# The Pathway to and Consequences of Foster Parent Intervention in Dependency Cases

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*Over the last 50 years, federal child welfare legislation has wrestled with how to reconcile the competing goals of the child welfare system: child protection, family preservation, and permanency. The United States foster care system has evolved alongside transformations in private adoptions. As the prospects for private adoption have dwindled, the pendulum has shifted toward prioritizing child protection. Youth in foster care have suddenly become the private adoption alternative. Most recently, some state courts have granted foster parents standing to intervene in termination of parental rights proceedings. In those cases, foster parents are permitted to battle with natural parents for their children—with the court's permanent placement decision coming down to a "best interests" determination. Natural parents face patently unfair odds. The child welfare system is pitted against them from the point of removal.*

*This Note examines the historical and federal legislative context that made it possible for nonrelative foster parents to assert claims for adoption over the objection of natural parents whose parental rights have not been terminated. It considers the constitutional, case, and statutory law that intervening foster parents use to support their argument that intervention is warranted based on a psychological parent-child relationship. This Note rejects that argument—finding that foster parents' reliance on these legal bases is ill-founded. This Note argues that permitting foster parents to intervene in termination of parental rights proceedings encroaches on the fundamental liberties of natural parents as articulated by the Supreme Court in Smith v. Organization of Foster Families for Equality and Reform and Santosky v. Kramer. Some states recognize the inherent disparity between natural parents and foster parents and warn against comparative assessments of foster parents' and natural parents' fitness. Others embrace those comparative assessments, with the justification that they promote "the best interest of the child." Many states fall somewhere in between.*

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*A "speedy path to permanency" with nonrelative foster parents should not be pursued when family preservation via reunification is possible. Foster parent intervention in termination of parental rights proceedings is contrary to Supreme Court jurisprudence and any rehabilitative or restorative purpose the child welfare system may have. We are in a critical moment: the threats to natural parents' rights in dependency cases are more palpable than ever. The protections of Smith and Santosky need to be reinforced. Accordingly, this Note proposes that states amend their statutory schemes to prohibit or severely limit foster parent intervention in dependency cases unless parental rights have already been terminated. This Note recommends new federal legislation that removes the incentives for foster-adoption over reunification, and instead reallocates resources toward supporting reunification, and preventing removal in the first place.*

TABLE OF CONTENTS

## INTRODUCTION

Alicia Johansen and Fred Thornton struggled with substance abuse.[1] Their son, Carter, was born in August 2019, premature and exposed to methamphetamines and marijuana.[2] In September 2019, the Department of Human Services (DHS) for Washington County, Colorado, removed Carter from Alicia and Fred after finding them neglectful.[3] DHS placed Carter with foster parents upon his release from the hospital. DHS provided Alicia and Fred with a case plan that listed the necessary steps to get their son back: random drug testing, stable housing and income, and successful, regular, supervised visits.[4] For the first three months that Carter was in foster care, Alicia and Fred did not make progress.[5] But by the summer of 2020 they had complied and succeeded on their case plan.[6] They were sober, employed, and had stable housing with room for Carter.[7] Around the time of the six-month review, Alicia and Fred learned that Carter's foster parents had taken steps to adopt Carter.[8] The foster parents used a strategy called "foster parent intervening."[9] Intervening gave the foster parents standing to file motions, introduce evidence, and call and cross-examine witnesses to argue that it was in Carter's best interest to remain with them.[10] The foster parents mounted a strong case against reunification.[11] They argued that because Carter had spent his whole life in their care, reunifying him with his parents would disrupt his bond with his foster parents—the only strong attachment he had.[12] In February 2021, the county moved to terminate Alicia and Fred's parental rights based on this argument. Alicia and Fred challenged the motion to terminate. Alicia and Fred made all the changes DHS required.[13] The county had no basis to terminate their parental rights.[14] Washington County officials later discovered that DHS spent an inordinate amount of money (over $300,000) on Carter's case.[15] A subsequent internal investigation revealed "improprieties" in how the case was handled.[16] The county then dropped the

1. *See* Eli Hager, *When Foster Parents Don't Want to Give Back the Baby*, PROPUBLICA (Oct. 16, 2023, 6:00 AM EDT), https://www.propublica.org/article/foster-care-intervention-adoption-colorado.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* The 2023 Child Welfare budget for Washington County, Colorado was $904,044. WASH. CNTY. COLO., 2023 BUDGET 26 (2023), https://washingtoncounty.colorado.gov/sites/washingtoncounty/files/documents/2023%20budget%20book%20%281%29.pdf. The 2022 estimated expenditures for the county was $654,113. *Id.*
16. Hager notes that the investigative report is under a gag order. Hager, *supra* note 1.

case entirely due to lack of sufficient evidence, so Alicia and Fred retained their parental rights, and Carter was returned to their care.[17]

Alicia and Fred's case exemplifies the tension inherent in the child welfare system's goals of simultaneously prioritizing child safety, preserving families, and promoting permanence.[18] DHS had to ensure that Carter was safe, so it placed him in a home that provided him with support and stability. In the meantime, Alicia and Fred worked toward reunification and engaged in services to support their recovery. They got sober, obtained stable housing, and prepared for their son to return home. However, Carter's return to his parents was not DHS's primary concern. Even though reunification is the preferred outcome for a dependency case (per state and federal law), DHS seemingly presumed that Carter's safety and long-term permanency would not be attainable with his parents. Said differently, DHS wanted to preserve Carter's prospects of growing up in what appeared to be a more stable environment. The intervening foster parents who wanted to adopt Carter made a strong argument that "permanency" and "safety" for Carter was best achieved by staying in their care. While juggling child welfare goals that are sometimes irreconcilable, DHS failed to appreciate that those goals were not in conflict in Carter's case. Bias about Alicia and Fred's capacity to be adequate parents based on the initial removal was fueled by the experts hired by Carter's foster parents. The social worker hired to evaluate Alicia and Fred's progress praised their sobriety but reported that neither had the kind of relationship with Carter that was necessary to make him feel safe.[19] She further reported that Alicia and Fred's visits were harmful, threatening Carter's "primary attachment" to his foster parents.[20] As a result, DHS proceeded down the path toward termination without properly considering Alica and Fred's progress. DHS committed to a pathway where permanency was incompatible with reunification.

Alicia and Fred's experience of a dependency case clashes with the explicitly stated purpose of the child welfare system: "Unless parental rights are terminated permanently upon removal, the child's stay in foster care is intended

17. *Id.*

18. The terminology identifying this tension has developed alongside child welfare reform. At the outset, the policy tug-of-war was between "respect for family privacy, on one hand, and invading that privacy, on the other." JOHN E.B. MYERS, CHILD PROTECTION IN AMERICA: A HISTORY 550 (2024). While family privacy versus state intervention is still central to the controversy at the heart of child-welfare decision making, many scholars currently identify the tension as between family preservation and reunification versus child safety and permanence. *See, e.g.*, William Wesley Patton & Amy M. Pellman, *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, 9 U.C. DAVIS J. JUV. L. & POL'Y 171, 171 (2005); Kathleen Coulborn Faller & Frank E. Vandervort, *Interdisciplinary Clinical Teaching of Child Welfare Practice to Law and Social Work Students: When World Views Collide*, 41 U. MICH. J.L. REFORM 121, 131 (2007).

19. Hager, *supra* note 1.

20. *Id.*

to be temporary; the parents retain the right to resume custody at a later date."[21] Chris Gottlieb, director of the NYU School of Law Family Defense Clinic, provides a succinct yet comprehensive description of goals of the child welfare system:

> The primary goal of the American child welfare system, as articulated in federal statutes, state statutes in every state, and extensive case law, is to protect children from harm by supporting their safety while they remain with their parents whenever possible and, if they need to be separated, to proactively work to return them to their families as quickly as safely possible.[22]

Federal and state policies have wrestled with balancing these goals of child protection and family preservation over the fifty years since the Child Abuse Prevention and Treatment Act (CAPTA) was initially passed in 1974.[23] Even though the state has a *parens patriae*[24] interest in the well-being of children, which is strong enough to overcome parental rights secured under the Fourteenth Amendment,[25] "[f]ew take the position that families should be completely immune from intervention."[26] However, "no one advocates unfettered government intervention in American homes. The dilemma is where to draw the line."[27] The pendulum has swung back and forth between forceful initiation of protective measures to ensure child safety (i.e., child welfare authorities removing children from home) and ameliorative efforts to preserve and rehabilitate families (i.e., monitoring a family with children at home, or reunifying a family following a period of separation).[28] Successive federal statutes illustrate how emphasis shifts between these goals and the difficulty in simultaneously promoting child safety, permanency, and family integrity.

The pendulum metaphor classically used to characterize child welfare reform is useful for demonstrating how priorities in the child welfare system

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21. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 626 (1976); *see also* Eli Hager, *An Expert Who Has Testified in Foster Care Cases Across Colorado Admits Her Evaluations are Unscientific*, PROPUBLICA (Mar. 18, 2024, 5:00 AM EDT), https://www.propublica.org/article/expert-in-foster-care-cases-admits-her-method-is-unscientific ("A fundamental goal of foster care, under federal law, is for it to be temporary: to reunify children with their birth parents if it is safe to do so or, second best, to place them with other kin.").

22. Chris Gottlieb, *Remembering Who Foster Care Is for: Public Accommodation and Other Misconceptions and Missed Opportunities in* Fulton v. City of Philadelphia, 44 CARDOZO L. REV. 1, 3–4 (2022).

23. Child Abuse and Prevention Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974).

24. The doctrine of *parens patriae* means "parent of the country" and refers to the state's ability to protect those who are unable to care for themselves. *Parens patriae*, BLACK'S LAW DICTIONARY (11th ed. 2019). In the child welfare context, the state as *parens patriae* has a responsibility to ensure that children are protected from harm and accordingly is able to intervene into families to fulfill that responsibility. Rajan Bal, *The Perils of "Parens Patriae,"* GEO. J. POVERTY L. & POL'Y ONLINE (Nov. 21, 2017), https://www.law.georgetown.edu/poverty-journal/blog/the-perils-of-parens-patriae.

25. *See* Santosky v. Kramer, 455 U.S. 745, 747–48 (1982).

26. MYERS, *supra* note 18, at 388.

27. *Id.*

28. Faller & Vandervort, *supra* note 18, at 131.

have changed over time. However, as Dorothy Roberts points out, the very premise of the metaphor is flawed for at least two reasons.[29]

First, it erroneously assumes that family preservation and child safety are at odds.[30] Linking "permanence" with "child safety" harmfully aligns the two ideas with termination of parental rights and positions them in opposition to reunification.[31] Like DHS in Alicia and Fred's case, it presumes a pathway where permanency and reunification are incompatible. While "preservation" and "reunification" are often harmonious with "permanency," the use of "permanence" throughout this Note should be read as synonymous with "termination of parental rights."

Second, the pendulum metaphor does not apply to all families at risk of child welfare intervention. Black and Native children are overrepresented in the child welfare system and disparities persist throughout the decisionmaking points in dependency cases: Black families are more likely to be reported and investigated for suspected maltreatment, and Black and Native children are at the greatest risk of being removed from their homes.[32] Roberts states, "Even the most supportive federal legislation still centers on threatening parents with taking their children and devotes the bulk of funding to maintaining children away from home. For Black families, the pendulum of child welfare services has stayed firmly on the side of child removal and foster care."[33]

This Note considers recent developments in dependency law and their consequences for natural parents subject to state intervention. It argues that federal and state child welfare policies of the last several decades have resulted in reduced protection for parents' constitutional rights to maintain relationships with their children. Furthermore, these policies fail to provide parents with adequate resources and opportunities to satisfy the requirements necessary for reunification. In contrast, they have incentivized nonrelative foster parents to regard foster care as a private adoption alternative by offering significant financial resources to individuals who adopt from foster care. Three trends have facilitated this shift: (1) concerns about "permanency" for children; (2) the

29. DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD 120 (2022).

30. *Id.*

31. *Id.* at 119.

32. CHILD WELFARE INFO. GATEWAY & CHILD. BUREAU, ADMIN. CHILD. & FAM., CHILD WELFARE PRACTICE TO ADDRESS RACIAL DISPROPORTIONALITY AND DISPARITY 2–3 (2021), https://forchildwelfare.org/wp-content/uploads/racial_disproportionality.pdf. The primary discussion of this Note is not focused on institutional racism in the child welfare system. However, it's critical to recognize that institutional racism is not merely a component of the child welfare system, nor is it only identifiable in the disparate impacts of state intervention into families. Rather, racism is a central, driving force of the continuing structure of the child welfare system that actively facilitates the targeted erosion of the rights of natural parents. Dorothy Roberts' early work is a good place to start for a detailed analysis of the child welfare system's roots in and dependence on institutional racism. *See generally* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001) (discussing institutional racism in the child welfare system and how state intervention disproportionately targets Black families).

33. ROBERTS, *supra* note 29.

integration of adoption pathways into foster care; and (3) recent state policies granting rights to nonrelative foster parents in dependency cases based on psychological parenthood principles. This Note argues that the child welfare system has strayed too far from the goal of preserving families, jeopardizing the rights of natural parents who are subject to state intervention.

Part I discusses a brief legislative and historical context of the child welfare system and how successive federal statutes illustrate the pendulum swinging between these dueling goals. Part II provides context for parental rights under the Constitution, as well as how psychological parenthood principles have proliferated throughout family law and into dependency law. Additionally, Part II demonstrates that foster parents' claims for parentage are incompatible with family law doctrine on psychological parenthood. Part III examines the constitutional basis for natural parent rights in relation to foster parent rights under *Smith v. Organization of Foster Families for Equality and Reform* (*OFFER*) and subsequent developments that put *OFFER*'s principles and natural parents' rights at risk. Part IV investigates state law practices that give foster parents standing to act as full parties in dependency proceedings, and most consequentially in termination of parental rights proceedings. This Part presents the argument of this Note: granting nonrelative foster parents standing to intervene in termination proceedings is both contrary to the child welfare system's goal of family preservation and corrosive of the rights of natural parents. Part V considers the impact and implications of third-party overreach on natural parent rights given that the child welfare system disproportionately intrudes on populations subject to poverty, institutional racism, and intergenerational trauma. Part VI proposes that state law and policy should return to *OFFER* and *Santosky*'s principles through litigation and federal and state legislation to ensure that natural parents are not competing with foster parents for custody of their children. Pitting natural parents against foster parents is an uneven fight that infringes upon natural parents' fundamental right to raise their children.

## I. LEGISLATIVE AND HISTORICAL CONTEXT

The modern child welfare system is the product of a dense legislative and historical context, which I briefly capture in this Part. The three federal legislative reforms covered below mark the beginning of a formal federal child welfare system, but the systems' origins can be traced back much further. Children in oppressed and subjugated populations have been forcefully separated from their parents since this country's inception. The Child Abuse Prevention and Treatment Act, Adoption Assistance and Child Welfare Act, and Adoption and Safe Families Act are merely mechanisms by which the government has *regulated* that intervention into families. To illustrate child welfare's roots in slavery, reform legislation's dependence on racism, and the consequent disparate impact, the second Subpart draws largely on the seminal

works of Dorothy Roberts. Reviewing this context is important to understanding the pathway laid for foster parents to intervene in dependency cases. Foster parents are incentivized by federal legislative reforms and granted by state law to petition for adoption over the objection of natural parents whose parental rights are intact.

## A. LEGISLATIVE CONTEXT: THREE FEDERAL REFORMS

This Subpart discusses three federal statutes: the Child Abuse Prevention and Treatment Act of 1974, the Adoption Assistance and Child Welfare Act of 1980, and the Adoption and Safe Families Act of 1997. The Child Abuse Prevention and Treatment Act of 1974 provided a framework for state intervention into families in cases of abuse or neglect. The Adoption Assistance and Child Welfare Act of 1980 focused on prevention and supporting families to stay together in the wake of child welfare concerns. Finally, the Adoption and Safe Families Act of 1997 marked a swing back to promoting intervention into families, and a more aggressive federal approach in favor of adoption.

### *1. The Child Abuse Prevention and Treatment Act of 1974*

In the 1960s, Dr. C. Henry Kempe was among a few scholars who shined a spotlight on child maltreatment when he published *The Battered-Child Syndrome* and gave a clinical description of child abuse.[34] Kempe recommended that certain professionals should be required to report suspected child abuse, giving rise to the first generation of reporting laws.[35] However, by the 1970s, state action to combat child abuse and neglect had proven insufficient[36]—federal legislative guidance was necessary.[37] Change was not happening fast enough: critics complained that too many children were stuck in out-of-home care that was supposed to be temporary and there weren't enough resources to adequately address child abuse and neglect at the state level.[38] "[T]his system of blurred authority did not work."[39] The Child Abuse Prevention and Treatment Act

34. *See* C. Henry Kempe, Frederic N. Silverman, Brandt F. Steele, William Droegemueller & Henry K. Silver, *The Battered-Child Syndrome*, 181 JAMA 17, 17 (1962), *reprinted in* 9 CHILD ABUSE & NEGLECT 143, 143 (1985) ("The battered-child syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent.").

35. Douglas J. Besharov, *"Doing Something" About Child Abuse: The Need to Narrow the Ground for State Intervention*, 8 HARV. J.L. & PUB. POL'Y 539, 542 (1985).

36. *See* David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAM. L.Q. 329, 332 (2000) ("[P]olicymakers perceived state child welfare systems as dysfunctional and in crisis.").

37. *See* U.S. DEP'T OF HEALTH & HUM. SERVS., CHILD.'S BUREAU, THE CHILD ABUSE PREVENTION AND TREATMENT ACT: 40 YEARS OF SAFEGUARDING AMERICA'S CHILDREN 6 (2014) [hereinafter CHILD.'S BUREAU]; MYERS, *supra* note 18, at 371 ("It was not until 1974 that the federal government assumed a leadership role in responding to child abuse and neglect.").

38. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456 (2008); CHILD.'S BUREAU, *supra* note 37, at 4.

39. Besharov, *supra* note 35, at 546.

(CAPTA) was the first federal legislation to address child abuse and neglect.[40] CAPTA authorized funding for states to develop prevention programs, supported government research, created grants for training and innovation to prevent and treat child maltreatment, and established the National Center on Child Abuse and Neglect as well as the National Clearinghouse on Child Abuse and Neglect Information.[41] CAPTA promoted the reunification of parent and child as the child welfare system's national policy goal.[42] It offered a holistic and preventative approach to tackling child abuse and neglect dependent on multi-system collaboration.[43] CAPTA also introduced mandated reporting as an investigative tool; it requires an extensive list of professionals to report suspected child abuse to their local child protective services agency.[44] Armed with CAPTA's expansive definition of abuse and neglect, the mandated reporter system broadened state intervention into the family.[45]

National attitudes grappled with the desire to protect neglected children while struggling to preserve parental autonomy.[46] Prominent child psychologists Joseph Goldstein, Anna Freud, and Albert Solnit wrote in *Beyond the Best Interests of the Child* that the state should secure the opportunity for "each child [to have] a chance to be a member of a family where he feels wanted . . . ."[47]

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40. *See* CHILD WELFARE INFO. GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY 1 (2019), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/about.pdf?VersionId=y7C6qleUR3mZJ_UJ5t_dnzCNfO6HPcPs.

41. CHILD WELFARE INFO. GATEWAY, MAJOR FEDERAL LEGISLATION CONCERNED WITH CHILD PROTECTION, CHILD WELFARE, AND ADOPTION 28 (2019), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/majorfedlegis.pdf?VersionId=eUt86ySkYkHftNugFlCOFVWlzzfigJxg.

42. *See* 42 U.S.C. § 5101 ("Congress finds that . . . national policy should strengthen families to prevent child abuse and neglect, provide support for needed services to prevent unnecessary removal of children from families, and promote the reunification of families where appropriate.") (note Congressional Findings (10)).

43. The 1974 Act's Congressional Findings suggest that Congress understood combatting and preventing child abuse would require intersectional solutions. *See* 42 U.S.C. § 5101, Congressional Findings (6), (10), (11), & (15).

44. *See* Shereen White & Stephanie Marie Persson, *Racial Discrimination in Child Welfare is a Human Rights Violation—Let's Talk About It That Way*, AM. BAR ASS'N (Oct. 13, 2022), https://www.americanbar.org/groups/litigation/resources/newsletters/childrens-rights/racial-discrimination-child-welfare-human-rights-violation-lets-talk-about-it-way.

45. Section three of the Child Abuse and Prevention Treatment Act, states that child abuse and neglect are defined as:

> [T]he physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.

Child Abuse and Prevention Treatment Act, Pub. L. No. 93-247 § 3, 88 Stat. 4, 5 (1974); *see also* MYERS, *supra* note 18, at 553.

46. *See* Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 986–87 (1975).

47. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 5 (1973).

Michael Wald[48] commented that these "influential authors" were read to support greater state intervention, despite their explicitly stated preference for minimal state intrusion into family life.[49] Goldstein, Freud, and Solnit's argument prioritized bonds between a child and their psychological parent rather than biological or formal legal bonds alone.[50] Depending on the circumstances, their theories could aptly support family integrity or a third-party psychological parent bond. Wald criticized the extension of state intervention to address marginal child neglect, cautioning that "[s]ince our society values the principle of family autonomy and privacy, we should carefully examine any decision to coercively limit parental autonomy in raising children."[51]

In the years after CAPTA's enactment, attention shifted from reporting and investigating to prevention efforts.[52] CAPTA's mandated reporting requirements produced a drastic increase in intervention and "the rising number of children in long-term foster care set off alarm bells in Congress . . . ."[53] Many children in state custody experienced multiple out-of-home placements, a phenomenon referred to as "foster care drift."[54] That is, children's reunification with parents often became so delayed that they had to change placements several times and remain in out-of-home care for extended periods of time.[55] Douglas J. Besharov, the U.S. National Center on Child Abuse and Neglect's first director, commented on the consequences of foster care drift for children and their relationships with their natural parents:

> As the U.S. Supreme Court has recognized, these children are lost in the "limbo" of the foster care system. Long-term foster care can leave lasting psychological scars. It is an emotionally jarring experience which confuses young children and unsettles older ones. Over a long period, it can do irreparable damage to the bond of affection and commitment between the parent and child. The period of separation may so completely tear the fragile

48. Michael Wald is a leading national authority on youth law and policy, at the time serving as deputy general counsel for the U.S. Department of Health and Human Services. Currently, he is a retired distinguished professor from Stanford Law School. *See Michael Wald*, STAN. L. SCH., https://law.stanford.edu/michael-s-wald (last visited Mar. 10, 2025).

49. Wald, *supra* note 46, at 987 n.11; *see also* Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of* Before the Best Interests of the Child, 78 MICH. L. REV. 645, 647 (1980); Peggy C. Davis, *"There is a Book Out . . .": An Analysis of Judicial Absorption of Legislative Facts*, 100 HARV. L. REV. 1539, 1580 (1987) (noting that courts generally employ Goldstein, Freud, and Solnit's work to expand state intervention and restrict natural parents' rights).

50. GOLDSTEIN ET AL., *supra* note 47, at 53. Goldstein, Freud, and Solnit's work will be discussed in more detail in Part II.

51. Wald, *supra* note 46, at 987.

52. *See* CHILD.'S BUREAU, *supra* note 37, at 27.

53. Myers, *supra* note 38, at 459.

54. *See* Herring, *supra* note 36, at 332. In 2003, the Washington Supreme Court found that frequent placement changes subject children in foster care to an unreasonable risk of harm that violates the substantive due process cause. *See* Braam v. State, 81 P.3d 851, 857 (Wash. 2003).

55. *See* Herring, *supra* note 36, at 332.

> family fabric that the parents have no chance of being able to cope with the child when he is returned.[56]

Foster care drift caused instability and, consequently, poor long-term outcomes; children were worse off in frequently changing foster homes, denied the support they needed, and suffered severe behavioral health consequences as a result.[57] While CAPTA marked a necessary step toward effective federal guidance, it revealed the difficulty in balancing parental rights with child protection interests. Mandated reporting overwhelmed local agencies and the existing reunification services weren't effective, so children were seldom reunified with their parents within expected timelines.[58] Although reunification was CAPTA's stated goal, its resources were targeted at *identifying* child abuse.[59] CAPTA did not effectively provide supportive services to prevent removal or reunify families, ultimately failing to prioritize family preservation.[60] This issue would become a major priority for the next federal legislative reform.

### *2. The Adoption Assistance and Child Welfare Act of 1980*

Family preservation was the "dominant paradigm of child welfare in the 1980s."[61] Accordingly, the Adoption Assistance and Child Welfare Act (AACWA) of 1980 focused on permanency planning, bolstering reunification, and protecting family integrity to address foster care drift.[62] AACWA was passed in response to complaints about state agencies removing children from their homes and placing them in foster care unnecessarily.[63] With AACWA, the pendulum swung toward prioritizing family preservation.

As a remedy, AACWA introduced the "reasonable efforts" requirement that states had to (and still must) follow to prevent needless removal and to reunify families as quickly and safely as possible.[64] Under the "reasonable efforts" requirement, local agencies must make a reasonable effort "to prevent or eliminate the need" to remove a child from their home and, if removal is

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56. *See* Besharov, *supra* note 35, at 560.

57. *Id.* at 560–61.

58. *Id.* at 560–63.

59. Myers, *supra* note 38, at 457.

60. *See* Besharov, *supra* note 35, at 561.

61. MYERS, *supra* note 18, at 382.

62. *See generally* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified at 42 U.S.C. § 671) (implementing measures to strengthen the foster care assistance program and facilitate family reunification). AACWA provides for adoption assistance payments while also imposing safeguards to address the concerns about the unnecessary removals that led to ACCWA's enactment. *Id.*; *see also* Myers, *supra* note 38, at 459 ("The effort to preserve families . . . was a key component of AACWA.").

63. Sarah H. Ramsey, *The United States Child Protective System—A Triangle of Tensions*, 13 CHILD & FAM. L.Q. 25, 29 (2001).

64. CHILD WELFARE INFO. GATEWAY, *supra* note 41, at 27.

necessary, to reunify them.[65] Accordingly, in addition to requiring reunification services, AACWA mandated the implementation of "prevention programs"[66] that provided services to families at risk of child welfare involvement; these programs aimed to prevent child removal if at all possible.[67] AACWA imposed status review timelines for children in out-of-home placements "with most emphasis placed on returning the child home as soon as possible."[68] It also mandated that each child in foster care have a "permanency plan" to reunify the family or terminate parental rights,[69] which would make the child available for adoption. Permanency planning is the "effort[] to ensure that abused and neglected children are not unnecessarily placed in foster care, do not drift from foster home to foster home, but instead are provided with a permanent living situation as quickly as possible."[70] Permanency planning concepts were interwoven throughout AACWA, resulting in a logical legislative scheme rooted in interdisciplinary knowledge on child development.[71]

As well intentioned as AACWA was, system resources were stretched thin.[72] This was due in part to the robust mandated reporting requirements under CAPTA, which required significant resources to assess and respond to reports of child maltreatment.[73] As a result, implementation of the "reasonable efforts" requirement was not narrowly tailored to each case.[74] Instead, implementation broadly consisted of burdensome requirements for parents to demonstrate general compliance rather than tailored behavior change, which stalled reunification efforts.[75] Further, courts were reluctant to reunify children with natural parents who had not received adequate services to address the safety concerns that prompted removal, so children remained in "temporary" foster

65. 42 U.S.C. § 671(a)(15); *see also* Herring, *supra* note 36, at 333. The "reasonable efforts" requirement was intended first and foremost as a safeguard against unnecessary removals; reunification as soon as possible was the priority. *Id.*

66. Hereinafter referred to as "prevention programs" or "prevention services."

67. CHILD WELFARE INFO. GATEWAY, *supra* note 41, at 27.

68. *Id.*

69. *See* Myers, *supra* note 38, at 459; s*ee also* Carolyn Lipp, *Fostering Uncertainty?: A Critique of Concurrent Planning in the Child Welfare System*, 52 FAM. L.Q. 221, 223–24 (2018) ("[AACWA] created the first federal procedural rules regarding 'permanency planning,' . . . .").

70. LISA PORTUNE, SOPHIA GATOWSKI & SHIRLEY DOBBIN, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, THE RESOURCE GUIDELINES: SUPPORTING BEST PRACTICES AND BUILDING FOUNDATIONS FOR INNOVATION IN CHILD ABUSE AND NEGLECT CASES 13 (2009), https://ncjfcj.org/wp-content/uploads/2012/03/The-RG-Supporting-Best-Practices-and-Building-Foundations-for-Innovation-in-CAN-Cases.pdf.

71. Herring, *supra* note 36, at 333.

72. Ramsey, *supra* note 63.

73. Reports increased from 60,000 in 1974 to over 1 million in 1980. *See* Myers, *supra* note 38.

74. *See* Ramsey, *supra* note 63.

75. *See id.*; *see also* Besharov, *supra* note 35, at 556, 562 (commenting that the levels of overreporting after 1976 were "unreasonably high and growing rapidly," which meant that "children in real danger of serious maltreatment [got] lost in the press of the minor cases flooding the system.").

care placements for extended periods of time.[76] By unsuccessfully implementing the reasonable efforts requirement and not dedicating adequate resources to permanency planning, local agencies failed to substantively implement AACWA.[77]

Following AACWA, the number of children in foster care increased from 262,000 in 1982 to 547,000 in 1999.[78] To address the rising number of children in foster care, the 1993 Family Preservation and Support Services (FPSS) Program reserved funds for prevention services.[79] Under the FPSS Program, families at risk of involvement with child protective services received support to "strengthen parenting and the families' quality of life."[80] However, these services suffered the same resource constraints as AACWA.[81] In practice, funding was insufficient for preventative services that meaningfully strengthened families and addressed underlying poverty.[82] Consequently, children either were returned home prematurely, before the circumstances of removal were remedied, or remained stuck in long-term out-of-home placements.[83] Although AACWA and the FPSS Program had the requisite intent and federal legislative scheme to truly prioritize family preservation and reunification as preferred outcomes, local child welfare agencies only complied in form, preventing substantive progress.[84] Falling short of meaningful implementation, particularly of AACWA, meant that concerns about child safety and long-term permanency endured. This would be the focus of the next major federal legislative reform.

### *3. The Adoption and Safe Families Act of 1997*

The persistent tension between child safety and family preservation as joint goals of the child welfare system was palpable, and it broke in favor of further emphasizing child protection. Richard Gelles[85]—a domestic violence scholar who argued that children were better off if they were adopted from foster care

76. *See* Ramsey, *supra* note 63; *see also* Herring, *supra* note 36, at 334 ("Because the public agency was often unable to provide services in a timely manner, many decision-makers found it difficult to make timely, permanent placement decisions. They properly felt that they could not return a child to parents who had not received necessary services. But decision-makers also felt, usually very strongly, that they could not proceed with a termination of parental rights and adoption, or even with a formal guardianship or long-term foster care arrangement. It seemed fundamentally unfair to legally sever a parent/child relationship without giving parents a fair chance to rehabilitate themselves.").

77. *See* Herring, *supra* note 36, at 336.

78. *See* Ramsey, *supra* note 63, at 30.

79. *See* Faller & Vandervort, *supra* note 18, at 132.

80. *Id.*

81. *Id.* ("[P]revention continues to play a minor role in child welfare service delivery because of resource constraints in the child welfare system.").

82. *Id.*

83. Herring, *supra* note 36, at 336.

84. *Id.* at 332, 336.

85. *Richard James Gelles, Ph.D*, PENNCURF, https://curf.upenn.edu/profile/richard-gelles (last visited Apr. 15, 2025).

rather than reunified with their parents—heavily influenced Congress to pass the Adoption and Safe Families Act (ASFA) of 1997.[86] He challenged the pursuit of family preservation as a child welfare goal, instead favoring increased coercive intervention to protect children.[87] Gelles wrote, "The essential first step in creating a safe world for children is to abandon the fantasy that child welfare agencies can balance the goals of protecting children and preserving families, adopting instead a child-centered policy of family services."[88]

ASFA aimed to correct the shortcomings of AACWA:[89] namely, AACWA did not explicitly address child safety.[90] ASFA was enacted to "promote the adoption of children in foster care,"[91] indicating a pendulum swing away from family preservation and toward intervention.[92] ASFA aimed to alleviate concern that some jurisdictions were interpreting existing federal child welfare law (CAPTA and AACWA) as requiring "reunification at all costs."[93] The legislation was enacted with two main goals in mind: (1) setting children's safety as a priority in placement decisions so that children are not returned to homes that may be unsafe; and (2) creating an expedited procedural timeline to allow for a seamless transition to an adoptive placement in the event that a reunification plan fails.[94] To translate: termination of parental rights is a prerequisite to adoption and ASFA accelerated this process.

ASFA strengthened *out-of-home* permanency planning by expediting termination of parental rights under certain conditions,[95] promoting adoption while de-emphasizing reunification efforts.[96] ASFA established "time-limited" reunification services.[97] The time limit created a trigger-point in the course of a dependency case to accelerate permanent placements like adoption; states must

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86. *See* RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 148 (1996).

87. *Id.* at 148–49.

88. *Id.* at 148–50. Gelles gave a scathing critique of family preservation, calling for child safety to return as the overarching goal of the child welfare system and indicting system-involved natural parents:

> It is time to abandon the myth that "the best foster family is not as good as the marginal biological family." The ability to make a baby does not ensure that a couple have, or ever will have, the ability to be adequate parents. The policy of family reunification and family preservation fails because it assumes that *all* biological parents can become fit and acceptable parents if only appropriate and sufficient support is provided.

*Id.* at 149–50.

89. *See* Ramsey, *supra* note 63, at 30.

90. *See* Herring, *supra* note 36, at 330; s*ee also* MYERS, *supra* note 18, at 549 ("[ASFA] placed child safety as the top priority.").

91. CHILD WELFARE INFO. GATEWAY, *supra* note 41, at 22.

92. *See* Herring, *supra* note 36, at 329 ("In passing ASFA, Congress . . . made clear that the paramount goal for public child welfare systems is to secure the health and safety of the children who enter these systems.").

93. CONG. RSCH. SERV., RL30759, CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105-89), at 2 (2004) [hereinafter CRS ASFA REPORT].

94. *Id.* at 2–3.

95. *See* Ramsey, *supra* note 63, at 25.

96. Alexis Pollitto, Kendall Kaske, Mathilde Pierre, Serena Dineshkumar, Hattie Phelps & Lindsay Sergi, *Adoption and Foster Care*, 25 GEO. J. GENDER & L. 303, 311 (2024); ROBERTS, *supra* note 29, at 121.

97. *See* CHILD WELFARE INFO. GATEWAY, *supra* note 41, at 22.

initiate proceedings to terminate parental rights if a child has been in an out-of-home placement for fifteen of the most recent twenty-two months.[98] In other words, if services do not work within fifteen months, the child's need for long-term stability overrides a parent's right to reunification.[99] Note that the requirement to *initiate* a termination of parental rights proceeding does not necessarily result in termination. States can grant extensions to the timeline for several reasons.[100] One such example is that the state may grant an extension if there is a "compelling reason" why termination of parental rights is not in the best interest of the child.[101]

ASFA attacked foster care drift by implementing the practice of "concurrent planning" as an additional requirement under "reasonable efforts":[102] agencies had to make "reasonable efforts" to have a back-up plan for adoption prepared in the event that reunification failed, and termination of parental rights moved forward.[103] ASFA also provided exemptions to the "reasonable efforts" requirement where the child welfare agency is not required to make any efforts toward reunification.[104] For example, if a parent commits violent crimes against a child, or subjects a child to "aggravated circumstances," the state does not need to make any effort to reunify the parent with that child or any siblings.[105] Additionally, ASFA requires that foster parents have notice and an opportunity to be heard in any proceeding regarding a child in their care.[106]

Criticisms of the child welfare system have been consistent since Wald articulated the main areas of concern in 1976:

> [C]riticisms generally have focused on three aspects of the system: the fact that courts often remove children from their homes without adequate effort to protect them in their own homes; the fact that children in foster care remain there for long periods of time and are subjected to multiple placements; and the fact that children who cannot be returned home are not provided with new

98. *See id.* at 23. Note that several exceptions apply to this rule.

99. If a child has been in out-of-home care for fifteen of the previous twenty-two months, the state *must* initiate a proceeding to terminate parental rights and concurrently plan for a permanent alternative. *See* 42 U.S.C. § 675(5)(E).

100. *See* LAURA RADEL & EMILY MADDEN, FREEING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART 1—THE NUMBERS 2–3 (Feb. 2021), https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf.

101. *Id.* The "compelling reason" is case-specific but may include when "adoption is not the appropriate permanency goal . . . , the child is an unaccompanied refugee minor, or there are international legal obligations or compelling foreign policy reasons that preclude termination." Mary Eschelbach Hansen & Daniel Pollack, *Trade-Offs in Formulating a Consistent National Policy on Adoption*, 46 FAM. CT. REV. 366, 372 n.5 (2008).

102. *See* Lipp, *supra* note 69.

*103. Id.* at 222.

104. *See* Herring, *supra* note 36, at 337.

105. *See id.*

106. *See* 42 U.S.C. § 675(5)(G). This subsection also states that it "shall not be construed to require that any foster parent, preadoptive parent, or relative providing care for the child be made a party to such a proceeding solely on the basis of such notice and right to be heard." *Id.*

> homes, either through adoption, guardianship, or a placement in a permanent foster home.[107]

CAPTA, AACWA, and ASFA all represent significant reforms in the child welfare system and conflicting approaches to addressing these criticisms. Society's view of how to promote children's best interests in the context of families who are not meeting their needs has developed over time, and that is reflected in each additional federal strategy and funding allocation. Since ASFA, the Fostering Connections to Success and Increasing Adoptions Act of 2008 expanded funding and eligibility for federal adoption assistance.[108] And in 2018, the Family First Preservation and Services Act (FFPSA) went into effect, purporting to "enhance support services for families to help children remain at home, . . . reduce the unnecessary use of congregate care," and build the capacity of communities to support children and families.[109] While some legislation has prioritized families remaining intact, many of these legislative acts promote intervention and expedited termination of natural parents' rights.

Today, child safety is the paramount goal, and tremendous federal resources are dedicated to maintaining a robust reporting system, foster care funding, and adoption subsidies.[110] Family preservation is secondary; even following the passage of FFSPA, the 1 percent allocation of funding toward "promoting safe and stable families" in the federal Administration of Children and Families budget reflects that prioritization.[111]

### B. HISTORICAL CONTEXT AND MODERN CONSTRUCTION: INSTITUTIONAL RACISM IN THE CHILD WELFARE SYSTEM

Most historical surveys of the child welfare system trace its roots to the 1800s, where the beginnings of a formal child welfare system that included white children is easily identifiable.[112] Dorothy Roberts takes its origins further—to the regimes of slavery and settler colonialism that forcefully

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107. Wald, *supra* note 21, at 636–37.

108. CONG. RSCH. SERV., RL34704, CHILD WELFARE: THE FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT OF 2008 (P.L. 110-351), at 2, 6 (2008).

109. *Family First Prevention Services Act*, CAL. DEP'T OF SOC. SERVS., https://www.cdss.ca.gov/inforesources/ffpsa (last visited Apr. 15, 2025); *see also* Memorandum from the U.S. Dep't of Health & Hum. Servs. Admin. for Child., Youth and Fams. to State, Tribal and Territorial Agencies Administering or Supervising the Admin. of Title IV-E and/or Title IV-B of the Soc. Sec. Act 5 (Apr. 12, 2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/im1802.pdf.

110. *See* Faller & Vandervort, *supra* note 18. *See generally* CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING (2024) (describing child welfare funding, spending, and programming).

111. *See Budget*, ADMIN. FOR CHILD. & FAMS. (May 14, 2024), https://www.acf.hhs.gov/about/budget. In contrast, 16% of the budget is allocated toward foster care. *Id.*

112. *See, e.g.*, Kristen L. Selleck, Ashley M. Toland & Joan M. Blakey, *From Denial to Disproportionality: History of White Supremacy, Structural Racism, and the Child Welfare System*, *in* SOCIAL WORK, WHITE SUPREMACY, AND RACIAL JUSTICE: RECKONING WITH OUR HISTORY, INTERROGATING OUR PRESENT, REIMAGINING OUR FUTURE 170, 171–72 (Laura S. Abrams, Sandra Edmonds Crewe, Alan J. Dettlaff & James Herbert Williams eds., 2023). *But see* ROBERTS, *supra* note 29, at 90, 102.

separated Black children from their enslaved parents and Native children from their tribes.[113] Not unlike other institutions in the United States, this history echoes through the child welfare system's current form.

Today, "the contemporary child welfare system has retained the fundamental division between poor and other families, along with the confusion of poverty with neglect."[114] The vast majority of reports to child protective agencies are for neglect.[115] The connection between neglect, poverty, and racism, though artificial, is well documented,[116] and there is an enduring disparity in socioeconomic status faced by communities of color.[117] Certainly, neglect and poverty are distinct from each other; but narratives often conflate the two which harmfully characterizes poor families as being prone to maltreat their children.[118] Martin Guggenheim[119] summarizes this dynamic concisely: "Poverty is what the family regulation system is really all about. Poverty and race, and family regulation and race, are intertwined at every level."[120]

Given this nexus between poverty and neglect, it follows that "[f]amily policing is most intense in communities that exist at the intersection of structural

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113. Dorothy Roberts offers a detailed discussion of how the modern child welfare system is rooted in slavery in Chapter 4 of *Torn Apart*. ROBERTS, *supra* note 29, at 85–124. Although Native children are similarly overrepresented in foster care, Native children and families have additional protections against forced separation by child welfare agencies under the Indian Child Welfare Act, unlike Black families. *See* Kathryn Fort, *The Road to* Brackeen*: Defending ICWA 2013–2023*, 72 AM. U. L. REV. 1673, 1677–81 (2023).

114. ROBERTS, *supra* note 32, at 27.

115. Ramsey, *supra* note 63, at 27.

116. *See, e.g.*, Wald, *supra* note 21, at 629; Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 536 (2019) ("[P]overty is often conflated with neglect or creates circumstances that may lead to neglect."); Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 IOWA L. REV. 1541, 1541 (2024); Janell Ross, *One in Ten Black Children in America Are Separated From Their Parents by the Child-Welfare System. A New Book Argues That's No Accident*, TIME (Apr. 20, 2022, 9:30 AM EDT), https://time.com/6168354/child-welfare-system-dorothy-roberts.

117. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 176.

118. While it is evident that neglect and poverty are inherently linked, it is important to note that neglect and poverty are distinct from each other. Richard Barth and his colleagues note that "for decades studies have suggested that both poverty and child neglect exert *separate* negative impacts on children's development. . . . Taken together, the evidence overwhelmingly suggests that neglect is a marker for conditions that may be associated with, but are distinct from poverty. Narratives that conflate poverty and child neglect unfairly characterize low-income families, the majority of whom provide appropriate care for their children." Richard P. Barth, Jill Duerr Berrick, Antonio R. Garcia, Brett Drake, Melissa Jonson-Reid, John R. Gyourko & Johanna K.P. Greeson, *Research to Consider While Effectively Re-Designing Child Welfare Services*, 32 RSCH. ON SOC. WORK PRACTICE 483, 487–88 (2022) (emphasis added); *see also* Kathi L. H. Harp & Amanda M. Bunting, *The Racialized Nature of Child Welfare Policies and the Social Control of Black Bodies*, 27 SOC. POL. 258, 267 (2020) ("Poverty has a significant effect but cannot fully explain differences by race." (citations omitted)).

119. Martin Guggenheim successfully argued *Santosky v. Kramer*—the case which raised the standard of proof required in termination of parental rights proceedings to clear and convincing evidence. *Martin Guggenheim*, NAT'L COAL. FOR CHILD PROT. REFORM, https://nccpr.org/martin-guggenheim (last visited Mar. 11, 2025). He is one of the nation's leading experts on children's rights, currently serving as a Clinical Professor of Law at NYU and President of the National Coalition for Child Protection Reform. *Id.*

120. 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, 729 (2021).

racism and poverty."[121] While there are statutory safeguards in place to prevent removals based on poverty alone,[122] they are not sufficient to overcome the tendency for social workers to remove children from families that are under-resourced and overpoliced.[123] Black children are disproportionately represented in foster care.[124] "Researchers have found that racial bias exists at each stage of child welfare proceedings, from investigation to mitigation efforts to ultimate removal. Statistics confirm that minority families, and Black families in particular, are less likely to receive in-home services meant to address underlying causes and prevent removal."[125] The expansion of mandated reporting has further increased surveillance and policing of Black families.[126] Black children are more likely to be subjected to child welfare involvement even when they present cases identical to white children.[127] Some statistics: more than 50 percent of Black children will experience a child protective services investigation, almost 10 percent will be removed from their parents, and for one in forty-one their parents' rights will be terminated.[128] As Roberts summarizes, "if you came with no preconceptions about the purpose of the child welfare system, you would have to conclude that it is an institution designed to monitor, regulate, and punish poor Black families."[129]

The historical context of ASFA exemplifies Robert's characterization of the child welfare system. ASFA was one of several Clinton-era reforms in the 1990s.[130] The Violent Crime Control and Law Enforcement Act of 1994 and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 simultaneously increased policing for and slashed support for Black communities.[131] As reformists argued that poverty was due to dependence on welfare, they also attributed the high proportion of Black children in foster care to failure of reunification programs which left fast-tracked adoptions as the only solution.[132] Racist tropes like the "welfare queen" and "crack baby" helped drive all of these pieces of legislation to enactment, ASFA included.[133] It created the

121. ROBERTS, *supra* note 29, at 36.

122. *See, e.g.*, CAL. WELF. & INST. CODE § 300(b)(2)(C) (West 2025) (providing that a child shall not be found dependent for conditions including poverty, the inability to provide or obtain clothing, home or property repair, or childcare).

123. Christina White, Comment, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL'Y 303, 313 (2006).

124. *Id.*

125. *See* Trivedi, *supra* note 116.

126. White & Persson, *supra* note 44; ROBERTS, *supra* note 29, at 35–36.

127. Roberts, *supra* note 117, at 173.

128. White & Persson, *supra* note 44. These rates far exceed any other demographic.

129. ROBERTS, *supra* note 32, at 6.

130. Dorothy Roberts, *The Clinton-Era Adoption Law That Still Devastates Black Families Today*, SLATE (Nov. 21, 2022, 5:50 AM), https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html.

131. *Id.*

132. Guggenheim, *supra* note 120, at 726.

133. Roberts, *supra* note 130.

narrative that Black mothers were both undeserving of welfare assistance and posed a danger to their children, such that the only way to keep them safe would be for another family to adopt them.[134]

Roberts argues that the persistent and disproportionate state intrusion into Black families "reinforces the[ir] continued political subordination . . . as a group."[135] In response to Elizabeth Bartholet, who opined that reunification and family preservation is more harmful to Black children than removal, Roberts states,

> This view of [B]lack children's civil rights recognizes that poor [B]lack families are victims of societal injustice, but uses their victimization as a reason to intervene in their families more than a reason to work toward social change. Its recognition of social injustice is dangerously limited, for it sees injustice as the root of child maltreatment, but not as the root of state intrusions into poor families. It appeals to whites only to pity [B]lack parents involved in the child welfare system but not to respect their autonomy, their claims of discrimination, or their bonds with their children. It sets up adoption as the only realistic way to persuade whites to care for [B]lack children and to guarantee their civil rights. This, it seems to me, is a particularly selfish way to approach child welfare that perpetuates rather than challenges America's racial hierarchy.[136]

As the pendulum continues to shift even further toward emphasizing child protection, that shift will inevitably be felt most intensely by Black children who are already the targets of overreach by the child welfare system.

With these considerations, juvenile dependency courts have broad discretion to determine how children are best kept safe and define the conditions which render removal necessary.[137] Removing a child from their family causes harm that cannot be understated or underestimated,[138] and a child in foster care due to marginal neglect allegations is often worse off than if they remained at home.[139] Conversely, there are situations in which state intervention into the family on behalf of the child is justified.[140] Even so, the current system is incapable of identifying those children that should be removed with any

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134. *Id.*; *see also* ROBERTS, *supra* note 32, at 197.

135. Roberts, *supra* note 117, at 180.

136. *Id.* at 181.

137. *See* Trivedi, *supra* note 116, at 526 ("Due to the child welfare system's long history of erring on the side of removal, taking children from their parents is widely considered the better and safer course of action.").

138. *See* Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less Than Thirty Days in Foster Care*, 19 U. PA. J.L. & SOC. CHANGE 207, 211 (2016); Roberts, *supra* note 117, at 173; *see also* Trivedi, *supra* note 116, at 526. Trivedi comments on recent media attention around child removal in the context of the Trump administration's family separation policy at the southern border: "Doctors say family separation yields 'catastrophic' results, with the trauma of being taken from one's parents having long-term effects on children's brains." *Id.* at 525.

139. *See* Trivedi, *supra* note 116, at 541.

140. *See* JOSEPH GOLDSTEIN, ANNA FREUD, ALBERT J. SOLNIT & SONJA GOLDSTEIN, IN THE BEST INTERESTS OF THE CHILD: PROFESSIONAL BOUNDARIES 4 (1986).

substantial level of accuracy.[141] This is true even though the U.S. child welfare system is pouring extraordinary resources into monitoring and disrupting families, and Black families in particular.[142]

## II. FUNDAMENTAL PARENTAL RIGHTS AND THE EXPANSION OF PSYCHOLOGICAL PARENTHOOD PRINCIPLES

What, if any, is the justification in constitutional, case, and statutory law for authorizing foster parent intervention in termination of parental rights on the basis that foster parents have developed a psychological parent relationship? This Part provides essential background information on the constitutional basis for parental rights and where foster parents draw support from when petitioning for adoption pre-termination of parental rights. Subpart II.A describes the Supreme Court's jurisprudence establishing fundamental parental rights, and how the Court extended those rights to unwed biological fathers in *Stanley v. Illinois*,[143] *Quillon v. Walcott*,[144] *Caban v. Mohammed*,[145] and *Lehr v. Robertson*.[146] Subpart II.B provides a brief explanation of psychological parenthood theories as a persuasive element in each of those four cases, and a framework that foster parents tend to rely on when asserting claims to parentage. Subpart II.C demonstrates that although Supreme Court cases regarding unwed fathers may appear to lend support for the claims of intervening foster parents—with psychological parenthood principles as the throughline—foster parents' claims are highly distinguishable. Subpart II.D discusses how the Uniform Parentage Act codified psychological parenthood principles and the requirements of *Stanley*. Subpart II.E describes how these principles have been applied to juvenile dependency law by foster parents pursuing adoption and consequently disrupting natural families.

### A. ESTABLISHING FUNDAMENTAL PARENTAL RIGHTS AND THEIR EXTENSION TO UNWED FATHERS

The Supreme Court has long recognized the fundamental right and liberty interest of natural parents to raise their children under the Due Process Clause of the Fourteenth Amendment.[147] In early constitutional jurisprudence,

141. Clare Huntington, *The Child-Welfare System and the Limits of Determinacy*, 77 LAW & CONTEMP. PROBS. 221, 222 (2014).

142. ROBERTS, *supra* note 29, at 36–38.

143. 405 U.S. 645, 658 (1972); *see infra* Subpart.II.A.

144. 434 U.S. 246, 256 (1978); *see infra* Subpart.II.A.

145. 441 U.S. 380, 394 (1979); *see infra* Subpart.II.A.

146. 463 U.S. 248, 267–68 (1983); *see infra* Subpart.II.A.

147. David J. Herring comments on the fact that while the Supreme Court has confirmed numerous times that parental rights to raise children are fundamental, the Court has never clarified the basis for that characterization. "Is this right fundamental because it provides for the best interests of children to be raised by their natural parents . . . or because it follows from a coherent political philosophy about the limited power that a government should possess . . . ?" Failure to clarify obfuscates the balancing act implicated in dependency

protection for parental rights was grounded in the value of pluralism, rather than the presumption that parents act in their children's best interests, which came later.[148] In *Meyer v. Nebraska*, the Court recognized that parents have a right to "establish a home and bring up children" and that this right is within the scope of liberty interests protected by the Constitution.[149] Two years later, in *Pierce v. Society of Sisters*, the Court stated that, "the child is not a mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."[150] Further, in *Prince v. Massachusetts*: "[I]t is cardinal within us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."[151] The Court has consistently and affirmatively established that the fundamental right and liberty interest in parenting is unquestionable.[152] The Court has elaborated upon the reach of parents' substantive due process rights over the course of many decisions in the century since they were first explicitly acknowledged in *Meyer*.[153]

The Supreme Court traditionally extended parental rights to "formal" parents, i.e. parents by biology, marriage, or adoption.[154] These classifications automatically extended protection to married couples, as well as single mothers. In *Stanley v. Illinois*, the Court expanded the class of individuals who were legally recognized as parents to include non-marital fathers.[155] The father in *Stanley* lost custody of his children after their mother's death because an Illinois statute declared that children of unwed fathers become wards of the state upon the death of the mother.[156] Although Stanley lived with his children intermittently for 18 years and was an active caregiver in their lives, the statute presumed that unwed fathers were unfit, warranting "protection" of minor children.[157] Consistent with prior decisions concerning the fundamental rights of parents, the Court placed an emphasis on family integrity.[158] "The private

cases. David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 168–69 (1992).

148. Gottlieb, *supra* note 22, at 34.

149. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

150. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

151. Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

152. Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

153. *Id.* at 243; *see also* Vanessa L. Warzynski, Comment, *Termination of Parental Rights: The Psychological Parent Standard*, 39 VILL. L. REV. 737, 743–45 (1994).

154. *See* Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 322 (2020).

155. *See generally* Stanley v. Illinois, 405 U.S. 645 (1972) (finding that non-marital fathers cannot be presumed unfit and neglectful).

156. *Id.* at 646.

157. *Id.* at 646, 648.

158. *See id.* at 651; *see also* NeJaime, *supra* note 154, at 283–84 ("Stanley linked the 'fundamental interest' in procreation to the interest in parental recognition, claiming that 'one who has exercised the right to procreate and *has gone on to establish a familial relationship with his biological progeny has a fundamental interest in*

interest here, that of a man in the children he has *sired and raised*, undeniably warrants deference, and absent a powerful countervailing interest, protection."[159] Significantly, this was the first case where the Court established that custody and "companionship" are included within the scope of parental liberty interests under the Fourteenth Amendment.[160] The Court found the presumption of unfitness unconstitutional in violation of Equal Protection under the Fourteenth Amendment and that non-marital fathers have a substantial interest in retaining custody of their children.[161]

*Stanley* was the first of four total cases in which the Court framed the parental rights of unwed fathers. In 1978, the Court established in *Quilloin v. Walcott* that not all unwed fathers have the same degree of constitutional protection.[162] *Quilloin* was an adoption case, rather than a dependency case, where the biological father tried to prevent the adoption of his child.[163] The biological parents never "married each other or established a home together."[164] The father never had custody of the child; the child had always lived with his mother and, when she married, her husband.[165] The Court distinguished Quilloin from married fathers: even though he had paid child support, Quilloin "never shouldered any significant responsibility with respect to daily supervision, education, protection, or care of the child."[166] In contrast, married fathers inherently took on these responsibilities.[167] Unlike the father in *Stanley*, Quilloin had never been a part of his child's family unit. The Court affirmed the adoption which preserved and recognized the child's existing family unit.[168]

Next, in *Caban v. Mohammed*, an unwed father challenged a New York statute that allowed his children to be adopted by their step-father without his consent.[169] The father in this case had a relationship with his children that was "fully comparable to that of the mother."[170] The couple and their children had lived together as an intact family unit for several years, and the father established strong bonds with his children.[171] *Caban* distinguished the unwed father who

*maintaining that relationship.*' Yet in the same sentence in which he emphasized biological procreation, *Stanley* highlighted 'familial relationship,' suggesting that social dimensions were also central to fatherhood." (emphasis added)).

159. *Stanley*, 405 U.S. at 651 (emphasis added).

160. *Id.*

161. *See id.* at 649, 652.

162. 434 U.S. 246, 248 (1978).

163. *Id.* at 247.

164. *Id.*

165. *Id.*

166. *Id.* at 256.

167. *See* NeJaime, *supra* note 154, at 293.

168. Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology 'Plus' Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47, 57 (2004).

169. 441 U.S. 380, 381–82 (1979).

170. *Id.* at 389.

171. *Id.*

steps forward to participate in the "care and support" of his child[172] from the "reluctant father" in *Quilloin*.[173]

Finally, four years later, the Court considered another claim of a putative unwed father protesting his child's adoption without his consent in *Lehr v. Robertson*.[174] In *Lehr*, the mother got married eight months after her child was born and the step-father filed to adopt when the child was two.[175] At the time, New York had a "putative father registry" where a man could register his intent to claim paternity of a child born out of wedlock and as a result become entitled to notice of any adoption proceedings for the child.[176] Lehr did not register when his child was born, nor did he ever provide financial support, live with the child, or marry the child's mother.[177] The Court recognized that states almost universally preferred and found that it was in children's best interests to be raised in a traditional family setting.[178] Lehr claimed that he was deprived of the fundamental liberty interest in the *potential* relationship with his child.[179]

With *Lehr*, the Court fully articulated the reach of constitutional protection for unwed fathers and distinguished those who qualified for that protection from those who did not.[180] Citing the dissent in *Caban*, the Court stated that, "parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring."[181] Thus, the Court drew a line between mere biological relationships and relationships of parental responsibility[182]—unwed fathers acquire protection for their interest in their parent-child relationship when they "grasp[] the opportunity" created by their biological connection and take on some of the "responsibility for the child's future."[183] Under this "biology-plus" principle, the Court explained that siring a child alone is not sufficient to warrant constitutional protection;[184] an existing relationship was also necessary.[185] This principle would become the unifying quality of the Court's series of cases concerning unwed fathers.[186]

172. *Id.*
173. Oren, *supra* note 168.
174. 463 U.S. 248 (1983).
175. *Id.* at 250.
176. *Id.*
177. *Id.* at 252.
178. *Id.* at 257.
179. *Id.* at 255.
180. *Id.* at 261–65.
181. *Id.* at 260 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)*; see also* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 657 (2002).
182. NeJaime, *supra* note 154, at 295.
183. *Lehr*, 463 U.S. at 262.
184. David D. Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 762 (1999).
185. Oren, *supra* note 168, at 63.
186. JOHN E.B. MYERS, CALIFORNIA FAMILY LAW, A PRACTICE FOCUSED CASEBOOK 115 (2d ed. 2018).

## B. PSYCHOLOGICAL PARENTHOOD THEORY BRIEFLY

The "plus" of biology-plus in these cases tends to be the existence of a psychological parent-child bond. Developmental psychologists have stressed the importance of this type of relationship for children for decades,[187] but it was first theorized as applied to legal spaces in the 1970s. The legal theory of psychological parenthood has its roots in Goldstein, Freud, and Solnit's scholarship. They articulated principles to govern custody decisionmaking based on the presumption that disrupting the bond between a child and their psychological parent is harmful to the child's health and well-being.[188] Goldstein, Freud, and Solnit defined a psychological parent as someone "who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs."[189] Psychological parent principles are dependent on attachment theory: "for children, the single most important factor in promoting positive psychosocial, emotional, and behavioral well-being is having a strong, secure attachment to their primary caregivers."[190] They proposed a legal framework based on psychological parenthood, the basics of which Peggy C. Davis captures well:

> On the one hand, [Goldstein, Freud, and Solnit] advocated a strengthening of the presumption against the removal of children from the household except in cases of dire threat to their physical well-being. On the other hand, they advocated a weakening of the biological parent presumption in cases involving children of broken homes and children residing outside the biological family. . . . [C]hildren who had been in the care of nonparents for a period sufficient to give rise to a presumption of psychological attachment to new caretakers would be permanently placed with those caretakers.[191]

Goldstein, Freud, and Solnit advocate that the state should exercise restraint when considering intervention into in a family.[192] Once intervention is warranted, they center the child alone as opposed to the parental or state

187. *See* Carolyn Curtis, *The Psychological Parent Doctrine in Custody Disputes Between Foster Parents and Biological Parents*, 16 COLUM. J.L. & SOC. PROBS. 149, 151 (1980) ("Psychoanalysts generally agree that a stable, continuous, and caring relationship with an adult is crucial for a child's healthy mental development.").

188. GOLDSTEIN ET AL., *supra* note 47, at 31–34. Note that psychological parenthood principles developed in the context of family law, *not child welfare*. Several scholars have discussed the issues that arise when applying family law doctrine to child welfare contexts. *See, e.g.*, Thomas P. Lewis & Robert J. Levy, *Family Law and Welfare Policies: The Case for "Dual Systems*,*"* 54 CALIF. L. REV. 748, 751 (1966).

189. GOLDSTEIN ET AL., *supra* note 47, at 98. It is important to emphasize that oftentimes a child's biological parent *is* their psychological parent. *See id.* As applied to legal frameworks, psychological parents are often viewed as distinct from biological parents. *See* Warzynski, *supra* note 153, at 748 ("Psychological parent-child relationships can occur when a child is placed in foster care or in the home of a relative or a close friend 'temporarily' by a biological parent, or when a child is awaiting a final decree of adoption while living with potential adoptive parents.").

190. NAT'L ACADS. SCIS. ENG'G & MED., VIBRANT AND HEALTHY KIDS: ALIGNING SCIENCE, PRACTICE, AND POLICY TO ADVANCE HEALTH EQUITY 9 (Jennifer E. DeVoe, Amy Geller & Yamrot Negussie eds., 2019).

191. Davis, *supra* note 49, at 1545.

192. JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 4 (1986).

interests.[193] They argue that centering the child necessitates that states protect a child's connection with their psychological parent, regardless of whether the psychological parent is also their biological parent or a nonrelative third party, like a foster parent.[194] Foster parents who are asserting claims to parentage, including those in Carter's case, are quick to rely on psychological parenthood theories to bolster their claims.[195] The next subpart explains why this reliance is ill-founded.

### C. DRAWING PARALLELS AND DISTINCTIONS: UNWED FATHER CASES AND FOSTER PARENT CLAIMS FOR PSYCHOLOGICAL PARENTHOOD

The decision in *Stanley* took a substantial step toward protecting the rights of fathers who care for their children—who hold them out as their own—regardless of marital status. The Court cautioned against unwarranted state intrusion that separates children from their parents and opined[196] The decision turned in great part on the nature of the relationship that the father in *Stanley* had with his children.[197] The Court granted protection specifically to a father who "under[took] the work of family."[198] However, *Stanley* was the "perfect case"; courts and legislatures presumed that the father in *Stanley* was the rare exception, rather than the rule.[199] In the cases that followed, the Court qualified constitutional protection for unwed fathers under the "biology-plus" principle. In both *Quilloin* and *Lehr*, the unwed fathers did not have the "plus." A few examples of that "something more" drawn from *Stanley* and *Caban* include: (1) a day-to-day relationship with their children, (2) the responsibility, financial and custodial, of raising their children, and (3) the mother's support or encouragement of their father-child social relationship.[200]

These cases clarify that the Court finds significance in the psychological parent-child relationship. Consequently, it seems that foster and prospective adoptive parents could find support for claims for permanent custody from the Court's jurisprudence on unwed fathers. *Stanley* and *Caban* are easily reconciled with Supreme Court recognition of psychological parenthood principles.[201] In *Stanley*, the Court ruled in favor of an unwed father who had lived with his children for many years, and for much of that time Stanley was in a relationship with their mother, which the Court viewed as analogous to a marital

193. *Id.* at 4–5.

194. GOLDSTEIN ET AL., *supra* note 47, at 53, 99.

195. *See, e.g.*, Hager, *supra* note 1 (discussing the foster parent's lawyer relying on an "expert" in attachment theory).

196. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972).

197. *See* NeJaime, *supra* note 154, at 270.

198. *See id.* at 285–86.

199. Oren, *supra* note 168, at 53–54.

200. *See Stanley*, 405 U.S. at 646, 666–67; Caban v. Mohammed, 441 U.S. 380, 391–93 (1979).

201. *See* Warzynski, *supra* note 153, at 751. Although Warzynski omits mention of *Caban* here, the same reasoning applies as with *Stanley*.

relationship.[202] In Goldstein, Freud, and Solnit's terms, Stanley fulfilled his children's psychological needs "on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality."[203]

Foster parents provide analogous day-to-day care and companionship for many months, even years at a time. They aim to fulfill the same psychological needs for a child and often are successful in doing so. Similarly, in *Caban*, the biological mother and father consensually participated in raising their children together until their separation, much like a marital relationship.[204] Upon separation, the father in *Caban* had developed a substantial relationship, a strong psychological bond which solidified his claim.[205] In this family law context, rather than dependency, the Court signaled that psychological parenthood would factor in determining the reach of unwed fathers' liberty interests.[206]

In *Quilloin* and *Lehr*, the Court also prioritized established family units where strong social ties were already in place.[207] Finding in favor of adoption in those cases simply affirmed the existing family unit, of which the unwed fathers had never been a part of. In those cases, too, the psychological parent-child relationship was protected. The Court rejected the claims of biological parents who asserted a liberty interest for their *potential* parent-child relationship. Foster parents can certainly draw support here too: many children are placed in their care in infancy, never having developed a psychological bond with their biological parents. When the placement lasts for an extended period, the child develops an enduring relationship with their foster parents; they may become an analogous family unit. One could similarly argue that for a child removed as an infant, there is only *potential* for a strong psychological bond with their natural parent. Significantly, both existing family units in *Quilloin* and *Lehr* were traditional, nuclear families[208]—consistent with state policy that preferred a policy of raising children in "family settings."[209] Foster families, albeit by design, satisfy this preference.

*Stanley* and the cases that followed certainly contributed to the expansion of psychological parenthood doctrines in family law. Those decisions emphasized the importance of emotional attachments, not the fact of a genetic connection or marital relationship alone.[210] Despite that, these cases are highly distinguishable from claims where nonrelative foster parents seek full custody of children in their care. In *Stanley*, *Quilloin*, *Caban*, and *Lehr*, the Court never

202. *See Stanley*, 405 U.S. at 646–47.
203. GOLDSTEIN ET AL., *supra* note 47, at 98.
204. *See* NeJaime, *supra* note 154, at 290.
205. *Caban*, 441 U.S. at 393.
206. *See* NeJaime, *supra* note 154, at 292.
207. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); Lehr v. Robertson, 463 U.S. 248, 267–68 (1983).
208. *See Quilloin*, 434 U.S. at 255; *Lehr*, 463 U.S. at 250.
209. *Quilloin*, 434 U.S. at 252.
210. *See* Warzynski, *supra* note 153, at 751 ("In *Stanley*, the Court found in favor of a father who already enjoyed a psychological parent-child relationship with his children.").

held that the psychological bond alone was dispositive.[211] When unwed fathers succeeded, the psychological bond was the "plus" in addition to the requisite biological relationship. Nonrelative foster parents do not have a similar biological relationship which grants them an opportunity to build a psychological bond. In contrast, their opportunity is afforded by the state under a contractual relationship.

*Stanley*, the most comparable case among the four for foster parent claims to permanent custody, clearly indicated a preference for natural families over those created by the state unnecessarily.[212] Not only that, in both *Stanley* and *Caban* the fathers had a marital-like relationship with the mothers, at least for some duration of the children's lives.[213] Consequently, the mothers—for whom parentage was decidedly presumed based on biology alone—consented to, promoted, and encouraged the relationship between the fathers and the children. Foster parents do not enjoy the same consent and encouragement from natural parents. Since the state primarily removes children from their homes involuntarily[214] (i.e. without the natural parents' consent), it cannot be said that natural parents promote the development of a psychological parent-child bond between their child and the foster parent.

Further, both the unwed fathers and stepfathers who prevailed in their cases assumed financial responsibility for raising their children. This financial responsibility is taken on by the state when children are placed into foster care; foster parents are paid caregivers and parents who adopt from foster care receive equivalent compensation until the child is an adult.[215] In short, the Court has never indicated that a psychological parent-child relationship alone is sufficient for a claim to parentage. In the absence of a "formal" claim to parentage by biology, marriage, or adoption, no single factor on its own is dispositive. By analogous reasoning, a psychological parent-child bond alone should not outweigh a legal parents' claim.

Foster parents' claim for parentage are often rooted in a similar *theoretical* principle of psychological parenthood as that presented in *Stanley*, *Quilloin*,

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211. Where unwed fathers prevailed, they had a biological connection in addition to a psychological bond. In the cases where the adoptive fathers prevailed, they had a marital claim to parentage in addition to a psychological bond.

212. *See* Stanley v. Illinois, 405 U.S. 645, 652 (1972) ("[T]he State registers no gain towards its declared goals when it separates children from the custody of fit parents.").

213. *See id.* at 646; Caban v. Mohammed, 441 U.S. 380, 389 (1979).

214. Eli Hager, *Police Need Warrants to Search Homes. Child Welfare Agents Almost Never Get One.*, PROPUBLICA (Oct. 13, 2022, 8:00 AM EDT), https://www.propublica.org/article/child-welfare-search-seizure-without-warrants.

215. Pamela Laufer-Ukeles, *Money, Caregiving and Kinship: Should Paid Caregivers Be Allowed to Obtain De Facto Parent Status?*, 74 MO. L. REV. 25, 28 (2009). For example, parents who adopt from foster care in California receive Medi-Cal eligibility and cash payments including $400 to cover the costs of adoption and monthly payments up to the rate that would be applicable if the child was in a foster home, "including any applicable specialized or level of care rate." YOUTH L. CTR., FACT SHEET: ADOPTION ASSISTANCE PROGRAM IN CALIFORNIA 2 (2021), https://www.ylc.org/wp-content/uploads/2018/12/Adoption-Assistance-Fact-Sheet-Final-Updated-August-2021.pdf.

*Caban*, and *Lehr*.[216] However, foster parents' claims are irreconcilable with this case law, which sowed the seeds for psychological parenthood's codification in family law. Identifying these distinctions is especially significant because they expose how easily family law and dependency law doctrine are obfuscated. Children are at the center of both, and courts often use similar standards to aid in decision-making. Yet, the legal frameworks and fundamental rights at stake and the history of interest-balancing in constitutional jurisprudence underpinning them are separable. The discussion of the constitutional basis for parental rights in the context of foster care and dependency law continues in Part III.

### D. FAMILY LAW CODIFICATION OF PSYCHOLOGICAL PARENTHOOD PRINCIPLES—FUNCTIONAL PARENTS

The 1973 Uniform Parentage Act (UPA) implemented the requirements set forth in *Stanley*,[217] distinguishing between unmarried fathers who were active parents and "the *disinterested* unmarried father."[218] The 1973 UPA contained a parentage presumption: "a man is presumed to be the natural father of a child if. . . while the child is under the age of majority, he receives the child into his home and *openly holds out the child* as his natural child."[219] Originally, the "holding out" presumption was gendered and intended for biological father-child relationships,[220] but it was later expanded to apply to nonbiological parents under the UPA.[221]

Since the doctrine's emergence in the 1970s, psychological parenthood principles have been relied upon to protect diverse family structures.[222] With advances in the legalization of same-sex marriage and second parent adoption for same-sex parents, it is increasingly more common for parents not to be biologically related to their children.[223] This evolution in family composition requires policies to protect those bonds in the event that the family dynamic changes.[224] As we have seen, parent-child relationships are afforded substantial protection under the Constitution. Traditionally, however, that protection was applied to married couples, adoptive parents, and biological parent-child

216. *See Stanley*, 405 U.S. at 651; Quilloin v. Walcott, 434 U.S. 246, 256 (1978); *Caban*, 441 U.S. at 389; Lehr v. Robertson, 463 U.S. 248, 260 (1983).

217. *See* Henry Krause, *The Uniform Parentage Act*, 8 FAM. L.Q. 1, 14 (1974).

218. *See id.*

219. UNIF. PARENTAGE ACT § 4(a)(4) (UNIF. L. COMM'N 1973).

220. This presumption was derived from *Stanley*, *Quilloin*, *Caban*, and *Lehr* which distinguished disinterested unwed fathers from those who established and maintained their relationships with their children, "grasping the opportunity" afforded them by a biological relationship. *See* Douglas NeJaime, *Parents in Fact*, 91 U. CHI. L. REV. 513, 535 (2024).

221. *See* Courtney G. Joslin & Douglas NeJaime, *How Parenthood Functions*, 123 COLUM. L. REV. 319, 335–36 (2023).

222. *See* Rebecca L. Scharf, *Psychological Parentage,* Troxel*, and the Best Interests of the Child*, 13 GEO. J. GENDER L. 615, 628–29 (2012).

223. *See id.* at 630.

224. *See id.*

relationships,[225] which failed to account for individuals who become parents through other means.[226] In response, family law doctrine has turned toward a more *functional* approach—placing emphasis on bonds and relationships as opposed to marriage or genetics which inform the traditional perception of "natural parents."[227]

Family law courts—which are distinct from Juvenile Dependency courts[228]—have since established more routes than just biology or marriage to establish legal standing as a parent, known as "parentage." The term "functional parent" refers to broad category of individuals who have (or should have according to the *Restatement of Children and the Law*)[229] parental rights (or parentage) based on a developed relationship with a child where they act as a parent.[230] Functional parent doctrines arose out of a wide range of contexts and consequently, there are several different versions, each with their own definition and implications for parentage.[231]

One example is the "de facto parent," which is used to recognize a caregiver who has developed a parent-like relationship with a child. A de facto parent is "a person who has 'established a bonded and dependent relationship with the child that is parental in nature.'"[232] Today, the language "openly holds out the child as his natural child" has become a cornerstone in defining the qualifications for de facto parent status.[233] De facto parent status is granted to qualifying third parties seeking legal recognition and protection for their relationship with a child.[234]

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225. *See* NeJaime, *supra* note 154, at 309 ("[V]indication of biological ties would protect parents who had been marginalized by the state and society. Prioritizing the rights of biological parents would safeguard the parental status of poor women and women of color subject to overreaching child welfare authorities and threats by foster parents seeking to supplant them.").

226. Anne L. Alstott, Anne C. Dailey & Douglas NeJaime, *Psychological Parenthood*, 106 MINN. L. REV. 2363, 2367 (2022) ("Courts and commentators commonly assume that the federal Constitution provides special protection to biological parent-child relationships, despite the fact that a biological requirement excludes children's bonds with LGBTQ parents and other nonbiological parents.").

227. NeJaime, *supra* note 154, at 319.

228. Family law courts adjudicate private familial matters including divorce, child custody and child support. *See, e.g.*, *Family Law*, SUPER. CT. OF CAL.: CNTY. OF S.F., https://sf.courts.ca.gov/divisions/unified-family-court/family-law (last visited Mar. 23, 2025). In contrast, juvenile dependency courts determine the course of action following reports of abuse and neglect by child protection agencies; they decide whether to remove a child from their parents, what services the parent(s) must complete to reunify, and ultimately whether to reunify a parent with their child or terminate parental rights. *See, e.g.*, CAL. WELF. & INST. CODE § 300 (West 2025).

229. NeJaime, *supra* note 220, at 517.

230. *See* Joslin & NeJaime, *supra* note 221, at 329–42. De facto parent, *in loco parentis*, equitable estoppel, emotional or psychological parenthood, equitable parenthood, and nonexclusive parenthood all fall under the umbrella of functional parent doctrine. *See* Storrow, *supra* note 181 at 665–66. All are based on the psychological parent principles proposed by Goldstein, Freud, and Solnit. *See id.* at 666.

231. *See* Joslin & NeJaime, *supra* note 221, at 323.

232. NeJaime, *supra* note 220, at 515 (citing RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 1.82(a)(3) (AM. L. INST., Revisited Tentative Draft No. 4 2022)).

233. UNIF. PARENTAGE ACT § 609(d)(4) (UNIF. L. COMM'N 2017).

234. *Id.* § 609(d).

The 2017 UPA "treats de facto parents as equal legal parents with all the rights and responsibilities."[235] Section 609(d) of the UPA provides the requirements for establishing de facto parenthood.[236] To prove de facto parenthood against another person who has claim to parentage, an individual must show by clear and convincing evidence that:

(1) the individual resided with the child as a regular member of the child's household for a significant period;

(2) the individual engaged in consistent caretaking of a child;

(3) the individual undertook full and permanent responsibilities of a parent of the child without expectation of financial compensation;

(4) the individual held out the child as the individual's child;

(5) the individual established a bonded and dependent relationship with the child which is parental in nature;

(6) another parent of the child fostered or supported the bonded and dependent relationship required under paragraph (5); and

(7) continuing the relationship between the individual and the child is in the best interest of the child.[237]

Most states extend parental rights (at least to some degree) to people who could be categorized as functional parents in some situations.[238] A handful of states have completely adopted the 2017 UPA and codified its de facto parent doctrine, including Washington, Maine, Connecticut, Rhode Island, and Vermont.[239] Functional parent doctrine has proliferated throughout the country in family law spaces.[240]

Douglas NeJaime, a leading scholar of parentage law reform,[241] discusses how courts use functional parent doctrines to "protect the child's relationship with the person who is in fact parenting them."[242] He continues:

> Given the circumstances facing these families, it seems especially critical to recognize the child's primary caregiver as a functional parent. Individuals are

235. Gregg Strauss, *What Role Remains for De Facto Parenthood?*, 46 FLA. ST. U. L. REV. 909, 910 (2019).

236. UNIF. PARENTAGE ACT § 609(d).

237. *Id.* These factors mirror those which the Court found significant in *Stanley*, *Quilloin*, *Caban*, and *Lehr*. Subsections (3) and (6) would preclude a nonrelative foster parent from gaining de facto parent status. Foster parents are paid stipends by the state for their services. Additionally, involuntary removal of a child would necessarily mean that "another parent of the child" did *not* "foster or support the bonded and dependent relationship." *See supra* text accompanying notes 212–215.

238. NeJaime, *supra* note 220, at 515–16.

239. *Id.* at 525.

240. Strauss, *supra* note 235, at 911. Strauss lists several states that have expressly rejected or significantly curtailed de facto parenthood. *See id.* at 911 n.34 and accompanying text. For an overview of the spectrum of how courts have adjudicated de facto parenthood (not specifically in the dependency context), see Steven W. Fitschen & Eric A. DeGroff, *Is it Time for the Court to Accept the O.F.F.E.R.? Applying* Smith v. Organization of Foster Families for Equality and Reform *to Promote Clarity, Consistency, and Federalism in the World of De Facto Parenthood*, 24 S. CAL. INTERDISC. L.J. 419, 427 (2015).

241. *Douglas NeJaime*, YALE L. SCH., https://law.yale.edu/douglas-nejaime (last visited Mar. 24, 2025).

242. NeJaime, *supra* note 220, at 554.

> forming parent-child relationships in response to their families' struggles with substance use disorders, physical and mental health challenges, incarceration, housing insecurity, and poverty. . . . In such cases, courts can safeguard the child's relationship with their primary caregiver and prevent their removal into state custody.[243]

NeJaime acknowledges the value of functional parent doctrines *to prevent* the removal of children by child welfare agencies. However, he does not consider the consequences of implicating functional parent doctrines *post*-removal and throughout the course of a dependency proceeding. Similarly, Sarah E. Oliver, a certified child welfare specialist with Children's Law Center of California, argues that psychological parenthood principles could offer much needed protection to extended family who have taken on a parental role for a child at risk of state intervention.[244] Oliver does not include "foster parents" in her list of examples of functional parents who need protection.[245]

Psychological parenthood principles (captured by functional parent doctrines) developed and expanded in family law cases. Nonetheless, the progeny of psychological parenthood, or functional parenthood doctrine, is increasingly applied in juvenile dependency cases.

### E. PSYCHOLOGICAL PARENTHOOD PRINCIPLES APPLIED TO JUVENILE DEPENDENCY

In the dependency context, psychological parenthood principles offer grounds on which the state and third parties, like nonrelative foster parents, can further disrupt the natural family.[246] Davis remarked that Goldstein, Freud, and Solnit's framework could be utilized either to protect or intrude upon family integrity; generally, legal spaces have opted for the latter.[247] Advocates for permanency planning preferably ending in adoption often base their preference on this theory: "termination of parental rights followed by adoption is the best means of satisfying foster children's psychological needs."[248]

Over time, foster parents have received increased protection for their interests in dependency schemes, due in part to the evolution and application of doctrines based on psychological parenthood theories. De facto parenthood and, more commonly, foster parent intervention (as exemplified in Carter's case in the introduction of this Note) are two means by which foster parents have

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243. *Id.*

244. *See generally* Sarah E. Oliver, *Adapting to the Modern Family: Recognizing the Psychological Parent in Child Welfare Proceedings*, 33 CHILD LEGAL RTS. J. 267 (2013) (illustrating that child welfare laws do not afford grandparents, stepparents, same-sex partners, etc. who are in parental roles sufficient protection unless they are legal guardians).

245. *See id.* at 267–68.

246. Davis, *supra* note 49, at 1580 ("[Goldstein, Freud, and Solnit] argue that '[t]o favor the biological parents [when the child has established a psychological bond with other adults] would impose intolerable hardship on both the child and the psychological parents.'") (quoting GOLDSTEIN ET AL., *supra* note 33, at 4).

247. *See id.*

248. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 446 (1983).

successfully wielded psychological parenthood theories. However, as seen above, the application of de facto parenthood to the child welfare context should be extremely limited. Foster parent claims to parentage are highly distinguishable from the Supreme Court family law cases. These cases provide the foundation for the UPA's de facto parenthood status qualifications. UPA 2017 section 609(d)(3) plainly precludes foster parents from qualifying for de facto parent status; foster parenting is inherently contradictory to this subsection because foster parents are paid caregivers.[249] Similarly, a foster parent would generally fail to qualify for de facto parent status under section 609(d)(6) because a natural parent does not "foster" nor "support" a bond borne from involuntary removal.[250] The Supreme Court of Washington acknowledges this and held that under very narrow circumstances it is possible for a foster parent to gain de facto parent status despite this conflict.[251] Other states allow foster parents to become psychological or de facto parents, but do not permit an automatic right to intervene in custody decisions.[252] Some states explicitly reject psychological parenthood for foster parents.[253] California is the only jurisdiction which explicitly provides nonrelative paid foster parents a pathway to de facto parent status.[254]

In contrast to de facto parent status' limited application in dependency proceedings nationwide, many states give foster parents standing to intervene.[255]

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249. *See, e.g.*, *In re* Custody of A.F.J., 314 P.3d 373, 377 (Wash. 2013) ("Foster parents in Washington State assume their obligations with the expectation of some compensation." (citation omitted)).

250. Section 609(d)(6) is a softened version of a former requirement that the natural parent "consent" to the parenting relationship between the third party and child.

251. *See id.* In addition to the requirements provided by UPA 2017, Washington also requires that an individual seeking de facto parent status establish that "the natural or legal parent consented to and fostered the parent-like relationship." *In re* Parentage of L.B., 122 P.3d 161, 176–77 (Wash. 2005) (citing *In re* Parentage of L.B., 89 P.3d 271, 284–85 (Wash. Ct. App. 2005)). This precludes foster parents who are caring for a child that was involuntarily removed from gaining de facto parent status in Washington State. *See In re* Dependency of J.H., 815 P.2d 1380, 1385–86 (Wash. 1991) ("Foster parents' intervention rights are limited, however, and intervention would be appropriate only to the extent that the rights of foster parents and the rights of the legal parents do not conflict. . . . Under Washington law as it exists at this time, foster parents do not have a liberty interest in the continuation of the foster parent/foster child relationship such that they are entitled to procedural due process before foster children can be removed from their foster home.").

252. For example, West Virginia follows this model. *See In re* Clifford K., 619 S.E.2d 138, 157 (W. Va. 2005).

253. *See, e.g.*, Drummond v. Fulton Cnty. Dep't of Fam. & Child. Servs., 228 S.E.2d 839, 842–43 (Ga. 1976).

254. California allows foster parents to gain de facto parent status in dependency cases. *See De Facto Parents*, CAL. CTS.: SELF-HELP GUIDE, https://selfhelp.courts.ca.gov/juvenile-dependency/de-facto-parent (last visited Apr. 7, 2025).

255. *See* Hager, *supra* note 21 ("[T]here is a growing national trend of foster parents undermining the foster system's premise by 'intervening' in family court cases as a way to adopt children."). The scope of intervention varies. In Colorado, foster parents may intervene as a matter of right after a child has been in their care for a year. *See* COLO. REV. STAT. ANN. § 19-3-507(5)(d) (West 2025). In Texas, a foster parent may intervene if they have standing to file an original suit. *See* TEX. FAM. CODE ANN. § 102.004 (West 2025). In Illinois, foster parents may intervene if a motion has been made to restore the minor to the parent. *See* 705 ILL. COMP. STAT. ANN. 405/1-5(2)(b) (West 2025); *see also* Hager, *supra* note 1 (noting that Colorado, South Carolina, Kentucky,

Generally, a person can intervene in a case if they share an interest in the outcome.[256] As described by Eli Hager, intervention affords foster parents an opportunity to present evidence that it is in a child's best interest to stay in their care based on psychological parenthood principles.[257] This argument can be supported by Goldstein, Freud, and Solnit's scholarship because a psychological parent is any person acting as a parent through daily care fulfilling the child's psychological needs.[258] In turn, a foster parent can put forth a compelling argument that their "relationship with a child takes precedence over a natural parent, even if the natural parent has lost custody of the child through no fault of [their] own."[259] State level variations in the applicability of psychological parenthood principles will be further explored in Part IV. Before that, it is necessary to discuss natural parents' rights, specifically in a dependency context.

## III. RISKS TO NATURAL PARENT RIGHTS IN THE CONTEXT OF FOSTER CARE

Part II explored the constitutional, case, and statutory law that serves as the basis for foster parents' claims to parentage against natural parents whose rights have not been terminated. This Part considers the position of natural parents. Subpart III.A discusses the constitutional rights of natural parents whose children have been removed and the Supreme Court's emphasis on the primacy of the natural family as against foster parents in *Smith v. Organization of Foster Families for Equality and Reform*. Subpart III.B elaborates on two changes identified by Gottlieb that have occurred since the Court's decision in *OFFER*, which jeopardize natural parents' constitutional rights.

### A. DEFINING PARENTAL RIGHTS IN THE CONTEXT OF FOSTER CARE

The Court has only considered the subject of foster care in five decisions, two of which are particularly significant for this Note.[260] *Smith v. Organization of Foster Families for Equality & Reform* (*OFFER*) provides the constitutional foundation for determining the extent of foster parents' rights against natural parents' rights.[261] In *OFFER*, appellant foster parents asserted a claim to a constitutional right to familial privacy and integrity of the family unit against New York procedures governing removals and placement changes of foster

Florida, Michigan, New York, Tennessee, Arizona all allow foster parents to intervene in termination of parental rights proceedings).

256. *See* Fed. R. Civ. P. 24(a). Intervention can be as of right or permissive. *See id.*

257. *See* Hager, *supra* note 1.

258. GOLDSTEIN ET AL., *supra* note 47, at 99–100.

259. Garrison, *supra* note 248, at 447.

260. The Court has discussed foster care in M.L.B. v. S.L.J., 519 U.S. 102 (1996); Santosky v. Kramer, 455 U.S. 745 (1982); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981); Smith v. Org. of Foster Fams. for Equal. & Reform (*OFFER*), 431 U.S. 816 (1977); and Stanley v. Illinois, 405 U.S. 645 (1972). This note will discuss *OFFER* and *Santosky* in depth.

261. *See generally OFFER*, 431 U.S. 816 (holding that New York's removal procedures do not infringe on the liberty interests of foster parents).

parents.[262] The Court revisited its conception of family, articulated the similarities and differences between natural and foster families, and identified the conflict created when affording a liberty interest to one party that inherently detracts from that of another.[263] The foster parents, relying in part on the work of Goldstein, Freud, and Solnit, advocated for the protection of their "psychological family" and the bonds they developed.[264] Recognizing this complexity, the Court acknowledged that family "is not necessarily dependent on biological relationships" and derives, in large part, from emotional attachments.[265]

Ultimately, the Court rejected psychological parent evidence in this case.[266] The Court opined that the liberty interests of foster parents (and therefore the protections they are granted under the constitution) are not in equipoise with those of natural parents. Foster parents' relationship with a child originates from "state law and contractual arrangements,"[267] so they do not, and cannot, share the same liberties as natural parents.[268] The Court acknowledged that irreconcilable challenges would arise if it were to find that foster parents were able to acquire and assert a liberty interest against a natural parent's constitutionally recognized liberty interest which "the foster parent has recognized by contract from the outset."[269] As a result, any liberty interest that foster families may have under the constitution must be diminished against that of a natural family.[270]

While, facially, this analysis is secondary to the question of whether a pre-removal hearing for foster parents was constitutionally required, the spirit of the decision lies here. The Court provided a modern and "robust description of the constitutional issues at the heart of foster care, centered the importance of family integrity, and considered the complex policy choices underlying the foster care system."[271] Although the Court did not find in favor of the foster parents, the decision does align with the psychological parent theories.[272]

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262. *Id.* at 818, 842.

263. *Id.* at 842–47.

264. *See* NeJaime, *supra* note 154, at 309.

265. Warzynski, *supra* note 153, at 749. Warzynski argues that *OFFER* is aligned with psychological parenthood principles based on this commentary from the Court. *Id.* In a different context, the Court stated that "the mere existence of a biological link does not merit equivalent constitutional protection." Lehr v. Robertson, 463 U.S. 248, 261 (1983).

266. Davis, *supra* note 49, at 1552 n.55.

267. *OFFER*, 431 U.S. at 845.

268. *Id.* at 846 ("A second consideration related to this is that ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another. Here, however, such a tension is virtually unavoidable.").

269. *Id.*

270. *See* Davis, *supra* note 49, at 1589; *OFFER*, 431 U.S. at 846–47 ("Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.").

271. Gottlieb, *supra* note 22, at 5.

272. Psychological parent theories will be discussed in depth in Part III.

### B. DEVELOPMENTS SINCE *OFFER* JEOPARDIZE THE RIGHTS OF NATURAL PARENTS

Since the Court's decision in *OFFER*, a lot has changed in the landscape of the child welfare system. Gottlieb identifies two aspects of the child welfare system that have dramatically shifted; when *OFFER* was decided, (1) most children in foster care were placed "voluntarily" by their parents;[273] and (2) "foster care was not viewed then as intertwined with adoption."[274]

Today, children are typically removed from their parents by state child welfare workers using their police powers (often without a warrant or advanced court approval).[275] Following these removals, they are placed into foster care by court order,[276] with one study finding that only 3.4% of foster care placements were voluntary.[277] Mandated reporting has undoubtedly contributed to the increase in involuntary removals.[278] After the enactment of CAPTA, reports increased from 60,000 in 1974 to two million in 1990.[279]

Two key elements contributed to the integration of adoption into the dependency scheme, giving rise to a shift in the relationship between natural parents and foster parents and in turn between natural parents and the state. First, ASFA created a pathway to permanent adoptive homes within the foster care system.[280] As noted above, ASFA sets a timeline to prevent children from being placed in foster care indefinitely. If the 15-of-22-months' timeline expires, the State must "file a petition to terminate the parental rights of the child's parents…and, concurrently,…identify, recruit, process, and approve a qualified family for an adoption" unless some exceptions apply.[281] All states have implemented portions of ASFA.[282] Some states, like California, have made this timeline even faster, providing an impetus for courts to terminate reunification services and move to a termination of parental rights hearing after six months in foster care for children under three, and twelve months for children over

273. The Court questioned the extent to which placements were truly voluntary. *See OFFER*, 431 U.S. at 824–25, 834; Wald, *supra* note 46, at 1006; Gottlieb, *supra* note 22, at 63. Local agencies would frequently give parents the "choice" between being taken to court or "voluntarily" accepting services or placing their children in foster care. *See* Wald, *supra* note 46, at 1006 n.124.

274. *See* Gottlieb, *supra* note 22, at 64.

275. Hager, *supra* note 214.

276. *See* Katharine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. & YOUTH SERVS. REV. 62, 65 (2017) (finding that 95.4% of children removed in 2013 were removed by court order).

277. *See id.*

278. *See* Gottlieb, *supra* note 22, at 63–64.

279. *See* White & Persson, *supra* note 44.

280. *See* Julianne Hill, *Family Limbo: Movement to Repeal a Clinton-Era Law Sparks Debate About Foster Care and Adoption*, ABA J., Feb.–Mar. 2024, at 54, 56.

281. 42 U.S.C. § 675(5)(E). Some groups advocating for the repeal of ASFA refer to this timeline as the "family death penalty." Hill, *supra* note 280, at 56–57.

282. CRS ASFA REPORT, *supra* note 93, at 1.

three.[283] The trigger timeline prescribed by ASFA severely weakened family preservation by "falsely equating child removal with child safety and permanency with termination of parental rights and adoption."[284] It has little, if anything, to do with child safety.[285]

Complying with a case plan within ASFAs timeline requirements is much more difficult without significant financial resources or services to achieve case plan goals in shorter periods of time. Consider Alicia and Fred's case plan: they had to get sober, find jobs, and secure stable housing. Drug rehabilitation alone often takes longer than 15 months, due to either the length of the program or delays with enrollment.[286] Further, class-based disparities and racial disparities overlap,[287] and ASFA intensified those disparities by implementing a structure that functionally aimed to terminate parental rights as swiftly as possible.[288] ASFA increases the likelihood that Black children will be permanently removed from their parents.[289] Parents could lose custody for a number of reasons unrelated to child protection, including being hospitalized or imprisoned.[290] ASFA was enacted on the coattails of racist rhetoric that casts Black mothers as undeserving and Black families as broken.[291] Roberts describes the impact of ASFA on Chicago, where most of the children in foster care were Black, as an example: in two years after ASFA, terminations increased from 958 to 3,753.[292] "The Adoption and Safe Families Act is the epitome of a racist law . . . ."[293]

ASFA does not require adoption or specify what must happen after termination of parental rights.[294] However, it does provide financial incentives to states to encourage support of adoptions from foster care: $5,000 per child adopted, $7,500 per pre-adolescent child adopted or under guardianship, $10,000 per older child adopted or under guardianship, and $4,000 per child under guardianship.[295] Adoptive parents also receive financial rewards in the form of a monthly stipend (which may be equivalent to foster care boarding

283. Under ASFA, concurrent planning supports adoption if reunification *is not possible*. *See* Hill, *supra* note 280, at 60.

284. ROBERTS, *supra* note 29, at 121.

285. *Id.*; White, *supra* note 123, at 311.

286. Guggenheim, *supra* note 120, at 725.

287. Gupta-Kagan, *supra* note 116, at 1547.

288. ROBERTS, *supra* note 29, at 122.

289. Roberts, *supra* note 130.

290. Guggenheim, *supra* note 120, at 722.

291. Roberts, *supra* note 130; Guggenheim, *supra* note 120, at 728.

292. ROBERTS, *supra* note 29, at 122.

293. Martin Guggenheim, *Let's Root Out Racism in Child Welfare, Too*, IMPRINT (June 15, 2020, 2:00 AM), https://imprintnews.org/child-welfare-2/lets-root-out-racism-child-welfare-too/44327; *see also supra* text accompanying notes 131–136.

294. *See* Hill, *supra* note 280, at 57.

295. Adoption and Safe Families Act of 1997, 42 U.S.C. § 673b(d).

rates)[296] and additional resources to support the permanency of the adoption that last until each adoptee reaches adulthood.[297]

ASFA introduced adoption as a concurrent (yet purportedly subordinate) emphasis of foster care under certain conditions.[298] Although adoption is framed as a back-up plan in case reunification efforts fail, ASFA does not provide similar financial incentives for successful reunifications.[299] This funding scheme suggests that adoption is not truly a secondary goal to reunification.[300] ASFA incentivized states to implement concurrent planning: agencies are encouraged to proactively develop a back-up plan for adoption while working toward reunification[301] instead of waiting for reunification efforts to take their course under traditional permanency planning.[302] Concurrent planning includes several coordinated efforts to clear the way adoption, including:

- establishing paternity at the earliest possible date;
- utilizing a broader definition of "relative";
- placing siblings in the same home;
- reducing the duration or eliminating reunification services;
- relying more on voluntary relinquishment by parents; and
- expanding kinship adoption agreements.[303]

The state places children with foster parents that are ready to adopt to promote smooth transitions between permanency plans if reunification fails.[304] The state also requires local agencies to be transparent with parents about the "parallel tracks of family reunification and permanency planning,"[305] i.e., the possibility of adoption through termination of parental rights. Concurrent planning proponents argue that the policy aims to provide speedy pathways for

296. *See supra* note 215 and accompanying text.

297. *See* Hill, *supra* note 280, at 56.

298. *See* Gottlieb, *supra* note 22, at 19.

299. *See* Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 CHILD WELFARE 111, 124 (2014).

300. Herring, *supra* note 36, at 331 ("ASFA transforms adoption into a permanency outcome that appears as desirable as family reunification."). ASFA aimed to double adoptions from foster care by 2002. Patton & Pellman, *supra* note 18, at 174–75. If reunification were truly the primary national goal of the foster care system, federal funding allocation would reflect that. Instead, federal funding for adoption incentives makes adoption a more fiscally appealing permanency goal for states to support than reunification, because the federal government foots more of the bill for providing services.

301. *See* Lipp, *supra* note 69, at 222.

302. *See* Amy D'Andrade, Laura Frame & Jill Duerr Berrick, *Concurrent Planning in Public Child Welfare Agencies: Oxymoron or Work in Progress?*, 28 CHILD. & YOUTH SERVS. REV. 78, 79 (2006).

303. *See* William Wesley Patton, *Searching for the Proper Role of Children's Counsel in California Dependency Cases: Or the Answer to the Riddle of the Dependency Sphinx*, 1 J. CTR. FAM., CHILD. & CTS. 21, 33 (1999).

304. Lipp, *supra* note 69, at 222.

305. Patton & Pellman, *supra* note 18, at 174. Lipp noted that while the transparency requirement was based on a belief that "full disclosure of the concurrent plan would motivate birth parents, full disclosure was associated with a lower likelihood of reunification." *See* Lipp, *supra* note 69, at 238–39.

children out of foster care to reduce placement changes and lengths of stay.[306] However, ASFA's adoption incentives are at the expense of reunification efforts—"social service agencies know that foster care and adoption have a higher value due to ASFA."[307] The federal government finances the majority of adoption assistance, while conversely paying for only 15% of state prevention costs.[308] In 1999, Linda Katz[309] cautioned that providing services to parents has to be a priority in concurrent planning.[310] She stated, "Concurrent planning is not a mere window dressing for expedited adoption. If it becomes that, it will have sacrificed all integrity."[311]

Second, it has become increasingly difficult for prospective adoptive parents to adopt a child. This difficulty increases the appeal of adoption opportunities that are linked to foster care.[312] There are an estimated 1 million families looking to adopt, and not enough available children.[313] International adoptions have also declined for a number of reasons, totaling 4,059 in 2018,

306. Lipp, *supra* note 69, at 226.

307. Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 STAN. L. & POL'Y REV. 307, 328 (2015); *see also* Lipp, *supra* note 69, at 233 ("The risk that concurrent planning could undermine reunification efforts is particularly troublesome because evidence suggests that the requirement that agencies make 'reasonable efforts' to reunify is already at risk.").

308. Patton & Pellman, *supra* note 18, at 175.

309. The origin of the term "concurrent planning" is attributed to Linda Katz and her work with the Washington State Department of Social Services. *See* PATRICIA SCHENE, NAT'L CHILD WELFARE RES. CTR. FOR ORGANIZATIONAL IMPROVEMENT, IMPLEMENTING CONCURRENT PLANNING: A HANDBOOK FOR CHILD WELFARE ADMINISTRATORS 2 (Barbara Sparks ed., 2001), https://fixcas.com/scholar/concurrent.pdf. Katz wrote extensively on the implementation of current planning. *See, e.g.*, Anita Weinberg & Linda Katz, *Law and Social Work in Partnership for Permanency: The Adoption and Safe Families Act and the Role of Concurrent Planning*, CHILD.'S LEGAL RTS. J., Fall 1998, at 1, 2; Linda Katz & Chris Robinson, *Foster Care Drift: A Risk-Assessment Matrix*, 70 CHILD WELFARE 347, 349 (1991); Linda Katz, *Effective Permanency Planning for Children in Foster Care*, 35 SOC. WORK 220, 220 (1990).

310. Linda Katz, *Concurrent Planning: Benefits and Pitfalls*, 78 CHILD WELFARE 71, 82 (1999).

311. *Id.* Katz argues that successful implementation of concurrent planning requires avoiding the following pitfalls: (1) failing to accommodate cultural differences; (2) using assessment tools to assess child safety, rather than the potential for foster care drift; (3) assuming that assessment tools will infallibly predict case outcomes; (4) investing in one particular outcome, either reunification or not, rather than allowing the result to evolve from the family's decisions and actions; (5) defining staff as primarily enforcers, rather than social workers with case management responsibilities; (6) designing case plans that are not family centered; (7) interpreting 12 months as an absolute limit on reunification, regardless of parental progress; (8) alienating community treatment providers by not collaborating with them in early program planning; (9) expecting workers to implement concurrent plans without solid legal training and ongoing consultation; (10) offering foster parents and relatives and estimate of "legal risk"; and (11) failing to train and support relatives and foster parents. *Id.* at 82–84.

312. *See* Hager, *supra* note 1; Olga Khazan, *The New Question Haunting Adoption*, ATLANTIC (Oct. 19, 2021), https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard/620258.

313. *See* Tik Root, *The Baby Brokers: Inside American's Murky Private-Adoption Industry*, TIME (June 3, 2021, 6:00 AM EDT), https://time.com/6051811/private-adoption-america; *see also* SOC. CAP. PROJECT, JOINT ECON. COMM.–REPUBLICANS, SCP REP. NO. 4-20, A PLACE TO CALL HOME: IMPROVING FOSTER CARE AND ADOPTION POLICY TO GIVE MORE CHILDREN A STABLE FAMILY 2 (2020), https://www.jec.senate.gov/public/_cache/files/4b0c6d1c-1f03-472f-8065-b24c3ecea6d4/4-20-a-place-to-call-home.pdf ("In fact, far more Americans are looking to adopt than there are children in need of adoption.").

down from 22,989 in 2004.[314] Fewer mothers opt to give up their babies.[315] "Private adoption has, as a result, turned into an expensive waiting game."[316] Foster-to-adopt ("fost-adopt"), viewed as a cheaper alternative to private adoption, has become the back-up plan for many prospective parents.[317] The declining number of children available for adoption coincides with a national shortage in available foster parents.[318] Many couples are recruited to foster under the guise that babies will be "fast-tracked" for adoption or that they will inevitably be able to adopt from foster care.[319] Concurrent planning, introduced and encouraged by ASFA, formalizes this process.

Adoption as motivation to become a foster parent is fundamentally opposed to best practices training for foster parents:

> [F]oster parents are also required to assist the agency in its obligation to proactively work with parents to achieve family reunification, if possible, by supporting the parent-child relationship and addressing the issues that led to the foster care placement. As one best practice guide put it, when recruiting foster parents, "it is critically important to fully address the importance of foster parents' role in reunification . . . [and] effectively position foster parents to help work toward reunification." . . . "The best vision of the proper

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314. *See* Susan Jacobs & Maureen Flatley, *The Truth About Intercountry Adoption's Decline*, IMPRINT (Apr. 23, 2019, 4:04 AM), https://imprintnews.org/adoption/the-truth-about-intercountry-adoptions-decline/34658?gad_source=1&gclid=Cj0KCQiAxOauBhCaARIsAEbUSQSPe_4gMLgsT1u0WIZPq3Wy7_p2W9ZNEbc1YGepK0QZvlFKZ6Dc3OcaAssPEALw_wcB; Root, *supra* note 313; This Land, *Supply and Demand*, CROOKED MEDIA, at 06:45 (Sept. 7, 2021), https://crooked.com/podcast/4-supply-and-demand. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption took effect in the United States in 2008. The Hague Convention establishes strict rules to govern international adoptions, bringing structure to a historically under-regulated practice to prevent child abduction and trafficking. *See* Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption (HCCH 1993 Adoption Convention), art. 1, May 29, 1993, https://assets.hcch.net/docs/77e12f23-d3dc-4851-8f0b-050f71a16947.pdf.

315. *See* Hager, *supra* note 1. Adoption rates declined significantly after *Roe v. Wade*; several studies concluded that legalizing abortion reduced the number of "unwanted" children. *See* Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the Number of Unwanted Children? Evidence From Adoptions*, 34 PERSPS. ON SEXUAL & REPROD. HEALTH 25, 25 (2002). Additionally, stigma around being a single mom declined. *See* This Land, *supra* note 314, at 05:40.

316. *See* Hager, *supra* note 1; *see also* Khazan, *supra* note 312 ("Adopting a newborn can cost $45,000 or more. . . . One survey found that 37 percent of adoptive families wait longer than a year.").

317. *See* Maggie Wong Cockayne, Note, *Foster to Adopt: Pipeline to Failure and the Need for Concurrent Planning Reform*, 60 SANTA CLARA L. REV. 151, 151 (2020) ("The term foster to adopt ('fost-adopt') conjures up the belief, 'if I foster long enough, I can permanently adopt this child.'"); Hager, *supra* note 1; This Land, *supra* note 314, at 19:23 ("Private adoption agencies have started new foster-to-adopt programs. They're taking people who really want to adopt and licensing them to be foster parents. Fostering is routinely presented as a pathway to adoption on agency websites."); *see, e.g.*, Cicero A. Estrella, *Catholic Charities Scaling Back Its Role in Adoption Services*, SFGATE (Aug. 3, 2006), https://www.sfgate.com/bayarea/article/san-francisco-catholic-charities-scaling-back-2515267.php (noting that Catholic Charities, formerly premier private adoption agency, would be turning its attention to "a statewide adoption exchange that matches foster children with families" in California).

318. *See* SOC. CAP. PROJECT, *supra* note 313. This report discusses, among other things, foster parent attrition in fost-adopt programs, citing lack of support and resources from local agencies as key factors contributing to poor retention rates for foster parents.

319. *See, e.g.*, Hager, *supra* note 1; ROBERTS, *supra* note 29, at 34.

> role of modern foster parents is as "an engaged member of the team working toward reunification . . . embrac[ing] the approach of shared parenting, and . . . committed to building a positive, child-focused relationship with the birth family."[320]

As the Court identified in *OFFER*, a foster parent's contractual role inherently recognizes the "temporary" nature of their caregiving to any one child; and therefore, an acknowledgement of the primary goal of reunification.[321] The child welfare system functions at its best when foster parents are active participants working toward the goal of reuniting a child with their natural parents.[322] Adoption was not embedded within the foster care system when the Court handed down the *OFFER* decision.[323] Today, foster care and adoption are deeply intertwined, largely as a result of ASFA.[324] Unfortunately, it appears that at least some of the consequences Katz foresaw with concurrent planning have come to fruition.[325] Foster care today is effectively a pipeline for adoption—a perversion of its intended purpose in the wake of a "shortage" of children available via private adoption.[326] Similar to the tension inherent in the competing goals of the child welfare system,[327] there is palpable tension inherent to being a foster parent.[328] The child welfare system imposes an immense emotional burden on foster parents by asking them to enthusiastically and effectively work toward reunification and simultaneously pursue a concurrent plan for adoption—goals which contradict each other entirely.[329] Given that the child welfare system is perpetually under-resourced,[330] local agencies cannot consistently provide foster parents with the

320. *See* Gottlieb, *supra* note 22, at 17–19 (footnotes omitted) (quoting ADOPTUSKIDS, EQUIPPING FOSTER PARENTS TO ACTIVELY SUPPORT REUNIFICATION 1 (2019), https://www.adoptuskids.org/_assets/files/AUSK/Publications/equipping-foster-parents-to-support-reunification-web508.pdf).

321. *See* Smith v. Org. of Foster Fams. for Equal. & Reform (*OFFER*), 431 U.S. 816, 846 (1977); *see also* Wald, *supra* note 21, at 626 (1976).

322. *See generally* ADOPTUSKIDS, EQUIPPING FOSTER PARENTS TO ACTIVELY SUPPORT REUNIFICATION 1 (2019), https://www.adoptuskids.org/_assets/files/AUSK/Publications/equipping-foster-parents-to-support-reunification-web508.pdf (providing guidance to foster parents on how to best support youth in foster care).

323. *See OFFER*, 431 U.S. at 824 (noting that foster care, which is for a planned period, whether that be temporary or extended, is unlike adoptive placement which is permanent).

324. *See* Gottlieb, *supra* note 22, at 64.

325. *See supra* notes 310–311 and accompanying text.

326. *See supra* text accompanying notes 312–319; Gottlieb, *supra* note 22, at 65.

327. *See supra* notes 23–28 and accompanying text.

328. *See* ADOPTUSKIDS, *supra* note 322, at 3.

329. *Id.*; *see also* Hager, *supra* note 1 ("The job of foster parents is inherently difficult on an emotional level. . . . They're expected to simultaneously love the child and accept that their bond with the child may be broken.").

330. *See* Wald, *supra* note 21, at 640; Herring, *supra* note 36, at 334; Smith, *supra* note 307, at 311; Lipp, *supra* note 69, at 231.

support necessary for them to actively engage with a reunification plan.[331] For all practical purposes, reunification efforts and fost-adopt are incompatible.[332]

*OFFER* is in harmony with the presumed purpose of the child welfare system (as originally established by CAPTA) and cognizant of the complexity and sensitivity of the issues involved.[333] These two developments since *OFFER* are the product of federal policies that signal a shift in national priorities. *OFFER*'s sentiment—that natural parents' substantive due process rights should be protected against the interests of foster parents—is at risk. Structural changes in the child welfare system have de-emphasized natural parents' relationships with their children in favor of prioritizing adoptive parents who are perceived as a more likely pathway to permanency. Part IV considers the implications of when foster parents have standing to intervene, particularly in termination of parental rights proceedings. This investigation is limited to a few cases where foster parents are positioned against natural parents.

## IV. INTERESTED PARTIES AND THEIR RESPECTIVE RIGHTS IN A TERMINATION OF PARENTAL RIGHTS PROCEEDING

Part IV illustrates how the dynamics discussed in Parts I through III play out in dependency cases. Subparts IV.A and IV.B, respectively, explain the process of a termination of parental rights proceeding and the rights that natural parents should have in these proceedings based on the Supreme Court's decision in *Santosky v. Kramer*. Subpart IV.C discusses the indeterminate standard employed at this stage, and how its indeterminacy reinforces racial disparities in child welfare. Finally, this Part reviews a spectrum of five different state law approaches to the competing claims of natural parents and foster parents in Subpart IV.D.

### A. BACKGROUND ON TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

Parental rights in a dependency case are increasingly attenuated as a case proceeds and the law's indeterminacy builds.[334] If a court adjudicates a child abused or neglected, it will convene a dispositional hearing.[335] There, the court decides a temporary placement for the child and orders services that the parents

331. *See* ADOPTUSKIDS, *supra* note 322, at 3 ("A foster parent's active support of reunification relies deeply on the engagement, development, and support that agencies provide.").

332. This is not to say that there are not some exceptional individuals who have the requisite supports and training to foster according to best practices and fully engage with concurrent planning. Rather, it is unrealistic to expect this model to function on a national scale when resources are stretched thin.

333. Smith v. Org. of Foster Fams. for Equal. & Reform (*OFFER*), 431 U.S. 816, 838 (1977) ("The parties and *amici* devote much of their discussion to these criticisms of foster care, and we present this summary in the view that some understanding of those criticisms is necessary for a full appreciation of the complex and controversial system with which this lawsuit is concerned.").

334. Josh Gupta-Kagan, *Confronting Indeterminacy and Bias in Child Protection Law*, 33 STAN. L. & POL'Y REV. 217, 220 (2022).

335. *See, e.g.*, CAL. WELF. & INST. CODE § 360 (West 2025); COLO. REV. STAT. ANN. § 19-3-507 (West 2025).

must complete to reunify.[336] In the early stages, parents are generally entitled to reunification services as a matter of right, and the presumption is that if they succeed on their case plan within a prescribed window of time, their child will be restored to them. If parents fail to meet certain milestones in their case plan or do not meet them quickly enough, then the scope of their parental rights narrows.[337] Failure to comply with the treatment plan may provide grounds for termination of parental rights.[338] The limited timeline to reunify is prescribed by ASFA: if a child has been out of home for fifteen of the most recent twenty-two months, the state is required to initiate a termination of parental rights proceeding, absent specific exceptions.[339]

State by state, there is a range of standards that courts apply in termination of parental rights proceedings, which has generated uncertainty about what the standard for termination should be, how the interests at stake should be balanced, and how to prevent such a drastic result.[340] "[T]ermination decisions encompass so many issues. For example, any solution must take into account the rights of parents, the rights of children, and the limitations on state intervention into family life."[341] What is almost entirely consistent across all jurisdictions is that, under *Santosky v. Kramer*, in order to terminate a parent's rights, the state must prove they are unfit by clear and convincing evidence;[342] a state cannot deny custody "merely because another family might provide better care."[343]

### B. DUE PROCESS RIGHTS FOR NATURAL PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS

All states have a process to terminate parental rights.[344] *Santosky v. Kramer* articulates what due process protections natural parents are guaranteed at that most consequential juncture of a dependency case.[345] The Santosky parents

336. CAL. WELF. & INST. CODE § 360 (West 2025); COLO. REV. STAT. ANN. § 19-3-507 (West 2025).

337. If parents do not comply with their services, those reunification rights are subject to termination. Subsequently, if parents do not rectify their circumstances, parental rights entirely are subject to termination. *See* A.M. v. A.C., 296 P.3d 1026, 1031 (Colo. 2013).

338. *See id.*

339. *See* 42 U.S.C. § 675(5)(E). This is true even if parents are making progress toward reunification. Gupta-Kagan cites the fifteen-month trigger as an example of a "limited determinate standard[]" within a holistic scheme of indeterminate legal standards that "push[es] cases toward permanent family destruction." Gupta-Kagan, *supra* note 334, at 221.

340. *See* Warzynski, *supra* note 153, at 752.

341. *Id.* at 739.

342. Santosky v. Kramer, 455 U.S. 745, 748 (1982). There is a single exception to this: in California, the "clear and convincing" evidentiary standard is applied in an earlier proceeding where termination of *reunification services* is considered, but not at the TPR proceeding. In *Cynthia D. v. Superior Court*, the California Supreme Court found that application of the clear and convincing standard at earlier stages in a dependency case was sufficient to protect parents' due process rights such that it was no longer warranted at the TPR stage. 851 P.2d 1307, 1315 (Cal. 1993). This case is discussed in greater detail in a following subsection. *See infra* Subpart.IV.D.6.

343. Ramsey, *supra* note 63, at 26.

344. Wald, *supra* note 21, at 633.

345. *Santosky*, 455 U.S. at 747.

contested the constitutionality of employing the "fair preponderance of the evidence" standard during a termination of parental rights (TPR) proceeding.[346] In lock-step with *OFFER*, the decision in *Santosky* gave a staunch defense of the liberty interests of natural parents facing a dependency case:

> The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life. *If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.* When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures.[347]

The Court in *Santosky* likened the state intrusion faced by parents subject to a dependency case to that involved in juvenile delinquency, civil commitment, deportation, or denaturalization, all of which require a "clear and convincing" burden of proof.[348] There is a key difference in stakes: whereas all of those comparable government-initiated proceedings are reversible, termination of the parent-child relationship is a complete and permanent severance.[349] Additionally, the decision draws explicit lines defining the appropriate scope of the fact-finding stage of a termination proceeding: the State cannot "presume that a child and [their] parents are adversaries,"[350] nor are the interests of foster parents implicated at this stage.[351] *Santosky* gives a vivid description of the disadvantages natural parents face when subject to a termination proceeding, which warrant a higher burden of proof:

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be an expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys full access to all public records concerning the family. The State may call experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to

346. *Id.* at 751.

347. *Id.* at 753–54 (emphasis added).

348. *See id.* at 759. All of these proceedings concern some significant deprivation of liberty that is "sufficiently serious" to warrant an elevated burden of proof. *Id.* The *Santosky* Court declined to elevate the evidentiary standard to "beyond a reasonable doubt" which has generally been reserved for criminal proceedings. It opined that a majority of courts had concluded that a "clear and convincing" standard of proof struck a fair balance and agreed. *Id.* at 769–70.

349. *See id.* at 759.

350. *Id.* at 760; *see* Herring, *supra* note 147*,* at 164 ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship").

351. *Santosky*, 455 U.S. at 760–61.

> testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination. The disparity between the adversaries' litigation resources is matched by a striking asymmetry in their litigation options. Unlike criminal defendants, natural parents have no "double jeopardy" defense against repeated state termination efforts. If the State initially fails to win termination . . . it always can try once again to cut off the parents' rights after gathering more or better evidence.[352]

The Court noted particular risks to due process when children have been taken from their parents because of neglect allegations: "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge."[353] In light of the fundamental liberty interests at stake and the inherent power imbalance between the government and individual parents, the Court held that parental unfitness at a TPR proceeding must be proven by "clear and convincing evidence," elevating the burden of proof.[354]

The overall sentiment gleaned from *OFFER* and *Santosky* is clear: the rights of natural parents deserve substantial protection, especially in the context of TPR proceedings,[355] where their fundamental parental rights are at risk of complete and permanent severance. The disadvantages outlined in *Santosky* are staggering, but competing with foster parents is absent from this list. This omission is likely due to the Court's decision in *OFFER*. *OFFER* explicitly states that foster parents' rights must be limited when asserting a claim against natural parents. If these conditions alone were sufficient to warrant a higher burden of proof, it seems reasonable to infer that any additional disadvantages, if they are substantial enough, may qualify as due process violations. The Court has even stated a due process violation to be likely under these circumstances, quoting *OFFER* in *Quilloin v. Walcott*:

> *We have little doubt that the Due Process Clause would be offended*, "[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[356]

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352. *Id.* at 763–64.

353. *Id.* at 762.

354. *See id.* at 747–48.

355. *See id.* at 754 ("If anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs.").

356. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (emphasis added) (quoting Smith v. Org. of Foster Fams. for Equal. & Reform (*OFFER*), 431 U.S. 816, 862–63 (1977)). It is important to note that *Quilloin* concerned a challenge to an adoption in family court rather than an adoption following foster care in juvenile dependency court. However, the same logic can be applied to dependency cases and even the facts from Alicia and Fred's case: if there is no longer unfitness because natural parents have remedied the conditions that led to removal as directed by the state, breaking up a natural family based solely the thought that it is in the child's best interest would likely offend the Due Process Clause.

Undoubtedly, the court has authority to evaluate whether reunification is safe and in the best interest of the child. However, the natural parent is still the legal parent—losing temporary custody does not strip them of that status or the fundamental rights attached to it. Despite *OFFER*, *Santosky*, and warnings about potential due process violations, many jurisdictions provide nonrelative foster parents the opportunity to assert their interests against natural parents. That further compounds the power imbalance for natural parents in dependency cases as laid out in *Santosky*.

### C. BEST INTERESTS OF THE CHILD

The "imprecise substantive standard" that the Court referred to in *Santosky* is the best-interests of the child standard ("best-interests standard"). What is in a child's best interests is highly variable and fact specific. Thus, "our inability to make predictions and our lack of consensus with regard to values" makes the development, let alone application, of "tight substantive standards" exceedingly difficult.[357] This tension is central to the discussion of bright-line rules versus open-ended standards: the former prioritizes certainty and uniformity, while the latter tends toward flexibility and individualization.[358] The flexibility of open-ended standards, like the best-interests standard, affords a judge discretion to consider the nuances of each particular case.[359] This is especially important in juvenile dependency cases because each child and parents' circumstances are unique—a one-size-fits-all rule would be too limited. However, the "flexibility" afforded by the best-interests standard comes at a cost: indeterminacy.

Judges use the best-interests standard to make custody decisions in family law and placement decisions in dependency law, including temporary placements and termination of parental rights to free a child for adoption.[360] Depending on the jurisdiction, courts employ the best-interests standard in at least two stages of a dependency case: the dispositional phase of finding a child dependent and the dispositional phase of a TPR proceeding.[361] The best-interests standard gives the court latitude to consider a range of factors before determining whether a child should be removed from the parents, where they should be placed, and if and when they should be returned to their parents. These factors include but are not limited to: (1) the child's views on their placement; (2) the child's safety; (3) the child's well-being; (4) the child's identity; and (5) family unity.[362] The best-interest standard's breadth can be quite useful because it

357. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 230.

358. *See* Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 399 (1985).

359. *See id.* at 406.

360. Mnookin, *supra* note 357, at 227.

361. Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering for Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1510 (1996).

362. Miriam Abaya, *Fact Sheet: The "Best Interests of the Child" Standard*, FIRST FOCUS ON CHILD. (Aug. 2, 2022), https://firstfocus.org/resource/fact-sheet-the-best-interests-of-the-child-standard.

allows a court to consider the holistic needs of children, rather than assuming that all children are best served in the same way.[363] The standard also leaves room for courts to give due credit to the child's interests as represented separately from those of their parents or the state.[364]

However, flexibility under open-ended standards comes with disadvantages, one such being indeterminacy, which can imbue prejudice and bias into the determination.[365] The best-interests standard is notoriously problematic for this reason.[366] Decisions under the best-interests standard require the judge to make "person-oriented" determinations.[367] The judge considers the child and parents as full social beings, rather than in isolation to a particular action.[368] Additionally, the judge must make an individualized prediction about what will best serve the child's future.[369] The combination of these two elements necessitates an evaluation of the relevant parties: the children, parents, and potentially other interested third parties.[370] In turn, the discretion afforded to judges under the best-interests standard opens the door for prejudice and subjective bias about proper parenting to influence the decisionmaking process.[371] For example, in *Painter v. Bannister*, the Iowa Supreme Court concluded that a child's best interests were served by placing him in his grandparents' "conventional, middle class, middlewestern" household as opposed to his father's "arty, Bohemian and probably intellectually stimulating" lifestyle.[372] In family law cases, the best-interests standard encourages parents to denigrate each other to advance their claims for custody, which makes it unlikely that parents will actually be able to cooperate for their children's benefit in the future.[373] In a dependency proceeding, a standard that is inherently subject to bias based on race and class[374] is particularly concerning because Black and Brown children are over-represented in the child welfare

363. *Id.*

364. The best-interests standard considers the interests of the child alone. The interests of the parents are not considered under this standard, nor are they viewed as synonymous as with that of the child.

365. *See* Schlag, *supra* note 358, at 400.

366. *See* Alstott et al., *supra* note 226, at 2365; Mnookin, *supra* note 357, at 229. The best-interests standard "vests judges with broad discretion to act on their own views about what is best and what factors are relevant to a child's wellbeing." Alstott et al., *supra* note 226, at 2365; *see also* Elizabeth S. Scott & Robert E. Emery, *Gender Politics and Child Custody: The Puzzling Persistence of the Best-Interests Standard*, 77 LAW & CONTEMP. PROBS. 69, 69 (2014); Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 45 n.13 (1981).

367. Mnookin, *supra* note 357, at 250.

368. *Id.* at 251.

369. *Id.* at 251–52.

370. *Id.* at 253.

371. *See In re* Dixson, 981 N.W.2d 62, 62 (Mich. 2022) (McCormack, C.J., dissenting); Gupta-Kagan, *supra* note 334, at 222.

372. *See* Painter v. Bannister, 140 N.W.2d 152, 154, 156 (Iowa 1966).

373. *See* Scott et al., *supra* note 366.

374. Alstott et al., *supra* note 226.

system[375] and neglect is consistently conflated with poverty.[376] Josh Gupta-Kagan provides a thorough discussion of how child welfare law, in totality, is indeterminate by nature.[377] The best-interests-of-the-child standard's propensity for vagueness only further fuels racial disproportionality in dependency cases.[378] The invigoration of foster parents' rights in these proceedings is an exacerbating force, due in part to the reliance on psychological parenthood principles.

Psychological parenthood principles further complicate the best-interests determination and termination of parental rights proceedings.[379] The theories proposed in *Beyond the Best Interests of the Child* were more explicitly intended to apply to family law and custody determinations rather than juvenile dependency. Nevertheless, foster and prospective adoptive parents can easily rely on the primacy of the psychological parent-child relationship and the argument that it should be protected above all else, regardless of competing biological or marital connections. The nature of being a foster parent necessitates acting as a parent to a child, connecting with them, and in turn forming a bond. Goldstein, Freud, and Solnit's ideas in *Beyond the Best Interests of The Child* provide scientific and developmental expertise on which foster and prospective adoptive parents can base their claim for custody. As Hager's article demonstrates, the best-interests standard gives space for foster parents to use psychological parenthood principles to advance the argument that removal from their home would be too detrimental—and courts find these arguments compelling.[380]

### D. STATE LAW

Natural parents face daunting odds against foster parents seeking to adopt. Given the socio-political factors discussed in Parts I, II, and III, the conditions are ripe for natural parents' liberty interests to erode against apparent newfound protection for foster parents. Amid a substantial swing toward child protection post-ASFA, adoption's primacy has certainly had a corrosive effect on a system that was never intended to serve foster and adoptive parents.[381] The foster care system has been tailored to serve a demand for adoptable children unmet by

375. Myers, *supra* note 38, at 458.

376. Trivedi, *supra* note 116 ("[P]overty is often conflated with neglect or creates circumstances that may need to neglect.").

377. *See generally* Gupta-Kagan, *supra* note 334 (explaining that "child protection law is substantively indeterminate" and as a result perpetuates racial and class biases and promotes the surveillance of families of color and families who are poor). *See* Mnookin, *supra* note 357, at 266; Wald, *supra* note 21.

378. *See* Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 245 (2013).

379. Warzynski, *supra* note 153, at 738 ("Courts have been struggling for years with the termination of parental rights in situations where the child is emotionally attached to a third party.").

380. Davis, *supra* note 49, at 1549 ("Background uses of psychological parent theory often appeared to be outcome determinative.").

381. *See* Gottlieb, *supra* note 22.

private adoption agencies:[382] adoption from foster care is marketed via "fost-adopt," financially incentivized under ASFA, and the preferred permanency outcome based on federal funding allocation. Psychological and functional parenthood principles provide a theoretical basis for foster and prospective adoptive parents to assert their interests that is rooted in developmental science and is highly persuasive.[383] All directions point toward an override of the due process protections set forth in *OFFER* and *Santosky*. However, the response at the state level has not been consistent. In at least one jurisdiction (Colorado), prospective adoptive parents are on equal footing with natural parents and can assert their interests as full parties,[384] posing a serious threat to Supreme Court precedent that is highly protective of parents in dependency cases. On the other end of the spectrum, some states, like Alaska, restrict foster parent participation in TPR proceedings to only those cases in which it is absolutely necessary.[385] In other jurisdictions, examples being Ohio and South Carolina, foster parent intervention is discretionary; whether foster parents are permitted to assert their interests is fact specific.[386] The following subparts will examine this variation.

### *1. Colorado: Intervening Foster Parents are on Equal Footing with Natural Parents*

In Colorado, foster parents who care for a child for more than twelve months and "have knowledge or information concerning the care and protection of the child" may intervene as a matter of right and be represented by counsel.[387] In *A.M. v. A.C.* the Colorado Supreme Court considered whether foster parents should be allowed to intervene and participate fully in a TPR proceeding.[388] The foster parents intervened after having A.M. in their care for 15 months pursuant C.R.S. section 19-3-507(5)(a), over the natural parents objection, asserting that they had "specific knowledge" about the A.M.'s best interests.[389] The natural parents and the agency argued that permitting the foster parents to have the same rights as all other parties constituted a due process violation. The court held that intervening foster parents satisfied the statutory criteria to participate as full

382. GRETCHEN SISSON, RELINQUISHED: THE POLITICS OF ADOPTION AND THE PRIVILEGE OF AMERICAN MOTHERHOOD 25 (2024).

383. Davis, *supra* note 49, at 1572.

384. *See* A.M. v. A.C., 296 P.3d 1026, 1037 (Colo. 2013).

385. *See* Tara R. v. State, 541 P.3d 530, 538 (Alaska 2024).

386. *See In re* A.H., No. 22 COA 040, 2023 WL 4174305, at *2 (Ohio Ct. App. June 26, 2023); Cooper v. S.C. Dep't of Soc. Servs., 835 S.E.2d 516, 521 (S.C. 2019).

387. COLO. REV. STAT. ANN. § 19-3-507(5)(d) (West 2025). This statute was amended following advocacy by Alicia and Fred, increasing the time period after which foster parents can intervene from three months to one year. *See* Hager, *supra* note 1; H.R. 23-1024, 74th Gen. Assemb., Reg. Sess. (Colo. 2023).

388. *A.M.*, 296 P.3d at 1028. The same lawyer who represented the foster parents in Carter's case represented the foster parents here.

389. *Id.*

parties in the termination hearing and that their participation did not impact the natural parents due process rights.[390]

The court stated that natural parents are already provided "significant protections" in TPR proceedings: (1) the burden of proof is clear and convincing evidence; (2) natural parents are entitled to notice of the TPR, a hearing, and legal counsel at that hearing; (3) parents have the right to call and cross-examine witnesses and adverse parties; (4) prior to termination, the court must consider less drastic alternatives; (5) the parents are given an opportunity to rehabilitate through their treatment plan; and (6) termination cannot proceed without the state finding the child is a dependent. The court weighed the *Eldridge* factors and found that, although the natural parents' interests would be substantially affected by permitting intervention, limiting foster parent participation would increase the risk of erroneous decisionmaking because foster parents "have valuable information about their foster children."[391] Further, the court opined that the government interest in child welfare is substantial, and "caution is best exercised by giving due consideration to all relevant, non-cumulative evidence—whatever the source."[392] The foster parents were permitted to participate in the termination hearing, enter evidence, and cross-examine witnesses as full parties.[393] The court held that full participation by the foster parent intervenors did not impact the natural parents due process rights, nor did it "undermine the fundamental fairness of the termination hearing."[394]

In the five years following the court's decision in *A.M. v. A.C.*, foster parent intervention tripled in Colorado.[395] One tenth of the state's dependency cases have an intervenor, and in those cases the likelihood of termination increases from 17 to 43 percent.[396]

*2. Tennessee: Foster Parents Can Petition for Termination Themselves.*

Tennessee goes as far as allowing foster parents themselves to petition for termination of parental rights.[397] In *In re Rainee M.*, the parental rights of both parents were terminated by the juvenile court following a petition filed by the Department of Children's Services.[398] The father appealed termination, and while the appeal was pending the foster parents filed their own petition seeking

390. *Id.*

391. *Id.* at 1036. Further: "Indeed, as the immediate caregivers for the child, foster parents are often uniquely positioned to provide a juvenile court with the most up-to-date status of the child and the child's wellbeing." *Id.* at 1037.

392. *Id.*

393. *Id.* at 1037–38.

394. *Id.*

395. Hager, *supra* note 1.

396. *Id.*

397. *See* TENN. CODE. ANN. § 36-1-113(b)(1) (West 2024).

398. *In re* Rainee M., No. E2015–00491–COA–R3–PT, 2015 WL 9584865, at *1 (Tenn. Ct. App. Dec. 30, 2015).

termination of the father's parental rights and adoption of the child.[399] The court dismissed the DCS petition due to a records error and reversed the termination of the father's parental rights.[400] However, the foster parent's petition for termination moved forward.[401] The court ultimately found in their favor, again terminating the father's parental rights based on a best interests determination and allowing the adoption to move forward.[402]

### *3. Ohio: Intervention is Discretionary, but Foster Parents are Consistently Permitted to Intervene and Favored at TPR Proceedings Under Best Interests*

Under Ohio's statute governing intervention, courts have the discretion to permit anyone, including foster parents, to intervene in an action and participate as full parties under the appropriate circumstances.[403] "A foster parent has no automatic right to participate as a party in the adjudication of the rights of natural parents and their children."[404] Rather, the court uses the best-interests standard to decide on motions to intervene.[405] In *In re T.H.*, an Ohio appellate court affirmed a trial court decision in favor of intervening foster parents even though the natural parents made sufficient progress on their case plan.[406] All of the agency workers testified that reunification was appropriate.[407] Acting against the agency, the foster parents filed a motion for legal custody after the child had been in their care for 22 months, arguing that they could offer the most long term stability and ultimately serve the child's best interest. The child's guardian ad litem supported the foster parents, because they were wary of the natural father's history of substance abuse (despite completing substance use disorder treatment) and the natural mother's dependence on him for financial assistance. On the foster parents providing the child stability, the court said: "Mother is the director of a day care and Father is employed at a local college. Foster Parents have another adopted child."[408] The court held that intervention would be in the

399. *Id.*
400. *Id.* at *2.
401. *Id.*
402. *Id.* at *6.
403. OHIO CIV. R. PROC. R. 24(b) (2025).
404. *In re* A.H., No. 22 COA 040, 2023 WL 4174305, at *2 (Ohio Ct. App. June 26, 2023).
405. *See id.*
406. *See In re* T.H., No. CT2016–0009, 2016 WL 5940835, at *2 (Ohio Ct. App. Oct. 6, 2016).
407. *Id.*
408. *Id.* at *3. This case is an example of how the indeterminacy of best-interests standard can easily disadvantage natural parents subject to state intervention. The child was removed due to substance abuse issues soon after birth, and the parents were given a case plan that listed the steps necessary to get their child back. *Id.* at *2. Rehabilitating and recovering from addiction is a long process, but after almost two years they succeeded and the agency was prepared to transition the child back because they believed there was no longer a risk of harm. *Id.* However, in the eyes of the court, the foster parents, who had a clean record of parenting in the eyes of the agency, could provide a more secure and stable life to serve the child's best interests. *Id.* at *7. When a proceeding uses the best-interests standard as a means to compare a child's potential future with their natural parents versus foster parents, natural parents are disadvantaged at the outset. The state has already decided that

child's best interest and was heavily persuaded by the fact that the foster parents stood *in loco parentis*[409] for the child for almost two years, assumed the dominant parental role, and provided stability and support.

Standing *in loco parentis* has since become the standard by which Ohio courts will allow prospective adoptive parents to intervene in dependency cases (standing *in loco parentis* provides a basis that the best-interests of the child will be served by permitting intervention). Contrast *In re T.H.* with *In re A.J.K.*: prospective adoptive parents in *In re A.J.K.* moved to intervene (against a relative, not a natural parent) in the case of A.J.K. because they had already adopted A.J.K.'s sibling in Oklahoma.[410] However, the prospective adoptive parents had never cared for A.J.K before, so they were never *in loco parentis*.[411] Consequently, the court denied their motion to intervene.[412]

#### *4. South Carolina: Intervention is Discretionary, but Foster Parents Who Have a Special Relationship are Favored*

Similar to Ohio, in *Cooper v. South Carolina Department of Social Services*, the South Carolina Supreme Court held that foster parents had a permissive right to intervene in a TPR proceeding arising from "the evolution of a special relationship."[413] The foster parents in this case were able to file private actions seeking termination of parental rights and adoption under South Carolina Code section 63-7-1710(A).[414] The court found that it was in the best interests of the children to consider the private action and the state initiated TPR proceeding because the children had been in foster care for an extended length of time and expert testimony revealed that the children had become attached to the foster parents, such that removal from their custody would be detrimental.[415] The court qualified its decision by "stress[ing] that [the] decision . . . should not be interpreted as a signal to the family court bench and bar that intervention should be granted to foster parents in every case."[416]

#### *5. Alaska: Foster Parent Intervention Should Be the Rare Exception*

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intrusion and consequent weakening of their parent-child relationship is warranted. Conversely, foster parents are the individuals that the state certifies as competent, capable and loving parents hired to take care of children removed from their homes. Natural parents in these cases are not afforded a fundamentally fair proceeding when a court utilizes the best-interests standard which is subject to such overwhelming bias based on income, resources, and stigma about substance abuse.

409. *In loco parentis* means "in the place of a parent." *In loco parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019). *In loco parentis* falls under the umbrella of functional parenthood doctrine.

410. *In re* A.J.K., 202 N.E.3d 857, 862 (Ohio Ct. App. 2022).

411. *Id.* at 869.

412. *Id.* at 870.

413. Cooper v. S.C. Dep't of Soc. Servs., 835 S.E.2d 516, 521 (S.C. 2019).

414. *See* S.C. CODE ANN. § 63-7-1710(A) (West 2025).

415. *Cooper*, 835 S.E.2d at 521–22.

416. *Id.* at 522.

*Rather Than the Rule*

The approach that Alaska courts take stands in stark contrast to those exemplified in Colorado, Ohio, and South Carolina. In *Tara R. v. State*, the Alaska Supreme Court affirmed that "[f]oster parent intervention should . . . be the rare exception."[417] There, foster parents were permitted continued intervention after successfully challenging a placement change.[418] The foster parents had been permitted to intervene originally for the narrow purpose of requesting a placement review hearing, nothing further.[419] However, the foster parents were erroneously permitted to *continue* to intervene, contrary to precedent set by *State v. Zander B.* and contrary to the goals of the local child protection agency and its governing statute.[420] The *Tara R.* court reiterated that in *Zander B.* the foster parents were only permitted to intervene because they had relevant evidence about a proposed placement change that the court could not likely receive from the existing parties.[421] Explicitly, "neither their status as 'pre-adoptive' foster parents nor their attachment to nor their future plans for the child"[422] served as the reason to allow intervention, because "allowing foster parents to intervene as a matter of course would be contrary to the goals of [Alaska's child welfare statutes]."[423]

The *Zander B.* court went so far as to explicitly criticize other state dependency schemes which provide a platform to compare the fitness of natural parents and foster parents:

> We agree with those courts that have cautioned against allowing foster parent intervention to devolve into a comparative assessment of the foster parents' and biological parents' fitness. Unlike some state laws, our. . . statutes plainly do not contemplate private actions for the termination of parental rights to a child in state custody; *we cannot currently conceive of a situation in which foster parent intervention . . . would be appropriate when the foster parents' purpose was to argue for the termination of parental rights.* The court's task when considering the termination of parental rights is carefully spelled out in statute and case law with an eye toward preserving the familial bond if at all possible, and *whether the children could have a better home in foster care is irrelevant to this determination*.[424]

The *Zander B.* opinion cited cases out of West Virginia and Washington, where courts have expressly warned against drawing any comparisons between

417. Tara R. v. State, 541 P.3d 530, 538 (Alaska 2024) (quoting State v. Zander B., 474 P.3d 1153, 1164 (Alaska 2020)).

418. *Id.* at 532.

419. *Id.*

420. *Id.* at 538.

421. *Id.*

422. *Id.*

423. *Id.* (quoting *Zander B.*, 474 P.3d at 1163).

424. *Zander B.*, 474 P.3d at 1170–71 (emphasis added).

natural parents and foster parents[425] and only permitted intervention if the rights of natural parents and foster parents are not in conflict with each other.[426]

*6. California: De Facto Parent Status*

After *Santosky*, all but one state elevated the burden of proof for TPR proceedings to "clear and convincing evidence."[427] In *Cynthia D. v. Superior Court*, the California Supreme Court held that "a preponderance standard" was sufficient at the TPR proceeding.[428] The court found that since the "clear and convincing" standard is applied at earlier hearings in the case (at the dispositional "placement" stage and at the hearing regarding termination of reunification services), "the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child."[429] At the TPR stage in California, termination is presumed:

> If it is likely that the child will be adopted, the court must choose that option—and as a result terminate the natural parents' parental rights—unless it "finds a compelling reason for determining that termination would be detrimental to the child due to one or more" of specified circumstances.[430]

As a result, the most determinative hearing for natural parents in California dependency cases is not the TPR hearing, but rather the hearing to decide termination of reunification services. In *Rita L. v. Superior Court*, a California appellate court held that the juvenile court erroneously terminated a natural mother's reunification services after "improperly consider[ing] the quality of [the child]'s relationship with his foster parents."[431] The foster parents were granted de facto parent status and were concurrently planning to adopt. Although the child had formed a strong relationship with his foster parents, the court found that consideration of that relationship was not relevant to whether the natural mother's reunification services should have been terminated.[432]

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425. *See* State *ex rel.* C.H. v. Faircloth, 815 S.E.2d 540, 550 (W. Va 2018) ("[W]hen foster parents are involved in [abuse and neglect] proceedings . . . the circuit court must assure that the proceeding does not evolve into a comparison of the relative fitness of the foster parents versus the biological parents." (quoting *In re* Jonathan G., 482 S.E.2d 893, 906 (W. Va. 1996))).

426. *See In re* Dependency of J.H., 815 P.2d 1380, 1385 (Wash. 1991).

427. *See* Konrad S. Lee & Matthew I. Thue, *Unpacking the Package Theory: Why California's Statutory Scheme for Terminating Parental Rights in Dependent Child Proceedings Violates the Due Process Rights of Parents as Defined by the United States Supreme Court in* Santosky v. Kramer, 13 U.C. DAVIS J. JUV. L. & POL'Y. 143, 146 (2009).

428. Cynthia D. v. Super. Ct., 851 P.2d 1307, 1315 (Cal. 1993).

429. *Id.* Lee and Thue challenge the constitutionality of this holding, arguing that the "package theory" advanced by the *Cynthia D.* court was expressly rejected in *Santosky*. *See* Lee & Thue, *supra* note 427, at 188 ("[T]he *Cynthia D.* decision is clearly not in line with *Santosky*'s holding that 'an amorphous assessment of the cumulative effect of state procedures' cannot make up for a 'constitutionally defective standard of proof.'" (quoting Santosky v. Kramer, 455 U.S. 745, 759 n.9 (1977))).

430. *See In re* Celine R., 71 P.3d 787, 789 (Cal. 2003) (quoting CAL. WELF. & INST. CODE § 366.26)(c)(1) (West 2025).

431. Rita L. v. Super. Ct., 128 Cal. App. 4th 495, 498 (2005).

432. *Id.* at 507.

De facto parent status is a judicially created doctrine that only appears in the California Rules of Court and in case law but is not provided for in the Welfare & Institutions Code statutes governing dependency cases. Similar to intervention in other jurisdictions, de facto parent status in California opens the door for nonrelative foster parents to assert their own rights in dependency proceedings, where gaining that status is based on psychological parenthood principles: "[a] de facto parent is a person who has been found by the court to have 'assumed, on a day-to-day-basis, the role of the parent, fulfilling both the child's physical and psychological need for care and affection, and who has assumed that role for a substantial period."[433] Again, the consistency with which California court's will be persuaded by evidence and testimony from de facto parents based on psychological parenthood principles is unclear.

### E. IN SUMMARY

There is a broad spectrum of how courts are responding to the potential re-balancing of natural parent versus foster parent rights in dependency proceedings. Colorado and Tennessee embody the worst-case scenario, where there is a real risk to *Santosky* and *OFFER*. In those jurisdictions and others that follow suit, the result is an encroachment on the rights of natural parents. The statutory ground has been laid for this possibility in other jurisdictions, but courts haven't uniformly followed suit. Some courts in states like Alaska, West Virginia, and Washington have expressly rejected any intrusion by third parties asserting an interest in dependency cases. Most jurisdictions fall somewhere in the middle, taking each case on its facts and not bound by any hard and fast rule permitting or rejecting intervention by prospective foster parents. In some cases, psychological parenthood principles prevail in a best-interests determination; in others, courts defer to protecting natural parents' constitutionally recognized fundamental rights.

## V. IMPACT AND IMPLICATIONS—THE HARM OF REMOVAL

In making the best-interests determination, courts seldom give appropriate weight to the harm of removal;[434] most jurisdictions only require consideration of risks children may face if they remain home.[435] The act of removal in and of itself is traumatic, notwithstanding prolonged family separation.[436] In fact, child welfare involvement leads to universally worse outcomes across the board; children in foster care have higher rates of delinquency, teen pregnancy, and

433. *De Facto Parent Information (JV-295)*, ADVOKIDS, https://advokids.org/legal-tools/information-for-caregivers/de-facto-parent-information-jv-295-to-297 (last visited Apr. 12, 2025).

434. *See* Trivedi, *supra* note 116, at 526 ("[I]n most states, courts consider only whether a child is at risk of harm if she remains in her parents' care, without factoring in the harm that results from the alternative—removing that child form her home and family.").

435. Theo Liebmann, *What's Missing From Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 145 (2006).

436. *See* Trivedi, *supra* note 116, at 530–31.

unemployment than those who remain at home.[437] The harm and lasting impact of removal is especially palpable for newborns. "Newborns are often removed by child protective agencies without regard for the fact that they suffer significant negative effects when taken from their parents, and especially when taken from their mothers."[438] Newborns are subject to expedited timelines in dependency cases because they are considered to be, developmentally, in more immediate need of permanency than older children.[439] The context of the opioid crisis adds an additional layer: if a newborn and their mother test positive for illicit substances at birth, or even drugs used for rehab and recovery from addiction, like methadone, child protection agencies will almost always remove the baby.[440]

The considerations explored throughout this Note have a disproportionate impact on those who are overrepresented in the foster care system.[441] Black women in particular are more likely to be subject to drug screenings during pregnancy, and consequently more likely to have their children removed.[442] This is particularly troubling in the wake of ASFA's 15/22 trigger, which is arguably incompatible with addiction recovery timelines for parents with substance use and mental health challenges.[443] Studies indicate that even under these circumstances, children are still often better off being left in the care of their parents.[444]

Considering these circumstances in light of psychological parenthood principles, the potential consequences are dire. Hager's article illustrates this dynamic well: Carter was removed upon his release from the hospital and placed in the care of foster parents. His natural parents, Alicia and Fred, had little, if any, opportunity to develop a strong bond with him at that point. From there, interactions with Carter, an infant, took place via supervised weekly visits (many of which were on Zoom due to the pandemic), where developing a strong bond

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437. *See generally* Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583 (2007) (exploring the effects of foster care on children's long-term outcomes).

438. *See* Trivedi, *supra* note 116, at 529. Trivedi continues:

> [T]he newborn experience is extremely important in the context of the current nationwide opioid crisis. When a newborn tests positive for illegal drugs at birth, or even methadone used in the *treatment* of opioid addiction, the mother may be criminally prosecuted and the child welfare system almost always removes the baby soon after birth.

*Id.*

439. *See, e.g.*, CAL. WELF. & INST. CODE § 361.5(a)(1) (West 2025) (providing that services are provided to parents for six months for children under three and twelve months for children over three).

440. *See* Trivedi, *supra* note 116, at 529; Harp & Bunting, *supra* note 118, at 263 ("[A]mphetamine exposed infants also have a higher likelihood of reporting and/or removal"). For an in depth discussion on newborns who are removed after positive tox screens, see generally Amy Reavis, Note, *Better Together: Toward Ending State Removal of Substance-Exposed Newborns from Their Parents*, 46 N.Y.U. REV. L. & SOC. CHANGE 362 (2022).

441. *See* White & Persson, *supra* note 44; ROBERTS, *supra* note 29, at 38.

442. Harp & Bunting, *supra* note 118, at 260.

443. *See* Smith, *supra* note 307.

444. *See* Richard Wexler, *Take the Child and Run: How ASFA and the Mentality Behind it Harm Children*, 13 U.D.C. L. REV. 435, 441 (2010).

is challenging and under the scrutiny of the agency. On the other hand, Carter's foster parents cared for him as normal parents do and with the full backing (financial and otherwise) of the agency. Even without support from the agency, Carter's foster parents had significantly greater resources. To determine permanent custody by comparing the strengths of these relationships, where one has been expressly sanctioned while the other has been endorsed by the state, is in diametric contradiction to the purpose of the child welfare and foster care systems. Doing so blatantly defies *OFFER* and *Santosky*, advances and strengthens inequity, and is fundamentally unfair.

## VI. A RETURN TO *OFFER* AND *SANTOSKY*

ASFAs trigger timeline,[445] the integration of adoption into the dependency scheme,[446] and foster parents wielding psychological parenthood principles[447] have a compounding effect. Together, they have generated the ideal conditions to diminish the rights of natural parents against those of prospective adoptive parents. Currently, case law at the state level is split. Some jurisdictions are clear in their response (Colorado on one end of the spectrum and Alaska on the other); others fall somewhere in the middle. This leaves a window of opportunity to reinforce protections for natural parents. This Note proposes three recommendations.

First, it is necessary to reaffirm the principles of *OFFER* and *Santosky*. The Supreme Court should wait for the appropriate case to re-establish that the interests at stake in a termination of parental rights proceeding are limited to the child and their natural parents—the Court should follow Alaska's lead in finding that whether a child may have a better home in foster care is wholly irrelevant to the question of termination of parental rights. The Court was clear in both *OFFER* and *Santosky* that natural parents face a significant deprivation of liberty at the outset of involvement with the child welfare system, but that does not strip them of their fundamental right to familial integrity and to their relationship with their child. *OFFER* expressly considered the consequences of a comparative battle between natural parents and foster parents, and declined to recognize that foster parents have comparable liberty interests. *Santosky* described in detail the obstacles natural parents must face when working to reunify with their child—an additional requirement to compete for custody by state-approved foster parents likely would not have been permitted in light of *OFFER*. *OFFER* and *Santosky* are still precedent. Affirming due process protections for natural parents may need to be litigated in state and federal cases, particularly when foster parent intervenors are permitted to go too far. *A.M. v. A.C.* would have been an appropriate vehicle for the Supreme Court to consider this issue, but a petition for writ of certiorari was not submitted following the Colorado Supreme

445. *See supra* Subpart.I.A.iii.
446. *See supra* Subpart.III.B.
447. *See supra* Part.II.

Court's decision. A class action suit challenging Tennessee Annotated Code section 36-1-113(b)(1) is another option. Whatever the long-term approach may be, states that have yet to fall one way or the other in response to these developments can take guidance from Alaska: beyond foster parents' right to be heard under ASFA, these jurisdictions should explicitly prohibit foster parents from participating in dependency proceedings, and especially termination of parental rights proceedings in either case law or state legislation.

Second, Congress should repeal ASFA's trigger timeline and financial incentives for foster-adoption permanency plans. Katz clearly outlined the consequences of strictly enforcing ASFA's timelines.[448] She states: "There is a fine line between the judicious use of time limits to prevent foster care drift, and a rote enforcement that ignores the full picture of parental motivation, effort, incremental progress, and a foreseeable reunification."[449] ASFA's arbitrary timelines have been enforced to forcibly separate Black families and used as an ineffective scare tactic to "motivate" parents.[450] The timelines are incompatible with the circumstances that parents subject to state intervention often find themselves in, like poverty, addiction recovery, and imprisonment.[451] If parents are engaging with their case plan and making progress toward reunifying with their child, a TPR proceeding should not be triggered. Additionally, eliminating the financial incentive for states to arrange adoptions from foster care would be a start toward prioritizing family preservation and reunification. What's more, the extraordinary federal and state funding for adoption subsidies could be re-routed. That funding could provide direct cash assistance and financial supports to families at risk of state intervention for neglect allegations that are rooted in poverty. Additionally, while this Note does not recommend repealing the concurrent planning component of the "reasonable efforts" requirement, it certainly argues that concurrent planning should not be uniformly implemented or incentivized under ASFA. Many jurisdictions have made concurrent planning the default for all children placed out-of-home, even when there is no indication that reunification will not be successful.[452] Concurrent planning should only be utilized in those cases where it is highly unlikely that a child will be reunified.[453] Concurrent planning should not be utilized in cases of marginal neglect, which comprise the vast majority of reports to child welfare agencies.[454] While many critics have argued for a complete repeal of ASFA, it is important to exercise some caution. The harm caused by frequent placement changes and foster care

448. Katz, *supra* note 310, at 83.

449. *Id.*

450. *See* Lipp, *supra* note 69, at 228, 238–39.

451. *See supra* notes 286–293 and accompanying text.

452. *See, e.g.*, *Concurrent Planning*, ADVOKIDS, https://advokids.org/childhood-mental-health/concurrent-planning (last visited Apr. 12, 2025) ("Concurrent planning is mandated by California law.").

453. One example of those cases is if a parent's rights to reunification are likely to be bypassed. This provides a tangible measure by which one can determine when concurrent planning is necessary.

454. Ramsey, *supra* note 63, at 27.

drift is real, and well-articulated by the Supreme Court of Washington in *Braam v. State*.[455] A total and haphazard reversal of ASFA and failure to adequately consider a child's interests in the relationships they build outside of their natural family would also be detrimental. Nonetheless, significant changes must be made to ASFA to protect the fundamental liberties of families to stay together.

Third, state or federal legislation is necessary to establish that foster parents are not entitled to disrupt reunification between a child and their parents. If the state does determine that a child is unlikely to be reunified with their parents after sincere efforts to rectify the circumstances that led to removal, the TPR proceeding should be conducted entirely independent of the interests of nonrelative foster parents. ASFA already requires that foster parents have notice and a right to be heard regarding placement changes—these requirements are sufficient to capture the information that would be relevant to the court for determining what serves the child's best interests. The Alaska Supreme Court provides guidance: foster parent intervention, particularly in TPR proceedings, should be the rare exception and the information offered to the court should be narrowly tailored. Having standing as a full party is unnecessary to accomplish that purpose. It would go a long way for states to codify this approach into their dependency schemes.

## CONCLUSION

"It is as true today as it was when Justice Brennan wrote the *OFFER* decision, that no one on any part of the ideological spectrum believes the American foster care system functions anywhere close to as it should."[456] Child welfare, at its best, is intended to serve children and families. In the course of the development of the modern child welfare system, policymakers and courts have struggled with how to achieve that purpose. The legal mechanisms and doctrines surrounding dependency have dramatically changed in the last 50 years. The private adoption market is different than it used to be. New legislation, such as the Adoption and Safe Families Act of 1997, is in force. The concept of the psychological parent is consistently applied to the context of foster care.

All of these factors have compounded to exacerbate the latest pendulum swing toward child protection and away from family preservation. As a result, the conditions are dangerously uncertain for natural parents who may have their children removed in the future. The suggested areas for reform would significantly impact hundreds of thousands of families. There are 437,000 children in foster care in the United States today and over 60,000 in California alone.[457] In 2018, over 25 percent of children in foster care were waiting to be

455. *See* Braam v. State, 81 P.3d 851, 857 (Wash. 2003).

456. Gottlieb, *supra* note 22, at 62.

457. *Foster Care Facts*, CHILD.'S L. CTR. OF CAL., https://www.clccal.org/resources/foster-care-facts (last visited Apr. 12, 2025).

adopted; "half of these children had a pending or completed legal termination of parental rights."[458] The reforms suggested in this Note obviously do not come close to addressing all the issues embedded into child welfare and foster care, the most formidable of which is surely the pervasiveness of institutional racism. Other scholars and advocates directly tackle this topic,[459] and their work is due proper consideration. There is no shortage of areas for improvement. That said, this Note focuses on addressing intervening foster parents encroaching on the due process rights of natural parents; the recommendations aim to curtail foster parent intervention in TPR proceedings while states are still split on the issue.

Hager's article was the impetus for this Note. Alicia, Fred, and Carter's story provides an illustrative and alarming example of the disadvantages natural parents may face when foster parents want to adopt their children, especially in the context of their circumstances. The Court in *Santosky* acknowledged the same disadvantages and power imbalances over 40 years ago. The child welfare system is an effectively punitive mechanism. It is ill-equipped to foster community and its competing goals of preserving family and facilitating adoption are at stark odds. The proposed changes would shore up protection for natural parents, emphasize family preservation, and hopefully work toward developing a child welfare system that aims to support children and families in crisis, rather than punish them. Moreover, these changes would better align child welfare law with Supreme Court case law balancing state intervention and fundamental parental rights.

Alicia, along with other natural parents subjected to the same conditions, went on to testify in support of legislation that increased the period of time before foster parents could intervene to one year.[460] While that is good progress, it is not sufficient to overcome the risks posed by foster parents being able to intervene at all. Although Carter ultimately reunified with his parents, a child welfare system designed to support children in their families would have done so two and a half years earlier. Alicia, Fred, and Carter should have been better protected as a family unit from the beginning.

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458. Emily Putnam-Hornstein, Eunhye Ahn, John Prindle, Joseph Magruder, Daniel Webster & Christopher Wildeman, *Cumulative Rates of Child Protection Involvement and Terminations of Parental Rights in a California Birth Cohort, 1999–2017*, 111 AM. J. PUB. HEALTH 1157, 1157 (2021).

459. *See, e.g.*, *generally* ROBERTS, *supra* note 29 (examining how the child welfare system is designed to punish Black families); Tricia Stephens, *Black Parents Love Their Children Too: Addressing Anti-Black Racism in the American Child Welfare System*, 67 SOC. WORK 91 (2022) (arguing that addressing racial oppression of Black families in child welfare "should be a central social justice concern for the social work[ers]"); Gupta-Kagan, *supra* note 334 (advocating for determinate substantive standards in dependency cases to limit biased decision-making); Bridget Cho, Julia Fleckman & Judith Scott, *Anti-Black Racism Within Child Welfare Services: Past, Present, and Future*, APSAC ADVISOR, Dec. 2023, at 106 (arguing that a crisis-oriented child welfare framework leads to a disproportionately punitive response for marginalized groups).

460. Hager, *supra* note 1.

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