

KINSHIP CARE AND ADOPTION MYOPIA

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INTRODUCTION

Parenthood and child-rearing among low-income families are often ignored in family law scholarship, pedagogy, and policymaking. False family law narratives perpetuate racialized myths, such as that everyone wants to or can get married; that children are only well-served when they are raised within the nuclear family; that exclusively the adult, intimate dyad and the parent-child relationship are socially and legally significant (leaving out grandparents, siblings); that poverty is a private, family problem related to “laziness” and “promiscuity”; and that people who want to care for children would always want to and be able to adopt. In this Article, I aim to debunk some of these myths, particularly as to kinship caregiving and adoption both critiquing the current adoption framework from the family policing/foster system,¹ and illuminating the benefits of and need for more support to kinship caregiving.

Approximately 2.5 million children are being raised by grandparents or other relatives—almost certainly an underestimate.² The number has grown significantly in the last two decades, and continues to increase rapidly due to stresses on families including, for instance, the opiate epidemic.³ The vast majority of them, about 1.8 million, live in an

1. I use this terminology rather than the “child welfare” system to reflect the system’s true nature. ALAN DETTLAFF ET AL., HOW WE END UP: A FUTURE WITHOUT FAMILY POLICING 3 (2021), <http://upendmovement.org/wp-content/uploads/2021/06/How-We-endUP-6.18.21.pdf> [perma.cc/7Z73-PBQQ] (“The child welfare system is predicated on the subjugation, surveillance, control, and punishment of mostly Black and Native communities experiencing significant poverty. We more accurately refer to this as the family policing system.”). I have previously described the social control inherent to the family policing and criminal systems. See Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, L. & POL. ECON. BLOG (Aug. 6, 2020), <https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/> [perma.cc/77K6-PYZS] (“Like the criminal legal system, the family regulation system has a long history as a state apparatus of racialized social control, including family separation during slavery . . .”). See also Caitlyn Garcia & Cynthia Godsoe, *Divest, Invest, and Mutual Aid*, 12 COLUM. J. RACE & L. 601, 603 (2022) (“[T]he family policing system is . . . ineffective at preventing or redressing harm on its own terms, while imposing very high fiscal and human costs.”); Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 169 (2022) (describing the criminal legal system as being “rooted in slavery and other forms of racialized social control.”).

2. *Children in Kinship Care in the United States*, KIDS COUNT DATA CENTER, <https://datacenter.aecf.org/data/tables/10455-children-in-kinship-care?loc=1&loc=1#detailed/1/any/false/2554/any/20160,20161> (Sept. 2023); see also Julia Hernández & Jill Duerr Berrick, *Kinship Probate Guardianship: An Important Permanency Option for Children*, 100 FAMS. SOC’Y: J. CONTEMP. SOC. SERVS. 34, 36 (2018).

3. See, e.g., ANNIE E. CASEY FOUNDATION, FAMILY TIES: ANALYSIS FROM A STATE-BY-STATE SURVEY OF KINSHIP CARE POLICIES 4 (2024), <https://www.aecf.org/resources/family-ties> (detailing an increase in kin foster placements between 2007-2021 from twenty-six percent to thirty-five percent of all foster placements). In most states, between one quarter

informal or “state-independent” arrangement, which brings no legal recognition or funding.⁴ To cite just one example, ninety-six percent of the kin caregivers raising almost 200,000 children in New York State do so outside of foster care, which usually means no or very little state support.⁵

Children removed from their parents do best in kinship placements; research shows numerous, significant benefits for children in kinship over non-kinship care including: fewer different placements; reduced stigma and trauma from removal; ongoing connection to their families of origin, including siblings, and to cultural and racial heritage, and fewer mental health, educational, and behavioral problems.⁶ Kinship caregivers are doing a massive, mostly unpaid, service by caring for many children that otherwise would be in the foster system—a conservative estimate is that if even half of the millions of children being raised in informal kinship care entered the foster system, it would cost \$6.5 billion a year.⁷ A significant number of caregivers are encouraged, or even pressured, into this arrangement to avoid children being placed in the foster system. Others, to receive any financial support in raising these children, are forced into state-surveilled arrangements such as foster care.⁸

and half of children in the foster system are in kin placements, while in a few states, the number is over fifty percent. *Id.* at 5. Kathleen Kelly Halverson, *Grandparent Adoptions on the Rise Due to Opioid Crisis*, ADOPTION.COM (Mar. 21, 2018), <https://adoption.com/grandparent-adoptions-on-rise-due-to-opioid-crisis>. Relatedly, multigenerational households in the United States have more than doubled in number over the last decades, increasing from seven percent in 1971 to eighteen percent in 2021. D’Vera Cohn et al., *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, PEW RSCH. CTR. (Mar. 24, 2022), <https://www.pewresearch.org/social-trends/2022/03/24/financial-issues-top-the-list-of-reasons-u-s-adults-live-in-multigenerational-homes/>.

4. Hernández & Berrick, *supra* note 2, at 36.

5. Erik Kriss, *Non-Parent Relatives & Family Friends Caring for Children Gain Legal Standing in NYS as “Kinship Caregivers”*, AARP (July 21, 2021), <https://states.aarp.org/new-york/non-parent-relatives-family-friends-caring-for-children-gain-legal-standing-in-nys-as-kinship-caregivers>. The failure to provide support of course impacts the children the system is purportedly designed to protect. *See id.* (reporting that only fifteen percent of children in New York State in kinship care receive the grant to which they are entitled).

6. *See* ANNIE E. CASEY FOUNDATION, *supra* note 3, at 3; *see also* CHILDFOCUS & N. AM. COUNCIL ON ADOPTABLE CHILD., *KINSHIP ADOPTION: MEETING THE UNIQUE NEEDS OF A GROWING POPULATION 2* (2010) [hereinafter CHILDFOCUS], <https://www.grandfamilies.org/Portals/0/Documents/Adoption/Kinship%20Adoption.pdf> (collecting research).

7. Gerard W. Wallace, *A Family Right to Care: Charting the Legal Obstacles*, 3 GRANDFAMILIES: CONTEMP. J. RSCH., PRAC. AND POL’Y 122, 129 (2016) (citing congressional research).

8. *Id.* at 168–169. This Hobson’s choice—between dignity and self-definition versus any state support—starkly illustrates the problematic treatment of kinship caregivers

Nonetheless, their prevalence and importance for children, policymakers and legal scholars continue to, at best, ignore and, at worst, pathologize or underserve kinship care families.⁹ Most federal statutes, such as the Family and Medical Leave Act (“FMLA”), focus on the nuclear family;¹⁰ nowhere is this more true than in the Adoption and Safe Family Act (“ASFA”) framework and in the funding driving the family policing, foster, and public adoption systems.¹¹ ASFA takes as its central goal creating more nuclear families through closed, even secretive, adoption.¹² Adoption is celebrated as solely benevolent, even beneficial—think of the annual

and the legal focus on rigid categories of family definitions. Two recent lawsuits brought by kinship caregivers, in Washington D.C. and New York City, outline in detail this harmful dynamic of “treating kinship families differently and less supportively than . . . children in licensed foster care and their foster parents.” Complaint ¶8, *K.H. v. District of Columbia*, No. 1:19-cv-03124 (D.D.C. Oct. 18, 2019); see *infra* notes 133–149 and accompanying text.

9. See, e.g., ANNIE E. CASEY FOUNDATION, SUPPORTING UNLICENSED KINSHIP CAREGIVERS 2 (2024), <https://www.aecf.org/resources/family-ties/supporting-unlicensed-kinship-caregivers> (reporting that it is impossible to know how many kinship caregivers are licensed foster families or not because federal data does not distinguish between the two); see also Kriss, *supra* note 5 (quoting Jo-Ann Yoo, executive director of the Asian American Federation, that kinship caregivers are “often invisible”). For an indication of their lack of importance to policymakers, note that the kinship caregivers raising 200,000 children in New York State only received a legal definition, some legal status and support in 2021, after twenty years of advocacy by AARP, the NAACP, and other groups. See *id.* There are a growing number of notable exceptions among scholars including Sacha Coupet, Sarah Katz, Solangel Maldonado, Ashley Albert & Amy Mulzer, Neoshia Roemer, and (of course) Dorothy Roberts. See Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079, 1079–80 (exploring guardianship in the context of “the differential value placed on the parent-child relationship in . . . the public and private law contexts.”); see also Sacha M. Coupet, *Ain’t I a Parent: The Exclusion of Kinship Caregivers from the Debate over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 595–96 (2010); Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 326–32 (2008); Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 COLUM. J. RACE & L. 557, 563 (2022); Neoshia R. Roemer, *Finding Harmony or Swimming in the Void: The Unavoidable Conflict Between the Interstate Compact on the Placement of Children and the Indian Child Welfare Act*, 94 N.D. L. REV. 149, 155 (2019); Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619 (2001).

10. See FRANK J. BEWKES, CTR. AM. PROGRESS, EXPANDING DEFINITIONS OF FAMILY IN FEDERAL LAWS 1 (2020), <https://www.americanprogress.org/wp-content/uploads/sites/2/2020/05/Definitions-of-Family-4.pdf>; see also Caroline Medina & Molly Weston Williamson, *Paid Leave Policies Must Include Chosen Family*, CTR. AM. PROGRESS (Mar. 1, 2023), <https://www.americanprogress.org/article/paid-leave-policies-must-include-chosen-family/>.

11. Public adoption is adoption from the foster system to which children are involuntarily removed, so it is inherently coercive and non-consensual.

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

televised celebrations on “Adoption Day!”—when in reality it is largely driven by social control of marginalized families and the (insatiable) demand for adoptive, preferably young and white, children.¹³ Numerous scholars have aptly described this racialized and coercive market as analogous even to slavery markets.¹⁴ Yet, the mythology around adoption persists. It creates harm for many children and families, not only at the point of entry but also after the finalized adoption, by imposing a legal fiction of only one set of parents/one family. This legal fiction denies the lived experience of most children adopted out of the foster system and needlessly cuts off all contact with their families and culture of origin. Attempts to expand post-adoption contact between birth parents and children, called open adoption, have largely been stymied despite ample evidence that it would benefit children, again demonstrating the political clout and funding of the adoption lobby.¹⁵ As I have previously described, this extremely narrow vision of permanency and parenthood “posits a zero-sum dichotomy between old and new parents” and thus denies the lived experiences of millions of families.¹⁶

Kinship caregivers continue to be denied legal status accorded other caregivers or are pressured to fit themselves into adoption despite the ill fit.¹⁷ They are almost always offered the stark choice of adoption or no

13. See Malinda L. Seymore, *Social Costs of Dobbs’ Pro-Adoption Agenda*, 57 U.C. DAVIS L. REV. 503, 511–12 (2023) (detailing the demand issues and the coercive nature of even private sector adoption).

14. See e.g., Michele Bratcher Goodwin, *Baby Markets*, in *BABY MARKETS: MONEY AND THE NEW POLITICS OF CREATING FAMILIES* 2, 6 (Michele Bratcher Goodwin ed., 2010) (describing the racialized market of adoption, so that it is cheaper to adopt a Black child than a white child and analogizing to slave markets); see also Seymore, *supra* note 13, at 507, 554 (describing adoption as “a nearly \$2 billion-a-year [U.S.] business that is growing fast” and quoting a post-*Dobbs* editorial in the Christian Post: “Saturate our culture, first, with a massive national marketing campaign to elevate the sacrificial love and benefit for heroic women and girls who choose adoption . . . Adoption marketing must consistently run like a product or political advertising campaign.”).

15. In New York State, for instance, a bill to allow such contact in some circumstances was recently vetoed for a third time by the Governor. Adilia Watson & Susanti Sarkar, *Governor Once Again Rejects Bill to Expand New York Parents’ Chances for Contact with Their Adopted Children*, IMPRINT (Dec. 11, 2023, 7:00 PM), <https://imprintnews.org/child-welfare-2/governor-once-again-rejects-bill-to-expand-new-york-parents-chances-for-contact-with-their-adopted-children/246586>.

16. Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 130 (2013); see also *infra* notes 89–93 and accompanying text (discussing Dr. Mark Testa’s research on children and young people’s perceptions of permanency); *infra* notes 61–77 (detailing the harms of permanent separations and terminations).

17. Indeed, kinship caregivers have long been forced into this binary of no recognition or adoption. In some jurisdictions “blood relatives” were prohibited from becoming licensed

state support at all, despite other potential options such as subsidized guardianship.¹⁸ As one “child-protection” professional acknowledges: “We always reduce things to these formulas and put families with real lives and real situations into boxes.”¹⁹ Kinship caregivers often do not want to adopt for very legitimate reasons, such as the history of family separation and white saviorism still pervading the contemporary adoption system.²⁰ My practice experience—confirmed by research—taught me that another major factor is that adoption, unlike guardianship and the like, requires a termination of the birth parents’ rights, which relatives usually do not want.²¹ In addition to the harm a termination of parental rights

(and paid) foster parents, presumably because they were supposed to be caring for related children out of their own pockets, despite multigenerational poverty, and out of some unstated concern of fraud, reminiscent of similarly racialized “welfare queen” tropes. Mark F. Testa, *The Ineffable Significance of Kinship*, 1 FAM. JUST. J. 8, 22 (2023); see also discussion *infra* notes 89–93.

18. See discussion *infra* Section II.A.1 (quoting recent class action lawsuits by kinship caregivers from Washington, D.C. and New York City centering on this issue).

19. Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113, 1127 (internal quotation marks omitted).

20. One prominent recent example is the disturbing case of Black NFL player Michael Oher, whose life and supposed adoption as a teenager in the foster system by an affluent white family was the subject of the movie *The Blind Side*. As one commentator describes it: “[T]he tale was a classic ‘white savior’ story that served to praise the goodness of white people and erase the nuances of a Black kid’s story of resilience.” Fabiola Cineas, *Was The Blind Side’s White Savior Narrative Built on a Lie?*, VOX, <https://www.vox.com/culture/23832310/michael-ohr-blind-side-adoption-tuohy-white-savior> (Sept. 29, 2023, 1:40 PM). Even more, the benevolent portrayal of the story seems to be based on a lie; the white family, the Tuohys, never adopted Oher, but instead set up a conservatorship allowing them to control his finances and his name but not fully include them in their family—something Oher alleges he never found out until this year, in his late thirties. *Id.* In general, “[t]he [white savior] trope erases and romanticizes racism, and raises questions about the dangerous power white people are able to wield when they’re viewed as saviors.” *Id.* Although they admit they never intended to adopt him (despite using that term throughout the movie), the Tuohys responded in their lawsuit: “In fact, they have always felt that the Petitioner was like a son and have used that [term] on occasion but not in a legal sense.” Marlene Lenthag & Diana Dasrath, *‘Blind Side’ Tuohy Family Say There Was No ‘Intent to Adopt’ Michael Oher, Deny Profiting off His Name*, NBC NEWS (Sept. 15, 2023, 10:51 AM), <https://www.nbcnews.com/news/us-news/blind-side-tuohy-family-say-was-no-intent-adopt-michael-ohr-deny-prof-rcna105234>.

21. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL’Y 1, 17 (2015) (“Guardianship grants legal custody to a non-parent...without terminating the legal relationship between parent and child.”). A guardian is legally responsible for the child and can make significant decisions and is free from state intervention in a way that foster parents are not. For a general overview, see Cynthia Godsoe, *Subsidized Guardianship: A New Permanency Option*, 23 CHILD’S LEGAL RTS. J. 11, 12 (2003). ASFA defines guardianship as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of [many] parental rights. . . .” 42 U.S.C. § 675(b)(7). Despite the fact that it is a legal

(“TPR”)—aptly termed the “civil death penalty”—brings parents, adoption requires kin caregivers to “shoehorn” themselves into family forms that fail to capture their relationships—a grandmother is not a parent in her eyes or the child’s eyes.²² As Professor Dorothy Roberts succinctly describes: “Kin caregivers often reject adoption as both unnecessary for and disruptive of family ties.”²³ Accordingly, kinship caregivers have vastly different access to resources and support depending on what “door” they come in.²⁴ Analogously to other contexts of state interaction with other women of color, they are both under- and over-served.²⁵

As for scholars, we do not even have the full picture of who these families are and how many of them are out there. They are undercounted in the census, and research on the wants and needs of kinship caregivers, indeed on all caregiving structures other than adoption, is very scant.²⁶ Legal scholars continue to focus on private family law, or when they do address adoption, on private adoption, largely treating it as an unalloyed good. They largely ignore guardianship and misconstrue or even devalue functional parenthood doctrines, wrongly believing they are primarily used to undermine the “true” parents, mothers, and engage in post-breakup disputes.²⁷ Professors Courtney Joslin and Doug NeJaime’s recent, groundbreaking research confirms what advocates have long reported—functional parenthood doctrines are often used by kinship caregivers who lack other ways to gain care of their kin without extensive state surveillance and other harms.²⁸

construct much more flexible than, and predating, adoption, it remains vastly underutilized in the United States. Godsoe, *supra*.

22. See generally Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. (forthcoming 2024) (on file with author). There is ample historical precedent for a more nuanced, less coercive system; indeed, the current on/off parenthood switch of TPR and involuntary closed adoption is a relatively recent development, mainly of the 1970s and then especially ASFA on. See *id.* at 12–13, 66–68 (detailing the long history of adoption in America upon consent of birth parents, without a TPR, and then a “voluntary transfer” of parental rights to the adoptive parents usually chosen by the birth parents).

23. Roberts, *supra* note 9, at 1627.

24. See discussion *infra* Section II.B.1.

25. See Roberts, *supra* note 9, at 1623.

26. Wallace, *supra* note 7, at 125.

27. See Sarah Hae-In Idzik, “Less Abortion, More Adoption”: A Brief Discursive History of Adoption as Solution, 10 ADOPTION & CULTURE 284, 288 (2022).

28. See Courtney G. Joslin & Douglas NeJaime, *How Functional Parent Doctrines Function: Findings from an Empirical Study*, 35 J. AM. ACAD. MATRIM. LAWS. 589, 590 (2023); Garcia & Godsoe, *supra* note 1, at 602–03. Even functional parenthood requires families to jump through hoops and perform nuclear family characteristics to gain legal status.

This erasure and under-resourcing are inextricably connected to race and class. Living in extended family and kinship caregiving has always been more common among certain communities, such as Black and Native American, due to both necessity and choice;²⁹ for instance, Black children are twice as likely as average to live in kinship care.³⁰ The large majority of kinship caregivers are aunts and grandmothers, overwhelmingly low-income, and disproportionately women of color.³¹ Indeed, Professor Marty Guggenheim has demonstrated how racial politics underlay ASFA's enactment—including cuts in financial assistance to families as more women of color became welfare recipients rather than the historic white, deemed deserving “war widows.”³² Those same racial politics are perhaps even heightened in the wake of *Dobbs* and the cessation of most international adoption.³³ Currently, there is an almost obsessive focus on increasing the supply of adoptive babies and on an “adoption cure” for poverty, infertility, barriers to abortion, and more.³⁴ And yet, the government itself acknowledges that only babies of under a year old in the foster system have adoption as their most likely outcome.³⁵

29. See e.g., Roberts, *supra* note 9, at 1622 (describing the seminal work of anthropologist Carol Stack and the function of kinship care as “an informal safety net for struggling black families”); Puneet Chawla Sahota, *Kinship Care for Children Who Are American Indian/Alaska Native: State of the Evidence*, 97 CHILD WELFARE 63, 64, 71 (2019).

30. Kriss, *supra* note 5 (citing national statistics).

31. See GRANDFAMILIES & KINSHIP SUPPORT NETWORK, GENERATIONS UNITED, GRANDFAMILIES AND KINSHIP FAMILIES: STRENGTHS AND CHALLENGES 1–3 (2022), <https://www.gu.org/app/uploads/2022/05/General-Grandfamilies-Fact-Sheet-2022.pdf>. See also Kriss, *supra* note 5 (quoting various racial and ethnic advocacy groups such as the NAACP and Asian American Federation, remarking on the high prevalence of kinship care in non-white communities).

32. Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 719–23 (2021).

33. Mark Montgomery & Irene Powell, *International Adoptions Have Dropped 72 Percent since 2005 – Here's Why*, CONVERSATION, <https://theconversation.com/international-adoptions-have-dropped-72-percent-since-2005-heres-why-91809> (Mar. 1, 2018, 9:29 AM).

34. This “solution” is not only coercive and biased, but also ignores the fact that the numbers have never worked—i.e., the demand for adoption is far greater than the number of children available for adoption. See Seymore, *supra* note 13, at 573; Laura Briggs, *Making Adoption Illegal Does Not Lead to More Adoptions*, 10 ADOPTION & CULTURE 251, 252 (2022).

35. CHILD'S BUREAU, U.S. DEP'T HEALTH & HUM. SERVS., ACYF-CB-IM-20-09, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 7 (2021) [hereinafter CB MEMO], <https://www.cwla.org/wp-content/uploads/2021/01/ACYF-CB-IM-20-09.pdf>.

Being offered adoption or nothing, and being underrecognized as having parental authority, harms kinship caregivers and children in both material and dignitary ways. Many kinship caregivers, particularly grandmothers, continue to struggle to gain the practical ability to, for example, take a child to the doctor or enroll a child in school—abilities mainstream families take for granted. This legal gap is compounded by the fact that many relatives are deemed not “good enough” to adopt based on poverty and bias—two particularly heartbreaking examples concerning indigenous children were seen in the recent U.S. Supreme Court case *Haaland v. Brackeen*.³⁶ This failure to accept their caregivers as sufficiently “permanent” means that many children will spend significant amounts of time in “stranger” foster homes and even age out as legal orphans with extremely high risk for homelessness, incarceration, etc.³⁷ Foster and adoptive parents receive significant federal aid; foregoing this aid to avoid adoption is no doubt a major reason why grandmothers raising children are the poorest households in the country.³⁸

Beyond financial, there are dignitary harms to families not being able to define themselves and being forced to conform to a white middle-class heteronormative family form that never represented the majority of U.S. households—particularly Black, indigenous, and immigrant communities where extended kin was and is more widespread and valued.³⁹ Families in the private law system who are separated, for example, by divorce, are almost always allowed to share custody and to parse out parental rights rather than being forced into a rigid all-or-nothing situation that harms adults and children alike.⁴⁰ As one client sadly told me after her mother’s parental rights were terminated: “I don’t

36. *Haaland v. Brackeen*, 599 U.S. 255 (2023).

37. There are many reasons children are not likely to be adopted, including the lack of adoptive parents for certain kinds of children, such as older children, children with siblings, or those with special needs; the refusal of caregivers to adopt, often because of a desire not to displace or create conflict with the biological parent; and confusion about the need for adoption where the kinship caregiver is already related and committed to the child. Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 450, 455 (1996); *Young Adults Formerly in Foster Care: Challenges and Solutions*, YOUTH.GOV, <https://youth.gov/youth-briefs/foster-care-youth-brief/challenges> (last visited Jun. 21, 2024). Older children themselves often decline to be adopted, perhaps because of ties to birth parents which are usually cut off by adoption. In virtually every state, children of a certain age have the right to consent to or refuse adoption. See, e.g., N.J. REV. STAT. § 9:3-49 (2023) (age 10 and up); CHILD WELFARE INFO. GATEWAY, CHILD’S BUREAU, CONSENT TO ADOPTION 2 (2021).

38. Hernández & Berrick, *supra* note 2, at 35.

39. See *supra* note 29.

40. Godsoe, *supra* note 16, at 120–21.

care what they say. She'll always be my mom. A piece of paper doesn't change that."⁴¹

I make this argument about kinship families in three parts. Part I maps the myopic and deeply flawed landscape of public adoption. Public adoption's racialized history, skewed funding priorities, and warped view of "permanency" contribute to a system that incentivizes child removal and TPRs among marginalized families to cultivate a supply of adoptable children.⁴² In Part II, I illustrate how this system is particularly harmful to kinship caregiver-headed families, despite those families being both large in number and usually best for children removed from their parents. Part III considers some "non-reformist reforms" to improve the current system, including more resources for kinship families and more flexible permanency solutions such as guardianship and open/partial adoption. I ultimately conclude, however, that only abolition of the current system and a reimagination of state support can meet the needs of all children and their caregivers.⁴³

I. ADOPTION MYOPIA

In this Part, I lay out the history of adoption, and in particular its focus on perpetuating the raced, middle-class nuclear family. Children being adopted are overwhelmingly being transferred from lower-income, families of color into white, middle-class families. I delve particularly into the history of "public" adoption, i.e., adoption from the family policing/foster system, which has—along with international adoption—long served as an outlet for white saviorism, which "remains pervasive and obscures truths about exploitation."⁴⁴ Next, this Part maps the construction of a skewed version of permanency in the foster and public adoption systems. Rather than focusing on permanency from a

41. Cynthia Godsoe, *Restoring Families*, 32 NAT'L L.J. 35, 35 (2010).

42. To cite just one expert on the coercive connection between family separation and a supply of adoptable babies, see Briggs, *supra* note 34, at 252 (noting that "the relentless and endless desire for adoptable children, particularly young and white ones . . . has led to . . . pressure to make the U.S. foster care system turn over its (white) babies more quickly, officials looking the other way when they separate families for political reasons or for no good reason at all.").

43. Relatedly, this focus on kinship care for out-of-home placement or permanency is a post-removal analysis; to be clear, I am not assuming removal is in the best interests of children. To the contrary, supporting parents and families of origin and not removing children should be the state's primary practice.

44. Cineas, *supra* note 20. The line between public or involuntary adoption, versus voluntary or private adoption, is quite blurry. Many of the latter have historically been and continue to be implemented under less than truly voluntary circumstances. My thanks to Solangel Maldonado for this point.

psychological or lived experience perspective, the funding and practice of the family policing system continues to prioritize adoption as the only real means to achieve permanency, thereby both overestimating adoption's permanency in the lived experience of children and underestimating other family structures.

This Part also shows how, despite its racialized history and the presence of other more flexible options, the legal framework—ASFA in particular—continues to prioritize adoption as the “gold standard” for all children in the foster system who are denied reunification with their parents. It details how the on-off legal parenthood construction, along with agency practice and funding priorities for foster and adoption, render adoption virtually the only means for caregivers to receive financial support and full legal parenthood status. Of course, this is not to say adoption cannot be positive: it creates loving homes for some children, helps people create families other than expensive and invasive assisted reproductive technologies (“ART”), and expands interracial and same-sex parenthood.⁴⁵ In this Article, however, I focus on a less-told story how this rigid framework can harm kinship caregivers and children.

A. *History of White Saviorism & Aiming to Recreate the Normative “Mainstream” Nuclear Family*

Adoption has a long history in the United States where it has always been more robustly used than in Europe, likely due to the lack of a social safety net here.⁴⁶ Until the last few decades, adoption was deemed shameful and so was kept secret. Throughout most of the twentieth century, adoptions were “closed,” with children and biological parents alike unable to discover each other's identities.⁴⁷ New birth certificates listing the adoptive parents literally erased the past.⁴⁸

The “matching” process characterizing adoption until at least the 1970s also assimilated adoptive families into the mainstream. Matched racially, ethnically, religiously and even (purportedly) by IQ, adopted children were supposed to be indistinguishable from biological children.⁴⁹

45. But see JULIE BEREBITSKY, *LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950*, at 2, 173 (2000) (arguing that, although adoption created non-normative families in the early twentieth century, it became more conformist in the 1950's).

46. Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 325–26 (2015).

47. See, e.g., BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* 202 (2002).

48. *Id.*

49. *Id.* at 51–54, 69–76, 102.

As I have previously described, this erasure was deemed to help all of the parties: the biological parents, usually a vilified “unwed mother” and “absent” father; the child, by allowing him or her a “better start” in life; and the adoptive parents by allowing them access to the bio-normative ideal and, in many cases, hiding their “shameful” infertility.⁵⁰

The focus on biological connection also created and continues to bolster the ideal “nuclear” family. Even without matching, the ongoing adoption industry (state and private) preference for two-parent households, and the transfer of children, preferably infants, continues to be a transfer from poorer families to more affluent, whiter families—a very American story of “upward mobility” characterized as good for the children (despite ample research that unnecessary adoption and severance of ties to birth families is harmful and often traumatizing).⁵¹ As Ashley Albert and Amy Mulzer put it, adoption “reinforces racist, classist, ableist, and misogynistic ideas about which families matter and which do not.”⁵²

And it has always done so, as its racialized history demonstrates. The historic roots of adoption include tearing families apart via slavery and in the false “Reconstruction” period;⁵³ orphan trains carrying about 200,000 immigrant children from Eastern cities to the West who often were not actually orphans;⁵⁴ and the forcible removal of Native American children. The “Indian Adoption Project” was a decades-long U.S. government project that removed native children from Western states to be adopted by white families in the East, using rhetoric about “unfit” indigenous families and children “needing” to be saved.⁵⁵ This history culminated in the 1950s with the ideal white middle-class heterosexual nuclear family—secrecy of adoption and “rebirth” of the religion and race-matched (and even IQ-matched) children who were adopted. Touted as the “golden era” of adoption, adoptions increased every year but one in

50. *Id.* at 106; see generally BEREBITSKY, *supra* note 45, at 110 (noting that infertility was deemed a prerequisite for a couple to adopt for much of the twentieth century).

51. Even “successful” or warranted adoptions are harmful if they bring a severance of ties to birth families and culture. See Seymore, *supra* note 13, at 546–48.

52. Albert & Mulzer, *supra* note 9, at 563; see also Laura Briggs, *Somebody’s Children*, 2009 UTAH L. REV. 421, 442–43 (2009).

53. Shani King, *The Family Law Canon in a (Post?) Racial Era*, 72 OHIO. ST. L.J. 575 (2011).

54. Angelique Brown, *Orphan Trains (1854 – 1929)*, SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/programs/child-welfarechild-labor/orphan-trains/>.

55. MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD 6–7, 9, 20 (2014).

this period (between 1944 and 1970) and peaked in 1970 at 175,000, over half of which were to unrelated adults.⁵⁶

This history is often intertwined with evangelical Christianity⁵⁷ and reflects a consistent throughline of white saviorism being weaponized to purportedly help, but ultimately harm, children and families of color.⁵⁸ The “child saver” mentality is well documented and closely intertwined with the broader “white savior” mentality.⁵⁹ Just as Teju Cole has written about efforts to save Africans, particularly African children, the rhetoric and practice around U.S. foster and family policing system, and especially adoption, similarly strokes “white egos” while ignoring the systemic poverty and racism that created these systems, and perpetuates significant harm through, often permanent, family separation.⁶⁰ “Child welfare” workers have seen themselves as “saviors” since their first incarnation during the Progressive Era.⁶¹ Significantly, the child-savior mentality further undermines the presumption that parents know what’s best for their children. Saviorism is sometimes even cited as a strength of foster and adoptive parents—in contrast to the “guilt” that kinship

56. Gottlieb, *supra* note 22, at 15.

57. Kathryn Joyce, *Shotgun Adoption*, NATION (Aug. 26, 2009), <https://www.thenation.com/article/archive/shotgun-adoption/> (describing Christian crisis pregnancy centers where young women are pressured, bribed, and tricked into adoption—“[t]hey say they want to help people in a crisis pregnancy, but really they want to help themselves to a baby.”). See also This Land, *Supply and Demand*, CROOKED MEDIA, at 05:18 (Sept. 7, 2021), <https://crooked.com/podcast/4-supply-and-demand/> (describing how one of the adoptive white families in the *Brackeen* case describe themselves as driven by evangelical Christian obligation to adopt (indigenous) children).

58. See Gottlieb, *supra* note 22, at 5.

59. See Erin Flowers, *White Saviors Are Not Saving Children*, CRIM. L. & POL’Y (Apr. 22, 2019), <https://crimlawandpolicy.wordpress.com/2019/04/22/white-saviors-are-not-saving-children/> [perma.cc/VN5YAW7P] (former social worker working with attorneys representing children in the system describing its overwhelmingly white judges, lawyers, and social workers and the potential for “saviorism” to creep in when making judgments for children from different racial, class, and cultural backgrounds).

60. See Teju Cole, *The White-Savior Industrial Complex*, ATLANTIC (Mar. 21, 2012), <https://www.theatlantic.com/international/archive/2012/03/the-white-savior-industrial-complex/254843/> [perma.cc/GK7P-2EN8] (“The White Savior Industrial Complex is not about justice. It is about having a big emotional experience that validates privilege. . . . I deeply respect American sentimentality, the way one respects a wounded hippo. You must keep an eye on it, for you know it is deadly.”).

61. See, e.g., ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 137–45 (2d ed. 1969); see also MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO*, at xxviii (2003) (asserting that juvenile court “aimed not merely to punish offenders but to assist and discipline entire urban populations”). Indeed, the current “child-welfare industrial complex doubles down on the idea that it is ‘saving’ children.” Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It’s Time to Listen to Them*, TIME (Mar. 17, 2021, 9:00 AM), <https://time.com/5946929/child-welfare-black-families/> [perma.cc/RD3K-V8V4].

caregivers may feel; foster and adoptive parents feel pressure to demonstrate “loyalty and commitment” to the child and are “motivated to demonstrate attachment that is as strong as previous attachment with [the] birth parent.”⁶² But how can adoptive parents know that it is as strong? More importantly, why compete? It’s not ‘winner take all’—or shouldn’t be. This paradigm denies the complex reality of most children’s lives and forces them to choose.

Child removal and the prioritization of adoption in the current family policing system continue to reflect this racialized history.⁶³ The legal structure explicitly facilitates and funds the removal of children from poorer, disproportionately Black and indigenous, families and their adoption into whiter families with more resources.⁶⁴ The enactment of the Adoption and Safe Families Act (“ASFA”) in 1997 expedited the termination of parental rights—often relying explicitly on the mythology around an “adoption cure”—and continues to underlie federal “child welfare” policy today, despite ample evidence of its failure to keep children safe and of its immense harms.⁶⁵ ASFA law and funding harshly cut off the parent-child relationship to enable children to gain a “new” family with very harsh “ticking time bomb” deadlines.⁶⁶ As noted before, this devaluation of family ties is deeply racialized; scholar and family defense attorney Marty Guggenheim describes the history:

Because of the degree to which the family regulation system had become so deeply racialized, members of Congress were highly persuadable that the parents who lost their children to foster care are dangerous child abusers—even though the overwhelming percentage of children who are separated from their parents and placed into foster care were never abused by their parents.⁶⁷

Compounding this harm, adoptions out of the foster system are almost always an on/off switch, inflexible, and usually “closed,” meaning that any contact is precluded, not only with parents, but also with other

62. CHILDFOCUS, *supra* note 6, at 6.

63. For more history showing the transition from race-matching to transracial adoptions as the supply of white babies shrank with the advent of legalized birth control and abortion, see Gottlieb, *supra* note 22, at 16. See also Seymore, *supra* note 13, at 512, 560–67 (outlining the economic and other coercion that frequently characterize even so-called voluntary, private adoption).

64. Gottlieb, *supra* note 22, at 36–37.

65. Guggenheim, *supra* note 32, at 722–25.

66. Erin Carrington Smith & Shanta Trivedi, “How Will I Get Back?: The Enduring Pain of Permanent Family Separation,” 2023 FAM. JUST. J. 26, 32.

67. Guggenheim, *supra* note 32, at 723.

family members such as siblings and grandparents.⁶⁸ To cite just one example, current New York law precludes judges from ever requiring contact post termination, even where, as in many cases, contact would be in a child or teenager's best interest.⁶⁹

In contrast, guardianship and other measures permit ongoing contact with these important relatives.⁷⁰ The ASFA framework is also very out of step both with the private adoption system, in which most adoptions are open to some degree, as well as the private family law world of divorce. In the latter, except in the most unusual situations of clear threats of serious harm, parents are entitled to some parenting time with their children, even if the majority of custody is with the other parent.⁷¹

Older children in particular often do not want to be adopted, mostly because of the severance of all ties and legal fictions that characterize it. They have to consent to be adopted in most states, so the focus on adoption relegates them to "legal orphanhood," whereby they age out of the foster system with no legal connection to any family member and at very high risk for various harms including homelessness, incarceration, and more.⁷² This rush to terminate on strict timelines also ignores the realities of the adoption market, which prefers babies, especially who can pass for white: more terminations do not add up to more homes for children.⁷³ Indeed, government research itself reveals that the only group

68. See Seymore, *supra* note 13, at 534 n.161. In addition to the harms to children, private adoptions that are closed are more likely to be described by the birth mother as "coerced." *Id.*

69. Madison Hunt & Adilia Watson, *NY Law Would Allow Parents to Stay in Touch with Kids after Losing Legal Rights*, IMPRINT (July 6, 2023, 10:37 AM), <https://imprintnews.org/top-stories/ny-law-would-allow-parents-to-stay-in-touch-with-kids-after-losing-legal-rights/242783>. Because of the harms of this extreme ban, legislators and advocates are pushing for a more flexible standard. See *infra* notes 198–200 and accompanying text (discussing the Preserving Family Bonds Act).

70. Godsoe, *supra* note 19, at 1123–24 (summarizing research by Madelyn Freundlich, and others, that the legalistic permanency model has significant gaps including its lack of focus on young people's "emotional security" and failure to acknowledge and account for the fact that ongoing contact with siblings is "a critical component" of permanency for many young people in the foster system).

71. Godsoe, *supra* note 16, at 120–21, 131, 169; Uniform Marriage and Divorce Act § 407(a).

72. Godsoe, *supra* note 16, at 132–34 (detailing the research demonstrating this). Professor Martin Guggenheim identified the growing legal orphan problem even before the passage of ASFA worsened it. See generally Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 121 (1995).

73. This truth reveals the flawed basis for Senator Jesse Helms's insistence at the time of ASFA's enactment that if more children were offered for adoption the adoptive parents would be there: "there is no shortage of prospective parents." 143 CONG. REC. 12073 (1997). Regarding the racial stereotypes infusing adoption, see This Land, *The Next Battleground*,

of children in the foster system who have adoption as the most likely outcome are babies of less than one year old.⁷⁴

Despite all of these problems, the mythology and pull of adoption remain very strong. For many policymakers and scholars, it is the ideal solution so appealing to the innate human desire for closure and simplicity: it provides a superficially clear-cut solution (a new family) to a complex problem (child poverty, mostly) with no apparent inconvenient leftovers, such as residual parental rights or recognition of past family relationships.⁷⁵ “For these reasons, adoption has tremendous symbolic value as a type of rebirth—it represents a ‘legal[] reincarnat[ion]’ for children akin to a ‘baptismal or conversion experience.’”⁷⁶ The story is that these parents are “bad,” so children would most likely benefit from the severance of all ties and membership in a new and “better” family.⁷⁷ Adoptive parents are viewed as the opposite of birth parents; these “good” parents are typically middle class and thus can bring children into a new socioeconomic milieu and a higher social status.⁷⁸ In sum, as Professor Naomi Cahn aptly describes, the history of adoption is “a means of socializing culturally disfavored children—of removing them and placing them in middle-class homes.”⁷⁹

B. Narrow View of Permanency Equated with Adoption

Adoption out of the foster system is prioritized as the “gold standard,” as the most permanent—or only permanent—outcome for children who

CROOKED MEDIA, at 00:48–1:35 (July 22, 2019), <https://crooked.com/podcast/this-land-episode-8-the-next-battleground/>.

74. CB MEMO, *supra* note 35.

75. See Gottlieb, *supra* note 22, at 61 n.321. As noted earlier, adoption outside of kinship adoptions is almost always a transfer from lower income to more affluent people; as one scholar and family defender describes it: “The comparative economic advantages typically found in pre-adoptive foster homes compared to the homes of birth parents continues [today].” *Id.* at 51.

76. Godsoe, *supra* note 16, at 143 (quoting Marsha Garrison, *Parents’ Rights vs. Children’s Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 387 (1996)).

77. See DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 25–26, 67 (2002). Dorothy Roberts has argued persuasively that this story also incorporates the historical devaluation of the parent-child relationship in African American families, who are disproportionately represented in the family policing system. See *id.* at 26.

78. *Id.* at 32–33.

79. Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1090 (2003). This history includes the “orphan trains” of the late nineteenth century, on which thousands of children from recent immigrant, low-income, urban families were shipped west to be absorbed by more “American” farm families in the Midwest and West. *Id.* at 1097.

the state will not permit to reunite with their families of origin.⁸⁰ There are many problems with this framework and rhetoric—compounded by skewed funding priorities. Permanency under ASFA has been much too narrowly framed to mean only adoption rather than other stable custodial situations or ongoing connections to biological families.⁸¹ Legal permanency continues to be “based on rigid categories and flawed normative concepts of family, rather than on empirical data.”⁸² As such, it denies the experiences of many families and children—particularly families of color and low-income families—and perpetuates the multi-billion-dollar adoption industry rather than realistically reflecting or meeting many children’s best interests.⁸³ The ASFA statutory scheme problematically conflates legal and relational/psychological permanency, thereby recognizing only adoption as truly permanent, and enshrining a rigid narrow definition of permanency into the law.⁸⁴ Relatedly, only adoption brings full legal parenthood status.⁸⁵ Children in non-adoptive plan families are so overlooked that even obtaining a rough estimate of the number of children in various types of kinship care is difficult.⁸⁶ Guardianship and informal care are particularly under-researched and underrecognized.⁸⁷

ASFA’s legislative history reflects this narrow definition of permanency. At its enactment, one senator expressed: “Children need to know that they have a permanency—which means successful, healthy reunification with their birth families or permanency in an adoptive home.”⁸⁸ Based on this rigid and incomplete view of permanency, parental rights are not parsed out in the family policing context. Workers

80. See Godsoe, *supra* note 19, at 1115–18.

81. As previously stated, kinship care is statistically the most stable and beneficial placement for children once they are removed from care. See *supra* note 6; see also Kriss, *supra* note 5 (reporting that almost half of grandparents raising grandchildren have been doing so for five years, longer than the average foster placement).

82. Godsoe, *supra* note 19, at 1113–14.

83. Adoption in the United States is a big-money industry, and its proponents are powerful lobby groups; for instance, lawyers and agencies helped fund in part the *Brackeen* case. See Alleen Brown, *How a Right-Wing Attack on Protections for Native American Children Could Upend Indian Law*, INTERCEPT (June 17, 2019, 12:10PM), <https://theintercept.com/2019/06/17/indian-child-welfare-act-goldwater-institute-legal-battle/>.

84. Godsoe, *supra* note 19, at 1122–23.

85. See Hernández & Berrick, *supra* note 2, at 35–37 (comparing various caregiving structures); see generally Joslin & NeJaime, *supra* note 28, at 589.

86. See *infra* note 97.

87. See Hernández & Berrick, *supra* note 2, at 34–35.

88. 143 CONG. REC. 12211 (1997) (transcribing statements made by Senator Chuck Grassley). The state was to “find” healthy families for children, rather than help the existing ones. *Id.* at 12210–13.

making the decision whether to remove a child often devalue parent-child ties.⁸⁹ Once children are removed from their parents, visitation is usually limited and under conditions not conducive to effective family bonding.⁹⁰ Despite bad results and growing advocacy for its repeal, ASFA remains the law.

This focus on adoption and parenting/caregiving as an on/off, all-or-nothing switch does not represent the psychological research or lived realities of children. Indeed, Dr. Mark Testa and other researchers have demonstrated that permanency in the psychological sense for children can come from other custodial arrangements than adoption, such as guardianship.⁹¹ Testa's research found no difference between adopted children and children in subsidized guardianship with respect to "intent, belongingness, and continuity."⁹² This better definition of permanency focuses on a child's needs and feelings, rather than a legal category, constituting "an enduring relationship that arises out of feelings of belongingness."⁹³ Other recent research confirms there is no difference in psychological stability for children in adoption versus guardianship.⁹⁴ Another benefit is that, unlike adoption, most guardianship frameworks allow for some visitation or contact between the biological parent and the child.⁹⁵

At the same time as it underestimates the real permanency for children of other family structures, the ASFA framework overestimates the permanency of adoption in two ways.⁹⁶ First, adoption does not feel secure to some children, since it is "just a word." As one teen in the foster system put it:

I didn't wanna be adopted because I knew that [it] wouldn't benefit me . . . I definitely wanted the relationship. [But] to me being adopted doesn't necessarily mean you're gonna have a good

89. See CTR. FOR STUDY SOC. POL'Y, LINN COUNTY, IOWA: INSTITUTIONAL ANALYSIS REPORT 11 (2011).

90. PEG HESS, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLAN., VISITING BETWEEN CHILDREN IN CARE AND THEIR FAMILIES: A LOOK AT CURRENT POLICY 7, 17–18 (2003) (making "findings . . . of great concern" that most responding states do not specify the frequency, duration, or conditions of visitation or recommend only sporadic visitation).

91. Godsoe, *supra* note 19, at 1123–25 (detailing the research of Mark Testa and Madelyn Freundlich).

92. *Id.* at 1124.

93. *Id.* at 1114 (quoting Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 499 (2005)).

94. THEODORE P. CROSS ET AL., EXPLORING THE ROLE OF GUARDIANSHIP IN EFFECTIVE AND EQUITABLE PERMANENCY 1 (2023).

95. See Schwartz, *supra* note 37, at 472.

96. Godsoe, *supra* note 19, at 1123 (summarizing research).

relationship It's just a paper that says you belong to someone [W]hat's on paper isn't what's important to me.⁹⁷

Second, and relatedly, there are a high number of broken adoptions from the foster system. A lawyer representing children, Dawn Post, researched New York City adoptions and outlined this problem, which, like most things about adoption from the foster system, was rarely discussed or tracked as recently as 2012.⁹⁸ Other research confirms this: between 2008 and 2020, more than 66,000 children (almost certainly an underestimate due to the lack of tracking) were returned to the foster system from failed adoptions.⁹⁹ In contrast, guardianship likely brings more security, certainly not less.¹⁰⁰ Yet, even after new legislation to further prioritize guardianship, discretion and caseworker culture continue to myopically prioritize only adoption.¹⁰¹

Adoption's outsized role in funding and policy has obscured the lived experience of millions of children and families, crowded out other caregiving options, and left many children—perhaps particularly those in kinship care—without the options and state support they deserve. Many caseworkers to see adoption as their only goal. As one caseworker put it: “[I]t's the experience—my background, my love is adoption. That's

97. GINA MIRANDA SAMUELS, A REASON, A SEASON, OR A LIFETIME: RELATIONAL PERMANENCE AMONG YOUNG ADULTS WITH FOSTER CARE BACKGROUNDS 48 (2008).

98. See, e.g., Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 441 (2012); Dawn J. Post, *What are the Factors Leading to Broken Adoptions?*, 2014 ADOPTION ADVOC. 1, 8–9. It should be shocking and unacceptable that a publicly funded system designed to keep children safe removes children from their original homes and places them in others, only to fail to find out what happens in those new homes.

99. Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 261 (2023); see also Smith & Trivedi, *supra* note 66, at 28 (elaborating on this research and noting that “[i]n many cases, the children of broken adoptions went back to their families [of origin]”).

100. See Testa, *supra* note 17, at 25 (reporting low disruption rates for children in subsidized kinship guardianships); CHILD'S DEF. FUND ET AL., MAKING IT WORK: USING THE GUARDIANSHIP ASSISTANCE PROGRAM (GAP) TO CLOSE THE PERMANENCY GAP FOR CHILDREN IN FOSTER CARE 10 (2012), <https://www.childrensdefense.org/wp-content/uploads/2023/08/making-it-work-using-the.pdf> (discussing the number of children benefitting from guardianship assistance programs throughout the nation).

101. See, e.g., Gupta-Kagan, *supra* note 21, at 2, 50, 64 (arguing that even years after a more expanded definition of permanency was put forth in federal law, there remains a “deep cultural and legal subordination of guardianship to adoption”).

what I did for eight years. It really brings me a lot of joy. So, I still think in terms of adoption as the best option.”¹⁰²

Caseworkers disregard families’ stated preferences, telling children that “if [they] communicate[] with [their] mom, [they] can both get in trouble.”¹⁰³ Caseworkers even refuse to believe the data that subsidized guardianship is usually as permanent as adoption; as one worker put it:

[Subsidized guardianship is] not the most permanent plan for the kids. Not the same ownership, level of responsibility, or commitment to the child. The kid still knows that that’s the guardian, not the parent. The kid knows that this person didn’t want to adopt. That’s why we always strive for adoption, because the psychological benefits are much better for the kid.¹⁰⁴

Neither of these assumptions is factually true—that a relative not wanting to adopt is bad for the child, or that adoption is always, or even usually, better for children. Instead, these assumptions illustrate how many caseworkers, acting upon their unsupported bias towards adoptive families, fail to inform families about guardianship.¹⁰⁵ As I have previously explained, “[t]his is particularly so for younger children who are more desired by adoptive parents. Adoption thus is framed not as at the top of the permanency hierarchy, but as the only meaningful permanency option.”¹⁰⁶

A recent Department of Health & Human Services Children’s Bureau public memo acknowledges many of these truths and advises states and other jurisdictions to explore kinship care first and most often, and to consider reunification in more cases and subsidized guardianship in far more cases—but few to no states do.¹⁰⁷ The memo is a very promising

102. ANNA ROCKHILL ET AL., OREGON’S TITLE IV-E WAIVER DEMONSTRATION PROJECT EVALUATION 2004–2009: SUBSIDIZED GUARDIANSHIP COMPONENT 82 (2009) (emphasis added).

103. PRESERVING FAMILY BONDS, <https://preservingfamilybonds.org/> (last visited June 21, 2024) (quoting Tatianna, a young person “[i]mpacted by the [t]ermination of [p]arental [r]ights”).

104. ROCKHILL ET AL., *supra* note 102, at 92.

105. See *id.* at 9–10, 26; U.S. DEP’T OF HEALTH & HUM. SERVS, SUBSIDIZED GUARDIANSHIP: SYNTHESIS OF FINDINGS, at iii (2011), <https://www.acf.hhs.gov/sites/default/files/documents/cb/subsidized.pdf> (finding that caseworkers “expressed reluctance to offer [subsidized guardianship] due to deep-seated professional beliefs regarding the preferability of adoption”).

106. Godsoe, *supra* note 16, at 144.

107. CB MEMO, *supra* note 35, at 10, 17, 23; see also PRESERVING FAMILY BONDS, *supra* note 103 (noting that research demonstrates that “[f]or children in the foster system, the right to regular visits with their parents can be a vital source of love, stability, and healing. . . . When a parent’s rights are involuntarily terminated, children may feel that

statement of the agency's position, one that would have been unthinkable even ten years ago due to adoption myopia, because it prioritizes keeping children with kin, including fictive kin.¹⁰⁸ It cites the research on the many benefits of kinship care, and advises states to use the exceptions in order to terminate fewer parental rights when children are in kinship care—a placement which also helps increase opportunities for reunification. The memo further states that adoption “should be viewed as an opportunity to expand a child's experience of family rather than replace their previous family.”¹⁰⁹ It also recognizes the importance of children's connection to kin, broadly defined, and to parents with whom they will not be reunified:

Children and youth in foster care have stories and memories that make up who they are, and they deserve to have all of those things safely preserved for them while they endure the trauma of being removed and displaced from all that they know. . . [by ensuring] the preservation of connections and continuity of family relationships.¹¹⁰

Nonetheless, guardianship has not been subsidized until very recently, in contrast to adoption, and is still vastly underutilized.¹¹¹ Whether local agencies will implement this guidance remains to be seen, but past experience indicates that bureaucratic change in this realm is very slow.

In short, decades of adoption legal and funding preference, and particularly the adoption myths, are hard to shake. Around the country, few agencies or individual caseworkers are recognizing this data and implementing anything close to these recommendations.

C. Federal Funding Prioritizing Adoption

Fostering and adoption bring a federal non-means tested and non-stigmatized government subsidy. ASFA also excuses states from aiding families to reunify in certain cases and prioritizes adoptions, bringing

their parents gave up, or did not love them enough to care for them. This is rarely the case. . . . However, by denying children the ability to contact their parents, the law denies children the ability to know that they are loved.”)

108. Fictive kin is “an individual who is not related by birth, adoption, or marriage to a child, but who has an emotionally significant relationship with the child.” *The Kinship Care and Fictive Kin Reform Act*, AMERICAN LEGISLATIVE EXCHANGE COUNCIL (Sept. 9, 2017), <https://alec.org/model-policy/the-kinship-care-and-fictive-kin-reform-act>; see also *infra* note 144.

109. CB MEMO, *supra* note 35, at 10, 11, 18, 23.

110. *Id.* at 11.

111. Godsoe, *supra* note 16, at 145.

numerous supports and funding sources to promote them.¹¹² Some states do not even offer subsidized guardianship, despite placing many children with kin caregivers.¹¹³ In numerous states, subsidized guardianship consists of lower payments, and in all states it is underutilized and often not even known about by caseworkers.¹¹⁴ Even in those states, adoption still brings more support, such as childcare, counseling, legal assistance, etc.¹¹⁵ To cite just two examples, a Washington D.C. class action lawsuit filed in 2019 and one filed in New York City in 2022 allege that kin caregivers are steered away or even barred from foster care and thus given no financial or other supports, thereby imperiling their ability to care for their kin children.¹¹⁶ These cases illustrate a broader phenomenon: most states provide non-foster kin caregivers with no support or a very low TANF/welfare payment, much less than foster care payments.¹¹⁷ As a result, many kinship caregivers have no way to get meaningful state financial support without adopting.¹¹⁸ Moreover, states who do not comply with the adoption mandate are sanctioned through the denial of federal funds.¹¹⁹

112. 42 U.S.C. § 671. ASFA is also “expected to increase the number of adoptions” by expediting terminations of parental rights and providing adoption subsidies. H.R. REP. NO. 105-77, at 7 (1997).

113. For instance, South Carolina just enacted a KinGap program in November 2023, despite placing a full twenty-five percent of children in state custody in kinship foster care (and undoubtedly many more with kin and not in foster placements). Press Release, S.C. Dep’t Soc. Servs., Governor Henry McMaster Signs Legislation to Establish a Kinship Guardianship Program in South Carolina (Nov. 9, 2023), <https://dss.sc.gov/news/governor-henry-mcmaster-signs-legislation-to-establish-a-kinship-guardianship-program-in-south-carolina/>.

114. See LYDIA F. KILLOS ET AL., CASEY FAM. PROGRAMS, A NATIONAL ANALYSIS OF GUARDIANSHIP ASSISTANCE POLICY AND IMPLEMENTATION 8, 14 (2018), https://www.casey.org/media/Guardianship-Assistance-Policy-and-Implementation_Research-Brief.pdf (noting that a few states have no subsidized guardianship programs, and that others fund it less than foster parent payments while some fund it the same, but none give it the full level of resources of adoption). More broadly, states fund kinship care based on its category—i.e., foster, adoption, guardianship, custody (no funding at all), rather than on the needs of the children and their caregiver (a need that is presumed in foster and adoption systems). See ANNIE E. CASEY FOUNDATION, *supra* note 3, at 5–6.

115. Wallace, *supra* note 7, at 162; see also ANNIE E. CASEY FOUNDATION, *supra* note 9, at 2–3 (reporting that “states provide unequal levels of support for kin[ship caregivers]” and that states also usually provide less financial support to kin than to non-kin caregivers).

116. See discussion of these cases *infra* Section II.A.1.

117. See ANNIE E. CASEY FOUNDATION, *supra* note 9, at 4–6.

118. See Hernández & Berrick, *supra* note 2, at 37, 46–47 (noting the absence of any support other than TANF/public assistance for most kinship caregivers).

119. See Post & Zimmerman, *supra* note 98, at 503.

This funding scheme has created a skewed incentive system which prioritizes foster care and adoption rather than in-home services and reunification. Tellingly, the federal government overall spends up to ten times more on fostering and adoption than on supporting families of origin, and also spends very little on kinship care as well.¹²⁰ Despite recent changes to allow for more federal funding of guardianship—a legal framework far more preferable to kinship caregivers, as outlined above—no state funds or uses subsidized guardianship to the same level as adoption.¹²¹ Compounding these harms to children, their parents and communities, is that terminations—especially of older children—do not equate to more adoptions.¹²² Tellingly, the more that states use kinship care and guardianships, the lower their TPR rates, as Professors Vivek Sankaran and Christopher Church demonstrate in a recent article.¹²³

In sum, the ASFA federal statutory scheme creates a “one-size-fits-all [child welfare] model which places poor children in foster care, terminates parental rights expeditiously and [in theory] locates adoptive homes immediately.”¹²⁴

II. ILL-FIT & HARM TO KINSHIP FAMILIES

In this Part, I map how the significant flaws and false narrative of public adoption can harm the millions of families headed by kinship caregivers, denying them access to the legal status, funding, and self-determination and dignity accorded other families. Adoption, as currently constituted, is an ill-fit for these families because of its problematic criteria, accompaniment by state surveillance (at least for a time), and, most significantly, its “replacement” model of all-or-nothing parenting, and concomitant insistence on a nuclear family model. This adoption myopia does not reflect the lived experience of millions of children and families in large part because adoption almost always entails destroying other legal, and perhaps emotional, bonds, and engaging in falsehoods about family structure. It is for this reason that

120. Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALK POVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/index.html>.

121. See KILLOS, *supra* note 114, at 3–5.

122. See *supra* notes 70–72 and accompanying text.

123. Sankaran & Church, *supra* note 99, at 253 (discussing Alabama, North Carolina, and Wisconsin, among others). One caveat is that those states do not necessarily support kinship care financially to an adequate degree; for a better system, both need to happen—fewer TPRs and more financial support for non-adoption outcomes.

124. Vivek Sankaran, *Immigration Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 287 (2007).

so many kinship caregivers—and so many children—do not want it. And yet, most of them are forced into either accepting adoption, with all its untruths and flaws, or having no state support at all. It is thus unfortunately not surprising that kinship caregivers caring for children “informally,” i.e. with no legal status, or even those doing so with guardianship, are far poorer and have access to fewer resources for caregiving than the general population of parents.¹²⁵ The policies centering adoption in virtually all cases ensures that this will continue to be the case until those policies change.

Compounding these inequities is the way that many state agencies deal with kinship families—giving them virtually no notice of child placement, assuming that they will and can care for the child immediately, often with no financial or other support, and (mis)construing any hesitation as a lack of commitment to the child.¹²⁶ It is all or nothing, one extreme or the other, to children’s detriment.

A. *Adoption’s Poor Fit*

This part maps how adoption’s skewed criteria, invasive process and accompanying surveillance, and rigid failure to accommodate the reality of most families particularly harms children in kinship care and their families.

1. Problematic Criteria & “Beauty Contest” for Parental Rights

Researchers and advocates unanimously note how kinship caregivers are often not informed of their options or rights, such as to become foster or adoptive parents, and are frequently pressured into “informal” care with no government benefits.¹²⁷ This is both a matter of official state agency policy and local caseworker culture and practice.¹²⁸ This pattern frequently goes beyond a lack of information to deliberate

125. Hernández & Berrick, *supra* note 2, at 37–38.

126. Christine Tangel, *The Hidden Hurdles and Benefits of Kinship Care and Adoption*, 2022 ADOPTION ADVOC. 1, 6–7, <https://adoptioncouncil.org/wp-content/uploads/2022/03/Adoption-Advocate-No.-164.pdf> (“Kinship relatives often voice that the situation does not feel like a choice, and express anger and resentment, and sometimes shame as well. If custody comes to these families through the domestic foster care system, children arrive quickly, preceded by a phone call and then by the child being literally dropped off at their door.”).

127. See, e.g., Wallace, *supra* note 7, at 168.

128. See *id.*

misinformation, and dissuading kinship caregivers from seeking benefits to save the jurisdiction funds.¹²⁹

Two recent lawsuits illustrate this dynamic in stark detail. A suit brought on behalf of kinship caregivers in Washington D.C. alleges that the local agency “intentionally treats relative caregivers . . . differently from licensed foster parents”¹³⁰ and “pressures kin caregivers to file for legal custody without informing them of their right to apply to become a licensed foster parent.”¹³¹ Then, if the kin custodian finds out they can obtain much-needed financial support through the system and later applies to be a foster parent, the agency routinely denies them fostering status, citing the fact that they are the child’s existing custodian.¹³² This vicious cycle denies these kinship caregivers—and the children they care for—benefits of foster system “including appropriate housing, food, clothing, education, health care. . . extracurricular activities, [and] transportation.”¹³³ For teenagers and older youth, kinship diversion also denies them access to college preparation programs, tours, and financial aid, as well as other transition to adulthood programs.¹³⁴

Demonstrating another facet of this conundrum, kinship caregivers in New York sued because they were prohibited from becoming foster parents, and likewise denied essential financial and other supports, because of decades-old criminal convictions, unfounded findings of neglect, and other rigid bureaucratic barriers particularly impactful in low-income communities of color, where so many children are removed from their homes.¹³⁵ For instance, grandparents, aunts and uncles, and other kin caregivers were denied foster care status due to, among other reasons, a twenty-five-year-old attempted burglary conviction, other criminal history dating back thirty to forty years including a 1996 drug conviction, the grandmother’s husband’s thirty-year-old robbery

129. See *id.* (relating a typical case of a grandmother taking in the newborn of her mentally ill daughter, not being informed about the foster system and benefits, and eventually being evicted with the baby for being unable to pay her rent).

130. Brief for Foster Kinship as Amici Curiae at 6, *K.H. v. District of Columbia*, No. 1:19-cv-03124 (D.D.C. July 22, 2021) [hereinafter D.C. Amicus Brief] (quoting Plaintiffs’ Memorandum of Points and Authorities in Opposition to Defendant’s Motion to Dismiss Plaintiffs’ Amended Complaint at 36, *K.H. v. District of Columbia*, No. 1:19-cv-03124 (D.D.C. Mar. 20, 2020)).

131. *Id.* at 2 (citing Complaint ¶¶4–5, 50, 84, 86, *K.H. v. District of Columbia*, No. 1:19-cv-03124 (D.D.C. Oct. 18, 2019)).

132. See *id.*

133. *Id.*

134. See *id.* at 12.

135. Complaint ¶3–4, 11, 78–79, *B.B. v. Hochul*, No. 21-cv-6229 (E.D.N.Y. Nov. 10, 2021). This is an issue nationwide. ANNIE E. CASEY FOUNDATION, *supra* note 3, at 4 (noting that the general fostering guidelines vary from state to state, but can include criminal background requirements that “impede kin from gaining foster home licenses”).

conviction, a twenty-year-old “incident” (unspecified) from a family policing investigation, an unfounded allegation of abuse of a prior foster child—unfounded!—and the like.¹³⁶

The New York 2023 complaint describes a very similar system to the D.C. 2019 complaint, wherein children are “diverted” into kinship care, denying the caregiver families any financial benefits or services and also, since it is deemed to be a “temporary” placement puts the children at risk of being moved into a “stranger” foster home or a group home.¹³⁷ Financial benefits given to New York foster parents are similar to D.C.’s including monthly maintenance payments, as well as child care, transportation, and other funds, as well as children’s automatic Medicaid eligibility, whereas services include assistance with providing for children’s medical, mental health, and education needs.¹³⁸ To be clear, in every case, the children remained with their kinship caregivers, at least for a while until the lack of resources became unsustainable, and the agency found that the children were safe and that the caregivers were amply meeting their needs.¹³⁹ This punitive system primarily denies services and resources to kin properly caring for children who need care, a group of people who are overwhelmingly low-income. Almost all the caregivers in these cases are on fixed incomes, are sometimes “short on their monthly bills,” “struggle[] financially” to care for their kin children, and “desperately need[]” the child care and other supports afforded foster parents.¹⁴⁰ Indeed, a lack of services and “significant financial stress” from caring for children with no state support led all these caregivers to be on the verge of not being able to keep the children in their homes,

136. B.B. v. Hochul, 21-cv-6229, 2023 WL 5935803, at *3–4 (E.D.N.Y. Sept. 12, 2023). I was involved in this case as a Guardian ad Litem/Next Friend for one of the named plaintiffs.

137. *Id.* at *2. Group homes, or congregate care, are worse than foster homes for children and teens educationally, safety-wise, and in many other ways. *See e.g.*, Shawna Bullen-Fairbanks, *Group Homes Have a Legacy of Causing Harm to Foster Youth*, IMPRINT (Jan. 3, 2022, 2:42 PM), <https://imprintnews.org/youth-voice/group-homes-legacy-of-harming-foster-youth/61439>; *What are the Outcomes for Youth Placed in Group and Institutional Settings?*, CASEY FAMILY PROGRAMS (June 29, 2022), <https://www.casey.org/group-placement-impacts/>; Kaylah McMillan, *I Survived the Foster Care System. Dismantling It Altogether Is the Only Path Forward*, <https://www.usatoday.com/story/opinion/voices/2023/09/24/foster-care-group-home-lasting-harm-kids-academics-mental-health/70863779007/> (Sept. 24, 2023, 5:05 AM).

138. B.B. v. Hochul, 21-cv-6229, 2023 WL 5935803, at *2 (E.D.N.Y. Sept. 12, 2023).

139. *See generally id.* at *3–6.

140. *See id.* at *3; *see also* D.C. Amicus Brief, *supra* note 130, at 12 (detailing how “[o]ne of the greatest difficulties faced by kin caregivers and their families is financial hardship”).

although they desperately want to, and in several cases, children were removed and placed in other homes due to this strain.¹⁴¹

Despite these harms, in D.C. at least, kinship diversion is allegedly a deliberate policy to keep foster care placements down, thereby saving the District money.¹⁴² And it definitely did save money, although at the steep cost of the wellbeing of many children. Within twelve years of prioritizing this kinship diversion, the number of children entering the D.C. foster system fell by sixty-four percent.¹⁴³ Similarly, the NYC department pressures kinship caregivers to take children even when they cannot be certified as foster parents and does not seek to change the rigid and irrational certification system or to obtain more benefits for non-foster kinship caregivers. These “penny-wise, pound-foolish” policies harm children and their families and result in more costs for the government in the long term.¹⁴⁴

Because fostering and adoption bring financial benefits and kinship caregivers, mostly grandmothers, often cannot or will not foster or adopt, their families are, as a group the poorest in the country.¹⁴⁵ There are other reasons for this as well, including structural sexism and racism, the fact that these families—almost by definition for those families in the family policing system—are low-income and facing challenges including disability, incarceration, and untreated substance abuse disorder.¹⁴⁶ Kinship caregivers—despite their widespread role in actually caring for children—are often deemed inappropriate to adopt, or even to foster, due to age, disability, poverty, etc.¹⁴⁷ Even worse, kinship caregivers are

141. B.B., 2023 WL 5935803, at *3–4, 8; *see also* Press Release, Ropes & Gray, DC KinCare Alliance and Ropes & Gray File Federal Lawsuit Challenging the District of Columbia’s Illegal Practices that Deprive Abused and Neglected Children of Essential Financial Support and Services (Nov. 11, 2019), <https://www.ropesgray.com/en/news-and-events/news/2019/11/dc-kin-care-alliance-ropes-gray-federal-lawsuit-challenging-dc-illegal-practices-deprive-children> (alleging that the District’s failure to support kinship caregivers “results in many of these families falling further into poverty, becoming homeless, and struggling to feed their children”).

142. *See* Complaint, *supra* note 130, ¶3.

143. D.C. Amicus Brief, *supra* note 130, at 9–10 (also noting that the local department deliberately set out to cut the number of children in the foster system while also increasing kinship care).

144. *See* Complaint, *supra* note 135, ¶¶ 191–93.

145. Hernández & Berrick, *supra* note 2, at 35. *See also* Kriss, *supra* note 5 (reporting that half of all single grandmothers raising grandchildren live in poverty).

146. *Id.* at 35 (collecting research that kinship caregivers—who are mostly maternal grandmothers—are older, poorer, and more likely to be disabled than other caregivers); *see also* Wallace, *supra* note 7, at 127–28 (collecting research on kinship caregivers).

147. *See* Separate Licensing Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 9411, 9412 (Feb. 14, 2023) (to be codified at 45 C.F.R. pt. 1355), <https://www.govinfo.gov/content/pkg/FR-2023-02-14/pdf/2023-03005.pdf>; *Am I Too Old to*

frequently disqualified as foster or adoptive parents, or even as custodians or guardians, because they do or may allow the child some contact with their birth parents.¹⁴⁸

Another aspect of adoption myopia is an overly narrow definition of kin. For instance, at least ten states do not include people who are not biologically related in their kinship definitions, despite the fact that kin has long meant much more than blood relations to many people.¹⁴⁹ As Dr. Testa describes fictive kin relationships: “They arise independently of primordial ties and can instill a similar sense of intense mutual attachment [as] blood relations often do.”¹⁵⁰ The narrow definitions and overly rigid state criteria of the adoption framework ignore the reality of so many children’s lives, namely who is actually caring for them physically and monetarily. Finally, the framework is culturally and racially biased since immigrant, indigenous, and families of color are more likely to live in extended family and kinship arrangements. As the D.C. plaintiffs put it, the policy treating kinship families differently “has a disproportionate discriminatory impact on poor African American women, children, and families, and sets them up to fail.”¹⁵¹

2. Surveillance Apparatus

Scholars and impacted people have described the lack of privacy and relentless surveillance that characterize state interventions into low-income families.¹⁵² The family policing and foster systems are no exception.¹⁵³ Despite the fact that there are no allegations of neglect or

Adopt?, AMERICAN ADOPTION NEWS (Sept. 6, 2016), <https://www.americanadoptions.com/blog/am-i-too-old-to-adopt/>.

148. This is based on my own practice experience. *See also What Causes Family to be Denied?*, ADOPTION.COM, <https://adoption.com/forums/thread/388803/what-causes-family-to-be-denied/> (last visited June 21, 2024).

149. Julia J. Eger, *Legally Recognizing Fictive Kin Relationships: A Call for Action*, A.B.A. (Mar. 1, 2022), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december2022/fictivekin/; *see also* the definition at *supra* note 108.

150. Testa, *supra* note 17, at 22.

151. Press Release, Ropes & Gray, *supra* note 141.

152. *See* Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 122 (2011); *Our Mission and Approach*, MOVEMENT FOR FAM. POWER, <https://www.movementforfamilypower.org/our-mission-and-approach> (last visited June 21, 2024).

153. *See, e.g.*, Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 AM. SOCIO. REV. 610, 610 (2020); Laura Matthews-Jolly, *Family Separation by Visitation 8* (Dec. 27, 2023) (unpublished manuscript) (on file with author) (arguing that while visitation for parents whose children have been removed is ostensibly for the child’s benefit, it is also a key site of the “surveillance” apparatus that serves to punish, and sometimes permanently sever, the

abuse against them, and that they are helping the state by taking in their grandchildren or other children in need of care, kinship caregivers who want any real financial assistance have to go through daily invasions of privacy in order to be licensed as foster or adoptive parents.¹⁵⁴ These may include unannounced caseworker home visits, mental health assessments, sharing of medical records, drug testing—actions that would require a warrant in criminal or other situations.¹⁵⁵ The purported best interests of the child justify incursions on rights that would be unthinkable in other contexts.¹⁵⁶

In sum, kinship caregivers have to trade their privacy for resources as financial support only really comes through the family policing system and adoption. Professor Dorothy Roberts presciently pointed out this dilemma over twenty years ago, arguing that “transferring parental authority to the state is the price poor people must often pay for state support of their children.”¹⁵⁷ Unfortunately, little has changed since then.

3. Warped Reflection of Families

Further demonstrating how kinship caregivers are overlooked in family law and policy, there is little research on their wants and needs, especially by the federal or state governments. Existing research by social work and legal professionals universally confirms my experience from practice—adoption is not suited to most of these families; even worse, it can harm them, yet they are pushed into it and left with few to no other alternatives that bring state support or even legal recognition.¹⁵⁸ There are numerous reasons why these families do not want adoption—

family”). Adoptions themselves, even for more affluent families, are lengthy, costly, and privacy-invasive. See Sankaran & Church, *supra* note 99, at 256 (reporting that adoptions from the family policing system take on average 28.5 months—over two years—versus 17.4 months from removal to guardianship and 5.7 months from removal to relative custody).

154. Roberts, *supra* note 9, at 1627.

155. See, e.g., *Requirements to Become a Foster Parent*, N.Y. OFF. OF CHILD. AND FAM. SERVICES, <https://ocfs.ny.gov/programs/fostercare/requirements.php> (last visited June 21, 2024). For an analysis of the particular onus on kinship caregivers of these licensing requirements, please see Separate Licensing Standards for Relative or Kinship Foster Family Homes, *supra* note 147, at 9412–14; *Am I Too Old to Adopt*, *supra* note 147. See also B.B. v. Hochul, 21-cv-6229, 2023 WL 5935803, at *1–2 (E.D.N.Y. Sept. 12, 2023) (outlining the detailed process to become a foster, not even adoptive, parent in New York State).

156. Indeed, being a foster parent—especially one who is lower-income, as most kinship caregivers are—increases the risk of that foster parent being reported and indicated for maltreatment themselves. See Roberts, *supra* note 9, at 1620. Being listed on the state central registry for child maltreatment is not only stigmatizing, but a barrier to many jobs in childcare, home health work, etc. My thanks to Chris Gottlieb for this important point.

157. Roberts, *supra* note 9, at 1621.

158. See, e.g., Albert & Mulzer, *supra* note 9, at 560.

perhaps most importantly, because the rigid nature of parenthood law means that granting a new “parent” legal status necessitates terminating another parent’s rights: the sons and daughters of most kin caregivers.

More broadly, the current required TPR, closed, and all-or-nothing adoption system, is not what these children and their caregivers want and need.¹⁵⁹ Although some adoption advocacy materials cite “[o]ngoing relationship[s] with the parent” as an advantage of kinship adoption, most adoptions out of the foster system are closed and do not allow any contact with biological parents.¹⁶⁰ Robert Johnson, whose aunt obtained guardianship of him rather than adopt, expresses the advantages:

I am thankful that our aunt did not need to adopt in order for [me and my sisters] to leave foster care. Adoption would have meant losing our mom, which is something that we never wanted to happen. Guardianship gave my mother space to heal so she could remain a meaningful part of our lives.¹⁶¹

Adopted children often want to retain ties to their biological parents,¹⁶² and their parents can contribute much to them. As advocate and impacted parent Joyce McMillan explains: “Parents lack resources, not love for their children For Black, Latine, and low-income children and parents who have been forcibly separated from each other, continued family visits can be vital.”¹⁶³

Many children who are adopted when they are old enough to remember their birth parents do not see one mother or father as “replacing” the other. Children who are not adopted also retain strong ties to their birth parents, despite a termination.¹⁶⁴ Children’s attachments to even absent or flawed parents are deep: parents play a

159. Open adoption is much less common in the public than in the private adoption system—sixty-seven percent versus thirty-two percent. *Id.* at 590 n.154 (2022). One caveat: although post-termination and post-adoption contact is legally prohibited in some places, as in New York, or just not permitted by agencies in many places, such as Illinois, in practice, such contact in kinship cases often happens—another advantage of kinship placements. For New York, see Preserving Family Bonds Act, discussed *infra* notes 200–01. See also Sponsor Memo, S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023). For Illinois, see Annette Ruth Appell, *The Myth of Separation*, 6 NW. J. L. & SOC. POL’Y 291, 296–97 (2011).

160. CHILDFOCUS, *supra* note 6, at 5.

161. Testa, *supra* note 17, at 25.

162. See Matthew B. Johnson, *Examining Risks to Children in the Context of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 397, 407–08 (1997).

163. Hunt & Watson, *supra* note 69.

164. See, e.g., MADELYN FREUNDLICH, CHAFEE PLUS TEN: A VISION FOR THE NEXT DECADE 18 (2010), <https://search.israelab.org/resource/chafee-plus-ten-a-vision-for-the-next-decade.html#download-options>.

significant role in the development of their identity and self-esteem,¹⁶⁵ many parents can still contribute to a child's life through visits and other contact, and children benefit from relationships with multiple loving adults.¹⁶⁶ In fact, many teenagers who age out of foster care return by choice to their birth parents, despite lacking any legal relationship and technically being orphans.¹⁶⁷

As a result of these family realities, kinship adoption is largely “involuntary.” As one report concludes: “It’s rare that adopting family members seek out this process; it often feels placed upon them.”¹⁶⁸ The same report continues: “Kinship relatives often voice that the situation does not feel like a choice, and express anger and resentment, and sometimes shame as well.”¹⁶⁹ Other research confirms this:

In the past, popular wisdom was that relatives do not want to adopt. Indeed, some relatives have concerns about adopting children with whom they already have an existing family relationship. Sometimes relatives do not want to permanently alter family relationships by terminating parental rights against their own children, sisters, or brothers. They hold on to the hope that the children’s parents will eventually make sufficient progress to be able to resume care for their children.¹⁷⁰

165. This is true even for children who have never met their biological parents, and largely explains the desire of many adopted children to search for their biological parents. See Appell, *supra* note 159; see also Sponsor Memo, S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

166. Johnson, *supra* note 162, at 408–11, 414; see also Maldonado, *supra* note 9, at 326–32 (arguing that post-adoption contact is likely particularly important in transracial adoptions, due to children’s identity formation); Shelley A. Riggs, *Response to Troxel v. Granville: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 43–44 (2003) (noting cross-cultural studies show that children can develop multiple strong attachments concurrently).

167. See Godsoe, *supra* note 16, at 131, 131 n.103 (gathering research). See also Mark E. Courtney, Outcomes for Older Youth Exiting the Foster Care System in the United States, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 40, 42, 52 (Benjamin Kerman et al. eds., 2009) (reporting national data showing that forty-seven percent of youth aging out of foster care returned to their biological families upon discharge from state care and study results that eighty-eight percent of former foster youth with a sibling visited him or her at least once after being discharged from foster care). The parental reinstatement statutes that over half of the states have enacted also reflect this reality. *Reinstatement of Parental Rights State Statute Summary*, NAT’L CONF. STATE LEGISLATURES, <https://www.ncsl.org/human-services/reinstatement-of-parental-rights-state-statute-summary> (Jan. 17, 2020). See also Godsoe, *supra* note 16, at 148–54.

168. Tangel, *supra* note 126, at 6.

169. *Id.*

170. CHILDFOCUS, *supra* note 6, at 3.

Caseworkers assume that caregivers who also support birth parents are somehow harmful to children, rather than recognizing that these parents still play a role in children's lives. Inversely, and equally as harmful, they assume that adoptive parents will be harmed, or even will not adopt, if the parents' rights are not terminated, and even more if there is post-adoption contact—something that the prevalence of open adoption in the private market has shown is not true.¹⁷¹

Nonetheless, ignoring the wishes of both children—for whose benefit the system purportedly exists—and their caregivers, caseworkers sometimes even threaten families with removal of the children in their care or actually move teenagers out of secure kinship homes into non-kinship pre-adoptive homes if the kinship caregiver refuses to adopt.¹⁷² These agency practices are directly contradictory to the psychological literature on permanency and the likelihood of adoption disruption, particularly for older children. They continue to be driven, however, by the funding focus on adoption, the statutory adoption preference, and, most sticky, decades of caseworker culture infected by adoption myths. Due to the funding attached and caseworker pressure, adoption by kinship caregivers has increased quite rapidly. For instance, in 2019, thirty-six percent of all children adopted from foster care were adopted by relatives, an all-time high.¹⁷³ Many of these were undoubtedly influenced by the lack of other options, especially ones that come with funding. At the same time, states underutilize guardianships and other very good permanency options that kinship caregivers prefer. For instance, in 2009, only four percent of children in the foster system had guardianship as their goal, whereas twenty-four percent had adoption.¹⁷⁴ Even more problematic, over a decade later, the guardianship goal for

171. Gottlieb, *supra* note 22, at 55 (“Adoption recruitment specialists commonly say ‘many prospective adoptive parents are reluctant to care for a child whose birth parents’ rights are still intact.’”).

172. Kendra Hurley, *Preserving Family Ties*, 15 CHILD WELFARE WATCH 8, 12–13 (2008); see also Olivia Golden & Jennifer Macomber, *The Adoption and Safe Families Act (ASFA)*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8, 24 (Susan Notkin et al. eds., 2009) (noting the inconsistent application of ASFA in California); MaryLee Allen & Beth Davis-Pratt, *The Impact of ASFA on Family Connections for Children*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 70, 75 (Susan Notkin et al. eds., 2009) (finding that the prioritization of adoption led caseworkers to pressure caregivers to adopt or risk losing custody of, and contact with, children in their care).

173. CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., No. 27, THE AFCARS REPORT (2020), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf>.

174. CHILD’S BUREAU, U.S. DEP’T OF HEALTH & HUM. SERVS., No. 17, THE AFCARS REPORT (2010), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport17.pdf>.

children in the foster system remains four percent, while adoption as a goal has risen to twenty-eight percent.¹⁷⁵

B. Material & Dignitary Harms

This zero-sum, all-or-nothing treatment of parenthood—adoption or bust—is in stark contrast to the parsing out of parental rights in “private family law” families after divorce. In most states, there is a de facto preference or even a legal presumption for joint custody and a high bar to deny visitation to any parent. In kinship care, those actually caring for children—parenting children sometimes for their entire lives—are not recognized as entitled even to visitation.

1. Lack of Resources & Legal Status

As noted earlier, kinship caregivers have historically been put in the position of all or nothing: either accept the rigid and harsh foster and adoption framework or receive no financial support. Although this has changed somewhat with federal funding of and state expansion of subsidized guardianship, many states still give fewer benefits to kinship foster parents and guardianship than adoption. For instance, in New York, children in regular, i.e. state-monitored fostering, receive assistance in addition to their care payments, including for clothing, camp, babysitting, and gifts.¹⁷⁶ Kinship guardians may now receive financial assistance through guardianship, but not for these things.¹⁷⁷ Moreover, many are not even informed of guardianship, as illustrated in the recent class action cases discussed earlier.¹⁷⁸ And kinship caregivers who do not learn about or qualify for guardianship assistance payments are relegated to a child-only TANF benefit, usually considerably less than the foster board rate.¹⁷⁹ In other states, the guardianship assistance rate

175. CHILD.’S BUREAU, U.S. DEPT’ OF HEALTH & HUM. SERVS., No. 29, THE AFCARS REPORT (2022), <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport29.pdf> (reporting the case plan goals of the 391,000 children in foster care as of September 30, 2021). Compounding the existing “legal orphan” problem is the fact that adoption is an unrealistic or unwanted goal for many of these children.

176. *New York State’s Permanency Comparison Chart: Adoption Assistance, Kinship Guardianship Assistance, and Foster Care*, GRANDFAMILIES.ORG, <https://www.grandfamilies.org/Portals/0/Documents/Wikihow/NY%20comparison%20chart.pdf?ver=NgNdeFKjrnnlP6hHAGEpPw%3D%3D> (last visited June 21, 2024).

177. Some care payments are significantly less than in the foster or adoptive system (including guardianship). See, e.g., D.C. Amicus Brief, *supra* note 130, at 12–13 (reporting that in 2018 the average “Grandparent Caregivers Program” subsidy was only forty to sixty percent of the foster system payment rate).

178. See *supra* notes 135–42 and accompanying text (discussing B.B. v. Hochul).

179. *Id.*

is always set at or below the foster payment rate, despite the add-ons given foster parents noted above and the limited resources and essential caregiving of most kin caregivers.¹⁸⁰

Given the underuse of subsidized guardianship, and the reluctance of many kinship caregivers to adopt, many of them have no legal status. This harms children and caregivers since without custodial or foster parent status, people cannot, for instance, enroll a child in school, consent to routine or emergency medical treatment, and many more things children need.¹⁸¹ More broadly, this failure to provide basic resources and denigration of family ties mirrors the state treatment of parents in the family policing system.¹⁸²

2. Dignitary Harms

As I outlined earlier, the primary approach in most places is still to either deny kinship caregivers any support or to force them into adoption options that often do not work for them or children, rather than change the system of state caregiver recognition and support. For instance, numerous state materials talk about how to incentivize or pressure more caregivers to adopt, rather than considering the creation of more flexible adoptions or more support for other caregiving arrangements such as subsidized guardianship.¹⁸³ As a result, many relatives are still forced into choosing termination and adoption, or foregoing meaningful financial support. This failure to recognize and value their relational attachments denies “dignity and respect for both the child and the [broader] permanent family.”¹⁸⁴

180. See, e.g., *Subsidized Guardianship in Wisconsin*, WIS. DEP'T OF CHILD. & FAMS., <https://dcf.wisconsin.gov/guardian/subsidized> (last visited June 21, 2024).

181. This was a frequent challenge facing kin caregivers when I practiced and continues to be a major problem almost twenty years later.

182. Cynthia Godsoe, *Disrupting Carceral Logic in Family Policing*, 121 MICH. L. REV. 939, 949 (2023) (reviewing DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD* (2022)) (citing ISSA KOHLER-HAUSMANN, *MISDEMEANORLAND: CRIMINAL COURTS AND SOCIAL CONTROL IN AN AGE OF BROKEN WINDOWS POLICING* (2018) (“[A]ll the research shows—and even the government acknowledges—that what would improve children’s wellbeing are material resources such as housing, child care, and physical and mental healthcare . . . [yet] the family-policing system is not functioning to increase child safety or help families; instead it sorts, marks, and hassles them thereby perpetuating a society stratified by race, class, immigration status, et cetera.”)).

183. See, e.g., CHILDFOCUS, *supra* note 6, at 11–12.

184. Testa, *supra* note 17, at 24. Lisa Washington has described and theorized other dignitary harms to families in the system. See S. Lisa Washington, *Survived & Coerced: Epistemic Injustice in the Family Regulation System*, 122 COLUM. L. REV. 1097, 1097 (2022).

While the U.S. Supreme Court has repeatedly articulated the right of individuals to choose family members; as it stated in *Obergefell*: “[F]amily relationships . . . and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make.”¹⁸⁵ In reality, however, that right is not equally accorded to all families. This is particularly true of low-income families, such as most of those headed by kinship caregivers.

III. A PATH FORWARD

A. *Some Concrete Non-Reformist Reforms*

There are numerous concrete changes that could better meet the needs of children and kinship caregivers. I am certainly not the first to suggest these, and I have also suggested some of them before, but change in this area is slow. All of these efforts must be assessed against an abolitionist horizon to ensure that they are not “reformist reforms.”¹⁸⁶ Reforms can be perilous—they may re-entrench and legitimate fundamentally unjust systems; “[b]y obscuring the true nature of unjust and flawed institutions . . . [they] help to reinvent and perpetuate these institutions and concomitant hierarchies of race and class.”¹⁸⁷ Accordingly, activists and scholars and scholar/activists should be mindful to support only “non-reformist reforms,” or reforms that do not grow the carceral state and that challenge the underlying power dynamics.¹⁸⁸ Balancing the potential tradeoffs between harm reduction in the here and now, and inadvertently strengthening or prolonging the system, is challenging but essential.¹⁸⁹

185. *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015).

186. Amna Akbar and others argue that non-reformist reforms are grassroots and inherently anti-elitist; they “advance radical critique and radical imagination” and are “pathways for building ever-growing organized popular power.” Amna A. Akbar, *Demands for a Democratic Political Economy*, 134 HARV. L. REV. F. 90, 103–13 (2020). Ruth Wilson Gilmore articulated this concept in her seminal work, *GOLDEN GULAG: PRISONS, SURPLUS, CRISIS, AND OPPOSITION IN GLOBALIZING CALIFORNIA* (Earl Lewis et al. eds., 2007).

187. Cynthia Godsoe, *The Place of the Prosecutor in Abolitionist Praxis*, 69 UCLA L. REV. 164, 197 (2022).

188. One important caveat is due here: eschewing reformist reforms does not mean refusing to make things better for those in the system while working towards the long-term abolitionist goal. Former prisoner and now-lawyer Angel Sanchez analogizes the carceral state to cancer: “we should fight to eradicate it but never stop treating those affected by it.” Angel E. Sanchez, *In Spite of Prison*, 132 HARV. L. REV. 1650, 1652 (2019).

189. Godsoe, *supra* note 182, at 961.

1. Resources

Financial assistance is key to children's wellbeing. The research is overwhelming that what families most need is material support.¹⁹⁰ Kinship caregivers should be able to receive support commensurate with foster and adoptive parents when caring for children, regardless of whether they are licensed or not, and whether they agree to adopt or not. A recent federal rule allows "child welfare" agencies to streamline and approve more kinship caregivers to receive Title IV-E foster system funds and mandates equal payments for licensed kinship and non-kin caregivers.¹⁹¹ Whether states will implement this remains to be seen.

Moreover, states should utilize subsidized guardianship and other more nuanced options to help families, and guardianship should not require caregivers to be foster parents first. Although funding for guardianship has increased dramatically in the last decade—from \$11.2 million claimed by states in 2010 to \$203 million in 2020—it still falls far short of funds used for fostering and adoption.¹⁹² State gatekeeping for resources forces kinship families into difficult choices and ultimately fails the children the system purports to protect.¹⁹³ Guardianships also save states considerable money over adoptions, which require TPRs that can involve lengthy court proceedings.¹⁹⁴

2. More Permanency Options

Beyond resources, legal structures should be more flexible and responsive to how families actually live; put another way lawmakers, judges, and agencies should center the needs, wants, and actual lived experiences of marginalized families.¹⁹⁵ This entails supporting counter narratives to the adoption myth.¹⁹⁶ As even the federal Children's Bureau recently recognized: "Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them."¹⁹⁷ Other concrete changes to

190. See Garcia & Godsoe, *supra* note 1, at 608 (summarizing research including Rise participatory research).

191. ANNIE E. CASEY FOUNDATION, *supra* note 3, at 4–5, 8 (discussing Administration for Children and Families regulation on Kin-Specific Foster Home Approval Standards issued September 2023).

192. *Id.* at 5 (noting that numbers were adjusted for inflation).

193. Garcia & Godsoe, *supra* note 1, at 607.

194. Sankaran & Church, *supra* note 99, at 260–61.

195. See Godsoe, *supra* note 182, at 960.

196. See Amna Akbar, *Under the Guise of Care*, L. & POL. ECON. BLOG (July 19, 2023), <https://lpeproject.org/blog/under-the-guise-of-care/>.

197. CB MEMO, *supra* note 35, at 10.

this end include a robust kinship preference for any out-of-home placement;¹⁹⁸ elimination of the requirement that kin caregivers become foster parents before being eligible for subsidized guardianship; a repeal of ASFA and its rigid and punitive timelines;¹⁹⁹ and a cessation of prioritizing adoption over other permanent outcomes, in both funding and practice.

The focus on adoption does not meet the needs of many children and families, as demonstrated throughout this Article. Some of the harms to children and families can be rectified by using more open adoption and/or permitting post-adoption contact.²⁰⁰ The proposed New York Preserving Family Bonds Act, for instance, would allow judges to order post-adoption contact where it is in the best interests of the child, and where children over fourteen years old consent to it, just as those young people have to consent to being adopted.²⁰¹ Note, however, that even this bill does not go very far. The default is still no contact, any contact only comes after a hearing with the burden of proof on the person seeking contact, and a finding of no contact cannot be used to challenge the adoption itself. This contact is very important to many children being adopted out of the foster system, since the vast majority of them know their birth parents and families of origin, and many are being adopted outside of their race or culture. As one former foster youth expressed, this contact helped her “maintain connectivity to her heritage, family of origin, and sense of self.”²⁰²

Yet even open adoption is not as radical as some characterize it—it still requires a termination of parental rights and makes parenthood a mostly on/off all-or-nothing switch, which is not how most families work and is harmful to many children and families.²⁰³ In my practice experience, post-adoption contact is often as little as one letter or visit a year. In many states, the agreements are legally unenforceable so the adoptive parents can end them at any time.²⁰⁴ Moreover, this model perpetuates the “us versus them,” zero-sum framework between birth

198. See Gupta-Kagan, *supra* note 21, at 11 (“The law should establish a strong kinship care preference, requiring agencies to place children with kin unless the agency can establish good cause why that would be unsafe or otherwise detrimental to the child.”).

199. See Smith & Trivedi, *supra* note 66, at 32; see also Guggenheim, *supra* note 32, at 732 (“The day cannot come too soon when we repeal AFSA and end this system which needlessly separates children from their families.”).

200. See CHILDFOCUS, *supra* note 6, at 9.

201. S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

202. Hunt & Watson, *supra* note 69; see also Sponsor Memo, S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023) (noting that post-termination contact “allows children access to their racial, ethnic, religious and cultural histories, critical in developing a sense of self”).

203. See Albert & Mulzer, *supra* note 9, at 591–92.

204. See Appell, *supra* note 159, at 295–97.

parents and kin and adoptive parents. This attitude—fighting over a child as exclusive property—not only underlies the current harsh ASFA TPR before adoption system,²⁰⁵ but is also motivating the New York Governor to repeatedly veto the Preserving Family Bonds Act.²⁰⁶ Governor Hochul said the bill does not give adoptive parents “full rights” or “finality,”²⁰⁷ and that post-adoption contact will impede “the child integrat[ing] into the adoptive home without continued interference by the court.”²⁰⁸ Should these interests of adults override a child’s best interests and desire to know her full family, and heritage? There is no reason that children in the public family law system should not benefit from the flexibility and parsing out of rights so prevalent in the private system—not to mention that courts are always potentially involved in some sense in divorcing families’ lives, until children are grown. As the New York bill sponsor memo puts it:

The difference between a voluntary surrender of parental rights and an involuntary termination by the court is a procedural one; it has nothing to do with the strength of the bond between the parent and their child, or the child’s need to maintain some form of contact with their family of origin²⁰⁹

Accordingly, rather than focusing only on open adoption, the system should fully fund and utilize guardianship, and also offer adoption modeled on tribal customary adoption, which allows for adoption without severing all the biological family’s rights.²¹⁰

205. See *supra* notes 157–169 and accompanying text.

206. S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

207. Hunt & Watson, *supra* note 69. This is the third time that a Governor is vetoing the legislation in New York.

208. Veto Message from Kathryn Hochul, Governor of New York, Veto Message of S. 6720 (Dec. 8, 2023), <https://nysfocus.com/2024/01/03/kathy-hochul-2023-veto>. This is despite evidence to the contrary. See Riggs, *supra* note 166.

209. Sponsor Memo, S. 6720, 2023–2024 Leg., Reg. Sess. (N.Y. 2023).

210. This type of adoption is permitted by law in a few states. See Albert & Mulzer, *supra* note 9, at 564 n.16 (outlining laws and research). There is ample historical precedent for a more nuanced, less coercive system; indeed, the current on/off parenthood switch of TPR and involuntary closed adoption is a relatively recent development, mainly since the 1970s and then especially after ASFA’s enactment in 1997. See Gottlieb, *supra* note 22, at 12–13, 66–68 (detailing the long history of adoption in America upon consent of birth parents, without a TPR, and then a “voluntary transfer” of parental rights to the adoptive parents usually chosen by the birth parents).

B. Abolish the Family Policing System & Reimagine Recognition of & Support for Families

Even with the above changes to reorient it and reduce harm, the current system cannot be fixed. As with the intertwined criminal system, the family policing system is “working the way it is supposed to.”²¹¹ To truly best serve all families, the system must be downsized out of existence—with first steps being to greatly reduce the number of children removed from their parents, and the number of terminations of parental rights.²¹² One model to look at to this end is the Indian Child Welfare Act (“ICWA”), which permits termination of parental rights only with a showing of “serious emotional or physical damage,” and prioritizes extended family and tribal members for out-of-home placement, which means fewer terminations and much more post-removal contact.²¹³

Divestment from the family policing system must be accompanied by an investment in birth families and extended families—both with resources and legal recognition. As Professor Sacha Coupet and others have argued, we should have an “additive, rather than substitutive” framework of parenthood.²¹⁴ As children of divorce usually do not have to cut off one parent and family, neither should children in the foster system have to “choose between families.”²¹⁵ Respect and dignity for all families necessitates valuing and supporting their chosen forms, complex as they may be.²¹⁶

CONCLUSION

An abolitionist horizon demands only reforms that are consistent with the larger vision of dismantling the carceral state, rather than inadvertently empowering it. Essential to this divestment and

211. Paul Butler, *The System Is Working the Way It Is Supposed to: The Limits of Criminal Justice Reform*, 104 GEO. L.J. 1419, 1419 (2016) (arguing that police violence against Black men is a systemic, structural problem and calling for radical, abolitionist change).

212. See e.g., CRITICAL RESISTANCE, WHAT IS ABOLITION? (2012) (“The best way to reduce harm is by building safe, healthy communities where people have their basic needs met.”); *Community Control*, MOVEMENT FOR BLACK LIVES, <https://m4bl.org/policy-platforms/community-control> [perma.cc/4SXM-MZRZ] (last visited June 21, 2024). See also ROBERTS, *supra* note 182 (calling for the abolition of the family policing system).

213. Roemer, *supra* note 9, at 155. Although ICWA itself is under attack, see Julia Gaffney, *“The Gold Standard of Child Welfare” under Attack: the Indian Child Welfare Act and Haaland V. Brackeen*, 56 FAM. L. Q. 231 (2022-2023).

214. Coupet, *supra* note 9, at 635.

215. See Gottlieb, *supra* note 22, at 61 n.321 (quoting CB MEMO, *supra* note 35, at 10); see also Hunt & Watson, *supra* note 69.

216. Wallace, *supra* note 7, at 161–69 (arguing for some kinship relational rights).

investment is centering the voices and leadership of impacted parties and helping to shift power to communities rather than wait for top-down reforms, which will inevitably fall short and perpetuate hierarchies.²¹⁷ As Rise, a community-impacted parents' movement in New York City puts it: "Parents [should] set the agenda. Allies will, increasingly, be allies. That is how parent power builds. To begin that cycle of shifting power, our growing movement [against family policing] must reckon with the dynamics [within the movement] that tokenize and marginalize parents."²¹⁸ And we could add, more broadly, children and extended family. Lawyers have a role in this process, not as leaders, but rather as allies, supporting and learning from families and community members to lift up what they are asking for, familial and community self-definition and empowerment.²¹⁹ Only this framework, rather than removals, terminations, and adoptions, will truly keep children safe and ensure they thrive.

217. See Jocelyn Simonson, *Police Reform through a Power Lens*, 130 YALE L.J. 778, 790 (2021).

218. Teresa Bachiller et al., *Centering Parent Leadership in the Movement to Abolish Family Policing*, 12 COLUM. J. RACE & L. 436, 457 (2022).

219. See Godsoe, *supra* note 182, at 962–64 (outlining this mandate for abolitionist and other allied lawyers).