NOTE

Preserving the Families of Homeless and Housing-Insecure Parents

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ABSTRACT

Every year in the United States, state child welfare agencies receive millions of reports of suspected child neglect. The families involved in these reports are often first subjected to government interference in the legally protected parent-child relationship on the basis of "neglect," a legal concept that lacks an intent standard and is often difficult to separate from a parent's poverty and consequent inability to provide for a child's physical needs. Children of families experiencing homelessness and housing insecurity are especially vulnerable to removal to foster care due to their lack of safe housing. After removal, it becomes increasingly difficult for a homeless parent to hold onto his parental rights while his child languishes in foster care, often with a caregiver who is a complete stranger. Although federal law requires states to make reasonable efforts to prevent removal or return a child to her home, reasonable efforts rarely include housing assistance. Meanwhile, states receive uncapped federal funding for foster care services, which include room-and-board payments to foster homes. Providing uncapped funding for foster care but little meaningful assistance to a child's parent stacks the deck in favor of termination of parental rights in cases where the primary barrier to family reunification is a lack of safe housing.

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Even for the small number of children in foster care for whom adoption is the best or only option, the number of adoptive families remains low despite efforts at the federal and state levels to encourage adoption. Congress continues to approach the problem by attempting to make adoption quicker and easier in order to increase the supply of available adoptive families, but there continues to be an enormous shortfall in the availability of adoptive homes for children in foster care. Furthermore, entry into foster care—even for a few days—is an adverse, disruptive, and jarring experience for children and families that should be avoided whenever possible. By reducing the number of children removed from their homes in the first place and therefore reducing the demand for adoptive families, the law can reduce the disparity between the number of children awaiting adoption and the available adoptive homes, promote racial and class justice, and breathe life back into the constitutional right of poor but otherwise fit parents to raise their children as they please. Requiring reasonable efforts to include housing assistance will prevent removals, and federal funding can be repurposed to serve the stated goals of child welfare law.

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Introduction

Bernadette Charles of Brooklyn, New York, had two options: she could keep living with the roaches and rats and the dirty water seeping through the walls of her apartment or she could risk losing her children.[1] When the conditions became too much to bear, Ms. Charles called the city to report her landlord.[2] He retaliated by calling the state child protective services agency.[3] Instead of addressing the fam-

1 Stephanie Clifford & Jessica Silver-Greenberg, *Foster Care as Punishment: The New Reality of 'Jane Crow*,' N.Y. Times (July 21, 2017), https://www.nytimes.com/2017/07/21/nyregion/foster-care-nyc-jane-crow.html [https://perma.cc/99SE-83QU].

2 *Id.*

3 *Id.*

ily's housing issues, questioning the landlord's credibility, or providing the family with a temporary place to stay, the agency removed the otherwise "clean and healthy" children from the apartment due to the unsafe conditions.[4] When Shakieta Smith of Washington, D.C., had no place to go with her two children, she called the local shelter hotline, which informed her that there were no beds available.[5] The hotline worker told Ms. Smith that if she was admitting to having no housing for the kids, the agency would have to call child protective services to conduct an investigation.[6] Ms. Smith lived in fear that her fruitless call for help would destroy her family.[7] She told the *Washington Post*, "I was afraid that my kids would be taken from me just because I can't afford to live in D.C. . . . It's not like I'm abusive or none of that. I ran into a situation where I don't have no place to go."[8] The threat of an investigation by child protective services looms large in the lives of poor parents who seek safe housing for their families. Millions of families are referred to and investigated by state child protective services agencies each year due to reports of abuse or neglect, and hundreds of thousands of children are removed from their homes to foster care as a result.[9] These families are often subjected to government interference in the legally protected parent-child relationship, not on the basis of abuse but on the basis of "neglect," a concept difficult to separate from a parent's poverty and consequent inability to provide consistently for a child's physical needs, such as safe shelter.[10] Homeless and

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4 *Id.*

5 Annie Gowen, *Homeless Families Who Turn to D.C. for Help Find No Room, Risk Child Welfare Inquiry*, WASH. POST (June 23, 2012), https://www.washingtonpost.com/local/homeless-families-who-turn-to-dc-for-help-find-no-room-risk-child-welfare-inquiry/2012/06/23/gJQAv9bJyV_story.html [https://perma.cc/7HBS-NW8Q].

6 *Id.*

7 *Id.*

8 *Id.*

9 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2015 6, 86 (2017) ("During FFY 2015, CPS agencies across the nation received an estimated 4.0 million referrals, a 15.5 percent increase since 2011."); *see Child Abuse Statistics & Facts*, CHILDHELP, https://www.childhelp.org/child-abuse-statistics [https://perma.cc/4WUN-LAAM].

10 *See* Marta Beresin, *Reporting Homeless Parents for Child Neglect: A Case Study from Our Nation's Capital*, 18 U.D.C. L. REV. 14, 16 (2015) ("While a report for child neglect does not necessarily mean that children are removed from their families, nationally, thousands of children remain in foster care each year due in part or entirely to inadequate housing or homelessness."); *see also* Michele Estrin Gilman, *The Poverty Defense*, 47 U. RICH. L. REV. 495, 513–16 (2013) ("[L]iving in a poor household appears to raise the risks of neglect—although . . . many findings of 'neglect' are really findings of poverty." (footnote omitted)); Symposium, *The Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y.C. L. REV. 61, 62 (2003) (noting that agencies often fail to distinguish

housing-insecure families are especially vulnerable to being swept into this system,[11] and several studies have shown that nearly a third of children in foster care could be reunited with their families if they had safe, affordable housing.[12] Once homeless parents are exposed to the invasive child welfare system, they must fight legal battles against far more sophisticated parties and institutions to maintain their constitutional right to raise their children.[13] Moreover, homelessness is typically a long-term problem unlikely to be addressed without guidance and assistance from the state or local government.[14] The breakneck pace of removal and termination of parental rights can destroy homeless families, even when they are diligently pursuing reunification.[15] Federal funding and incentives to state child welfare agencies aggravate these problems by investing more in foster care as a safety net for children than in programs that would benefit children by avoiding removal in the first place.[16]

The number of children in foster care—that is, children who have been removed from their homes and are being cared for in placements with relatives or nonrelatives, group homes, residential care facilities, emergency shelters, and supervised independent living arrangements[17]—in the United States has remained relatively steady, in the hundreds of thousands, for the last decade and continues to outpace

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"cases of child abuse and severe parental neglect—which constitute a small percentage of indicated cases—and child neglect arising from poverty").

11 *See infra* Parts I & III.

12 Deborah S. Harburger & Ruth A. White, *Reunifying Families, Cutting Costs: Housing-Child Welfare Partnerships for Permanent Supportive Housing*, 83 CHILD WELFARE 493, 500–01 (2004).

13 *See, e.g.*, *In re* L.M., 767 S.E.2d 430, 431, 433–34 (N.C. Ct. App. 2014) (upholding the trial court's determination that guardianship with foster parents was in the child's best interests where the child was in foster parents' home for an extended period of time and the foster father was "actively involved" in the child's life, even though the mother had "obtained employment, found stable housing, developed a positive relationship with [the child], and that [the child] desired to return to her custody"). *See generally* Kelli L. Kazmarski, *Protecting the Rights of Parents and Children: The Right to Counsel in Family Court*, VT. B.J. & L. DIG., Feb. 1994, at 37.

14 *See generally* NAT'L ALL. TO END HOMELESSNESS, CLOSING THE FRONT DOOR: CREATING A SUCCESSFUL DIVERSION PROGRAM FOR HOMELESS FAMILIES (2011) [hereinafter NAT'L ALL., CLOSING THE FRONT DOOR], http://endhomelessness.org/wp-content/uploads/2011/08/creating-a-successul-diversion-program.pdf [http://perma.cc/A2DA-XRR5]; NAT'L ALL. TO END HOMELESSNESS, TOOLKIT FOR ENDING HOMELESSNESS [hereinafter NAT'L ALL., TOOLKIT], https://endhomelessness.org/wp-content/uploads/2016/10/1223_file_Toolkit.pdf [https://perma.cc/ZWW6-SGXF].

15 *See* Beresin, *supra* note 10, at 45, 47.

16 *See* Harburger & White, *supra* note 12, at 494–95.

17 *Foster Care*, CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.childwelfare.gov/topics/outofhome/foster-care [https://perma.cc/6GKR-S6YZ].

the availability of adoptive homes for children who have been removed from their families.[18] Of the 427,910 children in foster care in the United States in September 2015, 269,509 had entered the system in the preceding twelve months alone.[19] Since 2012, more than 100,000 children each year were characterized by the U.S. Department of Health and Human Services as "waiting to be adopted."[20] In some states, neglect is identified as a reason for removal in over ninety percent of removals.[21] For example, in New York from 2010 to 2014, removals to foster care for general neglect constituted ninety-three to ninety-five percent of all removals, with the remainder of removals occurring due to findings of emotional abuse, medical neglect, physical abuse, sexual abuse, or some other unclassified form of maltreatment.[22] These statistics tell a different story from what some might view as the "typical" abusive parent involved in the child welfare system; they suggest that an approach to the child welfare system that views every family in the same way is not serving all children adequately.

Even a preliminary report of abuse or neglect can have detrimental consequences for family integrity and the well-being of a child, because a report prompts continual state interference into the parent-child relationship.[23] Any system of laws that seeks to protect children

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18 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2010–2014: REPORT TO CONGRESS ii (2017) ("Between 2005 and 2014, the number of children in care on the last day of the [fiscal year] decreased by 18.8 percent, from 511,000 to 415,000. The number of children in foster care hovered around 400,000 from 2010 through 2013 but increased to 415,000 in 2014." (footnote omitted)); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 131–32 (1995).

19 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT NO. 23 (2016), https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf [https://perma.cc/63A4-HPCN].

20 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN IN PUBLIC FOSTER CARE ON SEPTEMBER 30TH OF EACH YEAR WHO ARE WAITING TO BE ADOPTED: FY 2005–FY 2014, at 3, https://www.acf.hhs.gov/sites/default/files/cb/children_waiting2014.pdf [https://perma.cc/K2GE-6VRF] (defining "waiting to be adopted" as including "children in foster care on the last day of the Federal Fiscal Year who have a goal of adoption and/or whose parental rights have been terminated").

21 *See* Annie E. Casey Found., *Children Who Are Confirmed by Child Protective Services as Victims of Maltreatment by Maltreatment Type*, KIDS COUNT DATA CENTER, http://datacenter.kidscount.org/data/tables/6222-children-who-are-confirmed-by-child-protective-services-as-victims-of-maltreatment-by-maltreatment-type [https://perma.cc/YH6A-DXVR] (select "By State"; then select years 2010–14) (last updated May 2017).

22 *Id.*

23 *See In re* S.K., 564 A.2d 1382, 1390 (D.C. 1989) ("[T]here is substantial evidence that, except in cases involving very seriously harmed children, we are unable to improve a child's situation through coercive state intervention." (quoting Michael Wald, *State Intervention on Be-*

must take into account the substantive and procedural due process rights of parents to family privacy and integrity.[24] It must afford protections to parents not simply to protect their own liberty interests[25] but to protect the peerless sanctity of family bonds and the contribution of those bonds to the proper growth and development of children.[26] Because "the child's best interest is presumptively served by being with a parent, provided that the parent is not abusive or otherwise unfit,"[27] parents should not be required to be perfect or to prove that they are better than other real or hypothetical parents in order to preserve legal and physical custody. Accordingly, when a family becomes involved with the child welfare system through a report of suspected abuse or neglect, the legal burden of showing parental unfitness is on the state.[28] In practice, however, this burden often functionally shifts onto the parent to show fitness, because of factors such

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half of "Neglected" Children: A Search for Realistic Standards, 27 STAN. L. REV. 985, 993 (1975))); DIANE DEPANFILIS, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD NEGLECT: A GUIDE FOR PREVENTION, ASSESSMENT, AND INTERVENTION 57 (2006).

24 *See* Nell Clement, Note, *Do "Reasonable Efforts" Require Cultural Competence? The Importance of Culturally Competent Reunification Services in the California Child Welfare System*, 5 HASTINGS RACE & POVERTY L.J. 397, 401–02 (2008).

> The Supreme Court has continuously recognized that family privacy and parental rights are fundamental rights guaranteed by the Fourteenth Amendment and subject to substantive and procedural protections of due process. . . . [T]he Supreme Court has reiterated the constitutional protection of parental rights under the Fourteenth Amendment in cases that determine the rights of the parent in relation to the rights of others in a child's life. In *Smith v. Organization of Foster Families for Equality and Reform*, the Court stated that a biological parent's right to conceive and raise one's children is an essential right. The Court held that the biological parent's essential right does not apply to foster parents, and thus, a foster parent's rights to her foster child are not subject to substantive and procedural protections of due process.

Id. (footnotes omitted).

25 *See In re* Termination of Parental Rights to Zachary B., 662 N.W.2d 360, 367 (Wis. Ct. App. 2003) ("Case law clearly establishes that a parent who has had custody of the children and lived with them . . . has a fundamental liberty interest."), *aff'd*, 678 N.W.2d 831 (Wis. 2004); Stephanie Smith Ledesma, *The Vanishing of the African-American Family: "Reasonable Efforts" and Its Connection to the Disproportionality of the Child Welfare System*, 9 CHARLESTON L. REV. 29, 39 (2014) ("The bundle of parental rights 'encompasses the custody and companionship of the child, opportunities to influence the child's values and moral development through religious training, and important education and health care decisions.'" (quoting Eric G. Andersen, *Children, Parents, and Nonparents: Protected Interests and Legal Standards*, 1998 BYU L. REV. 935, 942)).

26 *See, e.g.*, *In re* S.K., 564 A.2d at 1390.

27 *Id.*; *see also* Beresin, *supra* note 10, at 42 ("[M]ost experts agree that family preservation is essential to the well-being of children.").

28 *See infra* Section II.A.

as the parent's lack of social and cultural assets[29] and lack of legal representation.[30] This de facto burden shifting continues in termination proceedings, where a parent must often compete with a foster parent to prove that it is in her child's "best interests" to remain at home.[31] As the stakes are raised in these proceedings, burden shifting is highly problematic because, as the Supreme Court has said, "[i]f anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs."[32]

Unfortunately, the promise of procedural and substantive protections for families who face the possibility of dissolution at the hands of the child welfare system is not fully realized. The few threads of hope for family preservation in both federal and state law are undercut by other provisions and funding incentives that promote foster care and adoption over family preservation, even where a parent is—although she may be poor—not unfit to raise a child.[33] The families who bear the greatest burden of these disincentives for preserving families are likely to be poor and unrepresented in court proceedings,[34] making it all the more crucial to develop protections that ensure the preserva-

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29 Ledesma, *supra* note 25, at 51 ("Subjectivity by state actors in decisions of child welfare matters 'often allows for individual biases and personal values . . . [to] serve as a standard for measuring parental compliance and fitness.'" (quoting Clement, *supra* note 24, at 416–17)).

30 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 29–30 n.5 (1981). The Court described a study of "New York Family Court judges who preside over parental termination hearings[, which] found that 72.2% of them agreed that when a parent is unrepresented, it becomes more difficult to conduct a fair hearing (11.1% of the judges disagreed); 66.7% thought it became difficult to develop the facts (22.2% disagreed)." *Id.* Douglas Besharov cites a lower proportion of favorable dispositions for unrepresented parents in termination proceedings and notes that "[i]f the child's best interests require termination, the petitioner, through sufficient planning and preparation, should be able to prove it in court. To protect children, the state needs no tools and needs no advantages greater than those it ordinarily possesses. It should not need the assistance of an unrepresented parent to make its case stick." Douglas J. Besharov, *Terminating Parental Rights: The Indigent Parent's Right to Counsel After* Lassiter v. North Carolina, 15 FAM. L.Q. 205, 209 (1981); *see also* Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1204 (1999) (noting that "[i]n many cases, it is the failure of the child welfare agency to offer adequate services, rather than the failure of the parents to comply with reunification efforts, that explains the lack of reasonable efforts").

31 Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 139 (1999) ("Deciding the best interests of the child in [foster care] might conjure up the question, would this child be better off in the comfortable home of this well-to-do couple or struggling on public assistance with that neglectful mother?").

32 Santosky v. Kramer, 455 U.S. 745, 753 (1982).

33 *See* Roberts, *supra* note 31, at 127.

34 *See, e.g.*, Kazmarski, *supra* note 13, at 37–38 (1994); Jessica K. Steinberg, *Demand Side Reform in the Poor People's Court*, 47 CONN. L. REV. 741, 751 (2015) ("In Philadelphia, eighty-

tion of the parental rights to which they are entitled even in the absence of counsel.[35] Further, children removed from their homes in the United States are disproportionately black, even when controlling for other factors;[36] this is especially troubling given that black children are less likely to be adopted out of foster care than white children, increasing the risk that black children may remain perpetually in foster care if removed from their homes.[37] The poor and disadvantaged families who constitute the bulk of those whose children are removed after a report of abuse or neglect often face obstacles to reunification such as housing insecurity, homelessness, and drug addiction.[38] These problems are not amenable to the quick fixes and conditions the child welfare system imposes upon them in order to maintain or regain custody of their children,[39] and the speed with which the law pursues adoption can obliterate family bonds before these problems have a fair chance to be solved.

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nine percent of child custody litigants—or 30,260 mothers and fathers—lack the assistance of counsel in emotionally charged proceedings that determine their parenting rights.").

35 *Lassiter*, 452 U.S. at 47 (1981) (Blackmun, J., dissenting) ("By intimidation, inarticulateness, or confusion, a parent can lose forever all contact and involvement with his or her offspring.").

36 Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 114–15 (2008) (noting that "the overrepresentation of these children does not derive from inherent difference in their rates of abuse and neglect" because it remains "[a]fter controlling for various risk factors, including income and family structure."); *id.* at 117 (noting a 2003 study by the U.S. Department of Health and Human Services that showed "overreporting of child abuse and neglect of minority children. Research also shows that both public and private hospitals overreport abuse and neglect among blacks and underreport maltreatment among whites" (footnote omitted)); Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 454 (2002) ("African American children[] are more likely to be in foster care placement than receive in-home services, even when they have the same problems and characteristics as white children." (emphasis omitted)).

37 Dixon, *supra* note 36, at 121 ("In most cases, African-American children had lower probabilities of being adopted than white children, and adoption finalizations for Black children took longer than for white children.").

38 *See, e.g.*, State *ex rel.* State Office for Servs. to Children & Families v. Rogers (*In re* Eldrige), 986 P.2d 726, 731 (Or. Ct. App. 1999).

39 *See, e.g.*, *id.* (reversing termination of parental rights and remanding for a new trial eight years after the initial termination where the parent had continued to struggle with homelessness and drug addiction since the termination because even though the mother had "not been particularly good at following through" with her case plan, "[state case] workers' and her attorney's efforts to work with mother [had] been half-hearted, at best," so termination was not the inevitable result of her 1991 hearing); State v. Jessica S. (*In re* Damien S.), 815 N.W.2d 648, 656 (Neb. Ct. App. 2012) (upholding termination where mother struggled with drug addiction and continued to be involved in abusive relationships); C.L.D. v. State (*In re* Interest of M.D.), 336 P.3d 585, 587 (Utah Ct. App. 2014) (upholding termination of parental rights where father participated in drug program, but "displayed drug-seeking behavior until late in the proceedings").

Federal child welfare law states that its goal is to preserve families.[40] It recognizes that, with proper supportive resources, resorting to removal from the home would not be necessary in cases where a parent's inability to pay for life's necessities is one of the primary reasons for removal.[41] For this reason, federal foster care and adoption laws require states to make "reasonable efforts" to preserve or reunify families before a child is removed or before parental rights are terminated.[42] In practice, however, the reasonable efforts requirement is often impotent; it varies by state and does little to effectuate the purpose of the statute and to ensure that a parent's constitutional liberty interest in raising her children is respected.[43] Federal law further aggravates the problem by creating perverse financial incentives for states to remove children to foster care and keep them there. Especially in the context of family homelessness, these incentives undermine the law's goals and result in the destruction of families of poor but otherwise fit parents. This Note proposes federal legislation to create a clearer definition of "reasonable efforts" in cases of homelessness and proposes the elimination of damaging provisions and funding incentives that bias the child welfare system against homeless families. This legislation will effectuate the purpose of the principal statutes governing the child welfare system: to preserve families and protect children. This solution will help slow the rapid pace of trau-

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40 *See* 42 U.S.C. § 629 (2012). Federally funded child and family services programs are intended to accomplish the following goals:

> (1) To prevent child maltreatment among families at risk through the provision of supportive family services. (2) To assure children's safety within the home and preserve intact families in which children have been maltreated, when the family's problems can be addressed effectively. (3) To address the problems of families whose children have been placed in foster care so that reunification may occur in a safe and stable manner in accordance with the Adoption and Safe Families Act of 1997. (4) To support adoptive families by providing support services as necessary so that they can make a lifetime commitment to their children.

Id. "Child welfare services" are defined as services aimed at purposes including "preventing the unnecessary separation of children from their families by identifying family problems, assisting families in resolving their problems, and preventing breakup of the family where the prevention of child removal is desirable and possible" and "restoring to their families children who have been removed, by the provision of services to the child and the families." Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 103, 94 Stat. 500, 519.

41 *See* § 103, 94 Stat. at 519.

42 *See id.* § 101; 42 U.S.C. § 671(a)(15)(B).

43 *See* Mark Andrews, *"Active" Versus "Reasonable" Efforts: The Duties to Reunify the Family Under the Indian Child Welfare Act and the Alaska Child in Need of Aid Statutes*, 19 ALASKA L. REV. 85, 110–11 (2002); Roberts, *supra* note 31, at 115. *See generally* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 261 (2003).

matic and unnecessary removals that tear apart homeless families even when there is no long-term alternative solution available for either the parent or the child.

Part I defines homelessness and housing insecurity and describes how families experiencing homelessness interact with the child welfare system. Part II describes the federal-law framework governing state child welfare systems and how federal law gradually departed from its original purpose of family preservation based on the misguided assumption that the lack of available adoptive homes was the primary problem facing the child welfare system. Part III explains the intersection of homeless and housing-insecure parents with the evolution of child welfare law and describes why homeless families' interactions with the child welfare system are ripe for a solution that will both serve Congress's goals and protect children and families. Part IV proposes that Congress enact legislation that includes a new, clarified definition of the "reasonable efforts" states must make before removing children from families that are homeless or housing insecure; an automatic waiver for reallocation of funds necessary to serve this purpose; and the elimination of provisions in the current law that have unintended consequences for homeless and housing-insecure families and are unnecessary to promote the safety and well-being of children generally.

I. Homeless Families and the Child Welfare System

Family homelessness is not a rarity in the United States. Of the 578,424 people experiencing homelessness in the United States in 2014, thirty-seven percent—216,261 individuals in 67,513 households—were members of families.[44] People in chronically homeless families—15,143 individuals—made up three percent of the total number of Americans experiencing homelessness.[45] Homeless and housing-insecure families also constitute a large share of the families involved with the child welfare system.[46] Families experiencing homelessness represent the intersection of several unintended and collateral consequences of state and federal abuse and neglect laws, namely the overrepresentation of poor children and children of color in the

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44 Nat'l All. to End Homelessness, The State of Homelessness in America 2015, at 7 (2015).

45 *Id.* at 7 n.5 ("[A] family is considered chronically homeless if . . . a head of a household[] has a disabling condition and has been continuously homeless for 1 year or more or has experienced at least 4 episodes of homelessness in the last 3 years.").

46 *See infra* Sections I.B–I.D.

child welfare system; the lack of substantive and procedural justice for unrepresented parents in removal, neglect, and termination proceedings; and the failure of the legal system to meaningfully distinguish between poverty and neglect.[47] Nearly a third of children in the care of the state could be reunited with their families if their parents could obtain stable housing,[48] and returning these children to their families would eliminate a large portion of the demand for adoptive homes. Thus, preserving and reunifying families experiencing homelessness would benefit not only those families, but also the tens of thousands of other children waiting to be adopted.

A. Defining Homelessness and Housing Insecurity

Federal law uses a variety of terms to describe individuals experiencing homelessness and housing insecurity. The Department of Housing and Urban Development ("HUD") established a new regulatory definition of "homeless" after the Homeless Emergency Assistance and Rapid Transition to Housing Act ("HEARTH Act")[49] was enacted in 2009. HUD does not define a homeless person as simply a person who may be living on the streets at a given time (also known as "literally homeless").[50] The term also includes people who are in untenable living situations and people who are "housing insecure," a catch-all term that includes "housing unaffordability, or high rent burdens suffered by stably housed families, and housing instability, which ranges in severity from frequent moves to eviction and homelessness."[51] HUD's definition creates categories of homelessness that apply to all of HUD's homeless assistance programs, and this definition is useful for contextualizing what it means to be homeless or housing insecure. There are four categories:

> (1) Individuals and families who lack a fixed, regular, and adequate nighttime residence and includes [sic] a subset for an individual who is exiting an institution where he or she resided for 90 days or less and who resided in an emergency shelter or a place not meant for human habitation immediately before entering that institution;

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47 *See infra* Sections I.B–I.D.

48 Harburger & White, *supra* note 12, at 500–01.

49 *See* Homeless Emergency Assistance and Rapid Transition to Housing (HEARTH) Act of 2009, Pub. L. No. 111-22, 123 Stat. 1632 (2009); 24 C.F.R. § 91.5 (2018) (defining "homeless" and related terms).

50 Beresin, *supra* note 10, at 24.

51 Emily J. Warren & Sarah A. Font, *Housing Insecurity, Maternal Stress, and Child Maltreatment: An Application of the Family Stress Model*, 89 SOC. SERV. REV. 9, 11 (2015).

> (2) Individuals and families who will imminently lose their primary nighttime residence;
> (3) Unaccompanied youth and families with children and youth who are defined as homeless under other federal statutes [e.g., the McKinney-Vento Homeless Assistance Act[52]] who do not otherwise qualify as homeless under this definition; or
> (4) Individuals and families who are fleeing, or are attempting to flee, domestic violence, dating violence, sexual assault, stalking, or other dangerous or life-threatening conditions that relate to violence against the individual or a family member.[53]

State child welfare agencies receiving federal funding are likely to refer to these categories for purposes of evaluating child neglect cases because they all implicate a parent's ability to provide safe housing for his children.

B. Homelessness as Neglect

In the child welfare system,[54] families who are literally homeless, living in unsafe housing, or at risk of becoming homeless all share characteristics that shape their experiences with the child welfare system.[55] In some places, families may be dissuaded from seeking shelter because an admission that they lack safe housing can result in a call to child protective services for a neglect investigation.[56] In 2012, Shakieta Smith, a mother of two in the District of Columbia, reportedly was told by an intake worker from the District's shelter hotline that if she admitted "she and her kids had nowhere safe to sleep" on a night when emergency shelters were full, "she'd be reported to the city's

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52 Stewart B. McKinney Homeless Assistance Act, Pub. L. No. 100-77, 101 Stat. 482 (1987), *renamed as* McKinney-Vento Homeless Assistance Act *by* Pub. L. No. 106-400, 114 Stat. 1675 (2000).

53 U.S. DEP'T OF HOUS. & URBAN DEV., EXPANDING OPPORTUNITIES TO HOUSE INDIVIDUALS AND FAMILIES EXPERIENCING HOMELESSNESS THROUGH THE PUBLIC HOUSING (PH) AND HOUSING CHOICE VOUCHER (HCV) PROGRAMS: QUESTIONS AND ANSWERS (Q&AS) 1–2 (2013), https://portal.hud.gov/hudportal/documents/huddoc?id=PIH2013-15HomelessQAs.pdf [https://perma.cc/CNH3-V9JS]; *see* 24 C.F.R. § 91.5 (2018).

54 "The child welfare system is a group of services designed to promote the well-being of children by ensuring safety, achieving permanency, and strengthening families to care for their children successfully . . . . Most families first become involved with their local child welfare system because of a report of suspected child abuse or neglect." CHILD WELFARE INFO. GATEWAY, HOW THE CHILD WELFARE SYSTEM WORKS 1–2 (2013), https://www.childwelfare.gov/pubPDFs/cpswork.pdf [https://perma.cc/C4CC-B24N].

55 *See generally* Beresin, *supra* note 10.

56 Gowen, *supra* note 5.

Child and Family Services Agency for a possible investigation into abuse and neglect."[57] It is possible to imagine a similar outcome regardless of the reason for housing insecurity, even where the reason for seeking shelter is domestic violence,[58] so it is important that families are not dissuaded from seeking housing assistance.

Whether homelessness constitutes neglect is a subjective assessment and, in the child welfare system as a whole, "[n]eglect charges are typically related to poverty, with issues such as homelessness, single parenting, addiction, mental illness, and domestic violence[] frequently associated with removal."[59] Generally, the category of neglect includes "the failure of a parent or other person with responsibility for the child to provide . . . shelter."[60] For homeless and housing-insecure families, the threat of termination of parental rights can force parents to make the difficult choice between seeking help from family services and courts—consequently exposing themselves to possible removal of their children—and saying nothing and remaining homeless or in unsafe housing.[61] Depending on the state, homelessness can trigger an investigation into a family for evidence of neglect or a finding of neglect primarily based on homelessness.[62] Sometimes, a parent might voluntarily agree to have her child removed to foster care because of homelessness or unstable housing.[63]

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57 *Id.*

58 Ashley Lowe & Sarah R. Prout, *Economic Justice in Domestic Violence Litigation*, 90 MICH. B.J. 32, 33 (2011) ("Domestic violence is the leading cause of homelessness in America. Most domestic violence shelters allow a 30-day maximum stay, yet it takes many dislocated families up to six months to secure permanent housing.").

59 Ledesma, *supra* note 25, at 32 (quoting Dana Hamilton et al., *Report of the Race, Class, Ethnicity, and Gender Working Group*, 70 FORDHAM L. REV. 411, 412 (2001)).

60 CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUMAN SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT 2 (2016), https://www.childwelfare.gov/pubPDFs/define.pdf [https://perma.cc/5GZF-ETBL].

61 *See* Brown v. Feaver, 726 So. 2d 322, 323 (Fla. Dist. Ct. App. 1999). After Helen Brown's house was "condemned by the Dade County Building and Zoning Department as being unfit for human habitation," the Department of Children and Family Services "threatened to place Brown's nephews in foster care because she could not afford to house them adequately." *Id. See also* Beresin, *supra* note 10, at 14; Gowen, *supra* note 5.

62 *See, e.g.*, NEB. REV. STAT. § 28-710 (2014); Beresin, *supra* note 10, at 46–47.

63 *See, e.g.*, N.J. Div. of Youth & Family Servs. v. A.R. (*In re* Guardianship of C.S., Jr.), 965 A.2d 174, 188 (N.J. Super. Ct. App. Div. 2009) (describing the need "natural parents have to depend on foster care to 'protect their children during difficult periods, including but not limited to experiences of homelessness.'" (quoting *In re* Guardianship of J.C., 608 A.2d 1312, 1321 (N.J. 1992))); Cahn, *supra* note 30, at 1200 ("[W]ith a decrease in the number of families on public assistance, there may be more voluntary placements in foster care, as parents try to help their children by placing them elsewhere." (citing Mark Hardin, *Sizing Up the Welfare Act's Impact on Child Protection*, 30 CLEARINGHOUSE REV. 1061, 1068 (1997))).

C. *Treatment of Homelessness in State and Federal Definitions of Neglect*

Very few state statutes defining child neglect clarify whether homelessness on its own can support a finding of neglect. Neglect is a vaguely defined act or omission in state child welfare laws. Alabama law, for example, defines "neglect" as "[n]egligent treatment or maltreatment of a child, including the failure to provide adequate food, medical treatment, supervision, clothing, or shelter,"[64] leaving open the definition of key terms such as "adequate," but defines "abuse" more specifically as "[h]arm or threatened harm to a child's health or welfare," which "can occur through nonaccidental physical or mental injury, sexual abuse or attempted sexual abuse or sexual exploitation or attempted sexual exploitation."[65] A few states appear to enshrine in their child welfare statutes some version of a poverty defense to a finding of abuse or neglect. In Pennsylvania, the statutory definition of "serious physical neglect" includes "failure to provide a child with adequate essentials of life, including food, shelter or medical care"[66] but excludes from its "abuse" definition "injuries that result solely from environmental factors, such as inadequate housing, furnishings, income, clothing and medical care, that are beyond the control of the parent or person responsible for the child's welfare with whom the child resides."[67] In Texas, neglect includes "the failure to provide a child with food, clothing, or shelter necessary to sustain the life or health of the child, *excluding failure caused primarily by financial inability unless relief services had been offered and refused*."[68]

A manual published by the United States Department of Health and Human Services ("HHS") notes that "[i]t is unclear whether homelessness should be considered neglect" and that homelessness is "considered neglect when the inability to provide shelter is the result of mismanagement of financial resources or when spending rent resources on drugs or alcohol results in frequent evictions."[69] Although

64 ALA. CODE § 26-14-1(2) (1975).

65 *Id.* § 26-14-1(1).

66 23 PA. STAT. AND CONS. STAT. ANN. § 6303 (West 2016).

67 *Id.* § 6304.

68 TEX. FAM. CODE ANN. § 261.001(4)(B)(iii) (West 2017) (emphasis added); *see also* W. VA. CODE ANN. § 49-1-201 (LexisNexis 2015) (defining "[n]eglected child" as one "[w]hose physical or mental health is harmed or threatened by a present refusal, failure or inability of the child's parent, guardian or custodian to supply the child with necessary food, clothing, shelter, supervision, medical care or education, when that refusal, failure or inability is not due primarily to a lack of financial means on the part of the parent, guardian or custodian").

69 DEPANFILIS, *supra* note 23, at 12 (quoting Diane DePanfilis, *How Do I Determine If a*

some states and the federal government appear to guard against removals for lack of housing due to poverty, what these statutes and definitions do not make clear is whether a child would be subject to removal even without a finding of neglect on the basis that the child is still not in safe housing. Further, different judges may interpret standards such as "beyond the control of the parent" and "mismanagement of financial resources" differently, and the cultural divide between poor families and judges suggests these interpretations would typically not be in favor of indigent parents,[70] especially when those parents are unrepresented.[71]

D. Treatment of the Collateral Consequences of Homelessness as Neglect

There are other generally recognized types of neglect for which a homeless or housing-insecure family may be reported. Under the category of physical neglect, children of families experiencing homelessness or housing instability may be subject to a type of physical neglect known as "shuttling," in which "a child is repeatedly left in the custody of others for days or weeks at a time."[72] Shuttling is common among families facing the threat of homelessness. Families facing the possibility of becoming literally homeless often couch surf, "mov[ing] around, often on a nightly or weekly basis, from one friend's living room couch or floor to another's"[73] until they wear out their welcome. Parents may also "choose to split up from their children or partners to find each family member a safe place to stay,"[74] which could mean an extended amount of time in the care of someone other than the parent. This type of behavior may fall under the definition of neglect because the child is out of the care and custody of the parent, sometimes for a long period of time, but a parent in this situation lacks the intent

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Child Is Neglected?, *in* HANDBOOK FOR CHILD PROTECTION PRACTICE 121, 123 (H. Dubowitz & D. DePanfilis eds., 2000).

70 *See* Laura Sullivan & Amy Walters, *Incentives and Cultural Bias Fuel Foster System*, NPR (Oct. 25, 2011, 12:00 PM), http://www.npr.org/2011/10/25/141662357/incentives-and-cultural-bias-fuel-foster-system [https://perma.cc/Q84Z-CZ38].

71 *See, e.g.*, Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 245 (2013) ("[T]he best interests of the child legal standard in foster care is so indeterminate as to render it unhelpful. Its indeterminacy 'allows foster care professionals and even judges to substitute their own judgment about what is in a child's best interest and allows unintended biases to permeate decision-making.'" (footnotes omitted) (quoting Tanya Asim Cooper, *Race Is Evidence of Parenting in America: Another Civil Rights Story*, *in* CIVIL RIGHTS IN AMERICAN LAW, HISTORY, AND POLITICS 107 (Austin Sarat ed. 2014))).

72 DEPANFILIS, *supra* note 23, at 12.

73 Beresin, *supra* note 10, at 24.

74 *Id.*

to do anything but provide for the child in the best way he knows how. A parent whose children are subject to shuttling makes a difficult choice to be separated from her child specifically to *avoid* the possibility of neglect by failure to provide adequate housing. If this behavior is characterized as neglect or used as a basis for removal, child welfare law could be removing children from fit and loving homes—and, worse, eventually terminating parental rights if a parent's housing situation does not improve—because of a parent's poverty, desperation, and resourcefulness.

Homeless and housing-insecure parents may also be more susceptible to accusations of "educational neglect"[75] if their children miss school for a significant period while the family is moving around or if their children constantly change schools. In 2011, Tonya McDowell, a homeless mother in Connecticut, was arrested and charged with felony larceny after a school district's private investigators learned she had enrolled her son in one of its elementary schools even though she had occasionally been staying in a home outside of the district.[76] On other nights, she and her son were staying at a shelter located inside the district.[77] Had McDowell *not* enrolled her child in school, her child could have been subject to removal under Connecticut's neglect law for denying her child "proper care and attention . . . educationally."[78] These various definitions of neglect create lose-lose situations for homeless parents who risk a report of neglect when they employ basic survival strategies to take care of themselves and their children or when they seek assistance from agencies tasked with helping them.

II. Federal Law and the Shift from Preservation to Accelerated Adoption

The child welfare system in the United States is governed by the Social Security Act,[79] which has been amended over time to reflect different legislative priorities in service of child welfare. The two ma-

75 *See, e.g.*, Conn. Gen. Stat. § 46b-120(6)(B) (2017); Utah Code Ann. § 78A-6-319 (LexisNexis 2012).

76 John Nickerson, *Bridgeport Woman Arrested for Registering Son in Norwalk School*, Stamford Advoc. (Apr. 16, 2011, 2:41 PM), http://www.stamfordadvocate.com/policereports/article/Bridgeport-woman-arrested-for-registering-son-in-1340009.php [https://perma.cc/UL6Z-449T].

77 *Id.* In McDowell's case, awareness and enforcement of the McKinney-Vento Homeless Assistance Act likely would have prevented her arrest and allowed her to enter into a dispute resolution process with the school; however, the outcome of her case suggests that no one informed her of her rights under McKinney-Vento. *See supra* Section I.B.

78 *See* Conn. Gen. Stat. § 46b-120(9)(B).

79 Social Security Act of 1935, 42 U.S.C. §§ 301–1397mm (2012).

jor pieces of legislation governing this area of the law are the Adoption Assistance and Child Welfare Act of 1980 ("AACWA")[80] and the Adoption and Safe Families Act of 1997 ("ASFA").[81] An examination of these two laws demonstrates how, in recent decades, the provisions of federal law that provide services to children and families in need have been overshadowed by provisions that dismiss families in need as lost causes and instead focus on foster care and adoption. In addition to the provisions that push state child welfare agencies to pursue speedy termination of parental rights and accelerated adoption at the expense of family preservation, the funding structure created by the current law also favors adoption and results in states using removal from the home as a safety net for families in need.

A. Reasonable Efforts and the Adoption Assistance and Child Welfare Act of 1980

Beginning in 1980, federal law sought to promote the protection of parental rights and the preservation of families by conditioning federal child welfare funding to states on efforts to prevent the removal of children to foster care.[82] AACWA amended the Social Security Act to require that "reasonable efforts" be made to "prevent or eliminate the need for removal of the child from his home."[83] In the event that a child was removed from her family for a period of time to foster care, the Act then required reasonable efforts be made "to make it possible for the child to return to his home."[84] This "reasonable efforts" provision of AACWA used funding to incentivize states to prioritize family preservation.[85] Under AACWA, states would no longer be eligible for federal payments for foster care and adoption assistance unless a "judicial finding [was made] that reasonable efforts [had] been made to prevent the need for the child's removal from his home or, where ap-

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80 Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C. ch. 7).

81 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C. ch. 7).

82 Brittany Lercara, Note, *The Adoption and Safe Families Act: Proposing a "Best Efforts" Standard to Eliminate the Ultimate Obstacle for Family Reunification*, 54 FAM. CT. REV. 657, 668 n.57 (2016) ("Keeping the child with their natural parents took precedence over removal of the child. [AACWA] also emphasized returning the child to their natural home as soon as possible.").

83 § 471(a)(15), 94 Stat. at 503 (codified as amended at 42 U.S.C. § 671(a)(15)(A)–(B) (2012)).

84 *Id.* § 671(a)(15)(B)(ii).

85 *See* Roberts, *supra* note 31, at 112–13 ("The [AACWA] encouraged states to replace the costly and disruptive out-of-home placements that had dominated child welfare practice with preventive and reunification programs.").

plicable, to make it possible for the child to return to his home."[86] By placing the burden on state child welfare agencies to show the courts that they had made these efforts, AACWA seemingly provided a layer of protection of parental rights. However, aside from the judicial determination requirement, AACWA provided no definition of reasonable efforts and no guidance to states as to what types of services a parent might need or be entitled to before the state could remove a child for abuse or neglect or seek to terminate a parent's rights.

In response to AACWA, most states enacted statutes that mirrored federal law and required the same vague "reasonable efforts" to preserve families without enumerating specific services that would be required or providing guidance to judges applying the law.[87] Some state statutes provided examples of what specific reasonable efforts *could* be required by courts before removal or termination of parental rights (e.g., services such as substance abuse treatment, food assistance, and parenting classes).[88] Some states attempted to strengthen the reasonable efforts requirement by requiring specific findings to be articulated in any judicial order declaring that reasonable efforts had been made and were ineffective[89] or by enumerating circumstances under which in-home intervention should be provided in lieu of removal.[90] Commentators widely recognize that the variation among states in the interpretation and operation of the reasonable efforts requirement illustrates Congress's failure to provide clear guidelines as to what efforts were required before removal or termination of parental rights.[91] Unclear federal guidance in the area of parental rights and child welfare is a problem that can lead to a parent's rights being arbitrarily denied based on where she lives, or on the subjective assess-

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86 H.R. REP. NO. 96-900, at 49 (1980) (Conf. Rep.), *as reprinted in* 1980 U.S.C.C.A.N. 1561, 1569–70.

87 *See, e.g.*, ALA. CODE § 12-15-301(10) (2016); ALASKA STAT. § 47.10.086 (2016); GA. CODE ANN. § 15-11-2(61) (2015) ("'Reasonable efforts' means due diligence and the provision of appropriate services.").

88 *See* 325 ILL. COMP. STAT. 5/8.2 (2016); YOUTH LAW CTR., MAKING REASONABLE EFFORTS: A PERMANENT HOME FOR EVERY CHILD 1 (2000), http://nc.casaforchildren.org/files/public/community/volunteers/Reasonable_Efforts_2.pdf [https://perma.cc/HSM4-8NY9].

89 *See* MO. REV. STAT. § 211.183 (2016); Gremli v. C.J.W. (*In re* Interest of A.L.W.), 773 S.W.2d 129, 134 (Mo. Ct. App. 1989) (holding that, regardless of underlying facts presented at a hearing, a judicial order that did not contain the required description of reasonable efforts made and an explanation of why the family could not be reunified was insufficient as a judgment in a removal case).

90 *See* ARIZ. REV. STAT. ANN. § 8-891 (2014).

91 *See, e.g.*, Harold M. Freiman, Note, *'Some Get a Little and Some Get None': When Is Process Due Through Child Welfare and Foster Care Fair Hearings Under P.L. 96-272?*, 20 COLUM. HUM. RTS. L. REV. 343, 354–55 (1989).

ments of child welfare workers and courts. Despite the best intentions, AACWA did not define its requirements with enough certainty to hold states accountable, and the judicial determination that reasonable efforts had been made was often nothing more than a "rubber stamp."[92]

B. Expedited Adoption and the Adoption and Safe Families Act of 1997

In 1997, Congress passed ASFA in an attempt to clarify the reasonable efforts provision, remedy the uneven application and enforcement of the provision across states,[93] and speed up the process of adoption out of foster care. Although ASFA would ultimately have far-reaching consequences for poor parents reported for neglect, including homeless parents, the cultural and legislative milieu of the mid- to late 1990s indicates that poor but otherwise fit parents in need of compassion and assistance were not Congress's focus when it passed ASFA. At the same time that state practices evinced confusion over the reasonable efforts requirement, sensationalized images of abusive parents and "irresponsible mothers whose values [had] been eroded by the welfare system"[94] were pervasive in the media and persistent in the minds of legislators.[95] The legislative debate devolved into a panic over child safety as a result of several nationally publi-

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92 Jennifer Ayres Hand, Note, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1281 (1996).

93 Pub. L. No. 105-89, § 101(a), 111 Stat. 2116 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(i) (2012)); *see* Roberts, *supra* note 31, at 122–23 ("Far from leading invariably to risky reunifications, the Act's vague reasonable efforts language permits judges to terminate parental rights without any real inquiry into the agency's activities.").

94 Lucy A. Williams, *Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159, 1163 (1995).

95 *See, e.g.*, S. REP. NO. 90-744, at 163 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2834, 3000 (supporting authorization of reimbursements under the federal Aid to Families with Dependent Children ("AFDC") program to states that removed children from their homes because "some children now receiving AFDC would be better off in foster homes or institutions than they are in their own homes. This situation arises because of the poor home environment for child upbringing in homes with low standards, including multiple instances of births out of wedlock."); 143 CONG. REC. S12669 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine) (testifying during debate on ASFA that reasonable efforts were being used primarily to try to preserve "families which are families in name only" and headed by "dangerous, abusive adults"); *see also* H.R. REP. NO. 104-651, at 4 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2183, 2185 ("[A] lack of married parents—a condition promoted by the current welfare system—contributes more to the crime rate than do race or poverty."); Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 402 (2002); Williams, *supra* note 94, at 1165.

cized cases of children who experienced severe abuse and even death at the hands of their parents after being reunited with their families, even though institutional incompetence rather than reasonable efforts at family preservation led to these tragedies.[96] The enactment of ASFA purported to address these real and perceived issues by clarifying the reasonable efforts requirement.

However, ASFA did not so much clarify the reasonable efforts requirement as rebuke it. Instead of creating meaningful requirements for family preservation, ASFA merely set forth the extreme circumstances under which reasonable efforts were *not* required for states to receive foster care and adoption reimbursements from the federal government. For example, reasonable efforts would no longer be required in cases where "the parent has subjected the child to aggravated circumstances . . . which definition may include . . . abandonment, torture, chronic abuse, and sexual abuse."[97] ASFA maintained AACWA's vague reasonable efforts requirement for situations in which the newly enumerated exceptional circumstances were not present, but as a whole the law reflected a shift away from family preservation and reunification and toward a focus on what it viewed as a conflicting priority: "the child's health and safety."[98] The enacted law reflected an assumption that reasonable efforts protected bad parents to the detriment of children's safety and that the reasonable efforts requirement was the primary barrier to adoption.[99] In New York City, the policy of the child welfare agency in response to ASFA's directives was "crudely referred to as 'when in doubt, yank them out.'"[100]

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96 *See* Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 148 (2001) (recounting the story of three-year-old Joseph Wallace of Illinois, who was killed by his mother after being removed and then returned to her, not because of a finding that Joseph should be reunified with his mother but because the state child welfare agency lost Joseph's records "when the family moved to another county. Only then was the child sent home to his death."); *see also* Williams, *supra* note 94, at 1173–74.

97 Adoption and Safe Families Act of 1997, sec. 101, § 471(a)(15)(D)(i), 111 Stat. at 2116 (codified as amended at 42 U.S.C. § 671(a)(15)(D)(i) (2012)).

98 *Id.* sec. 101, § 471(a)(15)(A), 111 Stat. at 2116 (codified as amended at 42 U.S.C. § 671(a)(15)(A) (2012)); Roberts, *supra* note 31, at 113.

99 *See Barriers to Adoption: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 104th Cong. 2 (1996).

100 Symposium, *supra* note 10, at 61–62.

1. *Expedited Permanency, Accelerated Adoption, and Unnecessary Tradeoffs Under ASFA*

With ASFA, Congress also sought to eliminate a situation known as "foster care drift," in which a child spends months and sometimes years in foster care before being adopted.[101] Congress again pointed the finger at the reasonable efforts requirement as the culprit. However, there is far more evidence that foster care drift persists because the number of available adoptive homes has never even come close to the number of children waiting to be adopted,[102] rather than because the reasonable efforts requirement made states hesitant to remove children from unsafe homes.[103] ASFA's method for decreasing the length of foster care stays by promoting swift and accelerated adoptions was threefold.[104] First, ASFA reduced the timeframe for so-called "permanency planning"—planning for a permanent placement, such as placement in an adoptive home, for children in foster care—from eighteen months to twelve months.[105] In addition to this new timeframe, ASFA, unlike AACWA, allows states to engage in "concurrent planning,"[106] meaning it allows states to pursue a permanency plan that includes adoption while also pursuing reasonable efforts toward reunification.[107] If, at any time, a judicial determination is made that reasonable efforts to preserve the family are inconsistent with the permanency plan the state agency created for the child, reasonable efforts can be abandoned in favor of adoption or other permanent placements.[108] Second, ASFA provided "adoption and legal guardianship incentive payments" for states that increased the rate of adoptions over previous years.[109] Finally, ASFA required the state child welfare agency to file a petition to terminate parental rights when a child has been in foster care for fifteen of the last twenty-two

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101 *Barriers to Adoption*, *supra* note 99, at 14 (statement of Sen. DeWine).

102 *See, e.g.*, Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 296 (2002).

103 *See* Crossley, *supra* note 43, at 273.

104 *See* Ruth McRoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL'Y & L. 475, 485 (2005).

105 *Id.*

106 Lercara, *supra* note 82, at 661–62.

107 Adoption and Safe Families Act of 1997, sec. 101, § 471(a)(15)(F), 111 Stat. at 2117 (codified as amended at 42 U.S.C. § 671(a)(15)(F) (2012)).

108 42 U.S.C. § 671(a)(15)(C).

109 42 U.S.C. § 673b(d) (Supp. II 2015); *see* McRoy, *supra* note 104, at 485.

months,[110] a requirement referred to as the "15/22"[111] or "length-of-time-out-of-custody"[112] rule.

By accelerating adoptions and forcing family preservation to compete with adoption plans, ASFA undercut family preservation. The combination of the concurrent-planning provision and the provision eschewing reasonable efforts in favor of the permanency plan "fail[ed] the family unit before it [was] given a chance to succeed."[113] In passing ASFA, Congress made a choice it did not need to make to promote children's safety. It attempted to accelerate the adoption process for children for whom adoption was the only possible outcome and gave short shrift to the reasonable efforts required to preserve families who could benefit from intervention.[114] This continues to have deleterious consequences for the poor, vulnerable families for whom preservation efforts could make the most difference.

2. *Imbalance and Competing Priorities in ASFA's Funding Incentives*

In addition to the concurrent-planning, length-of-time-out-of-custody, and other accelerated adoption and termination provisions of ASFA, the Act's funding incentives also reflect the unnecessary competition between family preservation and adoption. The assumption that only "bad" parents are involved in the child welfare system and that family preservation is dangerous for children reflects unfounded legislative biases and is in tension with the long-recognized constitutional right to family integrity,[115] which "allows parents to raise their children free of state intervention, unless a compelling reason—associated with the safety or welfare of the child—justifies intervention."[116] In this way, ASFA reflected a false "dichotomy between

110 42 U.S.C. § 675(5)(E); *see* McRoy, *supra* note 104, at 485.

111 *See, e.g.*, Katherine A. Hort, *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, 1881 (2001); Maryann Zavez, *The Adoption and Safe Families Act: Implementation and Case Law with a Focus on 15/22 Month Terminations*, 28 VT. B.J. 37, 37 (2002).

112 *See* Hand, *supra* note 92, at 1251–52.

113 Lercara, *supra* note 82, at 661.

114 *See* Roberts, *supra* note 31, at 114–15.

115 *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 72–73 (2000) (affirming the strength of a parent's right to family integrity and stating that the "Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child rearing decisions simply because a state judge believes a 'better' decision could be made"). *But see* Prince v. Massachusetts, 321 U.S. 158, 166, 169 (1944) (holding that Massachusetts could interfere with a custodial guardian's right to religious indoctrination of her child in order to enforce child labor law where a nine-year-old girl was forced into "street preaching" by her parent).

116 *See* YOUTH LAW CTR., *supra* note 88, at 2.

'child-centered' law, which focuses solely on children's best interests, without deference to the parents, and 'children as property' law, which focuses only on to whom the children belong."[117] ASFA also tailored federal funding incentives to states to fit its assumption that the law could not both preserve families and protect children. As is the case with much federal legislation, states are offered monetary incentives to implement AACWA's and ASFA's provisions.[118] State receipt of funds through Titles IV-B and IV-E of the Social Security Act is contingent upon the implementation of federal child welfare and adoption laws. Title IV-B funds go to preservation—funding the programs that would constitute the required reasonable efforts to preserve and reunite families—and Title IV-E funds go to foster care and adoption.[119]

Since the era of welfare reform, funding for prevention, preservation, and case management services has been provided to states through capped reimbursements under Title IV-B.[120] States may use this funding not only for family preservation and reunification services but also for "investigating, or otherwise responding to, allegations of child abuse and neglect."[121] Reimbursement to states for foster care and adoption costs under Title IV-E, however, is uncapped.[122] Currently, "states are not permitted to use Title IV-E funds to provide other services to children or their families (e.g., family or individual counseling, parent training)."[123] Moreover, state use of preservation funds is not restricted to programs that contribute to family preservation, further diluting their potential to preserve families; states may also use preservation funds for foster care maintenance, investigation, and other state child welfare agency activities. The Congressional Research Service reported that in 2013, states planned to use only about fifty-four percent of the estimated $589 million of capped preservation funds for purposes such as family reunification, family preservation,

117 Cahn, *supra* note 30, at 1209.

118 *See supra* Section II.A.

119 *See* EMILIE STOLTZFUS, CONG. RESEARCH SERV., R43458, CHILD WELFARE: AN OVERVIEW OF FEDERAL PROGRAMS AND THEIR CURRENT FUNDING 4, 12 (2016).

120 *See* 42 U.S.C. § 625 (2012); Rob Geen & Shelley Waters, *The Impact of Welfare Reform on Child Welfare Financing*, NEW FEDERALISM: ISSUES & OPTIONS FOR STS., no. A-16, Nov. 1997, at 1.

121 *See* STOLTZFUS, *supra* note 119, at 1.

122 *See* 42 U.S.C. § 674 (Supp. II 2015); Geen & Walters, *supra* note 120.

123 *See* EMILIE STOLTZFUS, CONG. RESEARCH SERV., R41860, CHILD WELFARE: FUNDING FOR CHILD AND FAMILY SERVICES AUTHORIZED UNDER TITLE IV-B OF THE SOCIAL SECURITY ACT 7 n.4 (2014).

and preventive and family support.[124] It estimated that thirteen percent of preservation funds would go to efforts to report and investigate parents and remove children, including "adoption promotion and support," and nineteen percent would go to "child protective services."[125]

Funding to states under ASFA illustrates that family preservation cannot reasonably compete with foster care or adoption: "The federal government allocates less than five percent of its child protective services budget to family preservation, while the remainder is spent on foster care."[126] Entitlement funding to state child welfare agencies for foster care and adoption is alarmingly higher than capped funding for family preservation, and this has forced states to turn to foster care as a safety net for children in need.[127] Of the total amount of appropriated preservation, foster care, and adoption funding disbursed to states in 2016, about eight percent—less than seven hundred million dollars—went to preservation.[128] Conversely, the total amount of funding to states for foster care maintenance payments and adoption payments under the entitlement Title IV-E program was nearly eight billion dollars in the same year.[129] Most of this money is disbursed directly to state child welfare agencies that are responsible for implementing federal child welfare policies. "Those policies are designed to ensure the safety and well-being of all children and families served. However, the most specific and extensive federal requirements concern the *protection of children in foster care, especially to ensure them a safe and permanent home*."[130] By creating this funding structure, ASFA accelerated the adoption process for children in foster care and placed family preservation and reunification in direct competition with "permanency." Foster care placement and adoption have won out over family integrity and the rights of poor parents.

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124 *Id.* at 1.

125 *Id.*

126 Cahn, *supra* note 30, at 1213–14.

127 *See* STOLTZFUS, *supra* note 119, at 1.

128 *Id.*

129 *See id.* The total amount of child welfare funding allocated under Titles IV-B and IV-E for 2016 was $8,689,000,000. Of that amount, $668,000,000 was allocated to all Title IV-B programs and $7,833,000,000 was allocated to all Title IV-E programs. These funding levels include the impact of sequestration. *Id.*

130 *Id.* at 2 (emphasis added).

III. How Federal Law Undermines Preservation of Homeless Families

Since ASFA was enacted in 1997, Congress has funded foster care with an eye toward accelerated adoption as way to promote "permanency"[131] while maintaining its stated goal of preserving families and promoting the well-being of children. Because of the way certain provisions and funding incentives in the law interact, however, preservation is forced to compete with adoption at the expense of homeless families. When examined in the context of homelessness and housing insecurity, the perversity of this lopsided funding and the failure of the federal government to fund reasonable efforts to preserve families is especially apparent.

A. Federal Funding for Child Welfare Programs Promotes Removal and Adoption at the Expense of Family Preservation

Several provisions of federal child welfare law and its associated funding incentives, described above, discourage preservation of families experiencing homelessness and housing insecurity. First, funding to states for preservation programs and social services—the very reasonable efforts required by the law—is capped, whereas funding to states for foster care and adoption is uncapped.[132] This is true even if the same services are provided to a child in a foster care as would be provided to preserve the family of origin. As the number of children in poverty grows, it is understandable that states might take advantage of uncapped foster care and adoption payments to form a de facto safety net for children who truly need services. Interventions that might offer a family the resources it needs to stay together will cost the state far more money than will payments to a foster or adoptive family, which will be reimbursed by the federal government indefinitely and at a consistent rate. States also receive incentive payments for increasing the number of adoptions over the previous year but are not similarly rewarded for making reasonable efforts to preserve families.[133] States simply have no fiscal incentive to choose preservation

131 "Permanency planning" refers to planning that will result in the removal of a child from a temporary situation such as foster care to a permanent situation. The possible permanency plans are "reunification, adoption, legal guardianship, placement with a fit and willing relative, or placement in another planned permanent living arrangement." 45 C.F.R. § 1356.21(b)(2)(i) (2007).

132 *See supra* Section II.B.

133 Children's Bureau, *Adoption*, U.S. Dep't of Health & Human Servs., https://www.acf.hhs.gov/cb/focus-areas/adoption [https://perma.cc/5VCE-9S4G] (last updated Dec. 12, 2017).

over adoption. Even so, the safety net created by uncapped foster care and adoption payments still does not result in permanency for tens of thousands of children because the real problem is lack of foster and adoptive homes.[134] The funding incentives may be achieving one aspect of the stated goal of the law—the physical safety of the child, at least in the short term—but they are failing to achieve the other aspects of the goal: family preservation and permanency.

Concurrently with nationwide increases in child poverty, the influence of ASFA over states' child welfare laws has grown. States seeking to fund interventions for a growing number of needy children and families have essentially no choice but to accept the mandates of the Act because they need federal funds for public programs. States can keep families together with little support from the federal government for necessities such as housing, or they can remove children to foster care or potential adoptive homes and receive essentially unlimited federal funding to support children in the foster care system. A system of laws with a true focus on the welfare of children would not force this choice;[135] it would support children's best interests by simply funding family preservation instead of creating a system that purports to value family integrity and children's safety and well-being but operates to promote the opposite through its funding structure.

When a report of neglect or the removal of a child occurs due to a lack of housing, it becomes glaringly clear that if the stated choice of federal law is to avoid removals and avoid permanent termination of parental rights wherever possible, the law's most powerful provisions and funding incentives tell a different story. A state must dig deep into its own coffers if it wishes to promote preservation by providing short- or long-term housing for a homeless family. Once a child is removed for neglect, a foster parent can then receive a state foster care maintenance payment that covers housing or "room and board," and the state will be reimbursed an annually adjusted portion of those costs without limit.[136] Foster care maintenance payments also include pay-

134 Guggenheim, *supra* note 18, at 132 ("Five years of aggressively terminating parents [sic] rights has produced a clear pattern: The number of children freed for adoption goes up every year; the number of children adopted fails to keep pace with the number of adoption-eligible children; and the total number of orphaned children not adopted continues to increase fastest of all.").

135 Roberts, *supra* note 31, at 138 ("Children's rights talk is easily co-opted by powerful people to achieve their social objectives and maintain their social position. . . . [I]t is not at all clear that speedy termination of parental rights to free children for adoption furthers the interests of most children in foster care.").

136 *See* EMILIE STOLTZFUS, CONG. RESEARCH SERV., R42792, CHILD WELFARE: A DETAILED OVERVIEW OF PROGRAM ELIGIBILITY AND FUNDING FOR FOSTER CARE, ADOPTION AS-

ments for clothing, books, school supplies, diapers, and even holiday and birthday gifts above the regular per diem provided by a state according to the child's basic needs.[137] This funding structure tells cash-strapped states that placing children in the custody of foster parents is, at the very least, less financially risky than making efforts at family preservation. It also has the potential to bias the judicial system against biological parents and families of origin in later proceedings, including termination proceedings, where the focus on a child's "best interests" often turns into a comparison of the child's parent and the foster home rather than a determination of whether a parent is actually unfit.[138] Because homelessness is often a protracted situation that requires intense intervention and is unlikely to be addressed without at least some help from the state,[139] a review of a child's case may show that a parent is still homeless, while a child out of the custody of that parent has been thriving, or at least has been provided with what the court views as life's essentials. When it comes time to determine which placement is in the child's best interest, the biological parent has a hard time competing with a foster or potential adoptive parent.

Of course, foster care maintenance payments themselves are not the flaw in the system. In cases where removal of a child from his family of origin is necessary, foster parents should be provided with appropriate funds to ensure that the child is well cared for. There is already a shortage of willing foster parents, and the burden on families asked to open their homes to traumatized children with complex needs can be great even with maintenance payments. There is a shortage of foster and adoptive families *despite* the availability of maintenance payments, and the efforts federal law has made to increase the number of adoptive homes have not adequately addressed this issue. Thus, a system that meaningfully prioritizes family preservation where it is possible is still necessary to effectuate ASFA's goals of promoting child welfare and permanency and to avoid long periods of

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sistance and Kinship Guardianship Assistance Under Title IV-E of the Social Security Act 5 n.7 (2012).

137 Kerry DeVooght & Dennis Blazey, Family Foster Care Reimbursement Rates in the U.S.: A Report from a 2012 National Survey on Family Foster Care Provider Classifications and Rates 7 (2013).

138 *See* Roberts, *supra* note 31, at 138–39 ("[T]he Act chooses foster and preadoptive parents over biological parents to represent the interests of children in foster care." This "might conjure up the question, would this child be better off in the comfortable home of this well-to-do couple or struggling on public assistance with that neglectful mother?").

139 *See generally* Nat'l All., Closing the Front Door, *supra* note 14; Nat'l All., Toolkit, *supra* note 14.

state custody that leave a child without the stability of a regular place to call home.

B. Potential Effects of the Length-of-Time-out-of-Custody and Concurrent-Planning Provisions on Homeless and Housing-Insecure Families

Federal law's length-of-time-out-of-custody provision—which requires states receiving federal funding to initiate termination proceedings after a child has been out of the custody of his parent for fifteen of the last twenty-two months[140]—combines with perverse funding incentives and the concurrent-planning provision[141] to ensure that removal will win out over preservation for homeless families because homelessness and housing insecurity are long-term problems that are unlikely to be remedied without the provision of services. When homelessness is a barrier to returning a child to her family of origin, it is hard for parents to beat the clock of the length-of-time-out-of-custody provision, especially when so little assistance is provided to them. Once termination proceedings begin, or even during a periodic evaluation of a child's situation, any reasonable efforts are abandoned if they conflict with the permanency plan created for a child under the concurrent-planning provision,[142] and a family can be dissolved.

ASFA's requirement that states initiate termination proceedings after a child spends fifteen of the last twenty-two months in foster care or state custody[143] is damaging to families experiencing housing insecurity. The length-of-time-out-of-custody ground for termination[144] is the most arbitrary yet most commonly used ground for state termination of parental rights,[145] and it stacks the deck against family preservation. Because the reasonable efforts state agencies must make to prevent the need for removal or termination of parental rights are so vaguely defined, the length-of-time-out-of-custody grounds for termination can be used as a sword against families of origin that could have been preserved with adequate planning and intervention. This

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140 *See supra* Section II.B.1.

141 *See supra* Section II.B.1.

142 42 U.S.C. § 671(a)(15)(C) (2012).

143 *Id.* § 675(5)(E) (Supp. II 2015).

144 *See* Hand, *supra* note 92, at 1251–52 (referring to the ground for termination of "finding that a child has been out of the custody of the parent, usually in foster care, for a statutory period of time during which the parent has failed to remedy the circumstances that led to the child's removal from the home" as the "length-of-time-out-of-custody" ground). This provision is also referred to as the "15/22" provision. *See, e.g.*, Hort, *supra* note 111, at 1881.

145 *See* Hand, *supra* note 92, at 1251.

allows termination based on the best interests of the child even where the parent is not abusive or neglectful and where the parent may be making meaningful strides toward the child welfare agency's goals for the family. Especially when the time out of custody is primarily the result of homelessness or housing insecurity, this is an unjust and immoral result.

The length-of-time-out-of-custody ground for termination of parental rights is flawed and unnecessary. It is a blunt tool in a context where precision is an absolute necessity to protect children and families. Setting aside criticisms of other grounds for termination of parental rights, including neglect caused primarily by poverty, the length-of-time-out-of-custody provision is redundant and therefore ineffective at achieving Congress's goal of protecting the safety and well-being of children. If a court finds, by clear and convincing evidence, that a child has been abused or neglected such that termination of parental rights is appropriate, parental rights will be terminated without regard to the length of time out of custody, as long as whatever independent grounds for termination required by the state have been proven.[146] Especially given the liberty interest parents have in their parental rights, the persistence of the length-of-time-out-of-custody provision is unnecessary at best and unconstitutional at worst because it runs the risk of erroneously depriving parents of their rights.

IV. A Legislative Solution

One of the primary issues with federal law's emphasis on adoption is that it ignores that the demand for foster and adoptive homes due to removals consistently exceeds the supply of adoptive homes. If preservation could be accomplished for some families by curbing removals based on lack of housing, then the need for adoptive homes would decrease. At the end of September 2014, 107,918 children were characterized by HHS as "waiting to be adopted," including children in foster care "who have a goal of adoption and/or whose parental rights have been terminated."[147] If the true goal of federal legislation on child welfare, foster care, and adoption is to keep children safe and to promote children's best interests, the incentives of the current legal framework undercut that goal. Although the current legal framework

146 *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding that the minimum constitutionally required standard of proof in termination of parental rights proceedings is "clear and convincing evidence," which "strikes a fair balance between the rights of the natural parents and the State's legitimate concerns").

147 Children's Bureau, *supra* note 20, at 3.

governing child welfare was created as a response to perceptions of rampant child *abuse* and not neglect, the law does not distinguish between abuse and neglect for purposes of removal and further fails to separate neglect from poverty.[148] Thus, poor parents who cannot afford safe or adequate housing—though they may lack the intent to abuse, neglect, or abandon their children—are subject to the same family disruptions as parents who intentionally harm their children. The most effective way to promote preservation is to remove the federal law provisions that unnecessarily bias the system toward the outcomes of removal, foster care, and adoption instead of providing services that would keep families together.

A. Congress Should Require That Reasonable Efforts Include Housing Assistance and Should Provide Automatic Funding Waivers to Allow States to Make These Reasonable Efforts

Removal of a child from a parent due to homelessness highlights a fundamental flaw in child welfare funding: the very funding provided to foster care providers for housing could, if provided directly to the parent, prevent the removal in the first place. To effectuate the purpose of child welfare law and protect parents from being separated from their children due to homelessness, Congress should pass legislation that prohibits removal where the primary basis for a finding of neglect is a lack of housing or where stable housing would allow a child to be returned to her family. This legislation should provide specifically that reasonable efforts must include housing assistance. Accordingly, the federally required judicial finding that reasonable efforts were made to preserve that family should not be entered unless housing assistance is offered and refused. This would prevent removal and termination of parental rights on the basis of homelessness.

B. Congress Should Eliminate the Length-of-Time-out-of-Custody Provision of the Adoption and Safe Families Act and Amend the Concurrent-Planning Provision

Even with stronger reasonable efforts legislation, the acceleration of adoption through the length-of-time-out-of-custody and concurrent-planning provisions could still impact families that entered the child welfare system before the passage of new reasonable efforts legislation. ASFA and state laws already allow for a case-by-case analysis of whether parental rights should be terminated pursuant to the many

148 *See supra* Section I.C.

grounds provided by each state's child welfare laws, which makes the length-of-time-out-of-custody provision redundant. The length-of-time-out-of-custody requirement for initiation of termination proceedings also shifts the focus of child welfare planning away from family preservation at an arbitrary time without regard to the issues that led to removal or state intervention in the first place. It is true that not every termination proceeding leads to actual termination—that depends on how states use the provision—but the initiation of termination proceedings combines with concurrent planning to bias the system against parents in case reviews and termination proceedings.[149] The length-of-time-out-of-custody provision should be eliminated, and states should be prevented from placing their own time caps on reasonable efforts. The concurrent-planning provision may benefit some children who ultimately need to be adopted, so it should not be eliminated just to protect homeless families, but it should be amended to prevent the permanency plan from winning out over reasonable efforts in cases where they conflict. These amendments will adequately protect homeless and housing-insecure families by ensuring that only more substantive grounds for termination, rather than an arbitrary time cap, can be used to terminate parental rights.

C. Sample Text of a Proposed Solution

Congress should pass legislation to promote the preservation of families subject to removal for neglect or termination of parental rights for causes arising from homelessness, housing insecurity, and lack of safe housing. The following legislative solution proposes amendments to the sections of the Social Security Act that lay out requirements for state plans for foster care and adoption assistance to be eligible for payments under Title IV of the Act and the requirements for initiation of termination proceedings. AACWA and ASFA previously amended these provisions, which contain the current reasonable efforts requirement stipulating that any state receiving Title IV funds may not receive foster care and adoption incentive payments unless a judicial determination has been made that the state child welfare agency made reasonable efforts to prevent removal or to return a child to his parent.[150] They also contain the length-of-time-out-of-custody and concurrent-planning provisions.[151]

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149 *See supra* Section III.B.

150 *See* 42 U.S.C. § 671(a)(15)(B) (2012).

151 *Id.* §§ 671(a)(15)(F) (2012), 675(5)(E) (Supp. II 2015).

1. *Clarification of the Reasonable Efforts Requirement with Respect to Lack of Housing as a Primary Barrier to Reunification*

Section 471(a)(15) of the Social Security Act[152] sets out the requirement that states must make reasonable efforts to preserve families before they can remove children from their homes or receive federal foster care and adoption payments. This section should be amended to require that "reasonable efforts" include housing assistance by adding the following text:

> "Reasonable efforts" under this title shall include the provision of housing assistance, housing vouchers, placement in a shelter, or other housing services—including, but not limited to, assistance locating housing—necessary to obviate the need for removal or to return a child to the home of the child's parent.
>
> If the child is not returned home, the court shall establish the following in writing:
>
> (a) Whether housing assistance is needed to prevent the removal of the child from the child's parents or facilitate the return of the child to the child's parent. If so, the court shall order that housing assistance be provided by the department or supervising agency.
>
> (b) Whether a parent's homelessness, housing insecurity, or lack of safe and suitable housing is a significant factor delaying permanency for the child by preventing the return of the child to the home of the child's parent. If so, the court shall order that housing assistance be provided by the department or supervising agency.[153]

2. *Automatic Title IV-E Waivers for Housing Assistance Under the Amended Reasonable Efforts Provision*

Congress should amend the provision that gives authority to the Secretary of Health and Human Services to authorize funding waivers under Title IV-E, 42 U.S.C. § 1320a-9,[154] to include the following:

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152 42 U.S.C. § 671(a)(15)(B) (2012).

153 The language of the provisions requiring a judicial determination of whether homelessness or lack of stable housing is a primary reason for the need for removal or a primary barrier to reunification is borrowed from a Washington statute. *See* WASH. REV. CODE ANN. § 13.34.138 (West 2013).

154 42 U.S.C. § 1320a-9(b) (2012).

> The Secretary shall authorize any State adopting [the new housing assistance requirements under 42 U.S.C. § 671] to use approved uncapped reimbursement funds under part E of subchapter IV for reasonable efforts to preserve families under part B of subchapter IV.

3. Elimination of the Length-of-Time-out-of-Custody Provision and Amendment to the Concurrent-Planning Provision

States should not be required to initiate proceedings to terminate parental rights after a certain period of time out of custody because it results in arbitrary removals. Congress should eliminate the language of 42 U.S.C. § 675(5)(E) that reads "in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or," and replace it with the following:

> In no case shall a State receiving funds under this title establish a maximum amount of time a child can spend in foster care before termination proceedings can be initiated, and states shall only initiate termination proceedings when statutory grounds for termination are met.

Congress should preserve the concurrent-planning provision at 42 U.S.C. § 671(a)(15)(F) but eliminate the requirement in 42 U.S.C. § 671(a)(15)(C) that preservation should be abandoned when it conflicts with the permanency plan.

D. Other Proposed Solutions

Since ASFA became law in 1997, countless solutions to various issues created by the law have been proposed. This Section addresses proposed or implemented solutions to the law's general issues that are ostensibly broad enough to address the problems the law creates for homeless and housing-insecure families. It assesses their strengths and weaknesses relative to the proposed legislative solution in this Note.

1. The Family First Act

The Family First Prevention Services Act of 2016[155] was a bipartisan bill that passed the U.S. House of Representatives in 2016 but later died in the Senate Finance Committee.[156] It "would have dramat-

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155 Family First Prevention Services Act of 2016, H.R. 5456, 114th Cong. (2016).

156 John Kelly, *Family First Act, Proposed Overhaul of IV-E, Dies as Senate Adjourns*, CHRON. SOC. CHANGE (Sept. 29, 2016), https://chronicleofsocialchange.org/child-welfare-2/family-first-act-dead/21669 [https://perma.cc/5T76-PE8E].

ically altered the federal IV-E entitlement"[157] by allowing foster care and adoption funds to be used for specific services that prevent removal and reunify families. The legislation would have been an important step forward in service of preserving families, but it focused largely on substance abuse services for parents, in the wake of increased nationwide demand for foster care due to the opioid addiction crisis many states are experiencing.[158] It would have allowed states to use entitlement funds for "mental health and substance abuse prevention and treatment services, in-home parent skill-based programs, and kinship navigator services."[159] The legislation was reintroduced in the House of Representatives in January 2017 with seven co-sponsors.[160] The proposed legislation in this Note is in the spirit of the Family First Act but fills a gap that the latter would have failed to fill. Given the large number of children who could be removed from foster care and returned to their families upon the provision of housing assistance, a solution that seeks to reduce demand on the foster care system cannot ignore homeless and housing-insecure families.

2. Amending the Length-of-Time-out-of-Custody Provision

Jennifer Hand has described the negative effects of the current law generally and proposed amending the current length-of-time-out-of-custody provision to add protective measures. She would not eliminate the provision altogether because, by "allowing for the termination of the rights of a parent whose behavior does not rise to the level of abuse yet clearly harms the child," it serves a vital function in the law.[161] The protective measures would include

> (1) a list of specific factors that the court should consider in evaluating the best interests of the child;
> (2) an incorporation of different statutory time periods for children of different ages; and
> (3) a detailed definition of "reasonable efforts."[162]

This solution would not adequately address the problems in the current law for two reasons. First, the justification for the length-of-time-out-of-custody provision—that it allows for termination in situa-

157 *Id.*

158 H.R. 5456 § 123.

159 *Id.* § 101.

160 Family First Prevention Services Act of 2017, H.R. 253, 115th Cong. (2017); *see Cosponsors: H.R.253—115th Congress (2017-2018)*, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/house-bill/253/cosponsors [https://perma.cc/HS28-XN3N] .

161 *See* Hand, *supra* note 92, at 1281.

162 *Id.* at 1282.

tions where no other provision of the law would—is not a strength of the provision but the *reason* it should be eliminated. In order to protect the interest in parental rights, only a specific finding of a parent's intractable unfitness or persistent danger to the child should result in termination of parental rights. Second, the proposed amendments to the provision would still rely on the "best interests" standard in termination proceedings, so even a fit parent could lose her parental rights based on the arbitrary time cap if a child appears to be in a better situation with a foster or potential adoptive parent, a likely outcome considering the current funding scheme and the fact that the parent is likely to lack counsel.

3. Civil Gideon

Some advocates argue that the most effective way to ensure protections of the liberty interest in parenthood is to adopt a civil right to counsel,[163] or "civil *Gideon*."[164] Most advocates of civil *Gideon* would limit the practice to specific classes of cases or at least prioritize certain types of cases at the outset of civil *Gideon*'s implementation because "certain deprivations in the civil context [are] 'so great that a quasi-criminal level of protection [is] appropriate.'"[165] In *Lassiter v. Department of Social Services*,[166] the Supreme Court held that, as a general rule subject to a fact-specific inquiry, the Constitution does not require the appointment of counsel for indigent parents in proceedings to terminate parental rights.[167] *Lassiter* did not sound the death knell for a civil right to counsel even in termination cases, but it certainly tempered the optimism of advocates of civil *Gideon*. Support for a right to counsel in nominally civil cases with nonetheless enormous consequences has ebbed and flowed over time;[168] civil *Gideon* would face practical problems in implementation[169] and, if the crimi-

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163 *See, e.g.*, Kazmarski, *supra* note 13, at 38–39.

164 In *Gideon v. Wainwright*, 372 U.S. 335, 342, 344 (1963), the Supreme Court held that the Sixth Amendment guarantee of counsel in criminal cases was "fundamental and essential to a fair trial" such that the right to counsel applied against the states by the Fourteenth Amendment and indigent defendants were entitled to have counsel appointed in criminal trials.

165 Steinberg, *supra* note 34, at 761 (quoting Benjamin H. Barton, *Against Civil* Gideon *(and for Pro Se Court Reform)*, 62 FLA. L. REV. 1227, 1242 (2010)).

166 452 U.S. 18, 31–32 (1981).

167 *Id.* ("We . . . leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.").

168 Steinberg, *supra* note 34, at 761–64.

169 *See id.* at 764–71.

nal context is any indication,[170] would not be a silver bullet even if it became the rule.

Although the right to counsel would certainly aid parents and would not conflict with the solution proposed in this Note, the proposed solution is more practicable and more effective than implementing civil *Gideon* in child welfare cases for several reasons. First, the proposed solution addresses problems at an earlier stage in the process. By clearly defining reasonable efforts and judicial findings that must be made before a child is *removed* from a parent, this solution intervenes well in advance of termination proceedings, thus reducing the demand for civil *Gideon* in this context. Second, by creating clear statutory definitions for what constitutes reasonable efforts where homeless families are concerned, it allows judges to administer the rules more effectively even when a parent does not have counsel; thus, it better ensures substantive fairness to homeless parents facing the temporary or permanent loss of their children, without the same practical implementation issues as civil *Gideon*. Finally, this solution better effectuates the stated purpose of federal child welfare law than does a civil right to counsel. Federal law presents family preservation as the preferred outcome of the early stages of child welfare system intervention and places the burden on the state to show that it has made reasonable efforts to ensure that outcome.[171] By clearly defining and funding housing assistance as reasonable efforts, including which specific services states must offer in order to meet the burden of proving they have made reasonable efforts at family preservation, the proposed solution allows courts to ensure that family preservation is actually prioritized in the child welfare system and the courts, not just in the text of the law. By defining reasonable efforts and ensuring the burden to show reasonable efforts is placed on the state—consistent with the letter of the law—the proposed solution prophylactically reduces the substantive and procedural disadvantages an unrepresented parent will experience in removal or termination proceedings, thus eliminating the need for civil *Gideon* in a high-stakes termination proceeding at a later stage in a homeless family's interaction with the child welfare system.

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170 *See generally* KAREN HOUPPERT, CHASING GIDEON: THE ELUSIVE QUEST FOR POOR PEOPLE'S JUSTICE (2013).

171 Roberts, *supra* note 31, at 116 n.22.

Conclusion

Regardless of the persistent gap between the number of children in foster care and the number of available adoptive homes, federal law continues to incentivize states to use foster care as a solution for children who need services and accelerates termination of parental rights in service of adoption, regardless of whether an adoptive home is actually available or may become available in the future. This has a harmful impact on poor families, especially homeless and housing-insecure families. For families experiencing homelessness or housing insecurity, removal for neglect is an especially unjust way to provide child welfare services because federal foster care payments provide the very funding that could have prevented removal in the first place and preserved the home of a poor but otherwise fit parent. By enacting legislation that requires housing assistance before a reasonable efforts determination can be made, states can promote family preservation, serving the goals of federal law. Further, by removing the unnecessary length-of-time-out-of-custody provisions from federal law and amending the concurrent-planning provision, Congress can prevent arbitrary removals from families working through the long-term effects of poverty and decrease the persistent disparity between the number of children in foster care and the number of available adoptive homes.