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**SWIMMING UPSTREAM AGAINST THE GREAT
ADOPTION TIDE:
MAKING THE CASE FOR “IMPERMANENCE”
SACHA COUPET***

INTRODUCTION

This Essay explores the following question: if adoption is a recognized good, particularly in the parlance of stated child welfare goals that prioritize permanency, does it follow that *more* adoptions are necessarily good? Asked another way, is there a case to be made, especially for a certain segment of the population, for opposing adoption in favor of a more “impermanent” alternative? A cursory review of federal and state child welfare policy would tend to suggest that the simple answer is “yes” to the first query and “no” to the second. Indeed, clearly articulated child welfare policy reveals distinct pro-adoption rhetoric that continues to laud adoption as the singularly ideal “happy ending” in the sad tale of foster care in the United States.¹ Like the townspeople gathered at the riverbank in Professor Martin Guggenheim’s parable,² rescue has come to reflect one

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¹ See *infra* text accompanying notes 112–124.

² In his presentation at the Wells Conference, Professor Guggenheim recited what is sometimes known as “The Parable of the River” or “The Parable of Good Works,” a tale about advocacy that appears in various iterations. Martin Guggenheim, Address at the Wells Conference on Adoption Law: Preventing Adoption of Foster Children by Preventing Placement in Foster Care (Apr. 1, 2005) (video transcript on file with the *Capital University Law Review*). In one telling, the parable is as follows: A stranger arrives in a town to find a large group of townspeople gathered at the riverbank. The stranger observes the townspeople working furiously to rescue a number of infants whose bodies are floating—drowning—in the water. The activity becomes more and more frantic as even more bodies float downstream. As more babies appear in the river, more people join in the rescue effort. The stranger then turns his back on the crowd and begins to walk the other way. Accusingly, the townspeople shout, “Where are you going? Why won’t you help?” *Id.* The stranger responds, “I *am* helping. I’m going upstream to stop whoever’s throwing babies into the river.” *Id.*; see also The Rocky Mountain Conference of the United
(continued)

dominant narrative: “waiting”³ children without natural parents are magnanimously plucked from the river of foster care and delivered to new, presumably fitter, “forever” families. Through the force of mixed motives—incentivized behavior conditioned by financial gain and perhaps deeply ingrained notions about the fungibility of mostly poor, minority parents—adoption has come to be viewed as the optimal, and perhaps too often, the *only* permanent solution for children who cannot be returned to their biological parents once they have been removed by the state. Simply put, adoption has become synonymous with permanence and has virtually crowded out all other competing alternatives. As the Assistant Secretary of Children and Families, Dr. Wade Horn, noted in championing the current federal effort to promote adoption, “President Bush has worked hard to increase the number of adoptions so [that] more children can grow up in safe, stable and loving homes . . . [and] so no child will be left behind.”⁴

Many seem to prefer adoption precisely because it leaves nothing behind. Only adoption, cast as the river rescue in the parable, offers the promise of “rebirth,” wiping the slate clean and permitting innocent and wounded children to start anew with healthier, untainted families. Once a new and improved parent-child dyad is constructed, the system is redeemed and the status quo is reinstated. That is exactly the problem. The varied profile and widely differing circumstances faced by these waiting children and the families from which they hail should prompt us to focus more intently on the second question posed above. The answer, I suggest, depends on *which* children are waiting, what *types* of out-of-home

Methodist Church, The Church and Society Network: Advocating for Peace with Justice, Resources, <http://www.rmcmc.org/MI/Justice/resources.htm> (follow “The Parable of the River” hyperlink) (last visited Jan. 3, 2006); Unitarian Congregation of Saskatoon, The Parable of Good Works, http://www.uksaskatoon.org/MIN/sermonsfrances/04-10-17_Parable.html (last visited Jan. 3, 2006).

³ The Administration for Children and Families defines “waiting” children as those in foster care whose parents’ rights to them have been terminated and for whom adoption is the goal. Sally Haslanger & Charlotte Witt, *Introduction: Kith, Kin, and Family*, in *ADOPTION MATTERS: PHILOSOPHICAL AND FEMINIST ESSAYS* 1, 4 n.2 (Sally Haslanger & Charlotte Witt eds., 2005). The Adoption and Foster Care Reporting System (AFCARS) data reflect that in 2002 there were 126,000 children waiting to be adopted from foster care. Children’s Bureau, U.S. Department of Health & Human Services, *The AFCARS Report: Preliminary FY 2002 Estimates as of August 2004* (9), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report9.htm.

⁴ Press Release, U.S. Dep’t of Health & Human Servs., HHS Awards \$17,896,000 in Adoption Bonuses (Oct. 14, 2004), http://www.acf.hhs.gov/news/press/2004/adoption_03.htm.

caregiving arrangements exist, and whether the *impermanent* alternatives really serve the same ultimate aim.⁵

State child welfare systems, taking guidance from federal legislation, have successfully broadened their scope of interventions to include, among other measures, an affirmative effort to increase the number of adoptions from foster care, in addition to enhanced child protection. These interventions serve as a means of both reducing the overall number of children in care and achieving permanency for children believed to need it most.⁶ The last major piece of federal child welfare legislation, the Adoption and Safe Families Act of 1997 (ASFA),⁷ represents the most comprehensive legislative scheme to assist states in achieving these aims. ASFA's primary intent was to limit the time children spent in out-of-home care by establishing expedited timelines for the termination of parental rights, which included eliminating the requirement on states to make "reasonable efforts" at reunification in a broader range of circumstances,⁸ and offering adoption incentive payments to states that increase their adoptions of foster children above a baseline measure.⁹ ASFA stepped up previously initiated adoption promotion efforts reflected in the Adoption Assistance and Child Welfare Act of 1980,¹⁰ the first piece of legislation to provide federal adoption subsidies.¹¹ Unlike the legislation that preceded it, ASFA placed an unambiguous priority on moving children from foster care and into adoptive homes by creating a hierarchy of preferred permanency goals. Although the priority is not evident in the language of

⁵ See generally Patricia O'Brien et al., *Upping the Ante: Relative Caregivers' Perceptions of Changes in Child Welfare Policies*, 80 CHILD WELFARE 719 (2001).

⁶ See discussion *infra* Part II.

⁷ Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 2 U.S.C. and 42 U.S.C.).

⁸ Such circumstances include, among others, where a parent has committed murder, voluntary manslaughter, or felonious assault of another of his or her children, or when a parent has had his or her parental rights to another child involuntarily terminated. *Id.* sec. 101(a), § 471(a)(15)(D)(ii)–(iii) (codified as amended at 42 U.S.C. § 671(a)(15)(D)(ii)–(iii) (2000)).

⁹ *Id.* sec. 201(a), § 473A(b)(2) (codified as amended at § 673b(b)(2)).

¹⁰ Pub. L. No. 96-272, § 101(a)(1), 94 Stat. 500, 501–11 (codified as amended in scattered sections of 26 U.S.C. and 42 U.S.C.).

¹¹ Although the Adoption Assistance and Child Welfare Act is generally perceived to reflect policy that is favorable toward family preservation and reunification, the Act also required states to make available adoption assistance payments to eligible adoptive families. *See id.*

the Act in which permanency goals are defined,¹² it is inherent in the creation of the accompanying adoption incentives.¹³ Consequently, adoption has come to dominate child welfare discourse. While family reunification retains currency as a concurrent goal around which case planning is, at least in theory, supposed to revolve, adoption continues to occupy a prominent place in the discussions concerning optimal permanency options for children in state custody, particularly once reunification with their biological parents is no longer an option.

Increased financial incentives under ASFA, and most recently under the Adoption Promotion Act of 2003,¹⁴ have achieved what policy initiatives alone could not. Under the incentives program, states were offered “up to \$6,000 for every adoption out of the foster care system [that] they could accomplish in excess of the number they [achieved] the year before.”¹⁵ Recent legislation has added an additional \$4,000 bonus for adoptions of older children.¹⁶ “States across the country, often in response to [these attractive] cash incentives offered by the federal government, have been under intense pressure in recent years to move children through their foster care systems and into permanent homes.”¹⁷ Indeed, states are continuing to direct a substantial amount of manpower and money to meet the challenge issued by President Clinton and then-First Lady Hillary Clinton at the signing of ASFA: to “speed up and increase the numbers of adoptions” nationwide.¹⁸ This legislation, and the financial incentives it created, has resulted in an increase in the number of children being adopted out of foster care and into presumably loving, and most importantly,

¹² These goals include placement with “an adoptive family, a fit and willing relative, a legal guardian, or . . . another planned permanent living arrangement.” Adoption and Safe Families Act of 1997 § 107(2) (codified at § 675(1)(E)).

¹³ See *id.* sec. 101(a), § 471(a)(15)(C) (codified at § 671(a)(15)(C)).

¹⁴ Pub. L. No. 108-145, 117 Stat. 1879 (codified at 42 U.S.C. § 673b). In December 2003, President Bush signed H.R. 3182, which reauthorized the adoption incentive payment program established under ASFA and increased the money directed toward adoption of children age nine and older. See *id.* sec. 3(a)(4)(C), § 473A(g)(6) (codified at § 673b(g)(6)).

¹⁵ Leslie Kaufman, *Cash Incentives for Adoptions Seen as Risk to Some Children*, N.Y. TIMES, Oct. 29, 2003, at A1.

¹⁶ Adoption Promotion Act of 2003 § 3(a)(3)(C) (codified at § 673b(d)(1)(C)).

¹⁷ Kaufman, *supra* note 15.

¹⁸ Hillary Rodham Clinton, Remarks by the President and First Lady at Adoption Bill Signing (Nov. 19, 1997), <http://www.clintonfoundation.org/legacy/111997-speech-by-president-at-adoption-bill-signing.htm>.

permanent homes.¹⁹ In the five years following ASFA's implementation, the percentages of children leaving foster care to either adoption or guardianship increased, while exits due to reunification declined.²⁰ Consistent with President Clinton's challenge and his accompanying Adoption 2002 initiative, adoptions in the four-year period following 1997 increased by 62%.²¹ Since this time, additional money continues to be poured into the promotion of adoption under the Bush administration's "revised and strengthened" Adoption Incentives Program, which in October 2004 rewarded thirty-one states and Puerto Rico with \$17,896,000 for having successfully increased the number of adoptions from foster care over the 2002 level.²²

In contrast to Professor Guggenheim, who noted at the Wells Conference that child advocates committed to making meaningful improvements in the lives of at risk children should strongly temper their support of adoption,²³ I would argue that these pro-adoption policies and

¹⁹ *Implementation of the Adoption and Safe Families Act of 1997: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 108th Cong. supp. (2003) (statement of Voice for Adoption), available at <http://waysandmeans.house.gov/hearings.asp?formmode=view&id=986>.

²⁰ NAT'L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FOSTER CARE: NUMBERS AND TRENDS 3-4 & fig. (2005), <http://nccanch.acf.hhs.gov/pubs/factsheets/foster.pdf>.

²¹ THE EVAN B. DONALDSON ADOPTION INST., FOSTER CARE FACTS (2002), <http://www.adoptioninstitute.org/FactOverview/foster.html> (noting that "26 states doubled (or more than doubled) adoptions from foster care over four years," and that two states, "Wyoming and Delaware[,] have tripled foster care adoptions"); see Press Release, U.S. Dep't of Health & Human Servs., HHS Awards Adoption Bonuses (Sept. 10, 2001), <http://www.acf.dhhs.gov/news/press/2001/adoption.html>. The federal government paid states \$82.7 million dollars in adoption bonuses from 1998 to 2002. Adopting.org, Adoption 2002: One Size Doesn't Fit All, <http://www.adopting.org/adoptions/adoption-2002-one-size-doesnt-fit-all-2.html> (last visited Jan. 28, 2006). Congressional findings in H.R. 3182 indicate that "adoptions increased by 64 percent, and adoptions of children with special needs increased by 63 percent" in the period between 1997 and 2002. H.R. 3182, 108th Cong. § 2(4) (2003).

²² U.S. Dep't of Health & Human Servs., *supra* note 4. According to the Department of Health and Human Services, Administration for Children and Families, "[t]he [adoption] bonus program, first created as part of [ASFA], has contributed to the substantial increase in adoptions in recent years—from 31,000 in fiscal year 1997 to approximately 51,000 in fiscal year 2002." *President Signs Adoption Promotion Act of 2003*, CHILD. BUREAU EXPRESS (Children's Bureau, U.S. Dep't of Health & Human Servs., Wash. D.C.), Dec. 2003/Jan. 2004, available at http://cbexpress.acf.hhs.gov/articles.cfm?issue_id=2003-12.

²³ Guggenheim, *supra* note 2.

the corresponding statistics that reflect their overwhelming success are not, in and of themselves, necessarily bad. For the many foster children who are, *as of today*, waiting for adoption, adoption by caring adults is unquestionably better than being shuttled between foster homes until emancipation at age eighteen. But the problem with touting adoption as the *best* long-term solution is that child welfare policy ends up being merely pulled along by a “downstream” adoption-focused force, one that compels us to shift our attention away from both earlier opportunities to intervene and perhaps more appropriately tailored interventions. Moreover, with our gaze fixed downstream, we are tempted to overlook the state’s failure to provide meaningful preventive services to avoid out-of-home placement, while celebrating the reconstituted adoptive nuclear family.²⁴

This is not surprising, considering that our entire framework for understanding, defining, and regulating families revolves around a nuclear family ideal. As it does in traditional family law, a definition of families based on a parent-child dyadic form, rather than the assumption of the “parenting” *function*, is still the prevailing paradigm in child welfare policy and practice. There is, moreover, a certain appeal to the idea of a fresh start that adoption is believed to offer children whose early lives have been so shaped by trauma and loss. Focusing on adoption as the last chapter of state involvement for foster children also allows us to avoid dealing with the enormously complex root causes of child neglect and abuse which, as is often remarked, would require a herculean effort backed, of course, by equally generous spending. In short, it is *easier*, but by no means *easy*, to tackle the problem at the point of least resistance—along a downstream current, so to speak—as opposed to swimming upstream. Consequently, in most states, by the time adoption is a realistic possibility for waiting children, there are few, if any, better remaining alternatives, not because they never existed, but perhaps because they were passed over earlier. Moreover, what options remain are subordinated relative to the promise of permanence offered by adoption. This is particularly true as applied to the case of relative or kinship caregivers raising relative minors who are in the custody of the state.

While intentionally side-stepping some of the thornier issues posed by Professor Guggenheim with respect to the far-reaching social injustice inherent in a downstream-focused child welfare system,²⁵ in this Essay, my

²⁴ Professor Guggenheim refers to this in his review of “nobody’s children” and in conjunction with his recitation of the “parable of the river.” *Id.*

²⁵ *See id.*

principal aim is to add one more specific concern to the list. This concern is the danger—in the frantic effort to rescue countless “downstream babies”—of coercing adoptions among relative caregivers for whom more creative “upstream” or “out-of-stream” solutions would work best. There is a strong case to be made that despite the reputed panacean effect attributed to adoption, it is far from a “one-size-fits-all” solution. Indeed, despite the positive benefits intended to flow from adoptive arrangements, not all children—even those whose biological parents are unable to care for them—would benefit equally from this permanent and radical reconfiguration of the family.

The current scope of long-term options places such a high priority on adoption—whether as direct-stated policy, indirect inducement, or implicit practice—that kinship caregivers are left with few workable alternatives. This remains so despite the fact that, as it relates to kinship caregiving and children growing up in kinship caregiving arrangements, adoption may fairly be regarded as an ill-suited solution for the distinct problems that beset this population. A pressing concern impacting this largely “conscripted” army of caregivers is the reality that despite efforts to develop child welfare policy responsive to their needs, there is a prevailing belief that all foster care participants can fit under one services umbrella.²⁶ Kinship caregivers and the non-kin caregivers whom they are seen to resemble do share some similarities in that both may be enticed to enter into adoptive arrangements due to the many benefits, both for caregivers and children, that attach to and flow from adoptions. A parallel attraction to pecuniary gain and the long-term security that adoption may bring, however, cannot be equated with a parallel motive to adopt. While kinship caregivers are willing and able to provide permanent and loving homes to the relative minors in their care, they may still be rightfully resistant to adopt due to the radical reconfiguration of familial relationships that accompany adoption; they may also have other valid reasons that neither diminish their capacity to provide ongoing care nor suggest a “lesser” commitment to the child. Kinship caregivers, unlike non-kin adoptive parents, are already related in meaningful ways, and they should not be forced to alter these relations in exchange for access to much needed and deserved benefits.

Current federal child welfare policy is structured to provide states with pecuniary incentives for moving children out of state child welfare systems, with success defined as returning the child to her parent or

²⁶ See Mark F. Testa, *When Children Cannot Return Home: Adoption and Guardianship*, *FUTURE CHILD.*, Winter 2004, at 115, 116.

providing for adoption by an alternate caregiver.²⁷ While reunification does not draw on either state or federal dollars, states are permitted to use federal subsidies to assist individuals who adopt children out of foster care.²⁸ In addition to reifying a downstream mentality, the practice of attaching subsidies only to adoption, thereby preferencing it above other options, effectuates a crude sort of “bounty” on the heads of poor children and families, currently anywhere between \$4,000 to \$10,000 a head.²⁹ The bonuses indisputably reflect the hegemony of the adoption rhetoric and may explain, in part, why many, including kinship caregivers raising children in state custody, might be lured into adopting even when adoption is not in their or the child’s best interest. Caught in the swell of the great adoption tide, too many children are carried along without significant regard for whether the tide will lead them to higher ground or further adrift. And while data reveal that alternatives to adoption, including subsidized guardianships, offer the same degree of lasting permanence for children, without the counter-therapeutic effects that accompany termination of parental rights and assumption of legally altered family identities,³⁰ adoption still remains the most frequently pursued option once children cannot be reunified with biological parents.³¹

The current pro-adoption tide is, in large part, the product of ASFA’s emphasis on permanency for children in care and the expedited timelines designed to achieve it.³² However, ASFA was drafted, paradoxically, with kinship caregiving in mind. For example, the Act “recognize[s]

²⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, sec. 101(a), § 471(a)(15), 111 Stat. 2115, 2116–17.

²⁸ See NAT’L ADOPTION INFO. CLEARINGHOUSE., U.S. DEP’T OF HEALTH & HUMAN SERVS., ADOPTION ASSISTANCE FOR CHILDREN ADOPTED FROM FOSTER CARE: A FACTSHEET FOR FAMILIES 1 (2004), http://naic.acf.hhs.gov/pubs/f_subsid.pdf.

²⁹ U.S. Dep’t of Health & Human Servs., *supra* note 4. Adoption bonuses under the Adoption 2002 Initiative were \$4,000 per child and \$6,000 for each “special needs” child adopted from foster care. Press Release, U.S. Dep’t of Health & Human Servs., HHS Awards Adoption Bonuses and Grants (Sept. 20, 2000). Under the Bush Administration’s Adoption Incentive Program, an additional \$4,000 is made available “to states for each child aged nine and above adopted from the public child welfare system.” U.S. Dep’t of Health & Human Servs., *supra* note 4. This bonus is on top of the current \$4,000 provided for each child and on top of the \$2,000 “special needs” bonus. *Id.*

³⁰ See Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 265 (2004).

³¹ *Id.* at 254.

³² See MaryLee Allen & Mary Bissell, *Safety and Stability for Foster Children: The Policy Context*, FUTURE CHILD., Winter 2004, at 49, 52–53 (2004).

placements with ‘fit and willing relatives’ or legal guardians as acceptable permanency options for children in foster care” and exempts relatives from the expedited timelines.³³ But these exceptions are not automatic.

Subsequent ASFA regulations emphasized that these exceptions could be invoked only on a case-by-case basis and that the permanency efforts had to be continued, even when such exceptions were invoked for termination of parental rights. ASFA required the continued scrutiny of permanency plans until the child was in a permanent home.³⁴

Under this scheme, relative placements exempted from ASFA timelines continue to drain state and federal dollars and resources,³⁵ while adoptions relieve state systems through the provision of federal subsidies.³⁶ It is not unreasonable to conclude that the exemptions for kinship caregivers permissible under ASFA, although intended to recognize the unique features of kinship caregiving, may be eclipsed by the benefits states stand to gain from realizing greater numbers of adoptions—kin and non-kin alike—thus creating a channeling effect driven, in part, by economic pressures.

In effect, the absence of a federally supported [alternative to adoption, which may include] guardianship program[s.] not only limits an important permanency option for thousands of families incapable of supporting the entire cost of care on their own, [but] the continuing availability of federal payments for relatives[,] as long as they continue to provide care to an open child welfare case[, also] inflates the number of children in more costly public foster care.³⁷

³³ *Id.* at 54 (quoting 42 U.S.C. § 675(5)(C) (2000)).

³⁴ *Id.* at 53.

³⁵ See Rob Geen, *The Evolution of Kinship Care Policy and Practice*, FUTURE CHILD., Winter 2004, at 131, 141.

³⁶ See Allen & Bissell, *supra* note 32, at 54.

³⁷ CHILDREN & FAMILY RESEARCH CTR., UNIV. OF ILL. AT URBANA-CHAMPAIGN, FAMILY TIES: SUPPORTING PERMANENCE FOR CHILDREN IN SAFE AND STABLE FOSTER CARE WITH RELATIVES AND OTHER CAREGIVERS 3–4 (2004), http://www.fosteringresults.org/results/reports/pewreports_10-13-04_alreadyhome.pdf [hereinafter FAMILY TIES].

The current incentive system creates an inherently coercive context within which permanency decisions are made, placing enormous pressure on kinship caregivers to adopt the minor relatives in their care or forego much needed aid. Indeed, in some cases, it is far easier to adopt a relative minor than to participate in alternative programs (e.g., subsidized guardianships) that provide relative caregivers with financial assistance.³⁸ Some might regard this assertion as an integral aspect of effective policymaking—Public Policy 101, so to speak. In order to increase the number of adoptions, the route to adoption must be made more attractive than any of the alternatives, for both states and individual participants. Moreover, because adoption shifts the cost of care from predominantly public to private support, eliminating barriers to adoption is crucial to the realization of long-term state financial gains.

Thus, the myth of adoption as the proverbial “happy ending” persists, and its enduring strength and appeal creates a tendency to view all other outcomes—even those described by the relevant parties as equally lasting, committed, and permanent—as “second best” solutions. The presently narrow scope for defining permanence coerces those for whom adoption is not ideal to make radical and permanent family alterations simply to access the many benefits to which they should already be entitled by virtue of their conduct, and the lasting commitment that it signifies. Despite recognition of their integral role in the child welfare system, kinship caregivers are left with a range of options that are not tailored to reflect their unique needs. It is but one more example of the ways in which existing federal child welfare policy, developed almost entirely around non-kin foster care dynamics,³⁹ may be inappropriate for kinship caregiving arrangements. As noted kinship researchers Patricia O’Brien, Carol Rippey Massat, and James P. Gleeson warn, in defining permanency so narrowly and in failing to acknowledge the inherent strength of familial caregiving networks, we risk looking at lasting success and calling it, nonetheless, failure.⁴⁰ Both success and permanency must be more expansively defined, especially in the case of children being raised by kin within extended family networks. They cannot be defined “only as [the] closing of a case without reentry into the system” or the creation of new

³⁸ See *id.* at 3.

³⁹ See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE, at v (2000).

⁴⁰ See O’Brien et al., *supra* note 5, at 723 (“[P]olicy initiatives that create pressure to adopt or to assume guardianship of related children may be adding another level of stress for caregivers.”).

legally binding parent-child dyads.⁴¹ Their definitions must also be expressed in relational terms “as the satisfaction and well-being of children and caregivers and by their warm and enduring relationships.”⁴²

This Essay offers a normative analysis of the impact of heavily pro-adoption politics on kinship caregiving families and advocates expansion of options that better reflect the unique needs and issues facing this population of caregivers.⁴³ Part I explores kinship caregiving’s historical roots and provides a contemporary profile of kin-caregiving. Part II examines the dominance of adoption in child welfare policy. Part III focuses on the subjective definition of permanence and its implications for policymaking. Part IV provides an intimate case study of a kinship caregiver confronting the limitations of the system. This Essay concludes with suggestions for reform that better reflect the needs of kinship caregivers who comprise a significant portion of out-of-home caregiving arrangements.

I. DEFINING KINSHIP CARE: A STRENGTH-BASED PERSPECTIVE

A. *An Historical Perspective*

Kinship care is generally defined as “the full time care, nurturing and protection of children by relatives, members of their tribes or clans, godparents, stepparents, or any adult who has a kinship bond with a child.”⁴⁴ The Child Welfare League of America (CWLA) notes that this definition is intended to be culturally inclusive and “respectful of cultural values and ties of affection.”⁴⁵ It is also intended to emphasize relationships of affinity, or fictive kin, as well as those established by blood. Informal surrogate caretaking within these wide kin networks has a rich, long, and diverse history,⁴⁶ especially among marginalized minority populations that have come to rely on their own communities because of

⁴¹ *Id.* at 744.

⁴² *Id.*

⁴³ The controversial preferencing of adoption over subsidized guardianship in child welfare permanency planning has been ably addressed in an article by Professor Eliza Patten. See Patten, *supra* note 30. As this Essay was intended to be a response to Professor Guggenheim’s remarks at the 2005 Wells Conference, it is not intended to address the same range of critique. It instead focuses predominately on the ways in which preferencing of adoption harms kinship caregiving families.

⁴⁴ Child Welfare League of America, Frequently Asked Questions, <http://www.cwla.org/programs/kinship/faq.htm> (last visited Jan. 3, 2006).

⁴⁵ *Id.*

⁴⁶ O’Brien et al., *supra* note 5, at 720.

traditions of care based on kinship support and exclusion from formal helping systems.⁴⁷ Assistance of this kind, particularly surrogate parenting of relative minors, is believed to foster reliance on extended family networks while strengthening familial ties and the intergenerational transmission of cultural values and heritage.⁴⁸ Although kinship practices and beliefs vary widely across cultural groups, most have in common some practice of caretaking based on bonds of affinity in addition to, or even in the absence of, genealogical connections.

Kinship connections in Black communities are believed to be a diasporic relic from Africa, where elderly members of the community played a significant role in child rearing across generations.⁴⁹ Such a strong reliance on kinship networks, which extended well beyond a nuclear family structure, was the only means of maintaining some sense of family throughout the period of slavery in the United States and has significantly influenced contemporary Black kinship practices.⁵⁰

Scholars have suggested that these strong extended family and kin relationships were a major source of strength that helped early African-American families survive the dislocation and brutality of slavery. At the same time, traditional African patterns of household and family were placed under enormous pressures and inevitably affected by the distortions of power, the forced separations, enforced mating, and arbitrary household creation and dissolution imposed by slave holders and by the economy of slavery, as well as by the subsequent persistence of

⁴⁷ See Sacha Marie Elizabeth Coupet, *Cognitive Appraisals and Family Dynamics as Predictors of Adjustment and Well-Being in Elderly Black Kinship Caregivers* 21 (1997) (unpublished Ph.D. dissertation, The University of Michigan) (on file with author).

⁴⁸ See *id.* See generally PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) (examining how African-American kinship practices were influenced by the institution of slavery).

⁴⁹ Sonia Gipson Rankin, Note, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 *ELDER L.J.* 153, 157 (2002). Rankin notes that "[i]n the West African extended family structure, 'children retained knowledge of and access to . . . birth parents and kin'" even when they were not raised by their biological parents. *Id.* (quoting Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 *TEMP. L. REV.* 1649, 1663 (1995)).

⁵⁰ See Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 *YALE J.L. & FEMINISM* 29, 52-53 (1998).

racism and poverty. The African-American family culture that emerged was forged by all of these forces.⁵¹

Quite often, the Black grandmother was regarded as the central stabilizing figure in the “fractured slave family,” fulfilling multiple roles focused on familial network strengthening.⁵² Following abolition, with the inception of child-saving efforts during the late nineteenth and early twentieth centuries,⁵³ kinship care continued to present a necessary resource for “Black children [who] were barred from White public and private sector child welfare programs.”⁵⁴ Moreover, during post-Reconstruction and the period of the “Great Migration,” extended family networks were once again called upon to provide a vital surrogate parenting resource for parents moving north in search of economic opportunities.⁵⁵ Despite the separation, however, children were encouraged to retain contact and relationships with their birth parents.⁵⁶ As anthropologist Carol Stack observed in her seminal 1974 work, *All Our Kin: Strategies for Survival in a Black Community*, informal surrogate caregiving in Black communities served the function of keeping families together by *extending* them, rather than by terminating familial bonds as a

⁵¹ Barbara Bennett Woodhouse, “It All Depends on What You Mean by Home”: Towards a Communitarian Theory of the “Nontraditional” Family, 1996 UTAH L. REV. 569, 592–93 (reviewing the key role of extended and fictive family networks in African-American culture in the United States).

⁵² Rankin, *supra* note 49, at 158. Rankin also explains that “Black families have been historically structured to involve at least three generations, with the grandparents responsible for the passing on of cultural traditions.” *Id.* at 174. According to Rankin,

Older Blacks act as the “kinkeeper” in the family, whose roles normally include: “(1) passing on the history of the family; (2) living by and encouraging a family philosophy or theme, moral prescriptions, and general family ethos; (3) promoting family unity and confronting members who may disrupt it; and (4) helping with family responsibilities and encouraging others to do the same.”

Id. (quoting Linda M. Burton & Peggye Dilworth-Anderson, *The Intergenerational Family Roles of Aged Black Americans*, in FAMILIES: INTERGENERATIONAL AND GENERATIONAL CONNECTIONS 311, 322 (Susan K. Pfeifer & Marvin B. Sussman eds., 1991)).

⁵³ See Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1091–93 (2003).

⁵⁴ Rankin, *supra* note 49, at 158.

⁵⁵ *Id.* at 159.

⁵⁶ See *id.*

means of establishing new ones.⁵⁷ In these communities, birth mothers and biological parents were not excluded or cut-off within a surrogate caretaking circumstance, thus avoiding the demand to relegate to only one caretaker the status of “real” parent.⁵⁸

B. A Modern Application of Kinship Care

Although kinship care has long historical roots as a traditional helping system within a natural support network,⁵⁹ it has re-emerged within the last two decades as an increasingly popular out-of-home placement option for children within and outside of the child welfare system.⁶⁰ The growing reliance on kinship care has been prompted, in part, by efforts at fiscal retrenchment⁶¹ and a renewed emphasis on family-focused and community-oriented child welfare approaches.⁶² According to U.S. Department of Health and Human Services (HHS) data regarding 25 states,

⁵⁷ See CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 62 (1974). Kinship practices similarly supportive of surrogate caretaking in addition to reliance on kin forged by bonds of obligation, affinity, and blood are expansively addressed in Professor Quince Hopkins’s comprehensive review of kinship practices and beliefs across the cultural spectrum. See C. Quince Hopkins, *The Supreme Court’s Family Law Doctrine Revisited: Insights from Social Science on Family Structures and Kinship Change in the United States*, 13 CORNELL J.L. & PUB. POL’Y 431, 475–97 (2004). Although her principal focus is on the Supreme Court’s assessment of kinship through a narrow cultural lens, she presents anthropological and sociological studies that demonstrate variations of kinship practices in Navajo- and Japanese-American communities that challenge the dominant tradition of western nuclear family form. *Id.* For the purposes of this Essay, I am limiting my discussion of kinship practices to Black families who continue to represent the disproportionate majority of those in private and public kinship caregiving arrangements. According to the Urban Institute, of the 2.3 million children estimated to be residing in kinship arrangements, approximately 43% are Black non-Hispanic and 17% are Hispanic. ASSESSING THE NEW FEDERALISM, URBAN INST., CHILDREN IN KINSHIP CARE 1, www.urban.org/uploadedpdf/900661.pdf (last visited Apr. 24, 2006). Drawing from the 2000 US Census data, the Annie E. Casey Foundation notes the following with respect to the percentage of all children within each ethnic category in kinship care: 17% Black, 14.5% Native American, 12% Latino, 7.4% Asian, and 6% White. DONNA M. BUTTS, THE ANNIE E. CASEY FOUND., KINSHIP CARE: SUPPORTING THOSE WHO RAISE OUR CHILDREN 6 (2005), <http://www.aecf.org/initiatives/mc/readingroom/documents/Kincare.pdf>.

⁵⁸ See STACK, *supra* note 57, at 63.

⁵⁹ See Rankin, *supra* note 49, at 157.

⁶⁰ *Id.* at 161–62.

⁶¹ See *id.* at 180.

⁶² See *id.* at 169.

kinship placements increased substantially between 1986 and 1990, with continued increases noted in states with large urban centers—California, New York and Illinois.⁶³ Since the passage of ASFA, however, there has been a leveling off⁶⁴ concomitant with a decline in the national out-of-home population.⁶⁵ As foster care caseloads increased across the United States between 1986 and 1990, so too did the number of children placed in formal foster care with relatives—roughly 18% of all public placements in 1986 and 31% in 1990.⁶⁶ According to data collected in thirty-nine participating states, in 1997 approximately 200,000 children were in kinship care via state placement, a figure that represented about 29% of all foster children at the time.⁶⁷ Although the numbers varied widely, kinship care became and remains an increasingly popular placement option in certain states and cities, particularly those with the highest foster care caseloads in the country. In Illinois, for example, by 1997, approximately 27,000 of the 47,400 children in foster care were in kinship placements.⁶⁸ “As of March 4, 2005, [of the] 18,161 children in substitute care under [the Illinois Department of Children and Family Services’s] supervision . . . 6,827 were in kinship foster care.”⁶⁹ Similarly, in 1997, the proportion of

⁶³ Geen, *supra* note 35, at 134.

⁶⁴ The Adoption Foster Care Analysis and Reporting System (AFCARS) reports that in September 1998 there were 560,000 children in foster care. Children’s Bureau, U.S. Department of Health & Human Services, The AFCARS Report: Interim Estimates for Fiscal Year 1998—April 2000 (3), http://www.acf.dhhs.gov/programs/cb/stats_research/afcars/tar/report3.htm. By September 2002, the number of children in foster care decreased to 523,000. Children’s Bureau, *supra* note 3.

⁶⁵ Geen, *supra* note 35, at 134; *see also infra* note 71.

⁶⁶ Testa, *supra* note 26, at 120.

⁶⁷ U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 39, at 7.

⁶⁸ Child Welfare League of America, Kinship Care: Fact Sheet, <http://www.cwla.org/programs/kinship/factsheet.htm> (last visited Jan. 4, 2006).

⁶⁹ AARP et al., Illinois: A State Fact Sheet for Grandparents and Other Relatives Raising Children 3 (Sept. 2005), http://www.childrensdefense.org/childwelfare/kinshipcare/fact_sheets/Illinois.pdf. One explanation for the substantial reduction in the number of children in kinship care after 1997 is the successful lobbying efforts of the Illinois Department of Children and Family Services (IDCFS). In response to the crushing demands of a growing kinship care population, which had increased by a staggering 169% between 1990 and 1995, the IDCFS was successful in urging the implementation of the Home of Relative Reform (HMR) Plan in 1996. ILL. DEP’T OF CHILDREN & FAMILY SERVS., ANNUAL PROGRESS AND SERVICES REPORT (1997), http://www.state.il.us/dcf/library/com_communications_1997plan.shtml. The HMR was intended to reduce the foster care caseload, specifically by rerouting kinship cases and deflecting associated costs. *See id.*

(continued)

children in California in kinship caregiving arrangements relative to the overall number of children in foster care was approximately 43%.⁷⁰ As to more recent national data, “the Adoption and Foster Care Analysis and Reporting System (AFCARS), the federal system for collecting data from states on the number of children in foster care, estimated that approximately 131,000 [foster] children” were residing with relatives in kinship caregiving arrangements nationwide as of September 2001.⁷¹

It is noteworthy and, of course, not surprising given its historical roots, that not all kinship caregiving takes place within the formal child welfare system. Indeed, the number of kinship caregiving arrangements outside of the formal child welfare system dwarfs that within the system.⁷² The prevalence of “private” as opposed to “public” kinship caregiving, in which the children in question are not in the custody of the state child welfare system, has grown in response to increasing rates of family

The HMR achieved this by, among other things, revising the definition of neglect. *Id.* The revision “removes the assumption that children informally left in the care of relatives are abused or neglected.” *Id.*

⁷⁰ Geen, *supra* note 35, at 135.

⁷¹ JENNIFER ERHLE ET AL., KINSHIP FOSTER CARE: CUSTODY, HARDSHIPS, AND SERVICES 1 (2003), http://www.urban.org/UploadedPDF/310893_snapshots3_no14.pdf. The figures on children in kinship caregiving arrangements vary widely. As Rob Geen notes,

From March 1998 to March 2000, the percentage of children in out-of-home care placed with relatives declined from 29% to 25%, and the number of children in kinship foster care decreased from 151,000 to 137,000. However, these data may underestimate the number of [kinship] foster children . . . as many states cannot identify children in kinship [foster] care who are not supported by foster care payments, and other states have difficulty differentiating between kin and non-kin foster care when kin meet the same licensing standards as non-kin. Bearing these limitations in mind, data from the National Survey of America’s Families (NSAF) suggest that the number of children in kinship foster care may be as high as 200,000.

Geen, *supra* note 35, at 134 (footnote omitted).

⁷² Geen, *supra* note 35, at 134 fig.1. As Rob Geen notes, “Between 1983–85 and 1992–93, the number of children in private kinship care (8.4%) grew slightly faster than the number of children in the United States as a whole (6.6%).” *Id.* at 134 (footnote omitted). According to Geen, of the “[m]ore than two million children in the United States now liv[ing] in kinship care arrangements[,] 10 percent of these, or approximately 200,000, are foster children.” SHELLEY WATERS BOOTS & ROB GEEN, URBAN INST., FAMILY CARE OR FOSTER CARE?: HOW STATE POLICIES AFFECT KINSHIP CAREGIVERS 1 (1999), <http://www.urban.org/UploadedPDF/anf34.pdf>.

disruption that is brought about by a number of social ills, including parental incarceration, substance abuse, death, and other crises.⁷³ The exact number of these private kinship arrangements is difficult to assess⁷⁴ due to the lack of a systemic or central organization of private kin caregivers at either the state or federal level and the absence of any mandated collection of kinship data. The most recent U.S. Census estimated that in 2000, of the six million children under the age of eighteen living with relatives, 4.5 million lived with grandparents,⁷⁵ making grandparents the overwhelmingly predominate proportion of relative caregivers. Furthermore, 2.3 million of these children resided in a household headed by a grandparent without a parent present.⁷⁶ For a significant portion of caregivers, this caregiving arrangement is far from short-term, and “[a]mong grandparent caregivers, 39 percent had [provided primary care] for their grandchildren for 5 or more years.”⁷⁷ By and large, these private kinship caregiving arrangements are “unregulated,” in the sense that they take place under the radar and away from the watchful eye of the child welfare system. They are also legally “tenuous,” as few, if any, legal mechanisms have been put in place to delineate the rights and obligations of kin caregivers acting in the place of absent parents.⁷⁸ What limited data on private kinship arrangements exists suggest that, although unregulated and legally tenuous, these private kinship arrangements are

⁷³ *Id.* at 132–34.

⁷⁴ *Id.* at 132.

⁷⁵ U.S. Census Bureau, P28. Relationship by Household Type for the Population Under 18 Years (2000), <http://factfinder.census.gov> (follow “get data” hyperlink under “Decennial Census”; then follow “List all tables” hyperlink under “Census 2000 Summary File 1”; then select table P28).

⁷⁶ See JENNIFER EHRLE & ROB GEEN, URBAN INST., CHILDREN CARED FOR BY RELATIVES: WHAT SERVICES DO THEY NEED? 1 (2002), http://www.urban.org/uploadedPDF/310511_B47.pdf; TAVIA SIMMONS & JANE LAWLER DYE, U.S. CENSUS BUREAU, GRANDPARENTS LIVING WITH GRANDCHILDREN: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf>.

⁷⁷ *Id.*

⁷⁸ While I believe some of the issues raised in this Essay are equally applicable to private kinship caregiving arrangements as they are to public, my principal focus is on those public kinship arrangements that are directly affected by child welfare incentives that promote adoption over other permanency alternatives. I assert that far less damage is done by supposing a collective need of public and private kinship placements, without regard to any distinction between them, than is done by lumping together the needs and challenges faced in kinship and non-kinship caregiving arrangements.

lasting and supportive resources,⁷⁹ particularly for poor and minority families.⁸⁰

C. *Benefits of Kinship Caregiving to Children*

There are numerous reasons, in addition to its rich historical origins, why kinship caregiving is now an increasingly preferred placement arrangement for children in foster care. Federal child welfare legislation has indeed been responsive to the need to develop a more family-focused system, and the language of ASFA itself encourages the placement of children within the homes of “fit and willing” relatives.⁸¹ Research reveals that advantages of kinship care include stability of placement and preservation of meaningful connections to family.⁸² While the data are somewhat inconclusive due to the small scale nature of most empirical studies in this area, some research has shown that children in kinship placements demonstrate better well-being outcomes, including fewer mental health, physical health, educational, or behavioral problems compared to children in non-relative foster homes.⁸³

[P]lacement of children in a relative’s home appears to minimize placement adjustment problems through the maintenance of identity and family ties [and caretaking in a familiar setting]. . . . The natural ties and shared experiences among extended family members are believed to buffer children from the trauma of separation from their

⁷⁹ See *id.* at 143.

⁸⁰ See *id.* at 135.

⁸¹ See 42 U.S.C. § 675(5)(C) (2000).

⁸² Geen, *supra* note 35, at 143. As Rob Geen notes, “[K]inship foster care . . . helps maintain family continuity by increasing the contact between children in foster care and their birth families Prior research has also shown that children in kinship foster care are significantly less likely than children in non-kin foster care to experience multiple placements.” *Id.*

⁸³ U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 39, at vii (“Children in public kinship care are much more likely to be African American and appear to have fewer physical and mental health problems than children in non-kin foster care.”); Geen, *supra* note 35, at 143 (noting that much more research is needed to assess whether children in kinship care demonstrate better developmental outcomes than children in non-kin placements); Coupet, *supra* note 47, at 115 (noting that when comparing behavioral index scores, a statistically significant difference was observed between a sample of children in kinship care and children in non-kin placements along the dimensions of internalizing, externalizing and total behavioral problems).

biological parents and may serve to make separation significantly less stigmatizing.⁸⁴ In addition, placement within families may facilitate ongoing contact with the child's parents, which can be favorable for some children. In some cases, extended family caregivers may become effective role models for the biological parent or may continue to serve in a long-term co-parenting capacity.⁸⁵

Research suggests that children in kinship foster care are more likely than children in non-kin placements to be placed with siblings and "more frequently placed in close physical proximity to the homes from which they were removed."⁸⁶ Both are believed to minimize adjustment difficulties and provide children with meaningful ongoing connections to sources of support.⁸⁷ In maintaining these connections, kinship caregiving permits children to be raised within culturally contiguous settings in which cultural heritage and traditions are transmitted across generations.⁸⁸

D. Disproportionate Burdens and Disproportionate Benefits for Kin and Non-Kin Caregivers

What kinship advocates take great pains to note, and rightfully so, is that kinship caregiving is believed to yield numerous benefits to children despite many potential risks and vulnerabilities faced by caregivers. A survey of research demonstrates that kinship caregivers, as compared to non-kin caregivers, are often economically challenged, poorly educated, single, minorities, disproportionately Black, grandmothers, struggling with few resources, and under particularly difficult circumstances.⁸⁹ Not surprisingly, relative to non-kin foster parents raising a comparable number of children, kinship caregivers have been shown to have worse overall

⁸⁴ Rankin cites research which demonstrates that a "sense of family identity, self-esteem, social status, community ties, and continuity of family relationships" are associated with kinship placements. Rankin, *supra* note 49, at 160 (quoting U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 39, at 10).

⁸⁵ Coupet, *supra* note 47, at 27 (citations omitted).

⁸⁶ Geen, *supra* note 35, at 143.

⁸⁷ *See id.*

⁸⁸ *Id.*

⁸⁹ U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 39, at vii ("Public and private kinship providers are older, more likely to be single, more likely to be African American, . . . more likely to have less education and lower incomes. . . . [and] more likely to receive public benefits.").

well-being.⁹⁰ Not only do kin and non-kin caregivers differ on all resource indices, but many have fundamentally different needs, perceptions, and conceptions of their roles, which may impact the experience of assuming a quasi-parental role.⁹¹ The most striking contrasts between these two groups have been the distinct difference in the routes to care, the implications based on the impetus for caregiving, and the nebulous legal status of both public and private kinship caregivers.⁹² Sometimes lost in the development of policy affecting kin caregivers is the fact that while non-relative foster parents generally prepare for their new role as caregivers by applying and receiving training to become surrogate caregivers, kinship caregivers generally drift or are abruptly catapulted into the role in response to often negative circumstances or crises occurring within their own extended families.⁹³ This salient feature of the caregiving experience significantly shapes the way they perceive their new role and carry out their responsibilities. While there are benefits of being a kinship caregiver, such as a renewed sense of purpose and companionship, many of the risk factors noted above—including minority status, older age, poorer physical and mental health, diminished fiscal resources, and life cycle disruption, among other stressors—contribute to significant caregiver burden and strain. Despite the many challenges that they face, kinship caregivers remain a committed and critical resource for the children who depend upon them and the child welfare system as a whole. Their success at surrogate parenting is indeed all the more noteworthy in light of their many vulnerabilities.

Despite the observed differences between kin and non-kin foster families, the unique needs and challenges of kinship caregiving arrangements have been overlooked largely by federal and state child welfare policy, which was developed to suit the needs of non-kin foster families. Although kinship caregiving as a facet of the child welfare service continuum has been duly noted and even preferenced as a placement option under ASFA, policy has been developed, in substantial ways, without respect to the specific needs of kinship arrangements, which are often incorrectly assumed to be identical to those of non-kin foster or adoptive families. While the roles kin and non-kin foster caregivers fulfill may resemble one another, the caregiving populations and nuances that

⁹⁰ *See id.*

⁹¹ *See* Rob Geen, *Providing Services to Kinship Foster Care Families*, in *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE* 129, 129–30 (Rob Geen ed., 2003).

⁹² *See id.*

⁹³ *See id.*

define the caregiving context are simply not one in the same. Moreover, attempts to group them together for policy purposes seriously threaten to undermine their very success. Paradoxically, while policy appears to have been developed on the premise that kin and non-kin share like or identical needs, research reveals that delivery of services to these two groups of caregivers differs substantially.⁹⁴ Despite a profile that highlights increased risk and caregiver burden, there is generally less support available to kinship caregivers than to licensed non-kin foster caregivers; there is also less supervision for their cases.⁹⁵ The increased need and decreased provision of support has led some to reasonably question whether kinship care can truly serve the best interest of children. UNICEF notes,

Concerns over the suitability of kinship carers and the absolute or relative lack of supervision to which they are subjected lead some writers—particularly from industrialised countries—to question the overall desirability of kinship care and to promote formal foster care and adoption solutions instead. . . . At the same time, there is surely a lack of scientific research to determine the strengths and weaknesses of kinship care in various situations and cultures, as well as the criteria for assessing when kinship care is or is not considered as being in the best interests of the child.⁹⁶

It is hard to ignore that as the prevalence of kinship caregiving rose nationwide, there was no corresponding assessment of what works and for whom, and even less policy developed around the specific needs of kinship caregivers. While research over the course of the last twenty years has moved us closer to developing such an assessment, it may be argued that although we are now wiser, we are far less invested in putting in place the sometimes costly mechanisms necessary to assure the long-term success of kinship placements. One can only speculate as to whether this is a reflection of the ways in which kinship caregivers in particular are perceived and their needs discounted, as these nontraditional families—typically Black, poor, and elderly—challenge our nuclear family ideal.

⁹⁴ *Id.* at 134.

⁹⁵ *Id.* at 134–35.

⁹⁶ INT'L SOC. SERV. & UNICEF, IMPROVING PROTECTION FOR CHILDREN WITHOUT PRENATAL CARE, KINSHIP CARE: AN ISSUE FOR INTERNATIONAL STANDARDS 3 (2004), available at http://www.unicef.org/videoaudio/PDFs/kinship_note.pdf.

Given the lack of a coherent and supportive legal response to these nontraditional families, it should come as no surprise that our investment in their continued success appears marginal, or ambivalent, at best.

Services for kinship caregivers and the emphasis placed on kinship caregiving varies widely across states, although a clear endorsement of kinship placement is evident in federal child welfare statutes governing the inclusion and consideration of kin when critical initial placement decisions are being made.⁹⁷ Taking their lead from federal child welfare policy, state systems reflect a similar preference or consideration of relative placements when children are removed from their homes. In Illinois, for example, “[s]tate policy requires that kin be considered first when an out-of-home placement is sought for a child under the [Department of Children and Family Services’s (DCFS)] care.”⁹⁸ Illinois DCFS also offers services to caregivers outside of the formal system in the form of an Extended Family Support Program (EFSP), which is open to all relatives caring for children in both public and private kinship care.⁹⁹ Through the DCFS, the State Central Register, the public schools, and other government entities, the EFSP offers much needed support to kinship caregiving families, including home stabilization “interventions to help relatives continue to provide quality care” and avoid placement within the child welfare system, assistance in obtaining guardianship, getting public aid, enrolling in school, and provision of a small cash assistance program.¹⁰⁰ In many communities, especially those in urban areas where kinship caregiving has become quite prevalent, informal assistance is made available through kin support programs and state and local programs for the elderly.¹⁰¹

⁹⁷ 42 U.S.C.A. § 5113(b)(6) (West 2003).

⁹⁸ AARP et al., *supra* note 69, at 3.

⁹⁹ *See id.*; *see also supra* note 57. In addition to altering preferences for relative placements and amending the definition of neglect, the Illinois Home of Relative Reform Plan also prompted the creation of support services such as the EFSP, which is intended to benefit private kinship caregivers. *See* ILL. DEP’T OF CHILDREN & FAMILY SERVS., *supra* note 69; *see also* Illinois Department on Aging, *Tips for Grandparents Who Are Raising Grandchildren in Illinois* (Mar. 2002), http://www.state.il.us/aging/1news_pubs/grg_tip-efsp.pdf (describing the numerous services made available through the Extended Family Support Program).

¹⁰⁰ Illinois Department of Children & Family Services, *Other Services*, <http://www.state.il.us/dcfsotherservices/index.shtml> (last visited Apr. 24, 2006).

¹⁰¹ *See* ADMIN. ON AGING, U.S. DEP’T OF HEALTH & HUMAN SERVS., NATIONAL FAMILY CAREGIVER SUPPORT PROGRAM RESOURCES: GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN 1–2 (2004), *available at* http://www.aoa.gov/press/nfc_month/2004/ (continued)

As it relates to financial support of kinship placements in the child welfare system, foster care subsidies and other benefits are generally made available to licensed kinship care providers, with licensure, and not relative status, determining the type and level of financial support received.¹⁰² Licensure itself may be obtained in one of three ways: (1) kin may become licensed to receive payments equal to those available to licensed non-kin caregivers;¹⁰³ (2) kin may be waived from certain licensing requirements;¹⁰⁴ and (3) kin may become licensed through kin-specific licensure standards.¹⁰⁵ Financial support, however, is not solely limited to foster care reimbursement. Federal policy has expanded opportunities for financial assistance to those providing care outside of formal foster care, including, on a limited basis, subsidized guardianships.¹⁰⁶ This expansion provides much needed instrumental support to children for whom reunification and adoption have been ruled out. However, the provision of expanded support takes place within a framework that first preferences adoption while subordinating guardianships as a measure of last resort.

II. THE HEGEMONY OF ADOPTION CONFRONTS THE PROMISE OF PERMANENCY THROUGH SUBSIDIZED GUARDIANSHIPS

A. Federal Legislation Favoring Adoption

The notion that adoption offers the ideal form of permanence as a way to relieve an overburdened foster care system did not take hold only in the last few years. Indeed, well before the enactment of ASFA with its accompanying adoption incentives, one could observe a strong preference for the severance of ties to biological parents above and beyond return to one's family of origin, nuclear or extended. A preference for adoption was evident in the child-saving era of the late nineteenth century, when out-of-home placements in orphanages began to be received with disfavor, replaced instead with a "placing-out" strategy,¹⁰⁷ whereby children from impoverished urban families were literally placed-out with rural

2004.asp (follow "Grandparents and Other Relatives Raising Children" hyperlink under "Caregiver Facts Sheets").

¹⁰² Amy Jantz Templeman, *Licensing and Payment of Kinship Foster Parents*, in KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE, *supra* note 91, at 63, 63.

¹⁰³ *Id.* at 66.

¹⁰⁴ *Id.* at 66–67.

¹⁰⁵ *Id.* at 67–68.

¹⁰⁶ *See id.* at 69.

¹⁰⁷ Jeanne F. Cook, *A History of Placing-Out: The Orphan Trains*, 74 CHILD WELFARE 181, 181–83 (1995).

families.¹⁰⁸ Placing-out incorporated, as a philosophical foundation, the strong belief that only by separating from their families of origin would children from impoverished, immigrant, and urban settings “increase their chances to become productive citizens as adults.”¹⁰⁹ While orphanages, which had been used in the past by families experiencing temporary financial or familial crisis, did not have the permanent separation of children from their families as their sole primary objective,¹¹⁰ the strategy of placing-out defined “success” in terms of the number of children who remained in the care of their rural foster homes until adulthood; it was, for all practical purposes, an adoption.¹¹¹ Adoption continues to enjoy similar favor in subsequent child welfare legislation, guided by the belief that securing new parents for needy children will best assure their long-term success.

Federal and state child welfare policies have continued to express, both directly and indirectly, a preference for adoption as a favored remedy to the problems facing children in out-of-home care who cannot be returned to their biological parents. The Adoption Assistance and Child Welfare Act of 1980 (AACWA),¹¹² for example, through which the federal government imposed extensive regulations on state child welfare systems as a condition for the receipt of federal funds, can be read as legislation creating a preference for adoption. Although AACWA supported the development of guardianships as permanency options for children, the Act made no special provision for the payment of subsidies for guardianships similar to the payments made to adoptive parents under the Title IV-E Foster Care and Adoption Assistance entitlement program.¹¹³ Sixteen years later, Congress had an opportunity to substantially expand permanency options by providing guardians and adoptive parents equal federal subsidies and expressly recognizing legal guardianship as a “permanent and self-sustaining”¹¹⁴ option for children in the child welfare system.¹¹⁵ However,

¹⁰⁸ *Id.* at 181, 185.

¹⁰⁹ *Id.* at 181–82 (describing the placing-out or orphan train strategy that was used between 1854 and 1930 and noting that this system is “considered to be the forerunner of modern family foster care”).

¹¹⁰ Katherine A. Hort, Note, *Is Twenty-Two Months Beyond the Best Interest of the Child?: ASFA’s Guidelines for the Termination of Parental Rights*, 28 FORDHAM URB. L.J. 1879, 1906, 1918 (2001).

¹¹¹ Cook, *supra* note 107, at 189.

¹¹² Pub. L. No. 96-272, § 1, 94 Stat. 500 (1980).

¹¹³ Testa, *supra* note 26, at 117 box 1.

¹¹⁴ 42 U.S.C. § 675(7) (2000).

“ASFA created a mandatory prioritization of permanency goals for foster children” that served to reinforce adoption’s dominance as an option for permanency.¹¹⁶ Under ASFA, “[w]hen reintegration with the child’s parent [or parents] is not a viable alternative,” child-serving agencies are required to pursue the following case plan goals, in descending order of preference: “(1) adoption, (2) legal guardianship, and (3) permanent placement with a fit and willing relative.”¹¹⁷ “Only when a compelling reason is documented for another ‘planned permanent living arrangement’ may the state depart from ASFA’s permanency hierarchy.”¹¹⁸ Consistent with the goals set by ASFA, the “call” to adopt championed by President Clinton at the Act’s signing,¹¹⁹ and the “Adoption 2002” initiative that developed from the Act,¹²⁰ states have doubled their efforts to expedite exit from foster care via adoption,¹²¹ for better *and* for worse.

B. Subsidized Guardianships

ASFA creates incentives to meet the adoption goals primarily by expediting short timelines for moving foster children into permanent homes¹²² and providing adoption bonuses for states.¹²³ The promotion of

¹¹⁵ Thomas Wade Young & Jae M. Lee, *Responding to the Lament of Invisible Children: Achieving Meaningful Permanency for Foster Children*, J. KAN. B. ASS’N, June/July 2003, at 46, 49.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* (quoting 42 U.S.C. § 675(5)(c) (2000)).

¹¹⁹ See William Jefferson Clinton, Remarks by the President and First Lady at Adoption Bill Signing (Nov. 19, 1997), <http://www.clintonfoundation.org/legacy/111997-speech-by-president-at-adoption-bill-signing.htm>.

¹²⁰ Adoption 2002 was the Department of Health and Human Services’s “response to President Clinton’s initiative to double” within five years of ASFA’s signing “the number of children in foster care who are adopted or otherwise permanently placed.” Press Release, U.S. Dep’t of Health & Human Servs., HHS Announces Adoption 2002 Excellence Awards: Cites Contributions of Families, Individuals and Organizations (Nov. 19, 1997), <http://www.hhs.gov/news/press/1997pres/971119.html>. In 2002, the Bush administration conceived a similar national adoption recruitment and retention campaign, the Collaboration to AdoptUSKids. See Children’s Bureau, U.S. Department of Health & Human Services, AdoptUSKids: About the Collaboration (2002), http://www.adoptuskids.org/servlet/page?_pageid=66&_dad=portal30&_schema=PORTA30.

¹²¹ Testa, *supra* note 26, at 115.

¹²² Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, sec. 101(a), § 471(a)(15), 111 Stat. 2115, 2116–17 (codified as amended at 42 U.S.C. § 671(a)(15) (2000)).

adoption as the preferred means of achieving permanence is evident in the incentive structure created by ASFA. While the Act provides much needed federal financial assistance for adoption when return home is no longer a possibility,¹²⁴ it provides no ongoing federal financial assistance for relatives and other caregivers who wish to make a permanent commitment to children by becoming their legal guardians. The Act does not, however, exclude all federal funds for non-adoption alternatives. In addition to the above noted goals, ASFA authorized the HHS to expand the opportunity it had previously provided in 1995: to permit states to apply for Title IV-E funds to finance subsidized guardianship demonstration projects for children in out-of-home placements who would otherwise have remained in public foster care.¹²⁵ Prior to ASFA, five states had initially applied for waivers; after the Act, this group expanded to eight.¹²⁶ Through this program, states were invited to apply for Title IV-E waivers to test the feasibility of extending financial assistance to caregivers who were willing to become permanent guardians of the children in their care when reunification and adoption were ruled out.¹²⁷ “The aim of these federal and state waiver demonstrations was to determine whether offering guardianship subsidies to families could boost the rate of permanence for children in foster care above levels observed for families not offered guardianship as an option.”¹²⁸

Although implemented only in the last decade, the idea of subsidized guardianships as a child welfare permanency tool is far from new. Kinship researcher Mark Testa notes that “the concept of . . . guardianship as a child welfare resource” was introduced to the field of child welfare over sixty-five years ago.¹²⁹ In 1966, in an era preceding both the federalization of child welfare and the implementation of financial incentives to coerce state agency compliance with federal goals, social welfare scholar Hasseltine Taylor “called for a federal demonstration to test the benefits

¹²³ *Id.* sec. 201, § 473A(a) (codified at § 673b(a)).

¹²⁴ *See id.* sec. 101(a), § 471(a)(15) (codified at § 671(a)(15)).

¹²⁵ *See* Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time Has Finally Come*, 26 SOC. WORK RES. 145, 146–47 (2002).

¹²⁶ *Id.* at 147.

¹²⁷ *See id.* at 146.

¹²⁸ FAMILY TIES, *supra* note 37, at 4.

¹²⁹ Testa, *supra* note 125, at 145.

and costs of providing financial subsidies to families who assume[d] private guardianship of dependent and neglected children.”¹³⁰

Presently, at least thirty-four states and the District of Columbia¹³¹ have established some kind of subsidized guardianship program “funded through a combination of federal (TANF, Title IV-B and other non-IV-E sources) funds and state and local funds. Seven of these states have received waivers from the federal government that allow them to use Title IV-E funds to operate [subsidized guardianship demonstration] programs.”¹³² A variety of conditions are used to screen participants in subsidized guardianships. In some states, subsidies for guardians are available only when the children are of a certain age.¹³³ In a few states, subsidized guardianships are available only for children with special needs or for children who meet certain income tests.¹³⁴ Typically, subsidized guardianships are subject only to minimal administrative oversight, which might include, for example, an annual report to the court or an annual meeting with the child welfare agency.¹³⁵ The dollar amount of the subsidy itself varies from state to state,¹³⁶ with some states opting to use their waiver dollars to fund numerous programs,¹³⁷ including enhanced adoption promotion.¹³⁸ Usually, the subsidy amount provided to guardians

¹³⁰ *Id.* (citing Hasseltine B. Taylor, *Guardianship or “Permanent Placement” of Children*, 54 CAL. L. REV. 741, 745 (1966)).

¹³¹ In addition to the District of Columbia, these states include the following: Alaska, Arizona, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Utah, West Virginia, and Wyoming. CHILDREN’S DEFENSE FUND, STATES’ SUBSIDIZED GUARDIANSHIP LAWS AT A GLANCE app. at 8–9 (2004), http://childrensdefense.org/childwelfare/kinshipcare/guardianship_laws.pdf.

¹³² Susan L. Brooks et al., *A Better Option?*, TENN. B.J., Mar. 2005, at 16, 17.

¹³³ Mary Bissell & Jennifer L. Miller, *Overview to USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN: KEY QUESTIONS TO CONSIDER* 3, 8 (Mary Bissell & Jennifer L. Miller eds., 2004) [hereinafter *USING SUBSIDIZED GUARDIANSHIP*].

¹³⁴ *Id.*

¹³⁵ See Brooks et al., *supra* note 132, at 17–18.

¹³⁶ Bissell & Miller, *supra* note 133, at 6.

¹³⁷ See *id.* at 9–10.

¹³⁸ See Testa, *supra* note 125, at 157. Some Title IV-E waiver dollars are used in ways that can be regarded as both expanding permanency options beyond adoption and reifying adoption as the optimal and normative model of permanence. See *id.* These programs include, for example, an “Intensive Services Component” in California that provides
(continued)

is somewhere between the amount of a TANF child-only grant and a traditional foster care payment.¹³⁹

Although these programs vary throughout the country, there are some key similarities. In general, subsidized guardianships serve “hard-to-place” children, particularly older children, sibling groups, or those with special emotional needs.¹⁴⁰ Under the current federal funding scheme, subsidized guardianships are usually only sanctioned when reunification with the birth parents and adoption have been thoroughly considered and ruled out.¹⁴¹ Most states require that the children be in the formal child welfare system for a period of time—ranging from six months to two years—prior to establishing a subsidized guardianship.¹⁴² In addition, twenty-four states require the children to be in the care of their prospective guardian to be eligible for subsidy,¹⁴³ and many states add the requirement of parental consent as a means of ensuring the permanence of the guardianship.¹⁴⁴

Illinois’s Subsidized Guardianship Waiver Demonstration, one of the largest subsidized guardianship demonstration projects in the nation,¹⁴⁵ provides a subsidy for children who have been transferred from DCFS’s custody to the custody of a legal guardian.¹⁴⁶ “Although the demonstration is geared towards children living [in kinship placements], children in licensed non-relative foster homes may also participate.”¹⁴⁷ While there is no blanket age requirement for children living in kinship homes, “[e]ligible children who live in the home of [a non-kin] foster parent must be at least twelve years of age.”¹⁴⁸ The subsidy rate is the same as both the state’s foster care and adoption subsidy rates.¹⁴⁹ In order to access these generous subsidies—i.e., before a child can become eligible and before the caregiver

Wraparound services and Family Group Decision Making (FGDM) for families, JAMES BELL ASSOCS., PROFILES OF THE CHILD WELFARE DEMONSTRATION PROJECTS 1–2 (2005), and adoption related services in Maine targeted to promoting adoption of special needs children. *Id.* at 46–52.

¹³⁹ Bissell & Miller, *supra* note 133, at 6–7.

¹⁴⁰ *See id.* at 8.

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *Id.* at 9.

¹⁴⁴ *Id.* at 5.

¹⁴⁵ *Id.*

¹⁴⁶ JAMES BELL ASSOCS., *supra* note 138, at 23.

¹⁴⁷ *Id.* at 22.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 24.

may receive subsidies—Illinois’s program required conformity with the hierarchy of preferred permanency goals outlined by the Department of Health and Human Services. Accordingly, before a family may qualify for a subsidy, DCFS is first required to rule out reunification with the biological parents and adoption as long-term options.¹⁵⁰

Both the procedure and threshold for determining when and the manner in which adoption is ruled out have not been specifically defined, and state agencies are left to subjectively assess the adoptive potential on a case-by-case basis.¹⁵¹ The regulations requiring that adoption be entirely ruled out are often regarded as creating overt pressure to adopt as the preferred form of permanency because it is a barrier through which caregivers must first pass as they set out to establish permanent caregiving arrangements.¹⁵² Indeed, critics argue that the rule-out provisions are unduly coercive because the provisions require caregivers to first produce a sufficiently compelling reason why adoption is not feasible in order to be eligible for a subsidized guardianship.¹⁵³ Often, the reasons offered by relatives—which may include a strong personal desire not to terminate the parental rights of their own daughter or son, a desire to maintain existing familial relationships, a desire to one day see the biological parent be able to parent successfully again, and a desire to utilize culturally based caregiving practices—may not be persuasive. It is not hard to imagine circumstances in which the very reasons offered for electing a guardianship—a desire to provide long-term care for a child with whom one has an ongoing relationship—might be used to illustrate why adoption is feasible, even if the caregiver is opposed. The standards applied in making rule-out decisions are woefully unclear and vulnerable to a high degree of subjective interpretation as to the relative merits of adoption versus guardianship in any given case.¹⁵⁴ Moreover, it remains unclear whether in the rule-out process, the court may look to the possibility of *any* person adopting the child or whether the court must narrow the focus to the child and the individual caregiver with whom he or she is currently placed.¹⁵⁵ These rule-out decisions have also served to communicate to

¹⁵⁰ Leslie Cohen, *How Do We Choose Among Permanency Options?: The Adoption Rule Out and Lessons from Illinois*, in USING SUBSIDIZED GUARDIANSHIP, *supra* note 133, at 19, 20.

¹⁵¹ *See id.* at 20–22.

¹⁵² *See id.* at 20–21.

¹⁵³ *See, e.g.,* Patten, *supra* note 30, at 263–64.

¹⁵⁴ *See* Cohen, *supra* note 150, at 20–22.

¹⁵⁵ *See id.*

caseworkers, with whom caregivers have the most direct contact, that the preferred permanency option is adoption and that guardianships should be discouraged, regardless of whether they might best fit the family's needs.

Contrast Illinois, a state with an extensive subsidized guardianship system through which kinship families have at least the possibility of receiving subsidies, with the neighboring state of Michigan. The child welfare caseloads of the two states are not particularly distinct; Michigan has almost as many children in foster care as does Illinois.¹⁵⁶ Of the 17,342 Michigan children in out-of-home placements, 6,692 were in kinship foster care.¹⁵⁷ In Michigan, however, kinship caregivers and their wards are left with a very different patchwork of programs and services¹⁵⁸ that make adoption all but foreordained as the only accessible long-term placement option. Similar to Illinois, Michigan “[s]tate policy requires that kin be considered first when an out-of-home placement is sought for a child under the [state’s] care.”¹⁵⁹ “In Michigan, some kinship care[givers] must meet the same licensing standards as non-kin foster parents” to receive foster care reimbursement.¹⁶⁰ Upon licensure, however, kin foster parents are eligible to receive payments equivalent to non-kin.¹⁶¹ But licensing is not the only means of accessing financial assistance. Kinship care providers who elect not to become licensed or who are ineligible to do so may still receive a TANF child-only grant if they meet certain kinship-specific assessment standards.¹⁶² Other limited instrumental support may be accessed through a loose network of state public assistance programs.¹⁶³ From the perspective of kinship caregivers, the most glaring distinction between the two states is that, unlike Illinois, Michigan does not have a subsidized guardianship program.¹⁶⁴ Upon termination of parental rights,

¹⁵⁶ Compare AARP et al., *supra* note 69, at 3 (noting that as of March 2005, 18,161 children were under the supervision of Illinois DCFS), with AARP et al., Michigan: A State Fact Sheet for Grandparents and Other Relatives Raising Children 4 (Sept. 2005), http://www.childrensdefense.org/childwelfare/kinshipcare/fact_sheets/michigan.pdf [hereinafter Michigan State Fact Sheet] (noting that as of June 2005, 17,342 children were in out-of-home placements under the supervision of Michigan’s Bureau of Child and Family Services).

¹⁵⁷ Michigan State Fact Sheet, *supra* note 156, at 4.

¹⁵⁸ *See id.* at 4–5.

¹⁵⁹ *Id.* at 4.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *See id.* at 4–5.

¹⁶⁴ *Id.* at 4.

there are only two funded options for those raising children in the custody of the state: adoption under limited circumstances, and only for children aged fourteen years and older, or long-term foster care. Because Michigan, like many states, has not developed a subsidized guardianship program, even on a waiver demonstration basis, families are denied an opportunity to permanently maintain meaningful family connections in ways that make sense to them.

The effort to promote subsidized guardianships on a broader scale has benefited greatly from follow-up data reporting on the impact of guardianships on permanency outcomes. A June 2005 report, prepared by independent evaluators for the HHS's Children's Bureau, provides ample empirical evidence of the success of subsidized guardianships in realizing the permanency goals embodied in the spirit and the letter of ASFA.¹⁶⁵ Three-year follow-up data from Illinois's waiver demonstration reveal that the availability of subsidized guardianships was statistically related to increases in permanency outcomes for children.¹⁶⁶ Comparing the crude permanency rate¹⁶⁷ for the control group (families not offered subsidies to become legal guardians of the foster children in their care) with the experimental group rate suggests that the availability of guardianship boosted net permanence by 6.7 percent, "statistically significant at the .01 level."¹⁶⁸ Researchers conclude, therefore, that "the higher permanency rate in the experimental group may be attributed to the availability of subsidized guardianship."¹⁶⁹ According to James Bell Associates, "of the

¹⁶⁵ See JAMES BELL ASSOCS., *supra* note 138, *passim*.

¹⁶⁶ *Id.* at 24.

¹⁶⁷ "[C]rude summary rates . . . make no statistical adjustment for compositional differences or interaction effects." Testa, *supra* note 125, at 149.

¹⁶⁸ *Id.* Testa reports that "[t]he crude permanence rate shows that 52.9 percent of the children in the experimental group were either adopted or taken into private guardianship by their caregivers compared with 46.2 percent of the children in the control group, who were eligible only for adoption subsidies." *Id.* It is worth noting that the Illinois waiver demonstration project utilized a random assignment field design in which participation in the subsidy program was limited to randomly selected families drawn from the larger pool of eligible families. *Id.* at 145. Acknowledging that there were likely systematic differences, both observable and not, between families who choose to adopt and those who select to enter into guardianship arrangements, Testa determined that random assignment was necessary to eliminate the influence of selection bias and to "infer that the experimental intervention was the cause of the differences." Mark F. Testa, *The Quality of Permanence – Lasting or Binding?: Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 521 (2005).

¹⁶⁹ Testa, *supra* note 125, at 149.

6,820 [children who] entered subsidized guardianship [arrangements in Illinois] between April 1997 and February 2002 . . . [, o]nly 237 (3.5 percent) are no longer living in the home of the original guardian,"¹⁷⁰ a figure that represents an impressively high rate of permanency. Of the 3.5% who are no longer with the original guardian, thirty-nine returned to live with their birth parents.¹⁷¹ When comparing permanency outcomes for those to whom guardianship subsidies were offered (experimental group) and for those to whom they were not (control group), statistical analysis reveals that virtually all of the difference in legal permanence was accounted for by the availability of subsidies.¹⁷²

[S]ubsidized guardianship . . . contributed 16.7 percentage points to the combined permanency rate in the experimental group. The reunification rate was statistically equivalent in both the control and the experimental groups (9.7 percent vs. 9.4 percent). As of March 31, 2002, 25.7 percent of children in the control group had aged out or still remained in long-term foster care, compared to 19.7 percent in the experimental group. This mean difference of 5.9 percent is . . . statistically significant at the .02 level. It was thus concluded by the State that the Illinois subsidized guardianship demonstration resulted in fewer children remaining in long-term foster care with ongoing administrative oversight.¹⁷³

Researchers note that although additional longitudinal research is certainly needed, the relatively low dissolution rates in Illinois suggest that, at a minimum, subsidized guardianship should not be dismissed as a viable permanency option.¹⁷⁴ Instead, the policy framework should focus on strengthening the provision of adequate pre- and post-permanency supports to minimize disruptions to permanence for the children.

Note also that the permanency findings referenced above were not affected by the decline in adoptions. "Although early data suggested that the waiver was also helping to boost adoption rates in the experimental group, the final results . . . indicate that adoption in the control group (61.6

¹⁷⁰ JAMES BELL ASSOCS., *supra* note 138, at 25.

¹⁷¹ *Id.*

¹⁷² *Id.* at 24.

¹⁷³ *Id.*

¹⁷⁴ *See* Cohen, *supra* note 150, at 21–23.

percent) has moved ahead of adoptions in the experimental group (51.8 percent).¹⁷⁵ One way of interpreting these data is to view guardianships as possibly supplanting adoption and bringing down adoption rates in circumstances where kin are able to choose a guardianship option. The follow-up data not only reveal that there may be an increasing tendency toward preference for guardianships over adoptions, but also that the degree of placement stability and permanence may be determined by factors independent of the actual legal relationship between the caregiver and child. Professor Mark Testa, who has analyzed and reported on the waiver demonstration project, suggests that kinship itself, or the nature of relatedness, may be the common denominator that contributes to permanence in both the control and experimental groups, regardless of whether the child remains in kinship foster care, is adopted by relatives, or enters legal guardianship.¹⁷⁶ This finding speaks favorably of the idea that permanence itself may be a product of the relational dynamics of caregiving, expressed in terms of commitments of emotion and affinity, and the “kinship” identity, loosely defined, of the caregivers, rather than the legal traditions that delineate rights and responsibilities. In her defense of nontraditional families and the interests of those who seek to define their own affiliations of obligation, Professor Barbara Bennett Woodhouse argues similarly that it is this feature of relating—the willingness to care for one another at times when we cannot take care of ourselves—that should figure in our definition and protection of family.¹⁷⁷ According to Woodhouse, “This functional definition not only corresponds to what most individuals experience as the core of family life, but also responds to societal interests in fostering interlocking and self-renewing networks of care,”¹⁷⁸ which can be framed as the most lasting bonds of all.

III. IT ALL DEPENDS ON WHAT YOU MEAN BY PERMANENCE: LASTING VERSUS BINDING COMMITMENTS

A. *Tension in the Child Welfare Policy Between Psychologically Lasting and Legally Binding Permanence*

Some regard the aims of adoption and placement with relatives, as they are expressed in ASFA, as incompatible policy initiatives; others believe these aims are indeed reconcilable if attention is shifted to an

¹⁷⁵ JAMES BELL ASSOCS., *supra* note 138, at 24.

¹⁷⁶ *See* Testa, *supra* note 125, at 156–57.

¹⁷⁷ Woodhouse, *supra* note 51, at 579–80.

¹⁷⁸ *Id.*

understanding of what exactly is meant by “permanence” and whether law, policy, and practice should hew toward the legally *binding* or emotionally *lasting* nature of the term. Federal preference of both permanent guardianship and adoption over a child’s being placed “with a fit and willing relative”¹⁷⁹ draws its “distinction . . . in the legal durability of the stated goals, not the identity of the caregivers.”¹⁸⁰ This same framework of comparison is used to draw distinctions between adoption and guardianship, and the existing policy of limiting the availability of subsidized guardianships, combined with a strong preferencing of adoption, suggests that policy is more attuned to the legally binding nature of the relationship rather than the lasting emotional ties between the parties. In framing the polarizing dynamics that have charged the permanency debate, Professor Testa casts the underlying tension in law and policy in terms of these competing definitions of permanence as psychologically lasting versus legally binding.¹⁸¹ Testa defines lasting permanence as that “sense of belonging . . . rooted in cultural norms” that places a child within a caretaking network even in the absence of definitive legally binding ties.¹⁸² Ideally, lasting permanence for children in out-of-home care would be created and indefinitely sustained through “enduring relationship[s] . . . aris[ing] out of feelings of belongingness.”¹⁸³ These relational aspects of caregiving are represented in a traditional psychological framework that defines permanency in terms of relational “bonding and attachment” rather than legal obligations and rights.¹⁸⁴

Indeed, psychological and sociological research supports the assertion that successful caretaking based on these relational dimensions can take place outside of the parent-child dyad, without any need to produce “new” parents for needy children.¹⁸⁵ This is particularly evident when the kinship network is activated to provide ongoing caregiving support and surrogate

¹⁷⁹ 42 U.S.C. § 675(5)(C) (2000).

¹⁸⁰ Young & Lee, *supra* note 115, at 54 (quoting § 675(5)(C)).

¹⁸¹ Testa, *supra* note 26, at 117 box 1.

¹⁸² *Id.*

¹⁸³ Testa, *supra* note 168, at 499.

¹⁸⁴ Mary Bissell & Katrina Kirana, *How Permanent Is It?*, in USING SUBSIDIZED GUARDIANSHIP, *supra* note 133, at 13, 16.

¹⁸⁵ See Hopkins, *supra* note 57, at 475–97.

parenting.¹⁸⁶ Kin may indeed become “psychological parents” without carrying the requisite constitutionally protected parental right.¹⁸⁷

Counterpoised with the relational aspect of permanence are the legal dimensions that highlight the binding nature of the commitment expressed in terms of legally enforceable duties that caregivers assume.¹⁸⁸ Although “[p]ractically speaking, . . . both adoptive parents and legal guardians have [comparable] control over a child’s life,”¹⁸⁹ adoption proponents continue to assert that long-term placements must be not only lasting, but also “legally ‘binding’ in order to qualify as *truly* permanent.”¹⁹⁰ As Testa observes, the definition of permanence that relies on an adoptive arrangement as the most legally binding “demotes guardianship as a permanency goal because it is more . . . vulnerable to legal challenge by birthparents than are termination of parental rights and adoption.”¹⁹¹ As noted earlier, there is little tolerance for the expansive definition of family that would need to be applied in dealing with “meddlesome” biological parents. Indeed, a great deal of the rhetoric around adoption promotion focuses on this particular dynamic—the continued presence of an intrusive biological parent, one who threatens the promise of a “happy ending.”

A growing emphasis on the legally binding nature of permanence has solidified adoption’s place at the top of the hierarchy of preferred permanency goals. Indeed, ASFA’s prioritization of permanency goals reflects an unequivocal desire to channel caregivers into the most legally binding relationships, something resembling the lost nuclear family parent-child dyad. Regardless of whether placement with a fit relative for an unknown duration might actually provide a meaningful lasting relationship for the child, adoption continues to be presumed as creating a worthier,

¹⁸⁶ *See id.*

¹⁸⁷ *See* JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 19 (new ed. 1979). More than three decades have passed since the introduction of the “psychological parent” theory, as defined in 1973 by child analyst Anna Freud, child psychiatrist Albert Solnit, and law professor Joseph Goldstein. In a trilogy of seminal texts exploring the relational dimensions of children’s lives, the authors suggested that beyond mere biological attachments, decisions regarding the custody of children should reflect the relationship bond between children and caretakers. GOLDSTEIN ET AL., *supra*; JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979); JOSEPH GOLDSTEIN ET AL., *IN THE BEST INTERESTS OF THE CHILD* (1986). These relationships include, of course, those within kinship networks even in the absence of biological parents.

¹⁸⁸ Testa, *supra* note 168, at 499.

¹⁸⁹ *Id.*

¹⁹⁰ Testa, *supra* note 26, at 117 box 1 (emphasis added).

¹⁹¹ *Id.*

more legitimate and stable relationship.¹⁹² It is under this presumption of permanence that kinship caregivers, when they desire to commit to the long-term care of a relative minor, must first assert that the preferred long-term arrangement, adoption, does not suit the child.¹⁹³ Only if adoption is rejected on the basis of a sufficiently compelling reason will guardianships even be explored.¹⁹⁴ If neither adoption nor guardianship are in the best interest of the child, the court may then place the child with other relatives or an alternate caregiver.¹⁹⁵

The presumption favoring adoption fails to account for the fact that adoption within kinship networks “is [inherently] complicated by the complex and ambivalent nature” of the relationship between the caregiver and both the birth parent and the other members of the family.¹⁹⁶ Indeed, “[o]ne of the most difficult challenges facing child welfare caseworkers is discussing adoption and [permanent] guardianship with [kinship caregivers] who [legitimately] do not believe that” changes in their legal status vis-à-vis their wards will help them or make the “children feel [more] safe or secure.”¹⁹⁷ As Patricia O’Brien, Carol Rippey Massat, and James P. Gleeson observe in the kinship caregiving families in their study, “Although it is commonly believed that adoption . . . increases the sense of permanence, security, and belonging of children adopted by nonrelative foster parents, caregivers in this and other studies point out that these children are already members of their families.”¹⁹⁸ The circumstance faced by kinship caregivers is a radical departure from the traditional adoption triad in which the connections between birth parent, adoptive parent, and child arise only through operation of law, conditioned upon termination of the birth parents’ rights to the child.

B. Whose Definition Matters? Insights from Caregivers and Children

The question that too often goes unasked, and hence, unaddressed, is which of these competing definitions of permanence resonates with caregivers and the children they are raising and whether the operating definition within caregiving communities holds any sway in the discourse on permanency. Mark Testa’s subsidized guardianship demonstration

¹⁹² See Young & Lee, *supra* note 115, at 54.

¹⁹³ See *id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ O’Brien et al., *supra* note 5, at 743.

¹⁹⁷ *Id.* at 742.

¹⁹⁸ *Id.*

project¹⁹⁹ revealed that in Illinois, “most caregivers and children participating in the state’s subsidized guardianship program define permanence as a feeling of belonging rather than a legal arrangement” with attendant rights and duties.²⁰⁰ Indeed, the guardians who participated in his study reported that they “expect the children they are raising to live with them until they become adults.”²⁰¹

My own empirical research with a sample of informal or private kinship providers, a group that one would expect to report the lowest expectations of permanence due to the absence of any legally defined or protected caregiving arrangements, echoes Testa’s findings. For example, 62.7% of the eighty-three kinship caregivers interviewed “reported that they [expected] to [be raising] the child in their care until [the child] reached . . . adulthood [or independence].”²⁰² Caregivers reported this relatively high rate of permanency despite the fact that they were given the option of endorsing the response: “until biological mother/biological father is able to do so.”²⁰³

Not surprisingly, children in subsidized guardianships also adhere to an ideal of permanence as relational versus legal. According to Bissell and Kirana’s findings, these children report high rates of perceived stability and permanence.²⁰⁴ “Ninety-two percent of the children interviewed as

¹⁹⁹ The study to which I am referring is Testa’s five-year evaluation of the Illinois Subsidized Guardianship Waiver Demonstration. See Testa, *supra* note 168, at 500–02. Testa notes that the study attempted to answer the following four questions:

- (1) Are more children discharged to permanent homes if caregivers are given the choice of subsidized adoption or guardianship as compared to caregivers offered subsidized adoption alone?
- (2) Do the intentions of raising a child to adulthood differ for caregivers who can choose between adoption and guardianship as compared to caregivers who can select only adoption?
- (3) Do children express any lesser sense of belonging in families that adopt or become guardians as compared to families that only adopt?
- (4) Are the homes of guardians and adoptive parents any more likely to disrupt than the homes of caregivers who can only become adoptive parents?

Id. at 502. For an at-length discussion of the findings, see generally *id.* at 499–534.

²⁰⁰ Bissell & Kirana, *supra* note 184, at 16.

²⁰¹ *Id.*

²⁰² See Coupet, *supra* note 47, at 138.

²⁰³ *Id.* at 139.

²⁰⁴ Bissell & Kirana, *supra* note 184, at 16.

part of the Illinois study felt their home was stable and that they were part of a family all or most of the time”²⁰⁵ This significantly high rate is identical to a comparable group of children in adoptive placements.²⁰⁶

Caregivers and children who have opted for subsidized guardianships in other states in which the option was made available have made similar observations as those noted above. Among the many reasons offered as to why guardianship could be the best possible permanency solution, caregivers and youth reported the following in Montana’s demonstration project follow up: “When older youth have a strong tie to a biological parent, or their name, guardianship lets them have a permanent situation without breaking their family bond.”²⁰⁷ As one youth stated, “My mom is my mom and always will be but it is good to be able to know I can stay with my grandma from now on.”²⁰⁸ Participants in the program also noted that guardianship may be preferred “[w]hen there are strong extended family bonds but the parents are not going to be able to be primary caregivers, [because] it supports other family members who would not otherwise be able to afford to keep the child to provide a permanent family bond.”²⁰⁹ In addition, “[i]t can be a way for extended family members to give parents more time to deal with physical infirmities, legal issues, and substance abuse while giving the child a sense of permanency.”²¹⁰ As one guardian noted, “[G]uardianship allows us to make the decisions and it works much better.”²¹¹ Guardianship was observed to be a more culturally appropriate arrangement for communities that “do not believe in the severance of parental rights.”²¹² According to a Native American caregiver, “We do not believe in making their mother not their mother but we want them to live with us so they can stay with the tribe and in the community.”²¹³ Most importantly, from a child-centered perspective, Montana’s demonstration project also stressed that guardianship can

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ INST. FOR HUMAN SERVS. RESEARCH, MONT. DEP’T OF PUB. HEALTH & HUMAN SERVS., MONTANA ASSISTED GUARDIANSHIP TITLE IV-E WAIVER DEMONSTRATION PROJECT THIRD ANNUAL REPORT 19 (2003), <http://www.healthmanagement.com/files/Montana%20Third%20Annual%20Report%20Final.pdf>.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.* at 20.

²¹² *Id.*

²¹³ *Id.*

provide stability for children who themselves do not want to be adopted.²¹⁴ One youth noted, “I do not want to be adopted but I do want to stay here until I grow up. These are not my parents but it is good to not be in foster care.”²¹⁵

C. *Who is Harmed when Stakeholders’ Views Are Ignored?*

Child welfare critics continue to rightfully draw attention to the narrow and sometimes contradictory ideological framework within which permanency is defined²¹⁶ and child welfare policy is developed, particularly as it relates to communities of color.²¹⁷ Professor Dorothy Roberts notes that while ASFA *purports* to place the child’s needs first, it categorically *assumes* that adoption is in the best interest of the child.²¹⁸ This preferencing of permanency outcomes may be fairly regarded as implying a “hierarchization of different cultural repertoires” in which non-mainstream forms of family organization and caregiving are subordinated and discounted.²¹⁹ In so doing, the child welfare system, and the policy that guides it, ignores the “non-mainstream logics” that may make perfect sense to “sane and intelligent people” and “may actually work to their benefit in ways unimagined by convention-bound state authorities.”²²⁰ Narrow conceptualizations of permanence as lasting familial bonds strike at the core of family democracy and highlight the ways in which child welfare policy may serve as a vehicle of state coercion of poor minority families. As Professor Woodhouse observes, “[T]here is something peculiarly American about the notion that among the basic human freedoms is the freedom to define and redefine the self’s most intimate and identifying connections.”²²¹ And yet, child welfare policy continues to ignore and stigmatize the lasting functional families that have risen to the occasion of providing care to substantial numbers of children in need

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 106–07 (2002).

²¹⁷ *Id.* at vi–vii.

²¹⁸ *Id.* at 108–10.

²¹⁹ Claudia Fonseca, *Inequality Near and Far: Adoption as Seen from the Brazilian Favelas*, 36 *LAW & SOC’Y REV.* 397, 397, 423–26 (2002) (examining how political and social inequalities may cause certain values regarding adoption to be presented as superior to others).

²²⁰ *Id.* at 400.

²²¹ Woodhouse, *supra* note 51, at 570.

because their form does not comport with a prevailing notion of permanence.

Even arguably permissive psychological concepts regarding families have been critiqued for cutting both in favor of and against the interests of nontraditional families. Professor Eliza Patten argues that in the child welfare context, while the “psychological parent” theory may serve as a powerful tool for “guardianship doves” in the debate on permanence, it perpetuates favoring one single-parent-like attachment figure—one who is, of course, embedded within a nuclear family structure.²²² She takes Goldstein, Freud, and Solnit to task for their failure to adequately address “culturally diverse[, extended family based,] care-taking patterns.”²²³ This ignorance, she explains, “lends their theory to use as a weapon against the low-income families of color who constitute a large proportion of the children in foster care”²²⁴ and whose proportional rates of participation in kinship caregiving exceed that of Whites.²²⁵ As Patten observes, a limited attachment-focused application of the psychological parent theory may open the door to “adoption ‘hawks’ and others in the child welfare field who, frustrated by foster care drift, advocate swift termination of parental rights and subsequent adoption.”²²⁶

Writing one year after the enactment of ASFA and in the wake of his sister-in-law and kinship caregiver, Betty Shabazz’s, death,²²⁷ noted kinship researcher, Robert Little, touched on concerns similar to those raised by Roberts and Patten when he observed the following:

²²² Patten, *supra* note 30, at 239–53 (challenging the legal and psychological fictions in child welfare policy that subordinate guardianship to adoption).

²²³ *Id.* at 250.

²²⁴ *Id.*

²²⁵ Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 *CHI.-KENT L. REV.* 1619, 1624 (2001).

²²⁶ Patten, *supra* note 30, at 240 (footnote omitted).

²²⁷ In June 1997, in a tragedy that “loom[s] Shakespearean in dimension,” Betty Shabazz, the widow of slain civil rights leader Malcolm X, died at the age of sixty-one, three weeks after suffering massive third-degree burns over most of her body. Audrey Edwards, *The Fire This Time: Death of Betty Shabazz, Widow of Malcolm X*, *ESSENCE*, Oct. 1997, available at http://www.findarticles.com/p/articles/mi_m1264/is_n6_v28/ai_19801491. Her twelve-year-old grandson, named Malcolm after the grandfather he had never met, admitted to setting the blaze, purportedly angry at having been sent from Texas to New York to live with his grandmother. See *id.*; see also Brian Jenkins, *Betty Shabazz, Malcolm X’s Widow, Dies at 61*, *CNN.COM*, June 23, 1997, <http://www.cnn.com/US/9706/23/shabazz.final/>.

Recently, I have become aware of a unique ideological orientation growing in influence in child welfare circles. However well-intentioned, these advocates for change often present worst-case scenarios as the norm, emphasizing child safety considerations as a mantra. Proponents of this approach are leading a charge to terminate parental rights earlier, which will free more children for adoption. They get community and other influentials involved in expounding the virtues of streamlining adoption laws, practices, and costs. These are all laudable objectives, but none of the proposals are complete and comprehensive in their application to the children most often served in public child welfare systems [, who are largely from poor and minority communities].

....

... [T]hey are by no stretch of the imagination silver bullets for a child-serving system that does not value children's own families as potential resources.²²⁸

As Little and other commentators note, the adoption hegemony is shaped most powerfully by the arguably least significant stakeholders—caseworkers, policymakers, and judges. In the absence of caregiving families, the vocal stakeholders exert their influence in statutory language, child welfare policy, and the ways in which permanency options are explored in day-to-day and face-to-face child welfare practice.²²⁹ It is more likely than not that because adoption has become the constructive embodiment of permanence, the message regarding its place in the hierarchy is communicated to caregivers in the child welfare system in a variety of overt as well as inconspicuous or innocuous ways. For example, the National Adoption Information Clearinghouse, a division of the Children's Bureau established under the Child Abuse Prevention and Treatment Act (CAPTA)²³⁰ to disseminate information on all aspects of child maltreatment, describes options for relative caregivers on their informational website that can reasonably be said to play on relative caregivers' fears by contrasting the benefits of adoption with the risk of

²²⁸ Robert L. Little, *Hitting Close to Home*, CHILD. VOICE, Winter 1998, at 10, 11, available at <http://www.cwla.org/programs/kinship/robertlittle.htm>.

²²⁹ *Id.*; ROBERTS, *supra* note 216, at 103–04.

²³⁰ Pub. L. No. 93-247, 88 Stat. 4 (1997) (codified at 42 U.S.C. §§ 5101–5107 (2000)).

“impermanence” that guardianships entail.²³¹ After a brief description of guardianship options, they explicitly note that because “adoption is often the agency’s preferred permanency plan for children not returning home, relatives may adopt *in order to keep from losing the children to nonkin families who are willing to adopt them.*”²³² The cautionary note in this description is a blunt reminder to relatives that in a hierarchy of permanency options, adoption trumps guardianship, regardless of whether it is an ideal fit. And at what cost? The hegemony of pro-adoption politics not only capitalizes on the fears of already marginalized people, but, more importantly, ignores the rich tapestry of family life in our society by forcing upon families struggling to remain intact a legal fiction ill-suited to extended family networks, which have developed ways of providing permanence without the need to legally alter familial status.

The results of the waiver demonstration projects in addition to the relevant critique reveals that “[t]he principal advantage of subsidized guardianship is providing ‘. . . [sic] continuity and stability for children by supporting them in the custody of loved and trusted adults, rather than in the custody of the state.’”²³³ Moreover, subsidized guardianships facilitate enduring caregiving relationships in communities of color in which there is already extant a rich and varied history of extended family care. Expressed in terms of continuity and stability, subsidized guardianships, research concludes, undoubtedly share a central core feature with adoption. Yet, despite shared permanency goals, kinship caregivers for whom this arrangement works best must first persuade child welfare officials that adoption, either with them or another caregiver, is not the better alternative before they can access an arrangement arguably more suited to their needs.²³⁴ An inherent catch-22 would appear to arise when kinship caregivers are required to first make a compelling case against themselves vis-à-vis adoption only then to have to demonstrate to the same court that they indeed possess the requisite skill and desire to provide long-term care for a child.

²³¹ NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERVS., KINSHIP CAREGIVERS AND THE CHILD WELFARE SYSTEM: A FACTSHEET FOR FAMILIES 1–3 (2005), http://naic.acf.hhs.gov/pubs/f_kinshi/f_kinshi.pdf.

²³² *Id.* at 11 (emphasis added).

²³³ Adoption.com, Subsidized Guardianship, <http://library.adoption.com/Human-Growth-and-Development/Subsidized-Guardianship/article/3733/1.html> (last visited Oct. 30, 2005).

²³⁴ See Young & Lee, *supra* note 115, at 54.

IV. CONFESSIONS OF A BOUNTY HUNTER: ADVOCATING BETWEEN THE ROCK AND THE HARD PLACE

As a guardian ad litem practicing in dependency court in Michigan, I remain haunted by my own role in securing an adoption “bounty” for the state on the heads of my three clients, all young African-American boys under the age of ten. The boys had, more often than not throughout their entire lives, resided with their great-grandmother, Mrs. D, age sixty-six. Their mother, T, had also been raised by Mrs. D, twenty-four years prior. T was a sporadic presence in the lives of her sons, yet, they all expressed a sincere fondness for her. Even Mrs. D reported that T was a warm and loving mother to these boys, despite her limited role in the household or in their day-to-day lives. Although Mrs. D was, for all intents and purposes, the boys’ de facto parent due to T’s long absences, neither she nor her granddaughter had ever put in place legal mechanisms to grant Mrs. D authority over the three children. This family had not escaped the legal radar, however, and T was known to the state social services department. Child Protective Services (CPS) had a file on T and her children that documented a number of instances of neglect. Each instance was mild enough to avoid the filing of a neglect petition in court and usually resulted in the “unofficial” placement of the boys back in Mrs. D’s care.

During one of her longer visits home with Mrs. D and the boys, T took two of her sons with her to a local mall from which she had been banned due to prior incidents of theft. From the description in the petition filed in dependency court, T was again accused of theft, and in an attempt to evade the police, she stopped a car on its way out of the parking lot, pulled the driver out of his seat, jumped in, and sped off. The police, however, did not give chase, because T had left something very important behind that would provide sufficient identity for the police to later issue a warrant against her. In her attempt to flee, she left the youngest of her three sons, age five, shoeless and angry, as described in the police report accompanying the neglect and endangerment petition. He told the police officer and CPS caseworker who arrived on the scene that he was angry at his mother, T, for leaving him behind and taking his brother with her.

Within hours, T managed to have one of the boys returned to Mrs. D’s home and, by telephone, told the CPS caseworker that she would not be appearing at the temporary custody hearing the next day because a warrant for her arrest would surely be issued for this incident as well as prior unresolved ones. She expressed relief that her boys would be cared for by Mrs. D. The next day, as promised, T failed to show for the temporary custody hearing. All three boys were formally placed with Mrs. D, who was an unlicensed foster parent, but was found to be a willing and suitable

relative placement. T remained a no-show at the subsequent adjudication hearing at which the court took formal jurisdiction over the matter. She similarly failed to appear at any of the subsequent ninety-day dispositional hearings. In all, she failed to participate for almost eleven months in any services aimed at reuniting her with her children.

During this same period of time, Mrs. D faced challenges at every turn. Although she was caring for official wards of the state, Mrs. D was only eligible for child-only grants and not foster care reimbursement, which would have been forthcoming had she been a licensed foster parent. She made do with the meager resources that she had and somehow was even able to move into a bigger apartment for her and the boys. Nonetheless, the significant lack of resources continued to be a major impediment that threatened to undermine this living arrangement. All the while, my three clients were adamant that they wanted to remain with Mrs. D, whom they called “Granny.” I recall poignantly that when asked about their “family” during one of our many meetings, the boys spoke only of one another, Granny, and their mother, whom they referred to by her first name.

Ten months after the boys became formal wards of the state, with the support of the state’s attorney, I supervised students in drafting a petition to terminate T’s parental rights to her three sons, as well as those of the three fathers who had also failed to appear in any court proceeding. The petition was submitted at a dispositional hearing where T appeared in an orange jailhouse jumpsuit with her hands and ankles shackled. Although there was a remote possibility that T would “shape up” and begin participating in her case plan in earnest, we decided to proceed in filing the termination petition in the event that T’s first appearance would be her only appearance. It was. In the time between filing the petition and the termination trial itself, T was not seen or heard from.

So, the wheels of justice rolled along. Records were gathered and subpoenas issued for all who had contact with this case and with this family. Even Mrs. D was expected to testify against her granddaughter. On the day of the termination hearing—approximately eleven months after the boys entered care—I arrived with two summer interns and a large case file, prepared to win the “good fight” and make way for an adoption, because Mrs. D had, at least when questioned, agreed to become her grandsons’ adoptive parent if that became necessary. We had prepared opening statements and closing arguments that highlighted both the minimal concern that T expressed for her children and the boys’ need for permanency. In support of the first contention, we argued that she had abandoned her children to the care of her grandmother. Knowing that T had not been seen or heard from since the last hearing, we were all

surprised to see her waiting for us at the courthouse, sitting beside Mrs. D and prepared to get her children back.

T's attorney had, the day before, indicated that her client would not be willing to sign a voluntary release of parental rights, although it was clear that even she felt the case against her client was solid and damning. Nonetheless, in the true spirit of "hallway lawyering" that so characterizes dependency practice, we invited T, her attorney, Mrs. D, and the caseworker to meet with us to negotiate a voluntary release. In a small meeting room off the corridor of the courtroom, T sat next to Mrs. D and across from the attorneys and the caseworker she hardly knew. I began the negotiation by explaining my role as guardian ad litem and my sincere interest in her sons' well-being. I acknowledged the role she played in their lives and her concern for their safety and happiness. I also informed her that I believed we had a strong case under Michigan law to terminate her parental rights involuntarily. I do not recall exactly how the words came out, perhaps because it is so distressing in every other context to imagine making such a request of someone, but finally, within a few sentences, I requested of T that she voluntarily relinquish her parental rights to make way for Mrs. D to adopt them. She firmly resisted and I understood. She began to cry and I fought hard not to, all the while explaining to T that while Mrs. D was doing all she could for these boys, the system in effect in Michigan did not permit us to support Mrs. D in the way she needed to be supported to continue in her role. Adoption subsidies, I assured T, would assist Mrs. D in ways that the current system would not and could not. She continued to cry and I felt compelled to tell her that once her parental rights were terminated and reassigned to her grandmother, it did not mean she was a non-entity to these children—the law in Michigan did not explicitly prohibit persons whose parental rights were terminated from having contact with their former children—but that she would have to respect Mrs. D's wishes as to the terms of contact.

And that was it. The "good fight" was over.²³⁵ The release, which had been prepared in advance in the event T would agree, was signed amid many tears and some very mixed feelings on my part. On one hand, my three clients were better off financially with adoption subsidies that provided for a steady stream of much needed funds into a home that we felt was indeed in their best interest. The strange legal fiction—termed

²³⁵ Although T relinquished her parental rights through a "voluntary release," a termination trial was still required pursuant to statute. Parental termination against all three fathers, each of whom received adequate notice of the hearing, was successful, as none appeared in court.

“permanency”—rang as a hollow victory for me, however, as the children’s representative. I could not honestly assert that the signing of just a handful of papers, effectively transforming my three child clients into their own mother’s uncle, meant that Mrs. D and her boys were more “permanently” attached as mother and sons than as Granny and great-grandsons, more secure in their relationship, or safer in the long run. At the end of the day, I simply felt that while a “bounty” had been won, the larger prize had not. A lack of creativity and a narrow fixation on adoption left Mrs. D and her family with few workable alternatives.

The state should have done better by providing for Mrs. D and her great-grandsons’ needs without forcing them into an unnatural and radical re-configuration of their family ties.²³⁶ I felt that perhaps I too could have done better as a child advocate. Only in hindsight, after the ink on the release of parental rights was dry, did I come to appreciate the degree to which I had neglected to fully inquire and assess what it meant for Mrs. D to adopt her great-grandsons, or for my clients to be adopted by Granny and to be permanently severed in the eyes of the law from a mother for whom they cared deeply. Without a doubt, I knew that Mrs. D loved these children. She expressed nothing but the deepest and sincerest concern about their well-being and impressed a cadre of child welfare professionals with her commitment to doing what was in their best interest for as long as she was able. The problem was that no one ever asked her what she thought was in their best interest or if she believed that adoption might or might not help to achieve this. In all the flurry of concern over the well-being of these three individual boys, even I, their advocate—a bounty hunter for the state—had perhaps failed to sufficiently assess the health of this family system, its capacity to respond to their individual needs, and, foremost, whether adoption would necessarily create the happy ending we would all have wished for this family. Then again, what choice did the

²³⁶ Under Michigan child welfare law, Mrs. D could have become a licensed foster parent for her great-grandsons, thus receiving benefits equal to those available to licensed non-kin foster parents. See MICH. COMP. LAWS ANN. § 722.115 (West Supp. 2005). But, with the support of the agency caseworker, she declined to participate in the foster parent training program and application for licensure. When questioned as to her reluctance to pursue licensure, she stated that she felt confident in her capacity to parent and not interested in being “trained” by the state to become a caregiver to the boys she had been raising almost since birth. Moreover, she feared she would have had to face yet another move into a more suitable residence under licensing regulations and, more troubling, perhaps, the ongoing scrutiny of the state that so many relative caregivers reasonably resist.

system, or the players in it, have in a state where no other legal alternatives exist?

Looking back, I cannot recall one time that Mrs. D herself proposed adoption as a long-term solution to the problems she faced raising her great-grandsons. She spoke of needing bunk beds, school clothes, help with home repairs, Christmas gifts, and child care for those times when she simply needed a break—all things that required funds, but in no way necessitated a change in her legal status vis-à-vis her great-grandsons. She did not request to adopt her great-grandsons, but it was all the system could offer her as a means of guaranteeing her family integrity. So she petitioned to adopt “her” boys. Saying, however, that Mrs. D *chose* to adopt these boys would be disingenuous and, at best, tell only half of the tale. She was simply coerced to accept the preferred path to permanence in a system that was short on innovative alternatives. After seeing Mrs. D arrive to and from court with T by her side, it became clear that only the system perceived these caretakers as entrenched on opposing sides with sharply divergent interests. Mrs. D simply regarded this as a case concerning her “kids”—the boys *and* their mother, T. Despite what termination might have achieved legally, T was and perhaps will always remain a part of the family. The family had not written her off in the same way that the system had, and perhaps the family would continue to allow her to play a role in the lives of her children, to whatever degree was deemed healthy for her and the boys. Mrs. D was, like many relative caregivers in her position, caught between the proverbial rock and a hard place with respect to her great-grandsons once they became wards of the state. She could either adopt or refuse to adopt. If she opted for the latter, she ran the risk of allowing the children, who were, upon termination, technically orphans, to be adopted by strangers.

The “choice,” if it can even be cast as such, was rife with coercion. The state has too many tempting financial incentives in promoting adoptions to refuse preferencing it above all other options. The incentives are similarly tempting to the caregivers who depend on the benefits attached to adoptions. Every day, caregivers like Mrs. D are forced to “choose” to seek adoption, but not because it makes the attachment between them and the children they are raising—usually their grandchildren—more permanent or lasting. Instead, the choice is made because the resources the caregivers desperately need to fulfill the roles to which they are committed come only with the perception of a legally binding relationship. Even if the choice to seek adoption risks weakening critical family networks and producing counter-therapeutic outcomes for

them in their surrogate parenting roles, kinship caregivers are compelled to chose from the system's priorities.

What does this say about adoption? In Mrs. D's case, it was the only alternative, for better or for worse. With termination a near certainty, adoption was the only way for Mrs. D to keep her great-grandsons in her care once they became "freed" for adoption and to obtain the needed resources to raise them. All of the boys were too young to remain in "long-term foster care," a practice disfavored under AACWA, ASFA, and state child welfare law. The choices downstream were woefully few. And what about upstream interventions? Even where unfunded private guardianship remains an option under state law, as it did in this case, if it would have permitted the children to exit formal foster care, the practice is generally disfavored. As one child welfare caseworker explained to me, in reference to a case in which she refused to recommend guardianship to either of two grandmothers vying for guardianship of the six grandchildren in state custody, "We just don't like them." When pressed to explain why, she stated that it was the agency's firm belief that guardianships were too unstable and increased the chances that the children would too easily come back into the system. She seemed genuinely puzzled when I suggested that the lack of resources for guardians in the state might be a significant contributing factor.

Is there merit to the caseworkers' resistance to guardianships? In all fairness, the riskiest and, paradoxically, best feature of guardianship arrangements is that the parents' parental rights need not be terminated. From a caseworker's perspective, the failure to terminate parental rights and to deliver needy children to new parents leaves open too great a risk of re-entry into state care. While grandparents or other relatives who become a child's guardian have legal and physical custody to act as the child's functional "parent," the biological parent often retains some parental rights, which may include visitation with the child. For caseworkers, even this limited parental control may present too great an opportunity for psychological or physical harm to the child. For some children, however, a limited relationship with a biological parent may actually serve their best interest. Guardianship is especially appropriate in these circumstances as a means of maintaining meaningful ties with biological parents. It is in this respect that kinship care is most noticeably distinguished from non-kin care, where the legal termination alters only legal rights and responsibilities while leaving family relationships damaged, but intact.

Failure to value alternatives to termination or to endorse guardianships post-termination reflects a continued failure to meaningfully value kinship resources in the service of poor, minority families. Indeed, a broad

expansion of permanency options predicated upon kinship strengths would mark a shift in the understanding and appreciation of the unique nature of kinship caregiving, which has for too long been both inappropriately compared to non-kin foster care and regarded as a destabilizing element in communities of color. As kinship researcher Robert Little observed,

Child welfare professionals should take a more proactive stance on issues impacting kinship care, exercising leadership by demonstration rather than remaining silent or, worse, permitting often uninformed policymakers to talk about kinship care as if it were just another form of foster care or an economic drain on state and local treasuries²³⁷

Little's critique is echoed in the ongoing debate about whether kinship caregivers "should play a role in child welfare that corresponds to that of traditional foster parents, or whether they should be considered family providing informal supports."²³⁸ This tension plays out in the subordination of guardianship to adoption even though research reveals that subsidized guardianship offers comparable permanency outcomes.²³⁹

Given its origins and history of use in poor communities of color, kinship care practice and the policies that encourage or undermine it are inevitably intertwined with issues of race and class.²⁴⁰ "[R]esearchers have argued that child welfare practices," including the promotion of adoption as the normative ideal, "do not reflect the cultural norms of minority groups and that changes in child welfare policies, especially those related to kinship care, 'should be based on a deliberate and conscious recognition of the cultural patterns of various racial and ethnic groups'" in addition to the cultural strengths these patterns of caregiving represent.²⁴¹ "The extended family structure has been viewed as a variant family form because [it differs from] what has traditionally been considered the ideal structure of the nuclear family."²⁴² These differences, in the child welfare

²³⁷ Little, *supra* note 228, at 10.

²³⁸ Rob Geen, *Kinship Foster Care: An Ongoing, yet Largely Uninformed Debate*, in *KINSHIP CARE: MAKING THE MOST OF A VALUABLE RESOURCE*, *supra* note 91, at 1, 12.

²³⁹ *See id.* at 16–17.

²⁴⁰ *Id.* at 18–19.

²⁴¹ *Id.* at 19 (quoting Joyce E. Everett et al., *Conclusion to CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE* 306, 307 (Joyce E. Everett et al. eds., 1991)).

²⁴² *Id.* (quoting Ivory L. Johnson, *Kinship Care*, in *WHEN DRUG ADDICTS HAVE CHILDREN* 221, 225 (Douglas J. Besharov & Kristina W. Hanson eds., 1994)).

context, have been interpreted to represent deficiencies.²⁴³ It can be argued that a failure to recognize and appreciate a variant cultural repertoire has created most of the current debate over what role, if any, kinship care should have in child welfare and whether policies should be developed consistent with kinship norms to assist extended families in raising children they do not wish to formally adopt.

CONCLUSION

No one can argue that permanency for children should not remain a paramount concern for child welfare administrators and policymakers. Federal and state policy appropriately orients the child welfare system in this direction, but with a particularly narrow vision of permanency that preferences adoption above other beneficial alternatives in cases where children are not able to be reunited with biological parents. Studies, albeit small scale, indicate that kinship caregivers already envision long-term care arrangements in which they commit to the ongoing support of the children in their care without the need for adoptive parent status. And yet, a hierarchy of permanency options remains—one in which happy “new” parents positioned downstream rescue a continuing torrent of “waiting” foster children through adoption.

It would be overly simplistic and unfair to cast the characters in this tale as wholly heroic or villainous. Adoption aims to create the stability and permanence we recognize as essential for optimal child development, and in so doing, creates a social good. That said, it is equally simplistic, perhaps even harmful, to cast adoption as an unadulterated good. What the rescue tale fails to capture is that for a fairly sizable portion of these would-be rescuers (kinship caregivers), the radical re-constitution of their family relationships is not a joy—it is another trauma they must endure, this time imposed by restrictive permanency options defined by the state. These permanency options, which cast guardianships as a “less than optimal” outcome for children in out-of-home care, establish something of a second class status at best and perpetuate a distinct and deficit model at worst among guardians, their wards, and the system in which they operate. In continuing to hold adoption as the normative ideal, the system risks coercing kinship caregivers into accepting a solution that may be an all around poor fit and, consequently, counter-therapeutic for all parties involved. As it reflects political and social inequalities, the hegemonic narrative of adoption, with its tendency to set our focus downstream and to define permanence in only the legally binding terms of parent and child

²⁴³ *See id.*

dyads, encourages the continued marginalization of families. Although kinship caregivers are prepared to make lasting commitments, the current structure of child welfare law and policy leaves them caught between sometimes equally unappealing options—adoption, with the attendant rupture and reconfiguration of familial bonds, or the possible loss of the children in their care to others who are willing to adopt them. In order to assist caregivers in raising children in optimal settings, the system must come to value a caregiving arrangement “that draws its life not from the coercion of law but from deeper structures of belief and obligation”²⁴⁴—from the emotional bonds of permanence rather than the mere legal.

While the availability of a broader array of permanency options, especially subsidized guardianships, is laudable, their mere availability is not enough. These options must be expanded with federal support in the form of matching dollars. To address the built-in incentives that are created by limiting federal monies to adoption, a number of child advocacy organizations, including the Children’s Defense Fund, have recommended expanding Title IV-E to cover subsidized guardianships for all children exiting foster care to legal guardianships, so that state and local funds can be used to help grandparents and other relatives raising children.²⁴⁵ “Currently, Title IV-E only funds subsidized guardianship programs for seven states that have waivers from the federal government,”²⁴⁶ a level of commitment that reflects ambivalence, at best, for this permanency option. “Of the 35 states and the District of Columbia that have subsidized guardianship programs, most use state and local funds,”²⁴⁷ and are thus subject to a greater degree of instability, especially in an era of increasing state budget shortfalls. “If Title IV-E could be used for all children exiting foster care into subsidized guardianships, the state and local funds could be used to provide subsidized guardianships for those relative-headed families outside the system.”²⁴⁸ Indeed, among CDF’s other recommendations is an expansion of subsidized guardianship programs to cover grandparents and other relatives who care for children who are not involved with the child

²⁴⁴ Woodhouse, *supra* note 51, at 612.

²⁴⁵ See Rob Geen, *Financing: What Are the Cost Considerations for Subsidized Guardianship?*, in USING SUBSIDIZED GUARDIANSHIP, *supra* note 133, at 63, 67–68.

²⁴⁶ GENERATIONS UNITED, GRANDPARENTS AND OTHER RELATIVES RAISING CHILDREN: THE SECOND INTERGENERATIONAL ACTION AGENDA 11 (2005), available at http://ipath.gu.org/documents/A012004_Action_Agenda_Final.pdf.

²⁴⁷ *Id.*

²⁴⁸ *Id.*

welfare system.²⁴⁹ CDF's recommendations mirror those of the Pew Commission on Children in Foster Care, a non-partisan group charged with the mission of "develop[ing] a practical set of policy recommendations to reform federal child welfare financing."²⁵⁰ Among the Pew Commission's recommendations was the expansion of federal subsidies for guardianships beyond the limited demonstration programs.²⁵¹

And yet, despite overwhelming data that support placing guardianships on par with adoption with respect to long-term placement options, federal legislation continues to promote perhaps not a "one-size-fits-all," but a "one-size-fits-best" model. The Kinship Caregiver Support Act²⁵² introduced in the Senate in May 2005, and the congressional version of the bill, The Guardianship Assistance and Promotion and Kinship Support Act,²⁵³ both admirably aimed at expanding options for kinship caregivers, miss the mark in their attempts to address the "unintended consequences" of adoption promotion by, among other things, codifying a rule-out provision.²⁵⁴ Although the House version of the bill acknowledges that cultural norms, particularly among African-Americans, play a role in who may or may not avail themselves of adoption and that reunification and guardianship are important permanency options,²⁵⁵ both bills would have conditioned, by amending Part E of Title IV of the Social Security Act, payment of guardianship subsidies upon an agency's documented efforts to effectuate an adoption over a legal guardianship.²⁵⁶ Neither bill made it out of committee before the close of the 2005 legislative year.

²⁴⁹ See Geen, *supra* note 245, at 67–68.

²⁵⁰ THE PEW COMM'N ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 9 (2004), available at <http://pewfostercare.org/research/docs/FinalExecSum.pdf>.

²⁵¹ *Id.* at 11. The Pew Commission recommended, among other financing reform measures, the provision of "federal guardianship assistance to all children who leave foster care to live with a permanent legal guardian when a court has explicitly determined that neither reunification nor adoption are feasible permanence options." *Id.*

²⁵² S. 985, 109th Cong. (2005).

²⁵³ H.R. 3380, 109th Cong. (2005).

²⁵⁴ Similar language is found in the Leave No Abused and Neglected Child Behind Act, introduced in July 2005. H.R. 3576, 109th Cong. (2005). The "unintended consequence" of H.R. 3380 is defined as reducing the likelihood that children will be reunified with their birth families. H.R. 3380 § 101(6).

²⁵⁵ H.R. 3380 § 101(4).

²⁵⁶ S. 985 sec. 201(C)(3), § 475(1)(F)(iv)–(v); H.R. 3380 sec. 102(b)(3), § 475(1)(F)(iv)–(v).

In a more favorable turn of events, the District of Columbia, a city in which an estimated 8,000 grandparents assume primary caregiving responsibilities for children under the age of eighteen, a bill calling for the implementation of a new expansive kinship support pilot program was recently signed into law.²⁵⁷ Pursuant to the Grandparent Caregivers Pilot Program Establishment Act of 2005,²⁵⁸ grandparent caregivers with legal custody or standby guardianship over their wards may be eligible to receive subsidy payments and support services comparable to what would be received through foster care.²⁵⁹ The pilot program is distinct from other traditional subsidized guardianship programs in that there is no requirement that children remain in or come from state custody.²⁶⁰ According to the Mayor's office, the bill "help[s] allow District grandparents to keep their families together."²⁶¹ While the benefits of such expansive programs have yet to be fully assessed, it is reasonably likely that these upstream interventions will both stem the flow of children into foster care and empower families to make meaningful caregiving decisions for themselves.

The expansion of subsidized guardianship programs and the provision of federal matching dollars, however, may bring only attenuated benefits to kinship caregivers if caseworkers with whom caregivers have the most contact are not trained to value guardianships as much as adoptions. To assure the appropriate use of subsidized guardianships, states should provide special training for child welfare workers to explore broad permanency options and sensitize caseworkers to the unique strengths of kin as permanent stable and loving caregivers.

In light of compelling research demonstrating that subsidized guardianship arrangements benefit children and families with no decrease in the duration and stability of placement—a goal shared by both “adoption hawks” and “guardianship doves”—policy and lawmakers must move beyond the polarizing rhetoric that has for too long defined this issue. Child welfare administrators must resist mucking about with success by removing “waiting” children who are already firmly embraced within their

²⁵⁷ Press Release, City of Wash., D.C., Mayor Williams to Sign Bill Strengthening Families by Helping Grandparents Who Are Raising Children (Jan. 22, 2006), <http://dc.gov/mayor/news/advisory.asp?id=761&mon=200601>.

²⁵⁸ Wash., D.C., Act A16-0231 (Dec. 22, 2005).

²⁵⁹ *Id.* § 104.

²⁶⁰ *Id.* § 103(2)–(3).

²⁶¹ City of Wash., D.C., *supra* note 257.

kinship networks and placing them with “family.”²⁶² It is arguably as harmful to shuttle children unnecessarily from relatives to “families”—as surreal as that sounds—as it is for them to be bounced between a number of different foster placements.

And to what end? Who are the “rescuers du jour” in the evolving adoption tale? It is remarked with some measure of cruel irony that current adoption recruitment efforts seek to target the same population from whom children are disproportionately removed and placed into child welfare. In a recent Urban Institute report that analyzed interest in adoption and reviewed state recruitment strategies, commissioned by the National Adoption Day Coalition, those individuals with the highest propensity to adopt—those to whom adoption recruitment efforts will now be specifically targeted—were thirty to thirty-four years old, Black and Hispanic, unmarried, low income, women.²⁶³

²⁶² Adoption recruitment material suggests that children waiting for a “family” consist of those foster children living with relatives. The statement might be read to suggest that foster children living with relatives are not already living within families and do not have “real” families to call their own. See THE NAT’L ADOPTION DAY COAL., URBAN INST., FOSTER CARE ADOPTION IN THE UNITED STATES: AN ANALYSIS OF INTEREST IN ADOPTION AND A REVIEW OF STATE RECRUITMENT STRATEGIES 1 (2005), available at http://www.urban.org/UploadedPDF/411254_foster_care_adoption.pdf.

²⁶³ *Id.* at 20.