidelines specify that "Judges are responsible for ensuring the physical, mental, emotional, and reproductive health, and educational success of all children under the supervision of the court."[16] However, in the absence of consistent information sharing among education, healthcare, and

11. 34 C.F.R § 99.1 (2021).
12. *Child Welfare Information Systems,* NAT'L CONF. ST. LEGIS. (June 25, 2020), https://www.ncsl.org/research/human-services/child-welfare-information-systems.aspx.
13. Victims of Child Abuse Act Reauthorization Act 2018, Pub. L. No 115-424, 132 Stat. 5465.
14. *See* U.S. Department of Health and Human Services, Administration for Children and Families, *Confidentiality Toolkit: A resource tool from the ACF Interoperability Initiative* (Aug. 2014), https://www.acf.hhs.gov/sites/default/files/documents/acf_confidentiality_toolkit_final_08_12_2014_0.pdf.
15. SHIRLEY DOBBIN ET AL., NAT'L COUNCIL JUV. & FAM. CT. JUDGES, CHILD ABUSE AND NEGLECT CASES: A NATIONAL ANALYSIS OF STATE STATUTES (1998), https://www.ojp.gov/pdffiles1/Digitization/188288NCJRS.pdf; 42 U.S.C. §670 et seq. (1989).
16. SOPHIE I. GATOWSKI ET AL., NAT'L COUNCIL JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES 15 (2016), https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf [hereinafter ENHANCED RESOURCE GUIDELINES].

CPS entities, the information presented to judges to fulfill federal requirements may be incomplete or unavailable. Further, while federal and state legislatures set the standard for information sharing and reviews of safety, permanency, and wellbeing for children in CPS custody, local interpretation of statutes and guidelines differ, sometimes widely, across jurisdictions. Local child welfare agencies may, for example, seek out the opinions of county prosecutors to determine how statutes and guidelines should be applied and then memorialize that guidance as agency procedure. As a result, one policy can result in substantial variation in practice across local jurisdictions, even in the same state.

COURT OVERSIGHT IN CPS CASES: THE LEGACY OF ASFA

Juvenile courts are required to oversee CPS involvement with families and children in CPS custody by the Adoption Assistance and Child Welfare Act, Adoption and Safe Families Act, and state abuse, neglect, and dependency statutes. Under these laws, juvenile courts are required to ensure that children enter CPS custody only when absolutely necessary and that children are expeditiously reunified with parents when possible or placed in alternative permanent placement when necessary.[17] In addition, juvenile courts are charged with overseeing the efforts of CPS to promote the physical and emotional health and educational success of children in CPS custody. Courts exercise their oversight responsibilities through timely hearings where judges have a heightened responsibility to ensure that the needs of children in CPS custody are appropriately addressed. Similar to specialized treatment courts, such as drug courts, veterans' courts, and mental health courts, juvenile courts use review hearings to oversee the treatment of families and children. During these hearings, courts review a broad range of concerns related to child safety, permanency, and wellbeing. Information sharing is vital to effective court oversight. Courts can effectively oversee CPS efforts only when caseworkers are able to efficiently gather and present timely and comprehensive information regarding the health and well-being of children and families with CPS involvement. In addition, because court resources are limited and courts are expected to oversee a wide variety of issues, it is important that caseworkers present information in a concise, comprehensive, and systematic way.[18]

There is no shortage of models, services, programs, and initiatives to facilitate information sharing among parties to prepare for court hearings and ensure that complete information is collected to present to the court.[19] Primarily, this occurs through scheduled in-person meetings among all parties involved in a case. However, such meetings can be difficult to sustain across all cases and during the entirety of a child's involvement with CPS. Moreover, by the time parties attend a family team meeting, the information that triggered a need for that meeting has often changed and other participants or pieces of information may be needed as a result, contributing to significant lags in decision making and case management. Furthermore, information gathering is time intensive. For example, caseworkers in southwest Ohio reported spending an average of one hour gathering health information for each child on a case in preparation for a review hearing. This burden is significant given that health information is only one aspect of child wellbeing that the court needs to be informed about. However, by the time a review hearing occurs, much of the health information gathered and shared with the court ahead of the hearing is out of date, reducing efficiency and limiting the benefits of court oversight for children in CPS custody.

"Information sharing is vital to effective court oversight."

BARRIERS TO INFORMATION EXCHANGE

Youth in foster care are often involved in multiple systems. In addition to involvement with CPS, they may be involved with healthcare systems, juvenile justice, education, community mental health services, and more. Collaboration between multiple systems requires correct and early identification of shared youth and interoperability of each services' data systems.[20] There are multiple reasons why this information sharing can be challenging and time-consuming, starting with identification. There are no shared identifiers between child welfare and healthcare systems. As a result, it may be challenging to identify a child's record in a different information system (e.g., using child welfare identifiers to locate a child's medical record). This challenge is compounded when there are discrepancies in identifying data, such as the spelling of a child's name. Failure to identify youth represented in more than one system due to discrepant data may result in the under-identification of multisystem youth and the perpetration of poor coordination and gaps in information sharing. Once shared records are identified, systems must determine what information needs to be exchanged. Without this step, critical information can be missing from a record request or be lost in pages of unneeded data. Adding to this complexity, children in CPS custody often receive healthcare at multiple institutions or are served by multiple child protective services agencies over the course of their childhoods. As a result, a single record request from only one institution will likely result in incomplete records. This is even more likely as children's needs become more intensive (e.g., children with behavioral health needs who are experiencing placement instability while in CPS custody). Instead, numerous record requests may be required to form a complete history. Professionals working diligently to serve youth in CPS custody are often motivated to gather this information because it is impossible for a

17. 42 U.S.C. §670 et seq. (1989); Adoption and Safe Families Act f 1997, Pub. L. No 105-89, 111 Stat. 2115.
18. *See* Enhanced Resource Guidelines, *supra* note 16.
19. Saul Singer, Director, Counseling, Consultation and Training, A Workshop for DFS Case Managers (Mar. 2003), (https://www.childwelfare.gov/pubpdfs/nv_casemanagementtrainingfacilitator.pdf); ProtectOHIO Consortium FTM Workgroup, Practice Manual for ProtectOHIO Family Team Meetings, (2011), https://jfs.ohio.gov/ocf/ProtectOHIO-FTMPracticeManual2013.stm.
20. Robert N. Boyd & Philip V. Scribano, *Improving Foster Care Outcomes via Cross-Sector Data and Interoperability,* 176 JAMA Pediatrics e214321, e214321 (2021).

> **"[D]ata can be linked and displayed across systems to provide a complete and holistic view of a given child..."**

provider, magistrate, judge, caseworker, or another support-service professional to establish effective intervention strategies without complete information. Unfortunately, when complete and often voluminous records are finally obtained, extensive time may be required to review and glean critical information from them.

Each hospital and CPS agency may keep records and respond to record requests with very different approaches, further complicating how information is shared and what information is provided. Some organizations have more formalized processes requiring extensive paperwork for submission of a records request; others may be less formal but with additional challenges, such as knowing who to contact and how to get a timely response. Often, Memorandums of Understanding (MOUs) may be in place between CPS agencies and healthcare systems to permit data sharing, but do not establish an efficient and timely manner for doing so. Medical recordkeepers with less experience with children in CPS custody may create unnecessary barriers due to a misunderstanding of governing rules, be short-staffed and unable to respond quickly to requests, or have inefficient procedures in place. Delays in data sharing inhibit effective treatment and case planning for individual children and also prevent population-level analysis to improve outcomes, such as program evaluations and quality improvement initiatives. Finally, unless there is a process for maintaining updated information, it becomes outdated shortly after it is shared, making records less beneficial to both healthcare professionals and CPS agency staff trying to provide the best care for a child in CPS custody.

HIPAA allows medical professionals to exchange health information for the purpose of patient care, and technology and staff support are often available to facilitate that information exchange;[21] however, medical record gathering remains complex for healthcare systems when a new patient establishes care. This can be an even more daunting task for a caseworker who is unfamiliar with healthcare information exchange, stretched thin with new cases and other critical tasks, and working without administrative support. In that context, a diagnosis may be overlooked or there may be a gap in medication adherence. This can compound existing health risks for children in CPS custody and sometimes creates serious safety concerns. For example, a child may be placed with a caregiver unaware of the child's anaphylactic food allergy. Similarly, medical institutions often do not have processes to gather information quickly and efficiently from child welfare institutions. As a result, healthcare providers may not even know when their patient is in CPS custody or where a child has been moved when placement changes occur. Healthcare systems may not have contact information for the current caseworker, given high caseworker turnover rates. All of this can result in missed appointments, poorly informed treatment plans, or even hospital discharges to the wrong caregiver.

AUTOMATED INFORMATION SHARING MAY IMPROVE INFORMATION ACCESS AND COURT OVERSIGHT

The migration of information management systems in child welfare, juvenile court, and medical and education sectors from paper to digital formats provides an opportunity to securely exchange essential medical, education, and child welfare information among parties responsible for the care and oversight of children in CPS custody. Technology has advanced significantly and affords the ability to safely and securely collect, process, and share information, including recognizing appropriate roles and responsibilities of users. Technology allows for the secure collection and storage of only essential data elements from each database, updated in an automated fashion to ensure appropriate rules are followed when children are in and out of CPS custody. Further, data can be linked and displayed across systems to provide a complete and holistic view of a given child in CPS custody while simultaneously reducing the burden on the caseworker or other personnel to collect and synthesize information relevant to adequately supervise and provide oversight for a given child. We have observed the benefits of implementing such a solution in our local jurisdiction, Hamilton County, Ohio, through a platform called IDENTITY.[22] IDENTITY uses a set of shared identifiers (e.g., child name, date of birth, gender, race, and ethnicity) to match a child welfare record with a corresponding medical record for the same child and displays that information to caseworkers and healthcare providers to review and access. Information is initially linked and displayed within 24 hours of a child's entry into CPS custody, as reported by the child welfare information system, and new information is updated daily. A child's data remains displayed in IDENTITY until CPS custody ends, as indicated in the child welfare information system. At this point, the child is no longer viewable on the IDENTITY platform. IDENTITY was designed to include the information healthcare providers and CPS staff were already trying to exchange on a case-by-case basis through records requests, phone calls, and emails. For that reason, the information displayed in IDENTITY is limited to only those fields necessary for healthcare delivery and ensuring child safety and wellbeing, including placement contact information, caseworker contact information, and substantiated maltreatment history. Health information includes diagnoses, current medications, immunizations, and healthcare use (e.g., completed annual visits, participation in outpatient therapeutic services). Further, caseworkers can generate a pre-populated form that meets requirements for state statutes about medical information sharing with the court ahead of review hearings.

Automated information sharing through IDENTITY has contributed to improvements in several domains in our local jurisdiction. First, CPS staff can now update the comprehensive child welfare information system with accurate and timely health infor-

21. *See* HIPPA *supra* note 10; *See also* Israa Abu-elezz et al., *The Benefits and Threats of Blockchain Technology in Healthcare: A Scoping Review,* 142 INT'L J. MED. INFORMATICS 104246, 104246 (2020), https://doi.org/10.1016/j.ijmedinf.2020.104246.

22. *See* Greiner et al., *supra* note 5.

mation directly from the medical record. This helps CPS ensure compliance with CFSR outcomes requirements[23] that children receive adequate services to meet their physical and mental health needs. Second, we have observed an increase in the quality of documented health information provided to the court at the time of review hearings. As a result, judges and magistrates can more effectively target questions and discussion during those review hearings toward gaps in healthcare or other service needs to support child wellbeing. Third, our healthcare system has observed improvements in compliance with healthcare service recommendations when children are in CPS custody.

Notably, the potential impact of automated information sharing expands beyond better recordkeeping outcomes. Caseworkers and healthcare providers in our community also identified efficient information sharing as a critical factor in preventing placement disruptions. When child welfare systems and courts have expanded access to and use of technology like IDENTITY, they may be able to make better-informed decisions about appropriate placement settings at the outset of a case, where the strengths and needs of a child are better matched with the capabilities of a potential caregiver, thereby improving placement stability. While this is important for initial placement, it may also have relevance for permanency, given that most children adopted from CPS custody find permanency in their existing placement. In that way, IDENTITY may also provide vital information to improve the likelihood that a child's first placement in CPS custody is the only placement. Maximally effective information sharing and decision making could reduce work for CPS and juvenile courts and also aid in ensuring children receive the best services and achieve the best outcomes while in CPS custody.

The successful implementation of technology and platforms like IDENTITY has contributed to meaningful shifts in approach and expectations around information exchange in our community. Incomplete health information was once commonplace during reviews and in the documentation submitted to the court. Now, hearing officers expect that health information will be more complete. Similarly, child welfare administrators in our community now perceive that they can attain the goal of updating the child welfare information system to be compliant with documentation requirements around child health and wellbeing. Our healthcare providers now expect to know when children are in CPS custody and with whom they are placed. Previously, that information was rarely available or accurate at the time of a healthcare encounter. Juvenile court judges and magistrates can take on a new role as they are able to exercise more effective oversight. Rather than spending time to see that information is gathered and shared, they can expect that complete and up-to-date information will be presented. Most importantly, they can incorporate that information into their decision making. These shifts are aligned with new federal guidelines, for example, the Comprehensive Child Welfare Information Systems (CCWIS) guidance, which encourage communities to use technology to look for opportunities to strengthen data sharing and, in doing so, create meaningful opportunities for prevention and improved outcomes through that strengthened data.[24]

"[I]ncreasingly important that juvenile courts have access to comprehensive information about children's health and wellbeing..."

AUTOMATED INFORMATION SHARING AND THE FUTURE OF ASFA

Legislation continues to shift toward ensuring services are provided to protect and maintain families and prevent the disruptive placement of children into CPS custody, through the Family First Prevention Services Act[25] and other initiatives. With these shifts, it will become increasingly important that juvenile courts have access to comprehensive information about children's health and wellbeing from the time they enter CPS custody until they exit care. Prevention services aimed to decrease maltreatment and preserve families are expected to safely reduce the need for out-of-home care. As a result, only those youth with the highest needs are expected to enter CPS custody.[26] Enhanced information sharing among healthcare providers, child welfare agencies, and courts is vital to accomplish goals of documenting 1) efforts to prevent the removal of children from their families of origin, 2) efforts to place children with relative caregivers and maintain those placements, 3) justification for placement in non-family settings only when necessary due to children's physical or behavioral health needs, and 4) ongoing support for older youth as they exit care. There are multiple opportunities to expand upon existing automated information exchange platforms to support prevention and ensure children remain with families. A few of those opportunities are outlined below.

1. Expanded access to existing automated information exchange platforms. One critically novel aspect of IDENTITY, which is distinct from information-sharing systems in other jurisdictions,[27] is that information is made available to two different user groups: child welfare and healthcare providers. The opportunity to reciprocate access to information to ensure both systems benefited and could serve youth in CPS custody better was a key component that made IDENTITY a success. While this is notable, the provision of IDENTITY data to the court system through case plans and court reports demonstrated that providing access to informa-

23. NAT'L CTR. SUBSTANCE ABUSE & CHILD WELFARE, CHILD AND FAMILY SERVICES REVIEW: OUTCOMES AND SYSTEMIC FACTORS, AND ASSOCIATED ITEMS AND DATA INDICATORS, https://ncsacw.samhsa.gov/files/TrainingPackage/MOD5/CFSROutcomesSystemicFactors.pdf (last visited Jan. 11, 2022).
24. *See* U.S. Department of Health and Human Services, Administration for Children and Families, *Federal Guidance for Child Welfare IT Systems* (Oct. 5, 2021), https://www.acf.hhs.gov/cb/training-technical-assistance/state-tribal-info-systems/federal-guidance.
25. Bipartisan Budget Act of 2018, Public L. No. 115-123, 132 Stat. 64.
26. FAMILYFIRSTACT.ORG, https://familyfirstact.org/about-law (last visited Jan. 11, 2022).
27. *Ventura County Foster Health Link: Connecting Foster Families with Their Essential Records,* CHILD.'S P'SHIP (Jan. 2016), https://www.childrenspartnership.org/research/ventura-county-foster-health-link-connecting-foster-families-with-their-essential-records/.

> **"Information exchange platforms can also be designed to generate detailed, individualized reports..."**

tion from integrated data sources for parties who are not contributing a data source themselves is also extremely valuable. There is an opportunity to expand access to existing platforms like IDENTITY, which could include granting access to the child's legal representation (e.g., the guardian ad litem or court-appointed special advocate) who could use that information to advocate for the best interest of the child, as well as to the temporary caregiver who is meeting the day-to-day health needs of the child in CPS custody. Using updated child welfare information systems data, access to a child's health information could be made available to new caregivers and restricted as soon as the child leaves that caregiver's home. Similarly, access could be granted to families of origin, mainly when the permanency goal is reunification, limiting protected information (e.g., temporary caregiver names and addresses) while simultaneously allowing families of origin to remain involved in medical decision making while children are in CPS custody. With consent, families could establish access and information exchanges before a child enters CPS custody to assist with preventing an out-of-home placement. When children do enter CPS custody, a parent could grant permission to maintain information exchanges and retain access to integrated health information after reunification, providing the parent with a comprehensive history of healthcare services and needs while their child was in out-of-home care and supporting continuity in healthcare following reunification. Further, it may be beneficial to provide young people with access to their personal health information while they are in custody and before they turn 18 as well as after they turn 18, whether they emancipate or remain in custody. Such access would allow young adults to view their complete medical records and use this information to access healthcare services and maintain their health independently.

2. Enhanced reporting features. Consistent with the intent of the Court Improvement Program reauthorized by the Adoption and Safe Families Act,[28] linked data and automated information sharing can provide mechanisms for identifying ways to improve the safety, permanency, and wellbeing of children in CPS custody. Reports of aggregate data can be made available to key stakeholders and policymakers to improve program and policy decisions while simultaneously protecting the identities of children in CPS custody. This provides the potential to look more explicitly at the impact of court reforms, for example, on child wellbeing using data gathered from the electronic health record.

   Information exchange platforms can also be designed to generate detailed, individualized reports to share with key stakeholders (e.g., judges and magistrates) to improve information gathering and sharing efficiency and completeness. For example, a juvenile court judge could receive a report generated using child welfare and electronic health records data that summarizes relevant information outlined in current enhanced resource guidelines[29] for each child on their docket, at review hearings or through summaries of agency administrative reviews. This information could be used to guide discussion and decision making at review hearings. Written reports could include a table summarizing a child's mental, physical, and dental needs and the services provided to address a child's needs since the last review hearing. In addition, it could include information regarding parental involvement in medical care and recommendations for future treatment to enhance the health and wellbeing of the child.

3. Extended reach. Like the healthcare system, the education system is expected to interact with and exchange information with CPS agencies when a child is in CPS custody. That information is expected to be relayed to the court for review and judicial oversight. The National Council on Juvenile and Family Court Justices (NCJFCJ), following guidance from the Adoption and Safe Families Act, provides guidance to juvenile courts about how to discuss children's participation in school, receipt of accommodations or other educational services, transportation to and from school, and parents' involvement in educational activities during the review hearing. The American Bar Association's Legal Center for Foster Care and Education further advocates sharing education data for children in CPS custody with child welfare and the court. Information sharing is intended to ensure access to educational services, track trends and deficits for individual children and the population of all children in CPS custody, and inform education and child welfare policy and practice.[30] Technical assistance is available to support these efforts, including guidelines for developing capacity for automated information sharing, where processes outlined are similar to those used by our team to build IDENTITY. The integration of education, child welfare, and health data could provide a powerful tool for child protective services systems to manage the day-to-day needs of children in CPS custody and support the court in providing oversight in ensuring child safety, perma-

28. *See* U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Court Improvement Program* (May 17, 2012), https://www.acf.hhs.gov/cb/grant-funding/court-improvement-program#:~:text=Awards%20are%20made%20to%20the,funded%20at%20%2410%20million%20annually.
29. *See* Enhanced Resource Guidelines, *supra* note 16 at 289.
30. *Data and Information Sharing,* A.B.A Ctr. on Child. & L. (lasted visited January 11, 2022), https://www.fostercareandeducation.org/AreasofFocus/DataInformationSharing.aspx.

nency, and well-being. This can be accomplished while fully complying with regulations around information sharing and exchange for youth in CPS custody. Further, by involving families of origin in the consent process, such services could be available to support families receiving assistance to prevent a child's placement in out-of-home care and after reunification, ensuring systems can work collaboratively to prevent both entry and re-entry into CPS custody.

CONCLUSION

Timely and efficient sharing of information between child welfare systems and medical care providers is vital to the goal of enhancing the well-being of children in CPS custody and meeting their healthcare needs. Information sharing can contribute to improving placement stability by better matching children with placement providers and reducing the time necessary to achieve permanency. It could also be a tool to provide courts with the up-to-date information needed to meet oversight responsibilities for children in CPS custody.

The exchange of information between these systems has historically been challenging. From the caseworker's perspective, compiling the initial medical history for children entering CPS custody is fraught with difficulties. It requires knowing where to look for medical records, filling out forms to authorize the transfer of records, and then sorting through what are often voluminous records to glean what is important. Often such records do not become available until weeks or even months after a child enters CPS custody. Caseworkers confront equally difficult and time consuming challenges maintaining up-to-date medical information for their case files. Moreover, when placements or caseworkers change, locating critical medical information may be difficult when it is buried in agency files. New caseworkers may not even be aware of information that was collected and stored prior to a child being added to their caseload. Finally, time spent securing and maintaining medical information reduces the time that can be spent on other equally important tasks for already overburdened caseworkers. Without up-to-date and complete information collected by caseworkers, it becomes challenging to ensure the court is well-informed and able to provide adequate oversight while a child is in CPS custody.

From the perspective of healthcare providers, obtaining timely information from the CPS agencies can be difficult and gives rise to a host of problems. Healthcare providers often do not even know whether a child is in CPS custody when they are providing care in a clinical setting. They may not know who to contact at CPS to discuss medical concerns. As children change placements, healthcare providers may lose contact with the child, making it impossible to provide ongoing medical care. As a result, even when healthcare systems want to deliver the best care for children in CPS custody and partner with CPS agencies to alleviate burden, they are challenged to do so.

Technology that safely and securely leverages automated information exchange, such as the "IDENTITY" platform, can provide a feasible solution to ensure that health and child welfare information is shared in a safe and secure manner consistent with the laws and regulations that govern the sharing of such information. Linked data, when available and accessible to stakeholders, can drive intervention, treatment, planning, and strategies tailored to the unique needs of each child in CPS custody. Aggregating these instances allows systems to identify what is working and what is not. Better information sharing offers the opportunity for improved collaboration between systems, and ultimately, improved outcomes for children in CPS custody.

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Magistrate Paul DeMott has served as a magistrate in the Hamilton County Court of Common Pleas, Juvenile Division (Cincinnati, Ohio) for over 35 years. He began his appointment as a magistrate presiding over juvenile delinquency hearings. Since 1989, Magistrate DeMott has presided over preliminary, adjudicatory, dispositional and post dispositional hearing in child abuse, neglect and dependency cases. Magistrate DeMott served as a consultant to the National Council of Juvenile and Family Court Judges in the development of its publication, Resource Guidelines: Improving Court Practice in Child Abuse and Neglect Cases, *National Council of Juvenile and Family Court Judges (1995). Magistrate DeMott was lead author of* Ohio Abuse, Neglect Dependency Law: A Practice Manual for Attorneys, *https://www.supremecourt.ohio.gov/JCS/CFC/resources/ local/practicManual.pdf. He has regularly been invited as a guest speaker on the topic of child abuse, neglect and dependency law at the University of Cincinnati's College of Law and the University of Cincinnati's School of Social Work. In addition to presiding over child abuse and neglect cases, Magistrate DeMott has had a long interest in using computer technology to measure and enhance court performance and caseflow management in child abuse, neglect, and dependency cases. He played a key role in the design and the ongoing use and enhancement of the Hamilton County Juvenile Court's Information Management System that is used to collect and report on a large array of descriptive statistics and court performance measures. Magistrate DeMott earned his Bachelors of Science degree in Economics from Miami University and his Juris Doctorate from the University of Illinois, College of Law.*

Rich Bowlen, completed his degree in sociology and psychology at the University of Muskingum in 1991. Following his education, he began his career as a licensed social worker working as a frontline caseworker for Franklin County Children Services. In 1997 he began serving as Lay Guardian ad Litem with the Franklin County Public Defender's Office in Columbus, Ohio representing the best interest of children in abuse, neglect, and dependency cases in Juvenile and Domestic Relations Court. He then accepted a role with Fairfield County Job and Family Services as Child Protective Services Director. Throughout his career, he has served on the State Behavioral Health Leadership Group and as Co-Chair for the Protect Ohio IV-E Waiver Committee. He joined Cordata Healthcare Innovations as a Senior Vice President in 2021 and leads their Child and Family Services practice to bring meaningful collaboration to public and private partnerships. Today, he continues his direct service to vulnerable children and families as Vice Chairman for the Fairfield Metropolitan Housing Authority Board and as Board Vice President for the Harcum House Child Advocacy Center in Lancaster Ohio. https://www.cordatahealth.com/ (Last visited December 12, 2021), @Rich Bowlen (LinkedIn), @RichBowlen (Twitter), rich.bowlen@cordatahealth.com

Mary Greiner, MD, is a child abuse pediatrician and the medical director of the Comprehensive Health Evaluations for Cincinnati's Kids (CHECK) Foster Care Center at Cincinnati Children's Hospital Medical Center. The CHECK Center provides comprehensive assessments of overall functioning for almost one thousand foster youth each year at the time of entry into foster care and with each placement change. Dr. Greiner has used her work with the CHECK Center to inform the study of issues related to health disparities for youth in foster care, including piloting and studying interventions to address identified needs for youth in foster care, including traumatic stress prevention, developmental and behavioral evaluations, and the role of data sharing (including the IDENTITY data-sharing portal) between healthcare systems and child welfare systems to improve health outcomes. Dr. Greiner is an Associate Professor of Pediatrics in the Department of Pediatrics at the University of Cincinnati College of Medicine and serves on the Executive Committee of the American Academy of Pediatrics' Council on Foster Care, Adoption, and Kinship Care. https://www.cincinnatichildrens.org/bio/g/mary-greiner (last visited December 8, 2021); @CHECKDr (Twitter), mary.greiner@cchmc.org (email).

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Answers to Crossword

from page 33

N	O	N	E	■	G	L	A	R	E	D	■	D	A	G
A	N	Y	A	■	L	O	R	E	N	A	■	A	L	I
H	O	U	R	L	Y	W	A	G	E	S	■	I	A	N
■	■	■	W	I	N	E	B	A	R	■	E	L	M	S
S	E	M	O	N	■	■	■	L	O	V	E	Y	O	U
A	V	E	R	■	A	C	H	E	■	E	N	D	■	■
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FJC
Federal Judicial Center

Judicial education plays an important role in enhancing the professionalism of the judiciary and promoting the rule of law. This following list includes information about the International Organization for Judicial Training and judicial education providers in the United States.

INTERNATIONAL ORGANIZATION FOR JUDICIAL TRAINING
The International Organization for Judicial Training (IOJT) was established in 2002 in order to promote the rule of law by supporting the work of judicial education institutions around the world. The organization convenes biannual conferences hosted by judicial training centers of different countries. These conferences provide an opportunity for judges and judicial educators to discuss strategies for establishing and developing training centers, designing effective curricula, developing faculty capacity, and improving teaching methodology. The IOJT website includes links to materials from past conferences as well as its journal: Judicial Education and Training.
http://www.iojt.org

FEDERAL JUDICIAL CENTER: EDUCATION AND RESEARCH FOR THE U.S. FEDERAL COURTS
An overview of the Federal Judicial Center, including its organization, history, and mission. For translated versions of this document, see Translated Briefing Materials under the Resources menu.
https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

NATIONAL ASSOCIATION OF STATE JUDICIAL EDUCATORS
The National Association of State Judicial Educators (NASJE) is a non-profit organization that strives to improve the justice system through judicial branch education. http://nasje.org

NATIONAL JUDICIAL COLLEGE
The National Judicial College provides judicial education and professional development for judges within the United States as well as for judges from other countries. https://www.judges.org

NATIONAL CENTER FOR STATE COURTS
The mission of National Center for State Courts (NCSC) is to improve the administration of justice through leadership and service to state courts, and courts around the world.
https://www.ncsc.org

THE JUDICIAL EDUCATION REFERENCE, INFORMATION AND TECHNICAL TRANSFER PROJECT
The Judicial Education Reference, Information and Technical Transfer (JERITT) Project is the national clearinghouse for information on continuing judicial branch education for judges and other judicial officers, administrators and managers, and judicial branch educators. This site includes links to judicial education centers serving the United States state court systems. https://www.fjc.gov/sites/default/files/2015/About-FJC-English-2014-10-07.pdf

COUNCIL FOR COURT EXCELLENCE
Working primarily in Washington, D.C., courts, the Council is attempting to create an accessible, fast-moving justice system. The Council for Court Excellence works to achieve this through education of the citizenry on the justice system and by advocating reforms. http://www.courtexcellence.org

NATIONAL CENTER FOR JUSTICE AND THE RULE OF LAW
Working through the University of Mississippi School of Law, the National Center for Justice and the Rule of Law attempts to ensure fairness in the U.S. criminal justice system. It uses projects, conferences, and education, and it produces publications that study the criminal justice system. It seeks to highlight issues of justice and rule of law and discuss methods to address related problems. https://olemiss.edu/depts/ncjrl/Administration/about_mission.html

THE FEDERAL JUDICIARY CHANNEL ON YOUTUBE
This link will bring you to streaming video productions developed by the Federal Judicial Center, the Administrative Office of the United States Courts, and the United States Sentencing Commission. The videos cover a range of topics including analysis of U.S. Supreme Court decisions, discussion of sentencing law, and information about the U.S. judiciary. https://www.youtube.com/user/uscourts?feature=watch

Timely Permanency for Children in Foster Care:

Revisiting Core Assumptions about Children's Options and Outcomes

Sarah A. Font & Lindsey Palmer

The Adoption and Safe Families Act (ASFA, 1997) represented an emerging consensus that foster care should not be a long-term solution for children. Foster care is intended to provide a temporary living arrangement until permanency can be achieved, but, at the time ASFA was passed, some children were spending large proportions of their childhoods in temporary homes. In many cases, these children had a permanency plan of reunification that had little chance of being realized. Thus, the overarching goals of ASFA were to reduce the amount of time children spent "in limbo" and to promote permanency, while maintaining explicit preferences for family preservation and reunification.

ASFA's permanency provisions (described elsewhere in this issue) reflect a central premise that remaining in foster care compromises children's social development and threatens their life chances. Although ASFA and its predecessor, the Adoption Assistance and Child Welfare Act of 1980, assume that reunification, wherever possible, is in children's best interests, ASFA also explicitly acknowledged that reunification may pose unacceptable risks to children in especially egregious cases and that indefinite efforts toward reunification deny children the opportunity for normative family life with an adoptive family or with relatives. Before ASFA, the foster care system was viewed as prioritizing the rights of parents to indefinite efforts to achieve reunification over children's interests in having safe, stable, and normative family life.[1]

Recently, advocates have asserted that ASFA (as well as other policies from that era, such as the Multiethnic Placement Act) is a failed policy and should be repealed.[2] Even in the absence of repeal, ASFA is functionally irrelevant in many areas of the country, as agencies rarely request or receive exemptions to reasonable efforts requirements[3] and broadly phrased exceptions to the termination of parental rights (TPR) timelines allow those timelines to be frequently waived.[4] Indeed, in several states, the average time to TPR exceeds 3 years.[5] Put in context, these children spend *at least* one-sixth of their childhoods in foster care. And, despite concerns to the contrary, there is little to no evidence that enforcing ASFA's permanency provisions meaningfully reduces reunification rates.[6]

This article focuses on two questions that should inform debates about the harms and benefits of ASFA's permanency provisions:

> Are children harmed by delays to permanency (remaining in foster care indefinitely)?
> Do the forms of permanency (reunification, adoption, or guardianship) confer different risks and benefits?

ARE CHILDREN HARMED BY DELAYS TO PERMANENCY?

Foster care is a suboptimal long-term environment, even when children have safe, stable, and loving non-relative or kinship foster parents. Two general principles about human development illustrate why timely permanency is a worthwhile objective.

First, knowing where and to whom one belongs is a fundamental need of humans.[7] The process of removing children from their homes complicates children's understanding of belonging: they may feel affection for or identify with both biological and foster parents, and consequently experience guilt about such feelings (the "loyalty conflict"). Indeed, children's behavioral and emotional outbursts before and after parental visitation is believed to derive, in part, from this ambivalence.[8] Such conflicts are not unique to foster care, however, and can also occur in cases of divorce or domestic violence.[9]

Second, the ability to cope and adjust to various life circum-

Footnotes

1. U.S Gov't Pub. Off., Improving the Well-Being of Abused and Neglected Children (1996).
2. upEnd Movement, How We endUP: A Future Without Family Policing (Jun. 18, 2021), http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf.
3. Jill Duerr Berrick et al., *Reasonable Efforts? Implementation of the Reunification Exception Provisions of ASFA*, 87 Child Welfare 163, 163–182 (2008).
4. U.S. Gov't Accountability Off., GAO-02-585, Foster Care: Recent Legislation Helps States Focus on Finding Permanent Homes for Children but Long-Standing Barriers Remain (2002) [hereinafter GAO-02-585].
5. Based on author analysis of Adoption and Foster Care Reporting and Analysis System microdata.
6. Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 Va. J. Soc. Pol'y & L. 371 (2004); Anna Rockhill et al., *Is the Adoption and Safe Families Act Influencing Child Welfare Outcomes for Families with Substance Abuse Issues?*, 12 Child Maltreatment 7–19 (2007); *See* GAO-02-585, *supra* note 4.
7. A. H. Maslow, *A Theory of Human Motivation*, 50 Psychol. Rev. 370, 370–396 (1943).
8. Sonya J. Leathers, *Parental Visiting, Conflicting Allegiances, and Emotional and Behavioral Problems among Foster Children*, 52 Fam. Rel. 53, 53–63 (2003).
9. Paul R. Amato & Tamara D. Afifi, *Feeling Caught Between Parents: Adult Children's Relations with Parents and Subjective Well-Being*, 68 J. Marriage & Fam. 222, 222–235 (2006).

stances requires some capacity, within reason, to anticipate what is coming.[10] Lack of predictability inhibits the ability to plan—and therefore exercise real or perceived control over—one's environment.[11] In the longer term, this undermines children's sense of agency, or the perception that they are able to actualize goals or impact their circumstances.[12] Research consistently demonstrates that unpredictable environments impact children's development above and beyond the effects of low-quality environments.[13] Consider again the example of parental visitation. If parents never show up, a child learns to anticipate their absence, as painful as that is likely to be. But, when parents intermittently show up, or are sometimes kind and sometimes cold, children cannot predict, and thus cannot prepare.

When unpredictability is long-term and implicates children's primary relationships and environments, it is likely to overwhelm their capacity to cope, leading to disruptive manifestations of anxiety. For example, children may attempt to release stress in destructive ways that threaten their safety (e.g., aggression or self-harm) or exercise control over their environments by running away, shutting down emotionally, or intentionally disrupting their foster care placements. Furthermore, prolonged uncertainty is likely to compromise long-term developmental milestones, as it induces impulsive and present- (rather than future-) oriented thinking[14] a cognitive framework that poorly situates youth for successful education, relationship, or career trajectories.

The dual anxieties of "to whom do I belong?" and "what should I expect to happen?" are intrinsic to the experience of foster care, even when agencies and courts follow best practices. This does not mean that foster care is never necessary or never preferable to the alternative. Rather, it underscores, consistent with the goals of ASFA,[15] the need to minimize the length of time children are deprived of a permanent family environment and to minimize the number of times a child is asked to adapt to a new environment. Children are not frozen in time while the adults in their lives sort things out. Notwithstanding the importance of making the best permanency decision for each child, it is very likely that delaying decisions also imposes a degree of harm on children.

THE COMPLICATED COUNTERFACTUALS TO REMAINING IN CARE

"Minimizing time in foster care is a reasonable goal based on children's developmental needs for belonging and predictability."

Minimizing time in foster care is a reasonable goal based on children's developmental needs for belonging and predictability. However, it is possible to reduce time in foster care while having no impact on—or undermining—children's life chances. Foster care is a non-ideal environment but undoubtedly the alternatives are sometimes far worse. It is often said that *children need families*, but one would not expect for the mere presence of a unit called "family" to be beneficial. Rather, it is what families provide—safety, unconditional love and support, and a stable foundation for development—that confers lifelong advantages to children. Absent those provisions, a "family"—biological, adoptive, or other—is unlikely to enhance children's quality of life. Thus, we must consider the comparative safety, stability, and supportiveness of children's permanency environments.

DO THE FORMS OF PERMANENCY (REUNIFICATION, ADOPTION, OR GUARDIANSHIP) CONFER DIFFERENT RISKS AND BENEFITS?

Reunification. As both a matter of law and of social preference, biological parents are the default custodians of a child and necessitate efforts toward family reunification for children in foster care. However, an abundance of research shows that reunifying families are, too often, ill-equipped to provide the safe, stable, and supportive care that all children need, and perhaps especially unprepared to provide the level of care needed to repair insecure attachments and help children cope with the effects of prior abuse and neglect. As agencies and courts are pressured to reunify more children more quickly,[16] it is essential to understand how reunified children fare.

The rates of foster care reentry average 20-40% within 1-5 years,[17] and rates of ongoing maltreatment risk are substantial.[18]

10. *See* Maslow, *supra* note 7; Jos F. Brosschot et al., *The Default Response to Uncertainty and the Importance of Perceived Safety in Anxiety and Stress: An Evolution-Theoretical Perspective*, 41 FEARING THE UNKNOWN 22, 22–34 (2016).
11. Matthias J. Müller, *Will It Hurt Less if I Believe I Can Control It? Influence of Actual and Perceived Control on Perceived Pain Intensity in Healthy Male Individuals: A Randomized Controlled Study*, 35 J. BEHAV. MED. 529, 529–537 (2012).
12. Bev Killian et al., *Children's Loss of Agency Under Extreme Adversity*, 18 J. PSYCHOL. IN AFR. 403, 403–412 (2008); Bruce F. Chorpita & David H. Barlow, *The Development of Anxiety: The Role of Control in the Early Environment*, 124 PSYCHOL. BULL. 3, 3 (1998).
13. Melissa A. Lippold et al., *Lability in the Parent's Hostility and Warmth Toward Their Adolescent: Linkages to Youth Delinquency and Substance Use*, 54 DEV. PSYCHOL. 348, 348–361 (2018); Melissa A. Lippold et al., *Day-to-Day Consistency in Positive Parent–Child Interactions and Youth Well-Being*, 25 J. CHILD & FAM. STUD. 3584, 3584–3592 (2016); Jay Belsky et al., *Beyond Cumulative Risk: Distinguishing Harshness and Unpredictability as Determinants of Parenting and Early Life History Strategy*, 48 DEV. PSYCHOL. 662, 662–673 (2012); Jeffry A. Simpson et al., *Evolution, Stress, and Sensitive Periods: The Influence of Unpredictability in Early Versus Late Childhood on Sex and Risky Behavior*, 48 DEV. PSYCHOL. 674, 674 (2012).
14. Willem E Frankenhuis et al., *Cognition in Harsh and Unpredictable Environments*, 7 CURRENT OPINION IN PSYCHOL. 76, 76–80 (2016); Chiraag Mittal & Vladas Griskevicius, *Sense of Control Under Uncertainty Depends on People's Childhood Environment: A Life History Theory Approach*, 107 J. PERSONALITY & SOC. PSYCHOL. 621, 621 (2014).
15. NAT'L COUNCIL JUV. & FAM. CT. JUDGES, ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES (2016), https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf.
16. UPEND MOVEMENT, *supra* note 2.
17. Sara E. Kimberlin et al., *Re-Entering Foster Care: Trends, Evidence, and Implications*, 31 CHILD. & YOUTH SERV. REV. 471, 471–481 (2009).
18. Christian M. Connell et al., *Maltreatment Following Reunification: Predictors of Subsequent Child Protective Services Contact After Children Return Home*, 33 CHILD ABUSE & NEGLECT 218, 218–228 (2009); Melissa Jonson-Reid, *Foster Care and Future Risk of Maltreatment*, 25 CHILD. & YOUTH SERVICES REV. 271, 271–294 (2003).

"Research has not established that reunification improves child wellbeing, even when compared with remaining in foster care."

Research has not established that reunification improves child wellbeing, even when compared with remaining in foster care.[19] Rather, studies largely find that reunified children and youth fare worse than those who remain in care or exit to alternative forms of permanency on a variety of metrics, including incarceration, teen motherhood, educational attainment, behavior problems, and exposure to violence.[20]

None of this evidence is intended to renounce reunification as a goal; rather, it highlights the urgent need to understand *why* outcomes of reunification are suboptimal, and *what* can be done to improve children's post-reunification experiences and outcomes. There are myriad possible considerations for these questions, but at least five implicate a role for court oversight[21]:

1. Low quality of services. The services families typically receive before, and after, reunification have little impact on child safety.[22] They may be particularly inadequate given the depth and complexity of challenges facing parents who lose custody of their children.
2. Lack of post-reunification oversight and support. Even "evidence-based" services demonstrate very modest impacts on child maltreatment recurrence or other aspects of family functioning.[23] Thus, even with high-quality services, many parents will need long-term support after reunification (e.g., to maintain mental health and avoid substance abuse) but may not continue services once court oversight ends.[24] Courts can continue oversight post-reunification to ensure continuity in supports and continued child safety.
3. Compliance with the case plan is a very low bar. Parents may participate in services, and thus meet criteria for reunification, without adopting the skills and the behaviors needed to provide a safe and healthy environment for a child. Although the desire to provide objective and clear criteria to parents about how to regain custody is understandable, it ultimately encourages both parents and caseworkers to engage in "box-checking" that is more so a test of parental endurance than parental capacity.
4. Lack of assessment and intervention around parent-child attachment. Insecure parent-child attachment both increases the risk of future abuse and neglect and adversely impacts children's social and behavioral functioning.[25] To form secure attachments, children need caregivers to be safe, consistent, and responsive[26] — the very conditions that are absent for abused and neglected children. Removing children from such conditions is unlikely to sever a *secure* attachment to the (abusive or neglectful) biological parent, because such an attachment is unlikely to exist.[27] Interventions with the potential to strengthen parent-child attachment and prevent child maltreatment, such as parent-child interaction therapy,[28] may be appropriate pre- and post-reunification.
5. The law, social norms, and structural incentives favor

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19. Nina Biehal, *Reuniting Children with Their Families: Reconsidering the Evidence on Timing, Contact and Outcomes*, 37 Brit. J. Soc. Work 807, 807–823 (2007); Sarah A. Font & Elizabeth Gershoff, Foster Care and Best Interests of the Child: Integrating Research, Policy, and Practice 89 (2020).
20. Sarah A. Font et al., *Foster Care, Permanency, and Risk of Prison Entry*, 58 J. Res. Crime & Delinq. 710, 710-754 (2021); Sarah A. Font et al., *Permanency and the Educational and Economic Attainment of Former Foster Children in Early Adulthood*, 83 Amer. Soc. Rev. 716, 716–743 (2018); Jennifer L. Bellamy, *Behavioral Problems Following Reunification of Children in Long-Term Foster Care*, 30 Child. & Youth Serv. Rev. 216, 216–228 (2008); Heather N. Taussig et al., *Children Who Return Home from Foster Care: A 6-Year Prospective Study of Behavioral Health Outcomes in Adolescence*, 108 Pediatrics E10, E10 (2001); Anna S. Lau et al., *Going Home: The Complex Effects of Reunification on Internalizing Problems Among Children in Foster Care*, 31 J. Abnormal Child Psychol. 345, 345–358 (2003); Alan J. Litrownik et al., *Long-Term Follow-up of Young Children Placed in Foster Care: Subsequent Placements and Exposure to Family Violence*, 18 J. Fam. Violence 19, 19–28 (2003); Nina Biehal et al., *Reunifying Abused or Neglected Children: Decision-making and Outcomes*, 49 Child Abuse & Neglect 107, 107–118 (2015); Richard P. Barth & Marianne Berry, *Outcomes of Child Welfare Services Under Permanency Planning*, 61 Soc. Serv. Rev. 71. 71–90 (1987).
21. Sarah Font & Elizabeth T. Gershoff, *Foster Care: How We Can, and Should, Do More for Maltreated Children*, 33 Soc. Pol'y Rep. 1, 1–40 (2020).
22. Fred Wulczyn, *Family Reunification in Law, Policy, and Practice*, 14 Future Child. 95, 95–113 (2004); Becci A. Akin et al., *Effect of a Parenting Intervention on Foster Care Reentry After Reunification Among Substance-Affected Families: A Quasi-Experimental Study*, 22 Child Maltreatment 194, 194–204 (2017); Catherine A. LaBrenz et al., *Service Utilization and Association with Recurrences of Child Maltreatment Post-Reunification*, 15 J. Pub. Child Welfare 52, 52–77 (2021); Catherine A. LaBrenz et al., *Reunifying Successfully: A Systematic Review of Interventions to Reduce Child Welfare Recidivism*, 30 Res. Soc. Work Prac. 832, 832-845 (2020).
23. Title IV-E Prevention Services Clearinghouse, https://preventionservices.abtsites.com/program?page=1 (last visited Oct. 10, 2019).
24. Berenice Rushovich et al., *A Post-Reunification Service Model: Implementation and Population Served*, 122 Child. & Youth Serv. Rev. 105928, 105928 (2021).
25. Jay Belsky, *Three Theoretical Models of Child Abuse: A Critical Review*, 2 Child Abuse & Neglect 37, 37–49 (1978); Heather Bacon & Sue Richardson, *Attachment Theory and Child Abuse: An Overview of the Literature for Practitioners*, 10 Child Abuse Rev. 377, 377–397 (2001).
26. Mary S Ainsworth, *Infant–Mother Attachment*, 34 Amer. Psychol. 932, 932 (1979).
27. Judith C Baer & Colleen Daly Martinez, *Child Maltreatment and Insecure Attachment: A Meta Analysis*, 24 J. Reprod. & Infant Psychol. 187, 187–197 (2006); Vicki Carlson et al., *Disorganized/Disoriented Attachment Relationships in Maltreated Infants*, 25 Developmental Psychol. 525, 525 (1989).
28. Jane Kohlhoff et al., *Parent–Child Interaction Therapy with Toddlers in a Community-Based Setting: Improvements in Parenting Behavior, Emotional Availability, Child Behavior, and Attachment*, 41 Infant Mental Health J. 543, 543–562 (2020); Brian Allen et al., *Parent–Child*

reunification, even when it presents serious risks. The burden of proof falls on agencies to demonstrate that reunification is not in a child's best interests. Building such a case requires extensive time, training, and effort (resources in limited supply for caseworkers). In addition, there is no real or perceived liability for failing to make the case. If the court returns a child home against agency recommendations—even if the agency made a poor case for continued placement—and the child experiences new harm, the agency correctly asserts that it was not their decision. If the reunification goes well, the agency can take credit for fulfilling federal and state policy priorities and achieving the outcome that is assumed to reflect children's best interests. Structural incentives are especially distorted for "hard to place" children, who have no identified adoptive or guardianship alternative.

Adoption. Long considered the best option for children born to parents unable or unwilling to safely care for them, a growing chorus of adoption critics—including some adoptees—have sought to change the narrative of adoption, arguing that adoption is unnatural[29] and intrinsically traumatic to children. These criticisms are especially pronounced in the case of "transracial" adoption.[30] What does the evidence say? Though limited, research generally suggests preferable outcomes for adopted children relative to remaining in care;[31] this appears to be no less true for transracial adoptees,[32] especially when parents are adequately prepared to support the child's cultural identity.[33] Although surprisingly little modern research compares adoptee outcomes to alternative types of foster care exits, research links adoption with higher levels of wellbeing compared with reunification and, in some cases, guardianship or permanent placement with a relative.[34] Of course, not all adoptions are successful and studies have highlighted a relatively high frequency of adjustment concerns, particularly for children adopted at older ages.[35] Children fare better after adoption when the adoptive parents are fully committed to the child[36] and have the social and economic resources to address the long-run effects of children's earlier trauma.[37] The courts play a critical role in evaluating these factors during the adoption finalization process.

"Again, for a variety of legal, social, and practical reasons, reunification is and remains the preferred option for permanency."

Again, for a variety of legal, social, and practical reasons, reunification is and remains the preferred option for permanency. This article is not asserting a need to change this preference. Rather, the evidence described can be interpreted thusly: where reunification does not appear to be viable within a reasonable period of time, there is little reason for agencies and courts to believe that they are harming children by changing their permanency goal to adoption.

Guardianship and other forms of legal permanency. In this section, we will use the term *guardianship* to encompass the range of legal custody options other than adoption (e.g., permanent conservatorship). Guardianships are pitched as providing the legal permanency children need without the aspects of adoption to which kin (and sometimes youth)[38] may object—namely, the requirement for termination of parental rights and the formal changing of roles (e.g., from grandmother to mother). In some states, non-relative foster parents can also opt for guardianship

Interaction Therapy as an Attachment-Based Intervention: Theoretical Rationale and Pilot Data with Adopted Children, 47 CHILD. & YOUTH SERV. REV. 334, 334–341 (2014); Stephanie Batzer et al., *Efficacy or Chaos? Parent–Child Interaction Therapy in Maltreating Populations: A Review of Research*, 19 TRAUMA, VIOLENCE, & ABUSE 3, 3–19 (2018).

29. NAOMI SCHAEFER RILEY, NO WAY TO TREAT A CHILD 63–64 (2021) (quoting Frank-Meyer).
30. For example, best-selling author Ibram X. Kendi said of transracial adoption, "Some White colonizers 'adopted' Black children. They 'civilized' these 'savage' children in the 'superior' ways of White people, while using them as props in their lifelong pictures of denial, while cutting the biological parents of these children out of the picture of humanity." *See* Ibram X. Kendi (@DrIbram), TWITTER (Sept. 26, 2020, 1:01 PM), https://twitter.com/dribram/status/1309916696296198146. Alan Detlaff, Dean of the University of Houston School of Social Work and invited speaker at the U.S. Children's Bureau, similarly asserts, "The 'intent' [of the Adoption and Safe Families Act] has always been to make Black children available to White parents looking to rescue them." *See* Alan Dettlaff (@AlanDettlaff), TWITTER (Aug. 17, 2021, 7:28 AM), https://twitter.com/AlanDettlaff/status/1427608350372646923.
31. Bo Vinnerljung & Anders Hjern, *Cognitive, Educational and Self-Support Outcomes of Long-Term Foster Care Versus Adoption: A Swedish National Cohort Study*, 33 CHILD. & YOUTH SERV. REV. 1902, 1902–1910 (2011); E. Christopher Lloyd & Richard P. Barth, *Developmental Outcomes After Five Years for Foster Children Returned Home, Remaining in Care, or Adopted*, 33 CHILD. & YOUTH SERVI. REV. 1383, 1383–1391 (2011); Nicholas Zill, *Adoption from Foster Care: Aiding Children While Saving Public Money* (May 19, 2011), https://www.firststar.org/wp-content/uploads/2015/02/05_adoption_foster_care_zill.pdf.
32. Femmie Juffer & Marinus H. Van IJzendoorn, *Adoptees Do Not Lack Self-Esteem: A Meta-Analysis of Studies on Self-Esteem of Transracial, International, and Domestic Adoptees*, 133 PSYCHOL. BULL. 1067, 1067 (2007).
33. EVAN B. DONALDSON ADOPTION INSTITUTE, FINDING FAMILIES FOR AFRICAN AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE (Evan B. Donaldson Adoption Institute 2008), https://www.nationalcenteronadoptionandpermanency.net/post/finding-families-for-african-american-children-the-role-of-race-law-in-adoption-from-foster-care.
34. Font et al., *Foster Care*, and Font et al., *Permanency*, supra note 20.
35. Rebecca Orsi, *Predicting Re-involvement for Children Adopted Out of a Public Child Welfare System*, 39 CHILD ABUSE & NEGLECT 175, 175–184 (2015); Kevin R. White et al., *Understanding Wellbeing and Caregiver Commitment After Adoption orGuardianship from Foster Care*, 15 J. PUB. CHILD WELFARE 105, 105–130 (2021).
36. *See* White et al., *supra* note 35.
37. Erum Nadeem et al., *Long-Term Effects of Pre-Placement Risk Factors on Children's Psychological Symptoms and Parenting Stress Among Families Adopting Children from Foster Care*, 25 J. EMOTIONAL & BEHAV. DISORDERS 67, 67–81 (2017).
38. Anonymous Akeema, *Saying No to Adoption*, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT (2004).

"The motivations for pursuing guardianship rather than adoption are an important line of inquiry that should be assessed and reported..."

over adoption, most often with older children. In most states, guardianships are eligible for federal subsidies similar to those provided for foster care or adoption.[39]

The various legal distinctions between guardianship and adoption suggest guardianships may be less preferable for children. Because guardianship does not require TPR, guardianship removes the onus on the child welfare agencies to collect and present evidence and the courts to make a finding as to whether the parents are unfit or whether permanent separation is in the child's best interests. In some states, the initial order of guardianship eliminates the presumption that parental custody is the child's best interests and return of custody to the parents requires a finding that guardianship dissolution is in the best interests of the child. Yet, other states retain the presumption that parental custody is in the child's best interests—even after a child was involuntarily removed from that parent's care—and thus require only a finding that the parent is (currently) fit.[40] A few states even place the burden on the guardian to prove parental unfitness, rather than on the parent (petitioner) to prove fitness[41]; guardians—often relatives of the parent—may be reluctant to contest the petition at all.

Of some concern, there is little research on the outcomes of guardianship following foster care, beyond reported rates of dissolution. Guardianships are two to three times more likely to end with reentry to foster care than adoptions.[42] However, it is not clear from research *why* or under what circumstances guardianships may have less favorable outcomes than adoptions. Notably, adoptions by relatives and nonrelatives are at equal risk of dissolution,[43] indicating that guardianships are not more likely to dissolve simply because they are more likely to involve relative caregivers. It is possible that differences emerge because supports—both financial subsidies and post-permanency services—are more available and widely accessed by adoptive parents than by guardians, or because the standards for approving an adoption are more stringent or comprehensive than for guardianship. Alternatively, when caregivers prefer guardianship to adoption, it may signal a lower level of commitment to the child. The motivations for pursuing guardianship rather than adoption are an important line of inquiry that should be assessed and reported on by attorney guardians ad litem, court-appointed special advocates, and child welfare agency caseworkers.

DO CHILDREN HAVE REAL OPTIONS FOR PERMANENCY?

A small proportion of children emancipate ("age out") from foster care, but the probability of aging out increases exponentially for children removed later in childhood.[44] Decades of data document the difficulties experienced by emancipated youth.[45] The emancipated population of youth includes both those who desired an adoptive or other permanency arrangement but did not receive that opportunity, and youth who chose aging out (which confers a range of federal and state benefits). The latter group—those who choose emancipation over possible alternatives—include youth who perceive adoption as inauthentic or disloyal to their families of origin[46] as well as those whose prior trauma or rejection leave them unwilling to risk opening up to a new family.

Approximately 50,000 children exit foster care to adoption each year (a dramatic increase since the passage of ASFA), but over 100,000 are "waiting"—meaning they have a goal of or are eligible for adoption.[47] (In some cases, these "waiting" cases reflect children residing in a pre-adoptive home and it's a matter of getting the court to finalize the adoption. In other cases, these are children who are not able to reunify, but no permanent family has been identified; existing federal data cannot discern the size of each group.)

Both the "aging out" and "waiting for adoption" populations underlie a common narrative that, regardless of the harms inflicted or risks posed by the families from which children were removed, the foster care system has nothing better to offer them. Put simply, there is a perception that *no one else wants these children.*

For decades, agencies have cited the undersupply of foster and adoptive families (especially for older children and children with significant behavioral challenges)[48] to explain why children

39. Child Welfare Information Gateway, Kinship Guardianship as a Permanency Option (2019).
40. Wisconsin Legislative Council Study Committee Memorandum, Information in Response to Members' Requests at Meeting on July 24, 2018 (2018), https://docs.legis.wisconsin.gov/misc/lc/study/2018/1784/020_august_28_2018_meeting_10_00_a_m_room_411_south_state_capitol/001a_aug21memo_minr.
41. A.B.A, Guardians Must Prove Parental Unfitness in Guardianship Termination Proceedings (Feb. 1, 2012), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol_31/Feb12/guardians_requiredtoproveparentalunfitnessinguardianshipterminat/.
42. Kierra M. P. Sattler & Sarah A. Font, *Predictors of Adoption and Guardianship Dissolution: The Role of Race, Age, and Gender Among Children in Foster Care*, 26 Child Maltreatment 216, 216-217 (2020); Nancy Rolock, *Post-Permanency Continuity: What Happens After Adoption and Guardianship from Foster Care?*, 9 J. Pub. Child Welfare 153, 153–173 (2015).
43. *See* Sattler & Font, *supra* note 42.
44. Annie E. Casey Foundation, Fostering Youth Transitions: Using Data to Drive Policy and Practice Decisions (Nov. 13, 2018), https://assets.aecf.org/m/resourcedoc/aecf-fosteringyouthtransitions-2018.pdf.
45. Amy Dworsky et al., Midwest Evaluation of Adult Functioning of Former Foster Youth, Research Collection, Chapin Hall University of Chicago (2011), https://www.chapinhall.org/research/midwest-evaluation-of-the-adult-functioning-of-former-foster-youth/.
46. *See* Akeema, *surpa* note 38.
47. U.S. Dep't of Health and Hum. Serv., The AFCARS Report: Preliminary FY 2019 estimates as of June 23, 2020 (2020).
48. *See* GAO-02-585, *supra* note 4; U.S. Gov't Accountability Off., GAO/HEHS-98-182, Foster Care: Agencies Face Challenges Securing Stable Homes for Children of Substance Abusers (1998); U.S. Gov't Accountability Off., GAO-16-85, Foster Care: HHS

are delayed or denied permanency. The consequent perception—that there are simply few if any families interested in adopting children with challenging life histories—may seem intuitive but is supported by little evidence. There are far more families interested in adoption—including older child and special needs adoption—than are ever "matched" for adoption.[49] Moreover, up to a third of approved foster families (some of whom are likely interested in adoption) have no children placed with them at any given time,[50] suggesting agencies are failing to draw upon their existing resources. Agencies continue to rely on "advertising" to solicit inquiries about a child in need of a permanent home, by posting blurbs about the child on an adoption exchange, public television, or social media. Advertising necessitates family-driven searches, where prospective adoptive families are advised to search for and inquire about children (rather than encouraging direct outreach to approved families by caseworkers), which are inefficient. [51] The number of children available for adoption is large and the information about them is very shallow: families are not well-positioned to evaluate whether they are a good option for a particular child. Further, and perhaps due to a high volume of inquiries where a match is very unlikely, there is little or often no response from caseworkers to family inquiries.[52] In sum, efforts to identify permanent homes for children are unlikely to be successful if relying heavily on advertising-based strategies; such strategies cannot constitute reasonable efforts or a diligent search.[53]

Some have argued that—due to contracting agencies' reliance on government contracts for their existence and the incentive structure of those contracts (which tends be based on the number of children being served)—there are strong disincentives to find permanent families for children or to finalize permanent arrangements once identified.[54] Even less-cynical observers would acknowledge that agencies' high turnover and limited resources leave them focused on dealing with emergencies, rather than planning for the future.

In sum, too many child welfare agencies and courts fail to see permanency as *urgent, necessary, and achievable* for all children. Some may believe that older children and traumatized children are incapable of developing secure attachments or that no suitable caregiver is willing to make the effort. Yet, children with maltreatment histories, even older children, can and do form secure attachments when provided safe and stable environments.[55]

"Judges hold incredible power over the lives of children who experience abuse and neglect..."

WHAT FAMILY AND JUVENILE COURT JUDGES NEED TO KNOW

Judges hold incredible power over the lives of children who experience abuse and neglect—perhaps more so than any other individual in their lives. Their discretion in the area of permanency—about whether to extend reunification timelines, how evidence is weighed or disregarded when evaluating TPR cases, how stringently caseworkers are held to their responsibilities to provide services to parents and pursue concurrent planning for children—is vast. The key takeaways for use of that discretion are:

Children need permanency to be timely, but permanency must also provide safe, stable, and supportive care. It is reasonable to conclude that long-term foster care harms children by leaving them uncertain of where they belong and what comes next for them. Timely permanency can improve opportunities (and, one could even argue, is necessary) for children to reach their full potential. Yet, it is clearly possible for children to exit foster care quickly to an unsafe or ill-suited environment: by focusing on timely permanency as the primary outcome, timely permanency ceases to be a reliable metric for children's needs being met.[56] By way of analogy, children typically need to attend school to learn, but it would be misguided to evaluate

COULD DO MORE TO SUPPORT STATES' EFFORTS TO KEEP CHILDREN IN FAMILY-BASED CARE (2015); U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-376, FOSTER CARE: ADDITIONAL ACTIONS COULD HELP HHS BETTER SUPPORT STATES' USE OF PRIVATE PROVIDERS TO RECRUIT AND RETAIN FOSTER FAMILIES (2018).

49. *See* Elaine C. Karmack et al., Eliminating Barriers to the Adoption of Children from Foster Care, Faculty Research Working Paper Series, Harvard University, John F. Kennedy School of Government (2012), https://dash.harvard.edu/bitstream/handle/1/9804493/RWP12-040_Kamarck_Wilson.pdf?sequence=1&isAllowed=y.
50. Fred Wulczyn et al., The Dynamics of Foster Home Recruitment and Retention, Center for State Child Welfare Data, Chapin Hall, University of Chicago (2018), https://www.chapinhall.org/wp-content/uploads/Foster-Home-Report-Final_FCDA_October2018.pdf.
51. Nils Olberg et al., Search and Matching for Adoption from Foster Care, Cornell University (Mar. 18, 2021), http://arxiv.org/abs/2103.10145.
52. *See* Karmack et al., *supra* note 49.
53. Previously, the federal government had issued definitions of diligent search requirements that seemed to suggest adoption exchanges were a mandated strategy, rather than one of many options agencies could pursue to match children with families—policy guidance has since been clarified, such that states clearly have the flexibility to use more effective strategies. *See* Adoption-Share, Onward Annual Report 2020, 5-6, https://adoption-share.com/wp-content/uploads/2021/01/Final-Annual-Report-2020-Electronic.pdf.
54. Isabella M. Pesavento, *How Misaligned Incentives Hinder Foster Care Adoption*, 41 CATO J. 139, 139-158 (2021), https://www.cato.org/cato-journal/winter-2021/how-misaligned-incentives-hinder-foster-care-adoption.
55. Michelle A. Joseph et al., *The Formation of Secure New Attachments by Children Who Were Maltreated: An Observational Study of Adolescents in Foster Care*, 26 DEV. & PSYCHOPATHOLOGY 67, 67–80 (2014); Mary Dozier et al., *Attachment for Infants in Foster Care: The Role of Caregiver State of Mind*, 72 CHILD DEV. 1467, 1467–1477 (2001); Shannon Altenhofen et al., *Attachment Security in Three-Year-Olds who Entered Substitute Care in Infancy*, 34 INFANT MENTAL HEALTH J. 435, 435–445 (2013); Katrin Lang et al., *Foster Children's Attachment Security in the First Year After Placement: A Longitudinal Study of Predictors*, 36 EARLY CHILDHOOD RES. Q. 269, 269–280 (2016).
56. Donald T. Campbell, *Assessing the Impact of Planned Social Change*, 2 EVALUATION & PROGRAM PLAN. 67, 67–90 (1979).

schools based solely on attendance or to assume that all children who attend are therefore learning. And, if schools were asked to improve attendance, without concordant expectations for learning, it takes little imagination to see how a school could improve attendance in ways that disregard, or even diminish learning.

Agencies can do more to find permanent relative or adoptive placements. Agencies default to the language of scarcity—"not enough families"—to justify children continuing to wait for adoption. However, it is often agencies' behaviors rather than the children's needs that deter prospective families. Agencies are often unresponsive to inquiries, and rely on passive strategies (e.g., posting information about a child and seeing who inquires) rather than active strategies (e.g., outreach to families who are waiting to adopt). The courts, through extracting testimony from caseworkers, guardians ad litem, and advocates, can identify and require better strategies to identify a permanent family for every child who does not have one.

A substantial proportion of children exiting to reunification will need ongoing support and oversight. Given the high rates of reentry and revictimization following reunification, closing the case at or shortly after reunification places children at risk. Trial reunifications and post-reunification court oversight are tools that states have used to reduce those risks.

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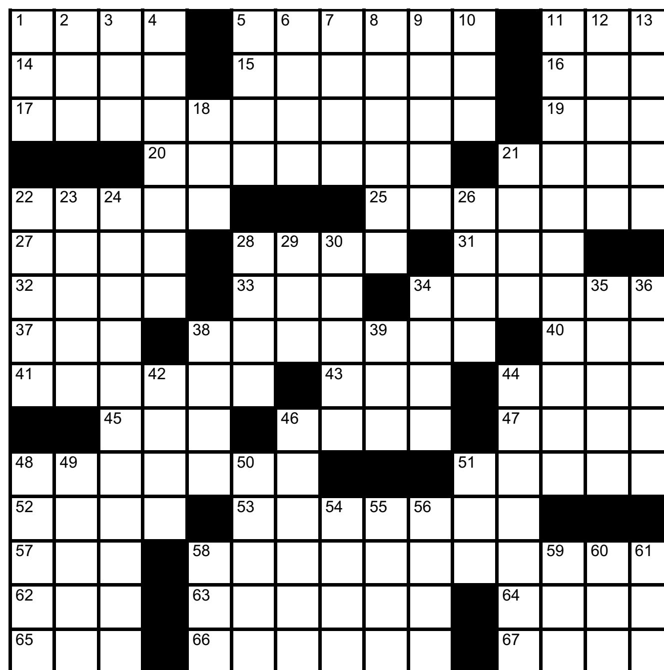
AMERICAN JUDGES ASSOCIATION: PROCEDURAL FAIRNESS INTERVIEWS

The American Judges Association (AJA) conducted interviews about procedural fairness with nine national leaders on issues involving judges and the courts. The interviews, done by Kansas Court of Appeals Judge and past AJA president Steve Leben, cover the elements of procedural fairness for courts and judges, how judges can improve fairness skills, and how the public reacts to courts and judges. The interviews were done in August 2014; job titles are shown as of the date of the interviews.

Visit http://proceduralfairnessguide.org/interviews/ to watch the interviews.

PERIODICALLY by Judge Vic Fleming © 2021

Don't look for me to do a puzzle of this nature ***annually***.



Across

1 ___ of the above
5 Stared angrily
11 1950s United Nations Secretary General Hammarskjold
14 "Avalon" author Seton
15 Golf great Ochoa
16 Muhammed or Laila
17 What employees may be paid
19 James Bond creator Fleming
20 Place for a red, white, or port
21 "Desire Under the ___"
22 Like some knee patches
25 Conclusion to a romantic note
27 Affirmatively allege
28 Dull discomfort
31 Wind up, as a class
32 Abound
33 Gehrig or Pinella
34 Certain women's legwear
37 Get on the nerves of
38 Breakfast fare
40 Union founded in '35
41 Certain women's legwear
43 Approves of
44 Historic river of Spain
45 China's Sun ___-sen
46 Domain
47 "Battle Cry" actor ___ Ray
48 Downward growth
51 Apply to
52 Blocks of time
53 Subject of a poster with a dog's picture thereon
57 ___ rally
58 Regular invoice from the cable company
62 Opposite of WSW
63 Amusement center
64 Met moment
65 Commonly pierced body part
66 Ukrainian seaport or Texas oil town
67 Bark like a dog

Down

1 "No way," slangily
2 Yoko ___
3 Big Apple coll.
4 Song repeating in one's mind
5 English romance novelist Elinor
6 "St. Elmo's Fire" actor Rob
7 Middle East native
8 Wine and dine
9 Month on a calendario
10 Prosecutors, initially
11 Wagering option at a horse-racing venue
12 Mission to remember in San Antonio
13 "As Seen on TV" knife
18 Vietnam Memorial architect Maya ___
21 Counting out rhyme start
22 Elegant sheet fabric
23 Each companion?
24 Journal that comes out Wednesday in a small town, maybe
26 Baby beef
28 "'Tis a pity!"
29 Bare-bones bed
30 Funny sort's forte
34 Tabula ___
35 "Taxi" character Elaine
36 Faint from rapture
38 Aware of
39 ___ out a living
42 Rows
44 Northern California subregion that encompasses Oakland
46 "Now!"
48 Plains shelter
49 Battle venue
50 Supplication beginning
51 "One-eighty" turn
54 RR stops
55 Advanced religious degs.
56 "Guilty" or "not guilty"
58 "Little Red Book" author
59 Fury
60 Abner's adjective
61 It forms when you sit

Judge Fleming is a widely published cruciverbalist. Send questions and comments to judgevic@gmail.com.

Solution is on page 24.

The Deportation of America's Adoptees

DeLeith Duke Gossett

The goal of the Adoption and Safe Families Act (ASFA)[1] was to promote permanency for children as early as possible. When President Clinton signed the bipartisan bill into law twenty-five years ago, Senator Mary L. Landrieu (D-La.) noted that it "will promote permanency" and "result in more children leaving hopeless situations and finding the best gift we can give a child—a permanent loving home." While ASFA was primarily directed at children in the foster care system, advocates of international adoption have promoted the same goal of giving children a permanent, "forever home." And for years, the United States has led the world in the number of children adopted from other nations. However, the promise of "forever" has been broken for many.

Historically, adoption has been considered a state matter. Each state develops its own laws concerning the formation and dissolution of a family, keeping the "best interests of the child" of paramount concern. However, the United States is also the largest "receiving country" of children through international adoption,[2] which falls under a different governmental system. Children who are born abroad and then adopted by American parents are subject to U.S. immigration law, which is primarily a federal concern.[3]

The children were adopted through a legal process initially; however, as many of the internationally adopted children reached adulthood, they found out they lacked U.S. citizenship because their parents had not fully completed their immigration requirements. Because they were never naturalized, they were forced to live in a "legal limbo," living in the country, but not as a citizen, and unable to secure a green card to work, acquire a driver's license, obtain a passport to travel outside of the country, or register to vote.

Lawmakers passed legislation to grant citizenship to those adoptees who had not been naturalized. However, because of congressional compromise, it omitted a whole segment of the adoptee population: those who had already turned eighteen on or before the Act's passage. An estimated 18,000 or more adoptees are thus classified as noncitizen immigrants, despite the fact that both the sending country and the United States legally agreed to the adoption and officially cut the adoptee's ties with the former country to allow the adoptee to form new family connections in the United States.

In recent years, immigration law has expanded the definition of "aggravated felony" to include even minor, nonviolent crimes. This meant that adoptees who had committed certain crimes were subject to deportation as noncitizen immigrants.[4] They were sent back to their countries of origin—places they did not remember, where they no longer had meaningful family ties or connections, and did not know the language—to predictably negative outcomes. And, under the revised immigration law, judges were stripped of their discretion to intervene.

New legislation has been introduced several times to finally grant citizenship to all adults who were internationally adopted as children. But because the issue is tied to immigration, these bills have failed to pass each time they have been introduced, leaving this group of adoptees without lawful citizenship.

THOUSANDS OF INTERNATIONAL ADOPTEES LACK U.S. CITIZENSHIP

International adoption began as an effort to help children who had been displaced, abandoned, or orphaned by war. The United States first passed the Displaced Persons Act of 1948[5] to allow for the adoption of nearly 2,000 orphaned children under the age of sixteen. Children came from Italy, Poland, Germany, Greece, and other European areas that were impacted by World War II. Following the Korean War, many mixed-race G.I. babies were rejected by a patriarchal society that favored racial purity. They

AUTHOR'S NOTE

The basis of this article is the author's previous work, *"[Take From Us Our] Wretched Refuse": The Deportation of America's Adoptees*, 85 U. Cin. L. Rev. 33 (2017). The author's use of "deportation" in this article is deliberate, even though the nomenclature has changed and the statutory text has replaced the term with "removal."

Footnotes

1. Adoption and Safe Families Act of 1997 (ASFA), Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).
2. Over a twelve-year period, the United States brought in nearly a quarter of a million children from other nations. The high mark was in 2004, when Americans adopted more than 22,884 children from other nations.
3. *See* Passenger Cases, 48 U.S. (7 How.) 283, 392, 400, 409 (1849) (striking state laws that taxed aliens and passengers arriving from foreign ports). The Federal Bureau of Immigration was established in 1891 with responsibility for all immigration matters. It was first overseen by the Treasury Department, but moved to the Department of Labor in 1913, along with a separate Bureau of Naturalization. Twenty years later, the two bureaus merged into a joined unit, the Immigration and Naturalization Service (INS), still under the jurisdiction of the Department of Labor. In 1940 Congress relocated the INS to the United States Justice Department, where it remained until 2003, when the Department of Homeland Security assumed its duties.
4. *See* Schultz v. Gonzales, 221 F. App'x 726 (10th Cir. 2007) (upholding the deportation order of 25-year-old, who was adopted from India at age three but never naturalized, upon his conviction for felony car theft).
5. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009, amended by Pub. L. No. 81-555, 64 Stat. 219 (1950).

were found on doorsteps, in train stations, in public toilets, and garbage dumps. Some blond-headed babies were found washed up from the sea. Congress passed the 1953 Refugee Relief Act[6] and granted visas to allow for the adoption of four thousand Korean children. Soon thereafter, U.S. federal immigration law was changed to allow for the unrestricted entry of legally adopted Korean children.

This was largely due to the work of Harry and Bertha Holt, who received special dispensation from Congress[7] and famously adopted eight children from Korea in the 1950s. A farmer from Oregon, Holt employed several practices to facilitate a greater number of adoptions. First, he implemented "proxy adoptions," obtaining power of attorney and standing in for prospective parents so they did not have to travel to Korea in person for the adoption. Second, he chartered "baby lift" flights to transport large groups of children at a time to the United States. These early methods made the transactions cheaper and faster and facilitated the emerging industry of international adoption, with Holt International Children's Services as its leader.[8]

In 1961, the United States amended the Immigration and Nationality Act of 1952[9] (INA) and revised its laws to allow international adoptions by Americans on a permanent basis, and not merely as a relief effort for refugees.[10] The U.S. State Department reported that 4,017 children, mainly Asian, were adopted by U.S. citizens in 1973. After the fall of Saigon in 1975, President Ford authorized Operation Babylift, and thousands of Vietnamese children were adopted by American families. By 1981, fifty agencies handled international adoptions, many of them facilitated by employing Holt's method of proxy adoption.

Even in the absence of war, the sending nations have tended to be places of political, social, and economic unrest. For example, thousands of babies from Central and South American countries were placed for adoption in the United States.[11] The well-publicized fall of the Ceausescu dictatorship and the plight of children in Romanian orphanages led to an influx of adoption agencies in Bucharest. The collapse of the Soviet empire and the Iron Curtain saw a surge in the number of international adoptions of children with medical issues from Russia. China's governmental one-child policy led to tremendous numbers of children, primarily girls, being adopted by American citizens.

"For whatever reason, whether intentionally or because of oversight, many parents never completed the naturalization process."

Even though international adoption began as a humanitarian effort, many of the adoptees have since found themselves in a precarious place as adults. The United States Constitution provides American citizenship through the Fourteenth Amendment for those "persons born or naturalized in the United States."[12] Because intercountry adoptees were not born on American soil, the United States government did not automatically grant them U.S. citizenship. Instead, under former immigration law, foreign-born children adopted by American parents entered the country as permanent residents with a green card but still had to undergo a separate naturalization process to secure American citizenship.[13] Thus, a child could be legally adopted under state law and still lack U.S. citizenship if they were not naturalized.

For whatever reason, whether intentionally or because of oversight, many parents never completed the naturalization process. The process was expensive and could take up to three years for Immigration and Naturalization Service (INS)[14] to complete. Further, some of the adoption agencies failed to follow up to make sure the steps had been taken. But once their green cards expired, the adopted children lost their legal status and were left to reside in the United States illegally as noncitizen immigrants subject to U.S. Immigration and Customs Enforcement (ICE) action. Indeed, many adoptees learned they lacked U.S. citizenship and were living in the country illegally when they applied for a job, or for a passport, or attempted to register to vote. Others only realized their status when they were flagged for deportation following their conviction for even minor, nonviolent crimes. The adoptees became de facto stateless: the adopting country no longer claimed them, sending them back to countries that gave up all claims to them decades before and no longer wanted them.[15]

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6. The Refugee Relief Act of 1953, Pub. L. No. 203-336, 67 Stat. 400. In addition to the Korean visas, the 1953 Refugee Relief Act allowed entry to almost 200,000 immigrants, with no regard for quotas. *Id.* § 3. However, a family could only adopt two foreign-born children. *Id.* § 5(a).
7. An Act for the Relief of Certain Korean War Orphans (Holt Bill), Priv. L. No. 84-475, 69 Stat. A161 (1955).
8. The Holts officially incorporated Holt International Children's Services in 1956. Holt sought to rescue both physically and spiritually orphaned, abandoned, and vulnerable children. However, his methods were not without criticism, as he accepted many adoptive parents who previously had been turned down by their state systems "for wise and good reasons" before turning to international adoption.
9. Immigration and Nationality Act of 1952 (McCarran–Walter Act), Pub. L. No. 82-414, 66 Stat. 163.
10. An Act to Amend the Immigration and Nationality Act; and for other purposes, Pub. L. No. 87-301, 75 Stat. 650 (1961).
11. Chile, Peru, Bolivia, Paraguay, Ecuador, Guatemala, El Salvador, Honduras, Panama, Brazil, and Colombia were some of the countries that partnered with American agencies for adoption. In 1974 Americans adopted so many babies from Colombia that Colombian novelist Gabriel Garcia Marquez exclaimed, "Americans are importing Colombian babies like bags of coffee."
12. U.S. CONST. amend. XIV, § 1.
13. Immigration and Nationality Act, 8 U.S.C. § 1431(a)(3) (2012).
14. First overseen by the Treasury Department, the Federal Bureau of Immigration moved to the Department of Labor in 1913, along with a separate Bureau of Naturalization. Twenty years later, the two bureaus merged into a joined unit, the Immigration and Naturalization Service (INS), still under the jurisdiction of the Department of Labor. In 1940 Congress relocated the INS to the United States Justice Department, where it would remain until 2003, when the Department of Homeland Security assumed its duties, alongside the newly formed United States Citizenship and Immigration Services (USCIS) and U.S. Customs and Border Protection (USCBP).
15. Rebecca Walsh, *Meth, Adoption, Deportation*, SALT LAKE TRIB., (July 27, 2008), http://archive.sltrib.com/story.php?ref=/news/ci_10011361. For example, India has refused to admit U.S. deportees. *Id.*

> **“[T]he American immigration experience has been as much about exclusion as it has been inclusion.”**

THE EXPANSION OF AGGRAVATED FELONY STATUS IN IMMIGRATION LAW

Despite the creed that America is a “nation of immigrants,”[16] the American immigration experience has been as much about exclusion as it has been inclusion. Early in the nation’s history, President John Adams signed into law the infamous Alien and Sedition Acts, a series of measures that allowed the deportation of immigrants judged to be “dangerous to the peace and safety of the United States.”[17] Those laws were vastly unpopular in the two years of their existence and probably cost Adams the presidency. But their unpopularity did not erase hostility toward certain classes of immigrants. The Chinese Exclusion Act of 1882[18] ended immigration for all Chinese laborers for a period of ten years and also prohibited courts from granting U.S. citizenship to anyone of Chinese descent. The U.S. Supreme Court upheld the restrictive law.[19]

The Immigration Act of 1924[20] excluded Japanese also from migration into the United States and further established a quota system that restricted immigration from Eastern and Southern Europe, Asia, and Africa, but allowed white, Protestant Anglo-Saxon immigrants. This law stood for the next thirty years, when Congress codified restrictive immigration through a quota system in the 1952 INA that provided for the immigration and naturalization of a limited number of Korean and Japanese Americans.

Criminal history has also served as a basis for exclusion. Since 1891, the United States has barred entry to, and also subjected to deportation, immigrants who have been “convicted of a felony or other infamous crime or misdemeanor involving moral turpitude.”[21] The 1917 Immigration Act[22] later authorized the deportation of “any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States.” And those who committed two or more crimes of moral turpitude could be deported any time after entry.

Congress did not define “crime of moral turpitude”; however, courts have generally settled upon the definition as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow men, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”[23] In 1922, convictions for narcotics and controlled substances were also classified as crimes of moral turpitude.[24] Still, the list of deportable offenses was exhaustive and considered a “narrow class” and deportation was considered a “drastic measure.”

However, in the 1980s and 1990s, criminal and immigration legislation greatly expanded the range of deportable offenses. In 1988, Congress passed the Anti-Drug Abuse Act (ADAA),[25] which added as an “aggravated felony” any conviction for murder, federal drug trafficking, and certain firearms offenses. Two years later, the Immigration Act of 1990[26] imported aggravated felony as a deportable offense and added drug trafficking, money laundering, and any “crime of violence” with an imposed sentence of at least five years to the list of offenses that counted as an aggravated felony.

Two pieces of legislation, in particular, have had a profound effect upon immigration and deportation. In 1996, in the wake of the Oklahoma City bombing, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA).[27] The AEDPA was passed with the stated purpose of deterring terrorism and providing justice for the 168 people who were killed when Timothy McVeigh bombed the Alfred P. Murrah Federal Building on April 19, 1995. But the response to domestic terrorism by a U.S. citizen arguably has most impacted “criminal aliens,” as the AEDPA significantly expanded the grounds of deportability for immigrants with criminal records.

On the heels of the AEDPA, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA)[28] in response to calls for tightened national security following the 1993 terrorist attack on the World Trade Center. Representing the most comprehensive immigration legislation since 1952, the IIRIRA amended almost every section of title two of the INA.[29] It expanded upon the ADAA’s definition of aggravated felony and included as crimes of violence those punishable by one year in prison. Even though aggravated felony is a creation of federal law, it applied to crimes a person most likely committed under state

16. *See* John F. Kennedy, A Nation of Immigrants 3 (1964) (“There is no part of our nation that has not been touched by our immigrant background.”).
17. An Act Concerning Aliens, ch. 58, 1 Stat. 571 (1798).
18. Chinese Exclusion Act of 1882, ch. 126, § 14, 22 Stat. 58, 61 (repealed 1943). Chinese immigration resumed with passage of the Magnuson Act, ch. 344, § 3, 57 Stat. 600, 601 (1943), which was passed to recognize the Chinese-American alliance in World War II.
19. Chae Chan Ping v. United States, 130 U.S. 581, 609 (1889) (opining that “[t]he power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the [C]onstitution”). *See also* Geary Act, ch. 60, 27 Stat. 25 (1892) (extending the provisions of the Chinese Exclusion Act for another ten years).
20. Immigration Act of 1924 (Johnson–Reed Act), ch. 190, § 11(a), 43 Stat. 153, 159.
21. Immigration Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.
22. Immigration Act of 1917, Pub. L. No. 64-301, ch. 29, § 19, 39 Stat. 874, 889.
23. *See, e.g.*, Gelin v. U.S. Attorney Gen., 837 F.3d 1236, 1240 (11th Cir. 2016).
24. Narcotic Drugs Import and Export Act (Jones-Miller Act), Pub. L. No. 67-227, ch. 202, 42 Stat. 596 (1922) (excluding 30 grams of marijuana); Padilla v. Kentucky, 559 U.S. 356, 360 (2010) (quoting Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948)).
25. Anti-Drug Abuse Act of 1988 (Drug Kingpin Act), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469.
26. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3), 104 Stat. 4978, 5048.
27. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 [hereinafter AEDPA].
28. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1227(a)(2)(A)(iii)) [hereinafter IIRIRA].
29. *Id.*; INA § 101(a)(43)(F)–(G), 8 U.S.C. § 1101(a)(43)(F)–(G) (2012); Nancy Morawetz, *Understanding the Impact of the 1996 Deportation Law and the Limited Scope of Proposed Reforms*, 113 Harv. L. Rev. 1936, 1939 (2000).

law. That means that even state misdemeanors, such as theft by check, shoplifting, or even failure to appear, have qualified as aggravated felonies under federal immigration law.

IIRIRA's expanded definition of aggravated felony also meant that many of the crimes now "fit within the broad immigration law category of 'crimes involving moral turpitude.'"[30] In the AEDPA, Congress made a single crime of "moral turpitude" a deportable offense without defining its contours.[31] Further, the definition of "conviction" and "sentence" were changed to include expunged convictions and suspended sentences, so that even suspended sentences of one year have qualified as a one-year prison term and met the definition of aggravated felony.[32]

Additionally, Congress allowed aggravated felony to be applied retroactively under IIRIRA, so that then-INS (now ICE) could pursue and remove noncitizens for convictions that occurred before the statute's enactment.[33] That meant that even relatively minor offenses that were not classified as aggravated felonies under immigration law when they were committed could, if later added by Congress to the list, be the basis for immediate deportation for noncitizens. While this would be unconstitutional in a criminal context, the Supreme Court has allowed it because deportation is a civil matter.[34] It also means that noncitizens who plead guilty to offenses that were so minor at the time that they lacked immigration consequences, can be deported if the crimes later become a deportable offense.

What began as a one-paragraph definition for aggravated felony in 1988 grew to over twenty paragraphs with multiple subsections, and the number of deportations rose dramatically. In the seven decades leading up to 1980, the United States had deported approximately 56,000 immigrants because of criminal convictions. However, that number was surpassed in one year alone following the passage of the 1996 laws, and countries that had previously resisted began cooperating and accepting the deportees.[35]

The United States Supreme Court has opined about the harsh effects of the laws. For example, the Court determined that aggravated felony should not encompass simple possession or DUI offenses.[36] Further, in *Carachuri-Rosendo v. Holder*,[37] Justice John Paul Stevens rejected governmental overreach and found that, under any construction, "a 10-day sentence for the unauthorized possession of a trivial amount of a prescription drug" did not comport with the ordinary meaning of aggravated felony to subject someone to deportation. But after the unprecedented terrorist attacks of September 11, 2001, security concerns once again dominated immigration policy, and the government still attempted to deport individuals for similar minor offenses that the Court rejected in *Carachuri-Rosendo*.[38]

"[A]fter the unprecedented terrorist attacks of September 11, 2001, security concerns once again dominated immigration policy..."

THE SIMULTANEOUS NARROWING OF JUDICIAL DISCRETION

For noncitizen immigrants convicted of aggravated felonies, IIRIRA established an expedited removal process without a formal hearing before an immigration judge and effectively eliminated judicial review. Before IIRIRA, a noncitizen subject to deportation could apply to a judge for suspension of deportation and adjustment of status. However, IIRIRA replaced suspension of deportation with "cancellation of removal,"[39] and made it unavailable to any noncitizens convicted of an aggravated felony as defined by immigration law.

IIRIRA's expedited removal process largely "eliminated the role of immigration judges in expulsion decisions"; deportation was all but certain for noncitizens who met the newly expanded definition of an aggravated felony,[40] even if they had been in the country for years and had developed substantial family and community ties. And Congress all but removed judicial discretion to decide otherwise, precluding judicial review of the noncitizen's factual challenges to a final order of removal.[41]

Critics argued that IIRIRA's approach to immigration conflated immigration with crime and treated all immigrants, including law-

30. Morawetz, *supra* note 29, at 1940.
31. AEDPA, *supra* note 27, § 435, at 1274 (codified at 8 U.S.C. § 1227(a)(2)(A)(i)).
32. *See* INA § 101(a)(48), 8 U.S.C. § 1101(a)(48) (2012); *see also* Morawetz, *supra* note 29, at 1942. This further includes charges that have been dropped after successful participation in a rehabilitation or diversion program.
33. IIRIRA, *supra* note 28; 8 U.S.C. § 1101(a)(43); Morawetz, *supra* note 29, at 1939.
34. *Padilla*, 559 U.S. at 362.
35. *Ice Statistics*, U.S. Immigration & Customs Enf't, https://www.ice.gov/remove/statistics (last visited Dec. 20, 2021). Deportations leapt to 63,012 in 1999 alone and increased to 88,000 in 2004. The highest number of deportations occurred in 2012 and 2009, with 407,821 and 401,501 deportations, respectively. From October 2014 through September 2015, fifty-nine percent of the 325,413 people who were deported had criminal convictions. In 2020, ninety-two percent of the 185,884 who were deported had criminal convictions or pending criminal charges.
36. *See* Lopez v. Gonzales, 549 U.S. 47, 59-60 (2006) (noting that aggravated felony was founded in federal law even when state offenses were involved but should not apply to simple drug possession offenses); Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (finding aggravated felony should not apply to DUI offenses).
37. Carachuri-Rosendo v. Holder, 560 U.S. 563, 566, 575 (2010) (rejecting the government's argument that two misdemeanor drug convictions, one for the possession of a single Xanax tablet, amounted to an aggravated felony under federal immigration law).
38. *See, e.g.*, Moncrieffe v. Holder, 569 U.S. 184, 206 (2013) (noting this was the third time in seven years the Court had considered this issue and holding that a non-citizen's state conviction for possession of marijuana with intent to distribute was not an aggravated felony under the INA).
39. 8 U.S.C. § 1229(b).
40. *Padilla*, 559 U.S. at 360 (quoting Fong Haw Tan v. Phelan, 333 U.S. at 10).
41. 8 U.S.C. § 1252(a)(2)(C). Constitutional and legal challenges were still available in federal appeals courts, bypassing district courts. 8 U.S.C. §§ 1252(a)(1); 1252(a)(2)(D). *But see* Nasrallah v. Bar, 140 S. Ct. 1683 (2020) (holding that the appellate court may also review the noncitizen's factual challenges to an order under the Convention Against Torture even for noncitizens who have committed aggravated felonies).

"[T]hat made adoptees who had committed even nonviolent, minor crimes targets for deportation."

ful permanent residents, as dangerous criminals.[42] Even the bill's sponsor, Representative Lamar S. Smith (R-Tex.), along with two dozen congressional leaders, conceded in a letter to then-Attorney General Janet Reno and INS Commissioner Doris Meissner that "some deportations were unfair and resulted in unjustifiable hardship" such that they "call for the exercise of such discretion."

But IIRIRA's language was clear that removal was mandatory for those noncitizens convicted of aggravated felonies, and Congress provided no further recourse. Often referred to as the "criminal-alien bar," Congress expressly decided that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" an aggravated felony. Congress doubled down on this proposition in 2005, when it passed the REAL-ID Act,[43] which eliminated the power of federal district courts to review deportation orders through habeas corpus petitions. And in 2011, the Court circumscribed the ability of the president and state governors to pardon deportation based on narcotics and firearms crimes.[44]

SOME ADOPTEES ARE GRANTED CITIZENSHIP

Adoptees who were born abroad and adopted by American parents, but who had not been naturalized, were classified as noncitizen immigrants and subject to deportation as any other noncitizen alien. And because some state misdemeanors classified a noncitizen immigrant as an "aggravated felon," that made adoptees who had committed even nonviolent, minor crimes targets for deportation. For example, twenty-two-year-old Joao Herbert was convicted for selling 7.5 ounces of marijuana. It was his first offense, and he was sentenced to probation and community treatment. Nevertheless, he was deported because his adoptive American parents never completed the naturalization process. Twenty-five-year-old John Gaul was deported to Bangkok after his conviction for car theft and writing bad checks. Adopted at the age of four by American parents, but never naturalized, he was sent back to Thailand, a place he had never been since his adoption, where he spoke no Thai and had no Thai relatives.

Both of these cases were highly publicized and reached former Representative William Delahunt (D-Mass.), who had adopted a daughter from Vietnam as part of the Operation Babylift program and secured her American citizenship within a few years of her adoption. Representative Delahunt tried to accomplish for adoptees what their parents and agencies had neglected.[45] Speaking from the House floor, he educated his congressional colleagues, who mistakenly thought children adopted from overseas automatically became American citizens. He called on Congress to grant citizenship to non-naturalized adoptees, urging, "No one condones criminal acts, Mr. Speaker; but the terrible price these young people and their families have paid is out of proportion to their misdeeds. Whatever they did, they should be treated like any other American kid. They are our children, and we are responsible for them."[46]

As Delahunt worked the bill in the House, then-Senate Assistant Majority Leader Don Nickles (R-Okla.) began a similar push in the Senate. His legislative counsel, J. McLane Layton, had adopted three children from Eastern Europe in 1995, only to learn they did not automatically receive U.S. citizenship upon adoption because they had been born overseas. Senator Nickles tasked Layton with drafting legislation that would confer automatic citizenship on those not born on American soil but who were subsequently adopted by an American citizen parent. He proposed the legislation to his colleagues with this admonition, "Lawmakers and the public need to understand that these adoptees were adopted by American citizens, were brought to this country legally, [and] were raised in American society." He garnered the unanimous consent of the Senate.

Just five months after its introduction, and after only one hearing, the bill passed both the House and the Senate. In October 2000, former President Bill Clinton signed into law the Child Citizenship Act of 2000[47] (Child Citizenship Act), which amended the INA and automatically granted U.S. citizenship to foreign-born children upon the finalization of their adoptions by

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42. This laid the groundwork for what some have termed the field of "crimmigration." *See* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2170-71 (2014); Juliet Stumpf, *The Crimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367, 380 (2006).
43. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief, Pub. L. 109-13, 119 Stat. 302 (2005) (abrogating the Court's decision in I.N.S. v. St. Cyr, 533 U.S. 289 (2001)).
44. Judulang v. Holder, 565 U.S. 42 (2011).
45. Child Citizenship Act of 2000, H.R. 3667, 106th Cong. (2000). Representative Lamar Smith (R-Tex.) had earlier introduced the Adopted Orphans Citizenship Act, H.R. 2883, 106th Cong. (2000). However, members of Congress, along with representatives from the State Department, INS, and the adoption community, testified that the bill's provision that granted citizenship retroactively to birth might produce inequities between adopted and biological children and other naturalized citizens. *Adopted Orphan Citizenship Act and Anti-Atrocity Alien Deportation Act: Hearing on H.R. 2883 and H.R. 3058 Before the Subcomm. on Immigration and Claims of the Comm. on the Judiciary*, 106th Cong. (2000). Rejecting the "legal fiction" that the child would be "deemed always to have been a United States citizen," which Smith's bill would create, they suggested instead Delahunt's language that conferred automatic citizenship on the date when the statutory criteria were met. *Id.* at 12-14 (testimony of Gerri Ratliff, Director of Business Process and Reengineering, Immigrations Services Division) ("While after the adoption it is entirely fitting and proper that the adopted child be considered equal to the adoptive parents' natural children for citizenship and other purposes, we do not believe it is appropriate to attempt to extend the claim retroactively back to birth."). On July 26, 2000, an amendment substituted the first four sections of Delahunt's bill, H.R. 3667, for the text of Smith's bill, and H.R. 2833 was renamed the Child Citizenship Act of 2000. H.R. REP. NO. 106-852, at 6 (2000).
46. 146 CONG. REC. 18,492 (2000).
47. Child Citizenship Act of 2000, Pub. L. No. 106-395, 114 Stat. 1631 (codified as amended at 8 U.S.C. § 1431 (2012 & Supp. 2014)). Introduced first on Sept. 21, 1999, as the Adopted Orphans Citizenship Act, the bill was revised to also include certain foreign-born biological children.

American citizens. Parents no longer had to go through a separate naturalization process to secure citizenship. Upon the bill's passage, Senator Patrick Leahy remarked, "Given the severe curtailment of noncitizens' rights under the immigration laws we passed in 1996, it is all the more important to extend the right to American parents and their adopted children."[48]

As enacted, the law prospectively and automatically conferred U.S. citizenship on children who were born abroad and coming to the United States on IR-3 visas, acquired when the child's adoption by American citizens was formalized in the country of origin. The Child Citizenship Act required that the child be under the age of eighteen and living in the legal and physical custody of at least one American citizen parent. The child had to be admitted into the United States as an immigrant for lawful permanent residence, and the adoption had to be final.[49] For children arriving on IR-4 visas, given in cases where the adoptions were not formalized in the country of origin, citizenship attached when the parents finalized the adoption by readopting the children in their state of residence.[50]

In either case, under the Child Citizenship Act, the parents no longer had to go through a separate and lengthy naturalization process to secure citizenship for their newly adopted children. In addition to prospectively granting automatic citizenship to future adoptions, the Child Citizenship Act also provided for retroactive citizenship to those foreign-born children who were adopted by U.S. parents but did not acquire citizenship through naturalization before they reached the age of eighteen. An estimated 75,000 adoptees under the age of eighteen became U.S. citizens overnight on February 27, 2001, the date of the Act's enforcement.

Though lauded as a "rare example of bipartisanship on immigration legislation," the Child Citizenship Act's passage only came about because of political compromise. Foreign-born adopted children who turned eighteen on or after February 27, 2001, and who were not previously naturalized, were excluded from U.S. citizenship under the Act. While the bill did provide relief from deportation for those over eighteen who innocently voted as noncitizens (a felony offense), it did not grant citizenship to them.

Ironically, the stories told on the House floor about the experiences of John Gaul (from Thailand) and Joao Herbert (from Brazil) may have worked against them. Simply put, Congress had taken a hardline stance on crime, and the bill failed to gain traction as long as it included citizenship for adult adoptees who had already committed crimes. Thus, advocates were willing to accept the compromise that resulted in the exclusion of those aged eighteen and over from retroactive citizenship. The hope was that if they could get the bill passed for the majority of adoptees, they could then address the Act's shortfalls. Then, just six short months later, 9/11 happened.

"Congress treated legal adoptees no differently than illegal immigrants and terrorists."

THE DEPORTATION OF AMERICA'S ADOPTEES

Border security concerns reached new heights after September 11, 2001, when radical Islamist jihadists hijacked commercial airplanes and attacked the Pentagon and the Twin Towers of the World Trade Center, forcing their collapse. With a nation reeling from the aftermath of September 11, the U.S. government vigorously enforced the stringent AEDPA and IIRIRA 1996 immigration laws. The Child Citizenship Act's passage ensured that adoptees under eighteen would be shielded from deportation as American citizens. But Congress's refusal to grant citizenship to adoptees aged eighteen and over subjected those who had already been punished for their crimes to a second punishment in the form of deportation. By equating the terms *child* and *adult* with age, rather than kinship, Congress treated legal adoptees no differently than illegal immigrants and terrorists.

Meanwhile, U.S. immigration law continued to expand the list of offenses that could subject a noncitizen adoptee to deportation. Because adoptees aged eighteen and over were left out of the Child Citizenship Act's protection, adoptees were left with little recourse. Generally, by the time adoptees discovered their parents had not completed the naturalization process, the entry visas that allowed them to legally live in the United States had lapsed. But green card applications following September 11 typically generated background investigations by the Department of Homeland Security and unwanted attention from then-INS.

Many adoptees were deported back to their countries of origin. The precise number is unknown because the federal government does not track how many adoptees receive citizenship. Critical adoption studies scholar Bert Ballard has estimated that if even 1% of the hundreds of thousands of children who came to the United States through adoption were not naturalized before the Child Citizenship Act came into effect, thousands could potentially be affected. His forecast is in line with the National Council for Adoption and other groups that estimate that 18,000 adoptees are without U.S. citizenship. Some suggest the number is even higher.

But that often led to tragic results when the adopted children were deported to countries where they had no meaningful con-

48. 146 CONG. REC. 22,780 (2000).
49. The Child Citizenship Act of 2000 was enacted before the ratification of the Hague Convention on Intercountry Adoption in 2008. IH-3 visas are issued for children with full and final adoptions from a Hague Convention country. "With an IH-3 visa, a child automatically acquires U.S. citizenship if the child enters the United States before his or her eighteenth birthday and resides with his or her adoptive parents in the United States (or overseas if parents are U.S. government or military personnel assigned abroad)." Elaine Schwieger, *Getting to Stay: Clarifying Legal Treatment of Improper Adoptions*, 55 N.Y.L. SCH. L. REV. 825, 845 & n.97 (2010/2011); *see also Before Your Child Immigrates to the United States*, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/adoption/your-child-immigrates-united-states (last updated July 8, 2021).
50. IH-4 visas are issued for children who are adopted from a Hague member country but whose adoptions are not finalized in that country. "With an IH-4 visa, a child does not automatically acquire U.S. citizenship upon entry to the United States, but becomes a permanent resident (green card holder) and automatically acquires citizenship on the date of his or her adoption in the United States, as long as the adoption occurs before the child's eighteenth birthday." Schwieger, *supra* note 49, at 845 & n.97; *see also Before Your Child Immigrates to the United States*, *supra* note 49.

"[T]hat often led to tragic results when the adopted children were deported to countries where they had no meaningful connections."

nections. For example, four years after his deportation, Joao Herbert, who could not speak Portuguese, was found murdered in the slums of Campinas, near Sao Paulo. Senator Landrieu, herself an adoptive parent, recognized that adoptees who committed misdemeanors or felonies should be punished "with the full penalties against them," as would any other U.S. citizen—but not with deportation.[51] She reminded her colleagues that "[s]ome adopted children, through no fault of their own, endure a precarious legal status, which can result in the horror of being deported to a country they don't remember at all, where they don't have any ties or even speak the language."[52]

Senator Landrieu introduced the 2013 Citizenship for Lawful Adoptees Amendment,[53] which sought to amend the Child Citizenship Act and the INA to provide automatic citizenship to all foreign-born adoptees of American citizen parents. The amendment was attached to a Senate immigration reform bill and specifically targeted those adoptees who were eighteen or over and thus precluded from U.S. citizenship when the Child Citizenship Act was enacted. The Senate approved the measure, but it stalled in the House of Representatives, once again leaving this group of adoptees aged eighteen and over without U.S. citizenship.[54]

THE ADOPTEE CITIZENSHIP ACT

Until 1995, Americans adopted more children from South Korea than from any other country. The work that Harry Holt began resulted in Korean adoptees comprising one of the largest adoptee communities in the country. As a result, they have also been disproportionately affected by the loophole created by the Child Citizenship Act and, thus, have actively mobilized to lobby for legislation that would finally provide redress for the thousands of adoptees without U.S. citizenship.

To finally close the gap left by the 2000 Child Citizenship Act, and to make all foreign-born adoptees U.S. citizens, regardless of their age, Senator Amy Klobuchar (D-Minn.) proposed the Adoptee Citizenship Act of 2015[55] (Adoptee Citizenship Act). The bipartisan legislation sought to amend section 320(b) of the INA "to grant automatic citizenship to all qualifying children adopted by a U.S. citizen parent, regardless of the date on which the adoption was finalized." Specifically, the bill provided for automatic citizenship of all persons born outside of the United States but adopted before age eighteen by a U.S. citizen parent.[56]

For those who had already been deported for "minor crimes" and served their sentences, the Adoptee Citizenship Act proposed to create a "clear pathway" for their return. To obtain a visa, they had to submit to a criminal background check, and any outstanding criminal issues flagged by law enforcement agencies had to be resolved in conjunction with the U.S. Department of Homeland Security and U.S. Department of State.

The bill was referred to the Committee on the Judiciary, and Senator Klobuchar, who had co-sponsored the failed 2013 bill with Senator Landrieu, advocated for its advancement. She stated, "We're dealing here with adoptees, who grew up in American families, who went to American schools, who led American lives, and are still leading them. . . . And the constant threat to the life that they know is really unjust." She noted the struggle that many adoptees encounter, as they are continually subjected to a life where they cannot advance without the ability to obtain an education or a job.

Representative Adam Smith (D-Wash.) and Representative Trent Franks (R-Ariz.) introduced a House companion bill in 2016 that tracked the Senate bill language identically.[57] Representative Franks, who served as co-chair of the Congressional Coalition on Adoption, held a press conference and called the omission of adoptees aged eighteen and over from the Child Citizenship Act an "arbitrary oversight." He acknowledged that the adoptees had "lived their entire lives knowing only the United States as home," and emphasized that "[a]dopted individuals should not be treated as second class citizens just because they happened to be the wrong age when the Child Citizenship Act of 2000 was passed." However, the Act died in committee in both houses and was not enacted.

Representative Smith and Representative John Curtis (R-Utah) recently reintroduced the Adoptee Citizenship Act.[58] This is the fourth iteration of the Act that Representative Smith has introduced, and the third that Senator Blunt has sponsored.[59] But each version has been stymied amid ongoing anti-immigration

51. 159 Cong. Rec. S4435-44 (daily ed. June 13, 2013). "[Deportation] may be an option for illegal immigrants but not children who have been adopted by American citizens." *Id.*
52. *Senator Landrieu Passes Amendment to Help Adopted Children Secure Citizenship*, Equality for Adopted Children (June 18, 2013), http://www.equalityforadoptedchildren.org/about_each/news_&_updates.html (quoting Sen. Landrieu). Senators Dan Coats (R-Ind.), Amy Klobuchar (D-Minn.), and Roy Blunt (R-Mo.) co-sponsored the bill. *Id.*
53. Amendment to the Border Security, Economic Opportunity, and Immigration Modernization Act, S. Amdt. 1222 to S. 744, 113th Cong. (2013–2014).
54. The House companion bill was introduced on Oct. 2, 2013, but was not enacted. H.R. 15, 113th Cong. (2013).
55. Adoptee Citizenship Act of 2015, S. 2275, 114th Cong. (2015). Senator Klobuchar served as co-chair of the Congressional Coalition on Adoption. The bill was co-sponsored by Senators Dan Coats (R-Ind.), Jeff Merkley (D-Or.), Kirsten Gillibrand (D-N.Y.), Brian Schatz (D-Haw.), Mazie Hirono (D-Haw.), and Patty Murray (D-Wash.). *Id.*
56. For the Act to apply, the adoptee had to be in the legal custody of the citizen parent before age eighteen, a resident of the United States pursuant to a lawful admission on the date of the enactment of the Act, and not already a U.S. citizen. For persons residing outside of the United States on the Act's date of enactment, citizenship became automatic once the person lawfully entered and was physically present in the United States.
57. Adoptee Citizenship Act of 2016, H.R. 5454, 114th Cong. (2016).
58. Adoptee Citizenship Act of 2021, H.R. 1593, 117th Cong. (2021); Adoptee Citizenship Act of 2021, S. 967, 117th Cong. (2021).
59. Adoptee Citizenship Act of 2018, H.R. 5233, 115th Cong. (2018); Adoptee Citizenship Act of 2018, S. 2522, 115th Cong. (2018); Adoptee Citizenship Act of 2019, H.R. 2731, 116th Cong. (2019); Adoptee Citizenship Act of 2019, S. 1554, 116th Cong. (2019). None of the bills received a committee vote.

concerns and polarized politics while, once again, the adoptees are left without citizenship.

CONCLUSION

The significant broadening of the grounds for deportation and the simultaneous curtailing of judicial review has resulted in a "radical transformation of immigration law" that bows to party politics rather than family unification. Thus, given the tense political partisanship that now surrounds nearly every aspect of border policy, it seems unlikely that Congress will be amenable to any legislation that expands any part of immigration law—even to grant citizenship to adult adoptees who originally came to this country legally.

These adoptees were at risk during the Obama administration, which ousted more than two million immigrants, more than any other preceding president at that time.[60] In his November 2014 address to the nation, President Obama pointedly addressed criminal activity, stating that deportation efforts would be directed "not at families, but at felons," whom he defined as dangerous criminals who pose a threat to the nation's security. But President Obama's description of a felon was narrower than that defined by federal immigration law, and adoptees were at risk as long as aggravated felony served as the priority measure.

Foreign-born noncitizen adoptees were especially at risk during the Trump administration, where his "get tough" approach to "restore the rule of law" targeted *all* noncitizen immigrants and those who had committed *any* crime.[61] Predictably, following the issuance of his executive order, the deportation numbers increased 42% percent from the year before.[62] That number included both those who had been convicted and those who had been merely charged with nonviolent crimes, including traffic tickets and drug possession. Roughly 10% of the individuals arrested had neither criminal convictions nor pending charges.

But even though President Biden has vowed to take a different approach to immigration than Trump, the adoptees are also at risk during a Biden administration. In laying out his priorities, President Biden indicated a shift from the "everyone goes" approach of the previous administration to a focus on those who pose a national security or "public safety" risk.[63] And even though he highlighted discretion, his metric for who qualified under the public safety prong included those who had committed serious crimes under federal immigration law. In other words, an aggravated felony under immigration law still puts a noncitizen adoptee at risk.

However, foreign-born adoptees occupy a unique space. They are not refugees seeking asylum, nor are they the same as Dreamers, who were brought here illegally. Rather, they came to this country through a legal process, with the governments of both the sending country and the United States signing off on the adoptions. The children became part of American families, just the same as if they had been born biologically into those families. Through no fault of their own, they did not obtain citizenship only because parents and adoption agencies did not follow through on naturalization requirements.

Still, foreign-born adoptees are being treated as all other noncitizen immigrants and getting lost amid the noise surrounding immigration concerns. And under current immigration law, judges are all but powerless to intervene to deter what the Supreme Court has called "the severe penalty" of deportation.[64]

Nearly 100 years ago, Judge Learned Hand opined that it would be "deplorable" to deport a young man born abroad but brought to this country as an infant. He stated, "[H]e is as much our product as though his mother had borne him on American soil . . . . However heinous his crimes, deportation is to him exile, a dreadful punishment, abandoned by the common consent of all civilized peoples. . . . [S]uch a cruel and barbarous result would be a national reproach."[65] Indeed, other countries have challenged the United States, as the world leader in the number of children adopted from abroad, to "also lead the world in the humanitarian treatment of them."

Accordingly, Congress should finally grant retroactive citizenship to all U.S. foreign-born children adopted by U.S. citizen parents, regardless of their age. Only then will the goal of "forever," promoted by advocates of both ASFA and international adoption, finally be realized.[66]

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60. President Obama called himself the "champion in chief" of immigration law reform; however, he was dubbed the "Deporter in Chief" instead. According to ICE data, the Department of Homeland Security carried out 438,421 deportations in 2013 and followed that with 414,481 in 2014.
61. Exec. Order No. 13768, 82 Fed. Reg. 8799 (Jan. 25, 2017).
62. According to ICE data, between Jan. 25, 2017, and the end of fiscal year 2017 (Sept. 30, 2017), ICE made 110,568 arrests compared to 77,806 during the same period in 2016.
63. Memorandum from Alejandro Mayorkas, Sec'y, Dep't of Homeland Sec., to Tae D. Johnson, Acting Comm'r, U.S. Customs & Border Prot., et al. 1 (Sept. 30, 2021), https://drive.google.com/file/d/18j2S2BvZVnK8sjoRSTVUgkg8Bh9dWQQr/view.
64. *Padilla*, 559 U.S. at 362.
65. United States *ex rel.* Klonis v. Davis, 13 F.2d 630, 630–31 (2d Cir. 1926).
66. On Feb. 4, 2022, the House passed the Adoptee Citizenship Act of 2021, H.R. 1593, as part of the America COMPETES Act of 2022, H.R. 4521. However, the citizenship provision was not part of the Senate's companion bill, the United States Innovation and Competition Act, S. 1260, and it is unclear if a reconciled version will finally include relief for these adoptees.

The Impact of Anti-Black Racism on the Sentencing of "Black Offenders" in Canada:

What Is the Correct Approach?

Wayne K. Gorman

Should the approach to the sentencing of "Black offenders" in Canada be different from the approach to non-Black offenders as a result of the history of racism and discrimination suffered by Black people in Canada?

INTRODUCTION

In this column, I am going to review two recent Canadian Court of Appeal decisions (*R. v. Anderson*, 2021 NSCA 62, and *R. v. Morris*, 2021 ONCA 680), which have considered this question. As will be seen, two very different answers have been provided, sparking a debate in Canada about the appropriate approach to be taken to the sentencing of individuals who are members of a group that have been the subject of historical racism and discrimination.

I intend to review the circumstances of the offences committed by the offenders in both cases and then review how each Court of Appeal addresses the proper approach to the imposition of sentence upon Black offenders in Canada. However, to place the debate in context, I intend to commence with a review of the approach to sentencing that applies in Canada. In particular, I will set out how it applies to Indigenous offenders, for which Canada has adopted an approach which differs significantly from that applied to non-Indigenous offenders. In *R. v. Mero*, 2021 BCCA 399, for instance, the British Columbia Court of Appeal recently pointed out that "Indigenous offenders are different from other offenders because…they 'are victims of systemic and direct discrimination.'" *Mero,* para. 69 (citation omitted). This is important because at the core of the debate over the sentencing of Black offenders in Canada is whether the approach applied to Indigenous offenders should be applied to Black offenders because Black Canadians have also been the victims of systemic and direct discrimination.

SENTENCING IN CANADA

In Canada, judges have a broad discretion in the imposition of sentence based upon the circumstances of the offence and the offender. They are not bound by statutory guidelines other than minimum and mandatory penalties set out in the *Criminal Code of Canada*, R.S.C. 1985 [hereinafter *Criminal Code*].

The Canadian approach to sentencing is an individualized one. Thus, in *R. v. Boudreault*, [2018] 3 S.C.R. 559 (Can.), the Supreme Court of Canada indicated that "sentencing is first and foremost an individualized exercise, which balances the various goals of sentencing, while taking into account the particular circumstances of the offender as well as the nature and number of his or her crimes." *Boudreault*, para. 58. On its face, this appears inconsistent with an approach based upon racism suffered by an ethnic or race community.

Any sentence imposed in Canada must be consistent with the purposes and principles of sentencing set out in the *Criminal Code*. The *Criminal Code* states that the fundamental purpose of sentencing "is to contribute...to respect for the law and the maintenance of a just, peaceful, and safe society. " *See Criminal Code,* § 718. It also indicates that any sentence imposed must be "proportionate to the gravity of the offence and the degree of responsibility of the offender." *See Criminal Code,* § 718.1.

In *R. v. Friesen*, 2020 S.C.C. 9, the Supreme Court of Canada indicated that "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing… and is now codified as the 'fundamental principle' of sentencing in s. 718.1 of the *Criminal Code*." *Friesen*, para. 30. More recently, in *R. v. Parranto*, 2021 S.C.C. 46, the Supreme Court held that "[p]roportionality is the organizing principle in reaching this goal ['a fair, fit and principled sanction']. Unlike other principles of sentencing set out in the *Criminal Code*, proportionality stands alone following the heading 'Fundamental principle' (s. 718.1)… The principles of parity and individualization, while important, are secondary principles." *Parranto*, para. 10.

THE SENTENCING OF INDIGENOUS OFFENDERS

The principles set out earlier apply to all offenders, regardless of their specific racial backgrounds or cultural heritage. However, the *Criminal Code of Canada* also contains one sentencing provision that applies based solely upon cultural heritage. Section 718.2(e) of the *Criminal Code* applies specifically to Indigenous offenders. This legislation was designed, in part, to reduce the overrepresentation of Indigenous offenders in Canadian prisons.[1] Section 718.2(e) of the *Criminal Code* states as follows:

> *A court that imposes a sentence shall also take into consideration the following principles:*
>
> *(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should*

Footnotes

1. Danielle Sandhu, *A Reasonable Alternative to Guilt: Flight and Anti-Black Racism*, 42 WINDSOR REV. LEGAL & SOC. ISSUES 51, 51 (2021) (Danielle Sandhu notes that "Black people are disproportionately represented in police interactions ranging from street-checks to deadly use of force, and are disproportionately incarcerated across Canada.").

be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders. [2]

In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada held that there "is no discretion as to whether to consider the unique situation of the aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." *Gladue*, para. 82. Subsequently, in *R. v. Ipeelee*, [2012] 1 S.C.R. 433, the Supreme Court stressed the importance of judicial notice in the sentencing of Indigenous offenders. The Court held in *Ipeelee* that sentencing courts "must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples." *Ipeelee*, para. 60. Finally, in *R. v. Boutilier*, [2017] 2 S.C.R. 936, the Supreme Court held that "through s. 718.2(e) of the *Criminal Code*, Parliament has directed sentencing judges to pay particular attention to the circumstances of Indigenous offenders. This recognizes that the systemic disadvantages and marginalization faced by Indigenous people inform moral blameworthiness and therefore the proportionality of sentences for Indigenous offenders." *Boutilier*, para. 108 (citation omitted).

Thus, it is clear that Canadian "sentencing judges are required to consider the *Gladue* principles in every case involving the sentencing of an Indigenous offender." *See R. v. Sanderson*, 2018 MBCA 63, para. 10. However, this approach to sentencing is not judge made. It flows form Parliament's decision to single out Indigenous offenders when it comes to sentencing. Section 718.2(e) of the *Criminal Code* mandates an approach to sentencing for Indigenous Canadians that is quite different from the approach to be adopted in relation to non-Indigenous offenders.

The *Criminal Code of Canada* does not contain a similar provision in relation to Black offenders. However, in a case comment on *Morris* and *Anderson*, Professor Tim Quigley suggests that "[t]he language of s. 718.2(e) is rather soft in its direction to judges, and therefore giving 'particular attention' to the circumstances of Aboriginal offenders does not mean that that same 'particular attention' cannot be paid to other groups suffering from systemic discrimination and over incarceration." *See NJI Criminal Law E-Letter 324*, 24.

THE CIRCUMSTANCES OF THE OFFENCES IN ANDERSON & MORRIS

In both cases, very serious crimes were committed.

R. V. ANDERSON

In *Anderson*, the accused, who is referred to in the judgment as an offender of "African descent," was convicted of a firearm offence relating to the possession of a loaded handgun. The Nova Scotia Court of Appeal indicated that "[o]n November 2, 2018 at 10 p.m., Rakeem Anderson was stopped by police at a random motor vehicle checkpoint on Highway 102. He was alone. A pat-down search located a loaded .22 calibre revolver in his waist band." *Anderson*, para. 15.

The Crown sought the imposition of a period of incarceration in the range of two to three years. The sentencing judge ordered that an Impact of Race and Culture Assessment Report be prepared (IRCA) and imposed a non custodial sentence. On appeal, the Crown did not seek an increase in sentence. Rather, it sought "guidance for courts tasked with applying the principles of sentencing to offenders like Mr. Anderson who are of African descent." The Court of Appeal affirmed the sentence imposed.

R. V. MORRIS

In *Morris*, the accused, who is referred to in the judgment as a "Black offender," was convicted of a number of firearm offences. The Ontario Court of Appeal indicated that after being arrested, the police found a "38 calibre Smith & Wesson handgun" in a jacket the accused had been wearing. *Morris*, para. 20.

Two reports were filed at the sentence hearing: (1) an "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", and (2) a report titled a "Social History of Kevin Morris" (the "Sibblis Report").

The trial judge in *Morris* also imposed a non-custodial sentence. On appeal, the Crown argued that the sentence imposed was "manifestly unfit and the trial judge made several material errors in his reasons, particularly in his treatment of the evidence led by Mr. Morris concerning the impact of overt and institutional anti-Black racism." *Morris*, para. 4.

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2. In *Sentencing Developments in the United States in 2020: The Pandemic, Black Lives Matter and Further Erosion of Mass Incarceration*, Mirko Bagaric and Peter Isham note that though "[r]educing the over-representation of African Americans in prisons is an objective which has gained renewed impetus since the killing of George Floyd," there "has been no concrete legislation or other developments which have been implemented to further this goal."

> This goal is especially important given that African Americans have been imprisoned at a rate more than three times that of the rest of the community. More than one in 50 African Americans is currently incarcerated. As of March 2020, Black Americans made up 40% of the incarcerated population, yet they make up only 13% of the total US population. The likelihood of imprisonment of African American males changes depending on their age; for instance, about one in 20 African American males between ages 35 and 39 were imprisoned in 2018. There has been a similar trend in jails; despite an overall decrease in the total jail population, the rate of incarceration of African Americans in jails is still nearly four times as high as that of white and Hispanic individuals as of mid-2018.
>
> While the Black Lives Matter movement has added impetus to the need to reduce the over-representation of African Americans in prisons, there has been no concrete legislation or other developments which have been implemented to further this goal. The Brennan Centre has recently grounded recommendations for sentencing reforms (including repealing mandatory minimum sentences for drug offences and reducing prison numbers through retroactive changes).

Mirko Bagaric & Peter Isham, *Sentencing Developments in the United States in 2020: The Pandemic, Black Lives Matter and Further Erosion of Mass Incarceration*, 45 CRIM. L. J. 114, 118 (2021).

The Ontario Court of Appeal concluded that a period of three years of imprisonment was an appropriate sentence. It indicated that a "person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society." *Morris*, para. 68.

Though both Courts of Appeal agreed that anti-Black racism was a factor to be considered in sentencing, they reached very different conclusions as to the impact of that racism on determining what constituted an appropriate sentence, despite the similarities of the offences committed by the two offenders. This is the fundamental difference of opinion reflected by these two decisions and it illustrates the significant practical impact that can occur, depending on the approach to this issue that is taken.

THE APPROACHES ADOPTED

In *Anderson*, the Nova Scotia Court of Appeal indicated that "the disproportionate incarceration of Black offenders reflects the systemic discrimination and racism that permeates the criminal justice system.…The experience of African Nova Scotian offenders like Mr. Anderson must be better reflected than it has been in the sentencing process and outcomes. In its intervention the Criminal Lawyers' Association has said: '…it is time that the distinct mistreatment of Black people in society be given its due recognition in criminal sentencing.'" *Anderson*, para. 5, 8.

In *Morris*, though the Ontario Court of Appeal was willing to accept that "evidence relating to the impact of anti-Black racism on an offender will sometimes be an important consideration on sentencing," it concluded that the trial judge's "task is not primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles and objectives of sentencing laid down in Part XXIII of the *Criminal Code*." *Morris*, para. 56.[3]

HOW IS THE EXISTENCE OF ANTI-BLACK RACISM TO BE ESTABLISHED?

The Nova Scotia Court of Appeal held in *Anderson* that "the existence of anti-Black racism can be admitted on the basis of judicial notice without the need for evidence. Judges are entitled to take notice of racism in Nova Scotia and have done so. There is no justification for requiring offenders to produce *viva voce* evidence of this pernicious historical reality." *Anderson*, para. 111. This is identical to the approach mandated by the Supreme Court of Canada in relation to Indigenous offenders.

Similarly, in *Morris*, the Ontario Court of Appeal indicated that "[i]t is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis." *Morris*, para. 1.

The Ontario Court of Appeal concluded in *Morris* that Canadian judges "should take judicial notice of the existence of anti-Black racism in Canada and its potential impact on individual offenders. Courts should admit evidence on sentencing directed at the existence of anti-Black racism in the offender's community, and the impact of that racism on the offender's background and circumstances." *Morris*, para. 123.

Though both Courts of Appeal agreed that sentencing judges can take judicial notice of the existence and impact of anti-Black racism, they reached different conclusions on the practicable impact of this notice. The primary reason for this divergence is their differing opinions on whether a "causal connection" between the existence of anti-Black racism and the offence committed by a Black offender is necessary for racism to become a mitigating factor in sentencing. In other words, does there have to be a connection between the racism suffered and the offence committed?[4]

IS A CAUSAL LINK NECESSARY?

Though it is not debatable that Black-Canadians have been the subject of historical and ongoing discrimination and racism, the question remains: for this to be a mitigating factor in sentencing does there have to be a causal link between the racism suffered and the specific offence committed? In *Ipeelee*, the Supreme Court rejected the proposition that an Indigenous offender need "establish a causal link between background factors and the commission of the current offence before being entitled to have those matters considered by the sentencing judge." *Ipeelee*, para. 81. However, the Supreme Court went on to say that "[u]nless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence." *Ipeelee*, para. 83.

In *Anderson*, it was suggested that a sentencing judge "does not have to be satisfied a causal link has been established 'between the systemic and background factors and commission of the offence….'" *Anderson*, para. 118. The Nova Scotia Court of Appeal's rational for this approach involved the adoption of the Supreme Court's jurisprudence in relation to the sentencing of Indigenous offenders:

> These principles parallel the requirements in law established by the Supreme Court of Canada in relation to *Gladue* factors in the sentencing of Indigenous offenders. As

3. A similar approach has been adopted in New Zealand. In Tipene v. R [2021] NZCA 565, para. 23, for instance, the New Zealand Court of Appeal indicated that "[d]iscounts for systemic deprivation and disadvantaged backgrounds can range widely depending upon the identifiable linkage between the offender's personal circumstances and their offending, and thus their moral culpability. Recent decisions of this Court have approved discounts of some 15 per cent as being appropriate in cases of serious offending in the context of a culturally alienated and marginalised upbringing."

4. R. v. Abdisalam, 2021 MBCA 97, para. 10 (the accused, a "permanent resident" of Canada from Somalia, argued on appeal that the sentencing judge failed "in assessing his moral culpability…to take into account his experience with anti-Black racism as a youth." In rejecting this argument, the Manitoba Court of Appeal indicated that "unlike the situation in *R v Anderson*, 2021 NSCA 62 and *R v Morris*, 2021 ONCA 680, there was no evidentiary foundation before the judge regarding overt and systemic anti-Black racism or its impact on this particular accused.").

> with Indigenous offenders, while an African Nova Scotian offender can decide not to request an IRCA, a sentencing judge cannot preclude comparable information being offered, or fail to consider an offender's background and circumstances in relation to the systemic factors of racism and marginalization. To do so may amount to an error of law. *Anderson*, para. 118.

In *Morris*, however, the Ontario Court of Appeal concluded that a causal link was required. It held that though evidence of "the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices" is relevant, it is not enough to cause a reduction in sentence:

> There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. *Morris*, para. 97.

This difference of opinion is fundamental to the different results in sentencing reflected by the two appellate decisions. For the Nova Scotia Court of Appeal, the history of anti-Black racism is a factor that lessens the moral culpability of the offender, regardless of the circumstances, just as it does for Indigenous offenders. For the Ontario Court of Appeal, something more than the existence of anti-Black racism is necessary for it to constitute a mitigating factor in a specific case. For that Court of Appeal, the sentencing principle of proportionality requires an analysis beyond the presence of anti-Black racism.

THE PROPORTIONALITY PRINCIPLE OF SENTENCING

As was pointed out earlier, this is the fundamental principle of sentencing in Canada. The "principle of proportionality is central to Canadian sentencing.…A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle is based upon the fundamental notion that the degree of punishment must reflect the seriousness of the offence and the moral blameworthiness of the offender." *See R. v. SADF*, 2021 MBCA 22, para. 22. In "other words, the ultimate sentence must correspond to the degree of 'gravity of the offence' (i.e., how serious the offence is); and the degree of responsibility of the offender (i.e., their moral blameworthiness)." *See R. v. Suter*, [2018] 2 S.C.R. 496, para. 168.

THE SERIOUSNESS OF THE OFFENCE

The seriousness of an offence is determined by the nature of the offence and its consequences. Thus, the "more serious the crime and its consequences…the heavier the sentence will be." *See R. v. Lacasse*, [2015] 3 S.C.R. 1089, para. 12.

In *Morris*, the Ontario Court of Appeal held that "when assessing the offender's degree of personal responsibility, an offender's experience with anti-Black racism does not impact on the seriousness or gravity of the offence." *Morris*, para. 3. The Court of Appeal indicated that "[p]ossession of a loaded, concealed handgun in public is made no less serious, dangerous, and harmful to the community by evidence that the offender's possession of the loaded handgun can be explained by factors, including systemic anti-Black racism, which will mitigate, to some extent, the offender's responsibility." *Morris*, para. 76.

In contrast, in *Anderson*, it held that "[e]ven where the offence is very serious, consideration must be given to the impact of systemic racism and its effects on the offender. The objective gravity of a crime is not the sole driver of the sentencing determination which must reflect a careful weighing of all sentencing objectives." *Anderson*, para. 145.

THE MORAL CULPABILITY OF THE OFFENDER

The "severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender." *Lacassse*, para. 12.

In *Anderson*, the Nova Scotia Court of Appeal held that the "moral culpability of an African Nova Scotian offender has to be assessed in the context of historic factors and systemic racism.… The African Nova Scotian offender's background and social context may have a mitigating effect on moral blameworthiness." *Anderson*, para. 146. The Court of Appeal went on to say that "the use of denunciation and deterrence to protect societal values should be informed by a recognition of society's role in undermining the offender's prospects as a pro-social and law-abiding citizen." *Anderson*, para. 160.

Once again, the Nova Scotia Court of Appeal found support for this conclusion in the Supreme Court's Indigenous sentencing jurisprudence. Thus, the Court of Appeal noted that "[i]n *Ipeelee*, the Supreme Court of Canada recognized this principle in relation to Indigenous offenders. It should be applied in sentencing African Nova Scotians. Sentencing judges should take into account the impact that social and economic deprivation, historical disadvantage, diminished and non-existent opportunities, and restricted options may have had on the offender's moral responsibility" *Anderson*, para. 146. In other words, a Black offender's degree of responsibility for her or his offence is lessened as a result of anti-Black racism without any specific evidence of the impact it has had upon the specific offender.

The Ontario Court of Appeal adopted a different approach. In *Morris*, it held that "as with Indigenous offenders, the discrimination suffered by Black offenders and its effect on their background, character, and circumstances may, in a given case, play a role in fixing the offender's moral responsibility for the crime, and/or blending the various objectives of sentencing to arrive at an appropriate sanction in the circumstances." *Morris*, para. 123.

The key distinction being the use of the words "in a given case."

THE COMPARISON TO INDIGENOUS OFFENDERS: SECTION 718.2(E) OF THE CRIMINAL CODE

As noted earlier, § 718.2(e) of the *Criminal Code* makes specific reference to Aboriginal offenders. The *Criminal Code* does not single out any other ethnic or racial community, including Black or African Canadian offenders. As we also saw, this did not discourage the Nova Scotia Court of Appeal from taking Indige-

nous sentencing principles and applying them directly to the sentencing of Black offenders. Interestingly, in *Gladue*, the Supreme Court indicated that "the circumstances of aboriginal people are unique." *Gladue*, para. 93(6).

The Ontario Court of Appeal rejected this approach. In *Morris*, it held that the sentencing principles applicable to Indigenous offenders do "not apply to Black offenders.…We do not agree that this court should equate Indigenous offenders and Black offenders for the purposes of s. 718.2(e). We come to that conclusion for two reasons.…Sentencing policy falls to be set, first and foremost, by Parliament. Parliament chose to specifically single out one group—Aboriginal offenders—in the context of the operation of the restraint principle in sentencing, especially as applied to imprisonment." *Morris*, para. 13, 118-119.

In reaching this conclusion, the Ontario Court of Appeal placed great reliance on Parliament's decision to make an "exclusive reference" to Aboriginal offenders in § 718.2(e) of the *Criminal Code*:

> …the rationale offered in *Gladue* and *Ipeelee* for applying the restraint principle differently in respect of Indigenous offenders does not apply to Black offenders. Although there can be no doubt that the impact of anti-Black racism on a specific offender may mitigate that offender's responsibility for the crime, just as with Indigenous offenders, there is no basis to conclude that Black offenders, or Black communities, share a fundamentally different view of justice, or what constitutes a "just" sentence in any given situation. The Indigenous offender's culture and historical relationship with non-Indigenous Canada is truly unique. That uniqueness explains the very specific and exclusive reference to "Aboriginal offenders" in s. 718.2(e). *Morris*, para. 122.

Interestingly, in *Morris* the Aboriginal Legal Services, which was granted intervener status, took the position that the Indigenous sentencing jurisprudence "developed in reference to the application to Indigenous offenders of the restraint principle in s. 718.2(e) of the *Criminal Code*, cannot be applied to non-Indigenous offenders." *Morris*, para. 10. In *Anderson*, though there were interveners, none of them represented the Indigenous community. As a result, the Nova Scotia Court of Appeal has adopted an approach which the Indigenous community appears to have rejected, without having heard from them.

Finally, in *R. v. F.L.*, 2018 ONCA 83, the Ontario Court of Appeal pointed out that though sentencing judges are "obliged to take judicial notice of [*Gladue*] factors, they do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel." *F.L*, para. 39. In contrast, in *Morris*, the Nova Scotia Court of Appeal appears to be suggesting that African-Canadian offenders should receive lesser sentences based upon the historical impact of anti-Black racism. If adopted, this would result in Black offenders being treated more leniently than Indigenous offenders in Canada, despite Parliament's decision to exclusively refer to Aboriginal offenders in § 718.2(e) of the *Criminal Code*.

WHAT IF THE VICTIM IS FROM A COMMUNITY THAT SUFFERS FROM HISTORICAL PREJUDICE AND RACISM?

Neither Court of Appeal commented upon the problem of Black offenders committing offences against Black victims. This is important because, as noted by the Supreme Court: "Children who belong to groups that are marginalized are at a heightened risk of sexual violence that can perpetuate the disadvantage they already face. This is particularly true of Indigenous people.… Children who belong to other groups that face discrimination or marginalization in society are also especially vulnerable to sexual violence. For instance, children and youth in government care are particularly vulnerable to victimization." *Friesen*, para. 70-71.

Parliament has specifically addressed this problem by enacting §§ 718.04 and 718.201 of the *Criminal Code*. These provisions read as follows:

> *718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.*
>
> *718.201 A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims.*

The decision in *Anderson* did not consider these provisions, and the Nova Scotia Court of Appeal may take a different view if the victim is also an African Canadian. Having said this, the Court's decision in *Anderson* reflects an approach that is inconsistent with these provisions in that it concentrates primarily, if not exclusively, on a historical factor of which both victims and offenders have been impacted, but only to the benefit of the offender. To change direction, the Nova Scotia Court of Appeal is going to have to apply the above provisions to offences committed by African Canadian offenders against African Canadian children and women.

CONCLUSION

Though the two Courts of Appeal differ significantly in relation to how historical racism effects the sentencing of Black offenders, they agree that it is a significant factor. This latter conclusion is not universally accepted in Canada. Michael C. Plaxton, for instance, in *Nagging Doubts About the Use of Race (and Racism) in Sentencing*, 8 C.R. (6th) 299, 300-302 (2003), suggests that racism against a particular community should not "affect" the sentence imposed:

> Racism pervades social life; as a result, people of certain ethnic groups are over-represented in the criminal justice system. One finds it difficult to state precisely how or why this fact, standing alone, ought to affect the sentencing process. First and foremost, sentencing hearings determine the level of moral blameworthiness of offenders, and calculate fit sentences on that basis. Unless a factor affects one's

understanding of the offender's moral blameworthiness or affects the offender's experience of a sentence, one cannot clearly see why that factor should affect the result....

There seems no principled means of using the sheer fact of systemic racism as a factor in mitigation of sentence. To make the sentencing hearing into the sort of forum where the judge could make statements about specific social ills through the sentence itself requires one to completely re-conceive the nature and purpose of the sentence; and, possibly, the nature of criminal justice generally. Neither Parliament, nor the Supreme Court, has made such wholesale changes.[5]

In *R. v. Wells*, [2000] 1 S.C.R. 207, the Supreme Court indicated that that "the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance." *Wells*, para. 42. The Supreme Court also held that though § 718.2(e) "requires a different methodology for assessing a fit sentence for an aboriginal offender; it does not mandate, necessarily, a different result." *Wells*, para. 44.

In *Gladue*, the Supreme Court indicated, however, that "jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence." *Gladue*, para. 95. When read in light of *Wells*, this suggests a limited approach to sentence reduction based upon Indigenous heritage.

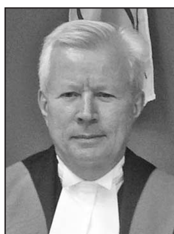
It is interesting to contrast the reasoning in *Anderson* with that in *R. v. Lavergne*, 2017 ONCA 642. In *Lavergne*, the offender was described as being "Indigenous." However, the Ontario Court of Appeal noted that "the record does not disclose anything else beyond his statement of his Indigenous heritage. There is no evidence of any systemic or background factors which may have played a part in bringing this accused before the court." The Court of Appeal held that a "bare assertion of Indigenous heritage, without more, would not have had any impact on the sentence imposed." *Lavergne*, para. 33 (citation omitted). *Anderson*, in contrast, takes the position that there is no need to consider whether the offender's Black heritage played a part in bringing the specific offender before the court. His or her Black heritage is deemed to be a mitigating factor in sentencing.

The Supreme Court of Canada has encouraged Canadian judge to impose "weighty sentences" for gun-related crimes. *See R. v. Nur*, [2015] 1 S.C.R. 773, para. 120. As we have seen, the sentencing principles of denunciation and general deterrence are of prime importance in Canada in sentencing for firearm offences. *Anderson*, para. 68. It has been pointed out that "ownership of firearms is very strictly controlled in Canada and sentences for firearms offences tend to be high, with an emphasis on deterrence as a priority objective of sentencing." *See R. v. Carter*, 2021 ONCJ 561, para. 18.

In *R. v. Letkeman*, 2021 MBCA 68, the Manitoba Court of Appeal pointed out that "[i]t is well established that when the principles of denunciation and general deterrence are paramount, the focus of the sentencing judge is to be more on the offence committed, rather than on the offender…Where denunciation and deterrence are the paramount sentencing principles, the accused's conduct is more important than his personal circumstances." *Letkeman*, para. 51, 126.

The decision of the Ontario Court of Appeal in *Morris* is consistent with this approach. The decision of the Nova Scotia Court of Appeal in *Anderson*, rejects it. *Anderson* requires that the sentencing judge concentrate primarily upon the circumstances of the offender. The circumstances of the offence are seen as significantly less important. It could be argued that the Nova Scotia Court of Appeal has made proportionality a secondary principle of sentencing in relation to Black offenders.

It appears that the Nova Scotia Court of Appeal is going much further than the Supreme Court in *Gladue* and *Ipeelee*. Based upon the Court of Appeal's analysis in *Anderson*, it seems that it is being suggested that the impact of anti-Black racism should almost always result in a significantly reduced sentence for Black offenders. If this is a correct interpretation of *Anderson*, and if it is adopted by other Canadian courts, then this constitutes a seismic shift in Canadian sentencing policy. I say this because it has been noted that "[a]s with all sentencing decisions, those involving Aboriginal offenders must proceed on an individual (or case-by-case) basis; that is, for this offence, committed by this offender, harming this victim, in this community." *See R. v. Cortez*, 2021 BCPC 263, para. 19. The approach adopted in *Anderson* would delete the use of the word "this."



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5. Matthew Clair and Alix S. Winter interviewed state judges in a Northeastern state to study "the implications of judges' understandings of racial disparities at arraignment, plea hearings, jury selection, and sentencing." Matthew Clair and Alix S. Winter, *How Judges Think About Racial Disparities: Situational Decision-Making in the Criminal Justice System*, 54 CRIMINOLOGY 332, 332 (2016). The authors concluded as follows as to what the interviews revealed about racism and sentencing:

    When asked whether they account for racial disparities when determining individual sentences, most judges in our sample (41 of 48, 85 percent) told us that they do not—and that they feel they cannot. There is a strong normative understanding that sentencing must be specially tailored to the particular factors and mitigating/aggravating circumstances of the case at hand. Similar to the plea stage, post-trial sentencing is complex and deliberative. Comparison between similarly situated defendants is particularly difficult at post-trial sentencing because of the great amount of information that becomes available over the course of a trial. Consequently, many judges in our sample see little way of drawing comparisons between racial groups. As one Judge told us, the problem of racial disparities is not part of her "decision-making" because "you have to look at each person and try to craft something that can help that person succeed."

    Id. at 350.

The Resource Page

COVID-19 RESOURCES

As the world continues to navigate ever-changing restrictions and advice due to the COVID-19, courts also must address issues related to the pandemic. The Judicial Division of the American Bar Association has several resources that may be of interest on their webpage: https://www.americanbar.org/groups/judicial/resources/covid-19/.

Some of these resources include information about:

- State-specific orders related to issues such as jury summons, court operations, and notary requirements.
- Conducting jury trials and hearings online
- Reopening courthouses
- Efficient operations
- Wellness

The National Center for State Courts (NCSC) also provides resources related to vaccine mandates for court staff, public face mask requirements, virtual hearings, and individual state court COVID-19 websites. These NCSC resources can be found here: https://www.ncsc.org/newsroom/public-health-emergency

Finally, Justia is providing individual state resources related to court operations on their website (https://www.justia.com/covid-19/50-state-covid-19-resources/court-operations-during-covid-19-50-state-resources/). Justia's page also includes resources related to COVID-19 and employees, employers, eviction bans, business assistance, taxes, immigration, criminal cases, bankruptcy, divorce, personal injury cases, and other topics.

ANTI-RACISM RESOURCES

How I Learned to Stop Worrying and Love Discussing Race; Jay Smooth TEDx Hampshire College (https://www.youtube.com/watch?v=MbdxeFcQtaU)

Jay Smooth is a commentator on politics and culture and host of the New York radio show, the Underground Railroad. In his talk, Smooth uses humor to provide thoughtful suggestions on how to approach the difficult topic of racism. He suggests reconceptualizing how we define being a good person as it relates to racism.

Conversations on Racial Justice is a resource provided by the National Judicial College (https://www.judges.org/racial-justice/). The website provides the downloadable document, "Twenty Actions Judges Can Take to Combat Racial Injustice." The page also includes several prerecorded conversations about race, including a conversation with the Washington Supreme Court, the American Bar Association President, and law college deans.

CHILD WELFARE RESOURCES

The National Court-Appointed Special Advocate (CASA)/ Guardians ad Litem (GAL) Association for Children has a webpage devoted to judicial resources (https://nationalcasagal.org/advocate-for-children/resources-for-judges/). As their history page describes, the original CASA program was a judge's idea to provide a voice for children in court. The resources available on their website include guidelines for enhancing practice, a video about improving outcomes for children in child protection cases, and the judge's role in creating and supporting CASA/GAL programs.

CONFERENCE AND OTHER LEARNING OPPORTUNITIES

The National Council of Juvenile and Family Court Judges (NCJFJC) has their 85th Annual National Conference on Juvenile Justice upcoming this summer. The conference will be held in Reno, Nevada from July 17-20, 2022. The conference will be in person and will adhere to health and safety protocols related to COVID-19 (e.g., vaccinations, masks, negative COVID-19 test). Please see their conference website for specific details: https://ncjfcj.users.membersuite.com/events/e63e4564-0078-cdb5-d948-2d881f903f5c/details

NCJFCJ also provides a variety of webinars, including their "Monday Morning Moments," that are a component of their judicial wellness initiative (https://www.ncjfcj.org/judicial-wellness-initiative/). Through this initiative they seek to promote judicial well-being.

The 2022 National Child Abuse and Neglect Institute (CANI) will be held at the end of March and is being offered in a virtual format. NCJFCJ recommends this institute for any judges who have recently or will soon start hearing dependency cases. Participants must agree to participate for the four full days of the institute. Registration is linked here: https://ncjfcj.users.membersuite.com/events/e63e4564-0078-c435-82f6-0b437c983ec5/details.

ARTIFICIAL INTELLIGENCE AND COURTS

The growing presence of artificial intelligence (AI) is making its impact in the courts on both sides of the bench. The American Association for the Advancement of Science is launching *(AI)2: Artificial Intelligence—Applications/Implications*, its project "to advocate for the responsible development and application of AI." It includes considerations of how AI will affect evidence derived from these new processes, and resources for judges to learn about AI and its anticipated effects in cases (https://www.aaas.org/ai2/projects/law/judicialpapers). In addition, some think AI may affect how courts work internally. In 2016, a British research study designed an algorithm for a computer "AI judge" that made rulings on previously decided real cases. It was identical about 80% of the time (https://www.theguardian.com/technology/2016/oct/24/artificial-intelligence-judge-university-college-london-computer-scientists). A good clearinghouse of AI authors is also found in the *Judges' Journal* of February 2020 simply titled "Artificial Intelligence" (https://www.americanbar.org/groups/judicial/publications/judges_journal/2020/winter/).

LET'S KEEP TALKING

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