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The Impact of Liberal Ideology on Child Protection Reform

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THE IMPACT OF LIBERAL IDEOLOGY ON CHILD PROTECTION REFORM

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This Article calls for an examination of liberal ideology and child-centered policies. I will eagerly provide such an examination, but I want to make it clear that although I spent almost all of my time on Capitol Hill working for Republicans, I can just as eagerly provide an examination of the disconnect between conservative ideology and child-centered policies. I am not an apologist for conservatives on this issue.

Despite the fact that words intended to make children safe have been written into social work manuals,[1] federal hearings have been held to investigate child abuse and neglect,[2] bicameral and bipartisan agreements to eliminate child maltreatment have been reached,[3] and child protection laws have been on the books for decades,[4] four-to-five children still die every day due to maltreatment.[5] Why are these laws not followed? What is the reasoning behind the appalling lack of implementation and enforcement? What is the impact of liberal ideology on child protection reform and action?

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[1] *See generally* DIANE DEPANFILIS & MARSHA K. SALUS, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD PROTECTIVE SERVICES: A GUIDE FOR CASEWORKERS (2003) (explaining how social workers must deal with both children and parents in order to be effective and limit fear and aggression).

[2] *See Breaking the Silence on Child Abuse: Protection, Prevention, Intervention, and Deterrence: Hearing Before the Subcomm. on Children and Families of the S. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. (2011); *To Examine Recent Failure to Protect Child Safety: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 108th Cong. (2003); *Child Abuse Prevention and Treatment in the 1990s Keeping Old Promises, Meeting New Demands: Hearing Before the H. Comm. on Children, Youth, & Families*, 102d Cong. (1992).

[3] *See, e.g.*, Protect Our Kids Act of 2012, H.R. 6855, 112th Cong. (as passed by the House of Representatives, Dec. 19, 2012).

[4] *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (2012)); Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5116 (2012)).

[5] *About CECANF*, COMM'N TO ELIMINATE CHILD ABUSE & NEGLECT FATALITIES (2015), https://eliminatechildabusefatalities.sites.usa.gov/about-us/overview/ [http://perma.cc/FFH9-NDQ8].

As a commissioner for the federally mandated Commission to Eliminate Child Abuse and Neglect Fatalities (CECANF),[6] I asked a panel of directors of child welfare and children's mental health experts: "Who do you believe is your client?" The responses ranged from "everyone who walks through the door" to "all poor Americans." Not one expert, out of all the state agency directors, named the child as the client. In fact, the panel ended with one of the witnesses grabbing the microphone to say: "Nothing can help prevent children from dying from maltreatment." Children cannot be protected until the problems that stem from poverty and institutional racism are solved.

In February 2014, a two-year-old child in Vermont was allegedly murdered at the hands of her stepfather.[7] Only a year earlier, the child suffered two broken legs as a result of abuse.[8] In the wake of her death, the Vermont State Police conducted a criminal investigation to determine if any child welfare workers knew that the two-year-old child had her legs broken only one year before and that the mother waited two days before going to the hospital while her child suffered severe pain.[9] The child welfare workers knew, but were swayed by the fact that the mother participated in counseling and parenting classes and took this as evidence that the mother should be reunited with the toddler, consequently awarding full custody to the mother on February 6, 2014.[10] Thirteen days later, the child "was admitted to the hospital with multiple severe head trauma resulting in her death."[11] It took the stepfather less than two weeks to allegedly murder this child. No criminal charges were filed against the child welfare workers, in part, because the lead investigator noted that several of the child welfare workers that he interviewed, along with an official from the State's Attorney's Office, stated that "there is an overwhelming push from the onset of most

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[6] *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 54 (2013) [hereinafter CHILD MALTREATMENT], http://www.acf.hhs.gov/sites/default/files/cb/cm2013.pdf [http://perma.cc/TYU7-GTLE] (taking the estimated number of child deaths per year (1,520) and dividing them by 365 yields a result of more than four child deaths per day).

[7] *Slain Toddler's Mother Had History of Abusing Her*, WPTZ (Feb. 25, 2014, 5:05 PM), http://www.wptz.com/news/vermont-new-york/burlington/slain-toddlers-mother-had-history-of-abusing-her/24667500 [http://perma.cc/ZQ52-QFDX]; Jack Thurston, *Stepfather Pleads Not Guilty in 2-Year-Old's Death*, WPTZ (Feb. 24, 2014, 4:29 PM), http://www.wptz.com/news/vermont-new-york/burlington/doctor-to-police-someone-held-toddlers-head-so-tight-her-skull-cracked/24647312 [http://perma.cc/ZN5F-CH63].

[8] Laura Krantz, *Report Details Communication Breakdown in Dezirae Sheldon Case*, VTDIGGER (June 14, 2014, 2:25 AM), http://vtdigger.org/2014/06/14/report-details-communication-breakdown-dezirae-sheldon-case/ [http://perma.cc/YY9Z-V7ZY].

[9] *Id.*

[10] Letter from William H. Sorrell, Attorney Gen., State of Vt., to David Yacavone, Comm'r, Vt. Dep't of Children & Families 2 (June 11, 2014) (on file with the Office of the Attorney General of the State of Vermont) (offering a review of the investigation of the death of the child, and signaling the Department of Children and Families' mistakes in handling the child's situation).

[11] *Id.*

cases for re-unification."[12] "It was brought up that this focus on reunification very often puts the needs of the parents above the needs and interest of the child or victim."[13]

Too many professionals in the fields of social work, law, and medicine ignore what is widely known about social services to prevent or treat parents that harm their children. Though some promising programs are emerging, the weight of empirical evidence indicates that tools for assessing child safety, along with child abuse prevention and treatment programs as currently administered and implemented, are not effective. A report to Congress on the effectiveness of activities under the Child Abuse Prevention and Treatment Act (CAPTA)[14] noted that available research cannot attribute federally funded state grants with producing any change or specific outcomes.[15] Yet, the belief persists that every abused and neglected child can safely remain in his family or return to his family through the provision of services. This Article will examine the ideology that contributes to front-line caseworkers responsible for assessing child safety, often experiencing confusion about who their client is, resulting in these workers' belief that they must exhaust every effort to preserve or reunify abusive families before making child safety a concern.

Twenty years ago, I testified before Congress, pleading for a change of paradigm in child protection programs, that is, to move from an adult-centered to a child-centered focus.[16] The vulnerability of children, especially those children most likely to die from abuse and neglect—infants under the age of one—is well established.[17] Yet, it is infants under the age of one who represent the largest population of children entering out-of-home placement because their families cannot or will not keep these babies safe.[18] The latest federal statistics show that 17% of the entrants into foster care in the 2013 fiscal year (FY 2013) were under the age of one.[19] That translates

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[12] Police Report of Det. Lt. James Cruise, Vt. State Police, para. 206 (2014) (a report by a Vermont State Police officer containing Case Narrative-14C101622 regarding the death of Dezirae Sheldon and determining whether the Vermont Department of Children and Families was responsible for facilitating the child's death).

[13] *Id.*

[14] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5116 (2012)).

[15] U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS ON THE EFFECTIVENESS OF CAPTA STATE PROGRAMS & TECHNICAL ASSISTANCE 1–9 (2013), http://www.acf.hhs.gov/sites/default/files/cb/capta_effectiveness_rptcongress.pdf [http://perma.cc/QZ9V-VXWH].

[16] *Federal Adoption Policy: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 104th Cong. 130 (1996) (statement of Carol Statuto Bevan, Comm'r, U.S. Comm'n on Child & Family Welfare).

[17] U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 56 (2011), http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf [http://perma.cc/6LUQ-4YRY].

[18] U.S. DEP'T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT NO. 21, at 2 (2014) [hereinafter THE AFCARS REPORT], http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport21.pdf [http://perma.cc/QMW3-2NRC].

[19] *Id.*

to 43,085 babies who had to be removed from their parents to keep them safe, or 118 babies each day.[20]

Human development is an ongoing process that starts at birth. The importance of bonding and attachment to at least one significant nurturing adult forms the basis for emotional, cognitive, and motor development.[21] Infants need consistent and predictable care to trust the world around them.[22]

Child protection laws and programs that place the rights of adults to parent above the infants' need for a safe and stable environment send babies on a long and irreversible journey filled with adverse changes in the brain, cognitive and physical developmental delays, socio-emotional trauma, repeated abuse, and even death.[23] Compliance with attendance at anger management or parenting classes is too often viewed as evidence of parental fitness or readiness for change. Almost all family intervention paradigms deem success as keeping families together and view anything short of family preservation or reunification as a failure.[24] Rule number one in the basic guide to social work is to never, ever, give up on a family.

In FY 2013, an estimated 679,000 children were abused or neglected, leading to 1,520 reported child deaths.[25] These official statistics on the size and scope of child abuse and neglect are seriously flawed; all fifty-two jurisdictions define child abuse and neglect differently.[26] There is no national standard on even the definition of a fatality due to child abuse or neglect, or who can be a perpetrator of child abuse. In some states, the child killed by the paramour of a parent will be counted as a victim of child abuse, while in another state the child will not be considered a child abuse victim because the paramour does not fit a restrictive civil definition of "perpetrator."[27] One of the most important data systems to measure child abuse and neglect, the National Child Abuse and Neglect Data System (NCANDS), is voluntary.[28] Thus,

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[20] *See id.* (dividing 43,085 babies that are placed into foster care by 365 days per year yields a result of little more than 118 babies per day).

[21] *See* JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31–32 (1973).

[22] ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 219–22 (1st ed. 1950); Saul McLeod, *Psychosocial Changes: Erik Erikson*, SIMPLY PSYCHOL., http://www.simplypsychology.org/Erik-Erikson.html (last updated 2013).

[23] Nat'l Sci. Council on the Developing Child, *The Science of Neglect: The Persistent Absence of Responsive Care Disrupts the Developing Brain* 3–4 (Harvard Univ. Ctr. on the Developing Child, Working Paper No. 12, 2012), http://www.developingchild.harvard.edu/resources/the-science-of-neglect-the-persistent-absence-of-responsive-care-disrupts-the-developing-brain/ [http://perma.cc/8H56-Z2G8].

[24] ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 38–39 (1999).

[25] CHILD MALTREATMENT, *supra* note 6, at 20, 54.

[26] *Id.* at viii.

[27] Interview with Cathleen Palm, Founder of the Ctr. for Children's Justice (Feb. 7, 2015).

[28] U.S. Dep't of Health & Human Servs., *NCANDS*, CHILDREN'S BUREAU, http://www

not all states submit data on every item. Some data systems offer duplicate counts of children by counting a child each time the child is the subject of a report in a federal fiscal year.[29] Other systems count a child only once despite the number of reports of abuse in a federal fiscal year.[30]

The measurement of child abuse and neglect is fraught with problems too numerous to detail here. It is important, however, to recall that only when social problems are counted or measured does the problem exist in the eyes of policymakers. It has been over fifty years since the term "battered-child syndrome" was coined,[31] yet professionals and the public continue to ignore the size and scope of the problem and view it as somebody else's problem. Moreover, there is no national study that examines the severity of the abuse or neglect.

When reports of severe abuse or neglect are substantiated, the children are often removed from their biological parents for their own safety. Here again, there is no national data or definition of a perpetrator of child abuse, but an examination of the Fourth National Incidence Study of Child Abuse and Neglect (NIS-4) data reveal that 80.8% were biological parents.[32] According to the NIS-4, the rate of child abuse and neglect is eight times greater when children are living with one parent and that parent's paramour than the rate of abuse when children are living with two married biological parents.[33]

Two current laws that require making children's health and safety the paramount concern are the Adoption & Safe Families Act of 1997 (ASFA)[34] and the Child Abuse Prevention & Treatment Act of 2010 (CAPTA).[35] CAPTA in particular has been met with much opposition as reflected by the spectacular lack of enforcement and implementation.[36]

.acf.hhs.gov/programs/cb/research-data-technology/reporting-systems/ncands [http://perma.cc/B8HG-8WMJ].

[29] CHILD MALTREATMENT, *supra* note 6, at 19.

[30] *Id.*

[31] C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 JAMA 17 (1962) (bringing to light the harmful and often life-threatening abuse that children have suffered from their parents or foster parents and how it has been inadequately handled by physicians thus far).

[32] U.S. DEP'T OF HEALTH & HUMAN SERVS., FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS 6-3 (2010), http://www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_pdf_jan2010.pdf [http://perma.cc/J24U-7F4V].

[33] *See id.* at 5–19 (showing that 0.0068% of children living with biological parents are abused, while 0.0572% of children living with one biological parent and their parent's unwed partner are abused).

[34] Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C. (2012)).

[35] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5116 (2012)).

[36] *See* Gerard F. Glynn, *The Child's Representation Under CAPTA: It Is Time for Enforcement*, 6 NEV. L.J. 1250, 1253 (2006) (discussing how states are not fully complying

ASFA was enacted in 1997 with much enthusiasm expressed by both chambers and both parties.[37] The worn out phrase "children are our most precious resource" was bantered about liberally in congressional hearings.[38] Yet, despite the rhetoric, opposition to three key provisions of this law was evident at the start and continues to this day, almost twenty years later.[39]

The first ASFA provision under the Title IV-E state plan requires that states, in determining and making reasonable efforts on behalf of the child, must make "the child's health and safety . . . the paramount concern."[40] The second ASFA provision, also a component of the Title IV-E state plan, clarifies that states would continue to be required to make reasonable efforts to preserve and reunify families; however, this requirement could "bypass" reasonable efforts in cases where a court has found that the child has been subjected to

> aggravated circumstances . . . (. . . which . . . may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse); . . . the parent has . . . committed murder . . . of another child of the parent; . . . committed voluntary manslaughter . . . of another child of the parent; . . . aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or . . . committed a felony assault that results in serious bodily injury to the child or another child of the parent; or . . . the parental rights of the parent to a sibling have been terminated involuntarily.[41]

The third ASFA provision is the requirement that states initiate a petition to terminate parental rights (TPR) for groups of children: those (1) who have been in foster care for fifteen of the most recent twenty-two months (known as the "15/22 month rule"); (2) who the court has determined are abandoned infants (as defined

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with CAPTA's mandate to provide children advocates and that there lacks a monitoring system to ensure compliance).

[37] Memorandum from Admin. for Children & Families, U.S. Dep't of Health & Human Servs., to State and Territorial Agencies Administering or Supervising the Admin. of Title IV-B & Title IV-E of the Soc. Sec. Act, Indian Tribes & Indian Tribal Orgs. 2 (Jan. 8, 1998), http://www.acf.hhs.gov/sites/default/files/cb/pi9802.pdf [http://perma.cc/FQ9A-RJCK].

[38] *See, e.g.*, 144 CONG. REC. 12,043 (1998); 142 CONG. REC. E571, 581 (daily ed. Apr. 19, 1996) (statement of Hon. Major R. Owens).

[39] John B. Mattingly, *"Twenty" Years with the Adoption and Safe Families Act*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 58 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[40] Adoption and Safe Families Act of 1997 § 101, 42 U.S.C. § 671(a)(15) (2012).

[41] *Id.*

by state law); or (3) who the court has determined have been assaulted by their parents, or whose parent has killed or assaulted another of their children.[42] There are exceptions to this requirement to terminate parental rights. The exceptions apply in various circumstances, including when the child is being cared for by a relative, when the state has a "compelling reason," which documents that TPR is not in the child's best interests, or when the state has not provided the services necessary for the child to return home.[43]

The second applicable law, the Child Prevention Neglect and Treatment Act (CAPTA),[44] was first enacted in 1974. There have been many revisions and reauthorizations to this law, the most recent amendments being implemented in 2010.[45] Congress enacted CAPTA to create a federal vehicle for state activities related to prevention and responding to child abuse and neglect.[46] As a condition of receiving 26.5 million dollars,[47] a very modest pool of federal dollars, states and certain Indian nations are required to have procedures in place: (1) for receiving and responding to reports of child maltreatment; (2) for providing assurances that state plans are implemented to keep children safe; and (3) to conduct research to determine the size and scope of child abuse.[48]

CAPTA requires states to meet certain requirements or regulations to obtain the federal grant.[49] These assurances range from how a state plans to spend the CAPTA funds to language regarding the legal provisions for expediting the termination of parental rights.[50] These provisions are very similar to the ASFA provisions clarifying that states are not required to make reasonable efforts to reunite a child whose parents have been convicted of a heinous crime against that child or sibling.[51] In addition, a state plan must be certified by the governor of the state, ensuring that the state has an enforceable statute in place that specifically addresses the needs of newborns identified as being affected by parental exposure to illegal drugs or suffering from withdrawal systems and/or Fetal Alcohol Spectrum Disorder (FASD).[52] The requirement also includes: (1) the development of a "plan of safe care for the infant born";

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[42] *Id.* § 103.

[43] *Id.*

[44] Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106, 5116 (2012)).

[45] CAPTA Reauthorization Act of 2010, Pub. L. No. 111-320, 124 Stat. 3459 (2010) (codified as amended at 42 U.S.C. §§ 5101–5106, 5116 (2012)).

[46] Child Abuse Prevention and Treatment Act § 2 (creating a "National Center on Child Abuse and Neglect").

[47] AM. HUMANE ASS'N, FEDERAL FISCAL YEAR (FY) 2012 BUDGET 2 (2011).

[48] 42 U.S.C. § 5116a (2012).

[49] *Id.*

[50] *Id.*; *id.* § 5106a.

[51] *Compare id.* § 5106a, *with* Adoption and Safe Families Act of 1997 §101, 42 U.S.C. § 671(a)(15) (2012).

[52] 42 U.S.C. § 5106a.

(2) "procedures for . . . immediate screening, risk and safety assessment"; (3) "prompt investigation of [the] report"; and (4) procedures for protecting the safety of a victim of child abuse or neglect.[53] While the hospital staff or other healthcare professionals are required to notify child protective services of the birth of an infant born exposed to illegal drugs and/or FASD, CAPTA and related state laws underscore that this referral does not constitute a "child abuse report" and does not trigger any prosecution.[54] It is instead intended to assure the infant's safety through the provision of services to the mother following hospital discharge.[55]

It must be noted that, although the safe plan of care provision was a bipartisan and bicameral notion, it remained the subject of much congressional debate for almost a decade.[56] Despite the provision's sponsor, Representative James Greenwood's (R-PA), attempts to clarify that the provision was intended to determine where the newborn would go after leaving the hospital, a car, or homeless shelter, and if the mother had access to treatment,[57] the objections centered on two issues: the inclusion of alcohol exposure in the infant and the argument that mothers would be profiled for referral to child protection services.[58] There is very little evidence at the federal level that captures information about implementation of the expedited procedures for TPR under ASFA or the fulfillment of the state plan requirements under CAPTA to ensure a safe plan of care for newborns born addicted to substances, whether legal or illegal. Likewise, there are no national data on CAPTA-related reports for substance-exposed newborns. Overall, the reactions to these reforms have been uniform and in lockstep. States have nullified the impact of the federal statutes, judges have ignored the intent of the statute, and social workers have actively resisted the law.[59] Neither ASFA nor CAPTA apparently sent a strong enough signal about changing from an adult-centered to a child-centered field. Or, the signal could not be detected because of the overwhelming belief that the rights of parents must be preserved and that government intervention into abusive homes is a slippery slope to the "nanny state." On March 30, 2015, the Administration for Children and Families (ACF) published a final rule in the Federal Register removing the CAPTA regulations referred to above in their entirety.[60] The rule clarified that this change reflects statutory changes

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[53] *Id.*

[54] *Id.*

[55] 149 CONG. REC. 15,058 (2003).

[56] *Id.* at 15,064.

[57] *Id.* at 15,058.

[58] Based on conversations the author had during negotiations on the legislation, which are on file with author.

[59] *Child Care and Child Welfare: Joint Hearing Before the Subcomm. on Human Res. of the Comm. on Ways & Means & the Subcomm. on Early Childhood, Youth, & Families of the Comm. on Econ. & Educ. Opportunities*, 104th Cong. 109 (1995) (statement of Cassie Statuto Bevan).

[60] Removal of Child Abuse and Neglect Prevention and Treatment Act Implementing Regulations, 80 Fed. Reg. 16,577 (Mar. 30, 2015) (to be codified at 42 U.S.C. § 5101).

and outdated provisions and does not establish or affect substantive policy.[61] This rule effectively eliminates any federal conditions for states receiving CAPTA funds and in this author's opinion may impact some safeguards for children in terms of effective implementation.

Must we as a society accept the severe and chronic abuse of our children as a systemic flaw in our government-run programs? Unlike within Veterans Healthcare System, where constituencies are united and vocal in demanding reform to correct flaws, the child protection voice is muted.[62] It appears that liberals who blame "the system" want reforms, but not if reform means making the child's safety the paramount concern above the family.[63] These are the same people who call for school reform, but only if the reforms do not offend the teachers' unions.

The objections to the bypass of reasonable efforts to make children safe is that low-income, minority communities have been long discriminated against by a hostile government that is indifferent to their needs as a community.[64] Institutional racism is correlated with violent and drug-plagued communities, low-performing schools, high school drop-out rates, a lack of job skills, few employment opportunities, no community development, and a disproportionate number of poor unwed teen mothers.[65] But as every statistics class pounds into the heads of students: correlation is not causality.

The bypass of reasonable efforts in particular was viewed by state advocacy groups as an infringement of states' rights to write domestic relations laws. The expedited procedures to shorten the stay of children in out-of-home care in the federal law might cause state child abuse laws to be written or lose federal funds. A mandated list of aggravated circumstances might omit circumstances that one state finds compelling or be too expansive so as to constrain state flexibility. These arguments led the drafters to weaken the aggravated circumstances provision to an illustrative list of behaviors defined by state law rather than a federally mandated expansive list of parental behaviors.[66] The provision did not send a strong enough signal to the states that repeated and severe abuse of a child would trigger the bypass

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[61] *Id.*

[62] *See* Cassie Statuto Bevan, *Adoption and Safe Families Act: No Second Chances?*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 52, 52 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[63] *See* CASSIE STATUTO BEVAN, FOSTER CARE: TOO MUCH, TOO LITTLE, TOO EARLY, TOO LATE 24–29 (1996).

[64] *See* PATRICK T. MURPHY, WASTED: THE PLIGHT OF AMERICA'S UNWANTED CHILDREN 19 (1997) (explaining the formation of the "black underclass").

[65] *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 94–95 (2002) (explaining the effects of racist institutions and white privilege).

[66] Adoption and Safe Families Act of 1997 § 101, 42 U.S.C. § 671(a)(15) (2012).

of reasonable efforts. For example, a Maryland bill is currently moving through the General Assembly to add "severe physical abuse" to the list of circumstances where reasonable efforts do not have to be made.[67]

On March 6, 2015, the *Washington Post* reported the case of a three-month-old infant who suffered a brain fracture and several broken ribs.[68] CPS removed the baby from her parents, but after eighteen months, social workers reunited the family, claiming that under Maryland law there was insufficient evidence that the baby was abused.[69] It took only three weeks for the father to beat the child to death.[70] The sponsor of the Maryland bill stated that Social Services did not believe that "chronic abuse," as an aggravated circumstance, applied in this case because the baby was in foster care for eighteen months.[71] Thus, the social workers believed that they had no choice but to return the child.[72] For this reason, Maryland's proposed law to add "severe physical abuse" to the state law is necessary.[73] Such circumstances have been in the federal law for almost twenty years.[74] State resistance to the bypass of reasonable efforts has put severely abused children at risk while state legislators diddle with state definitions.

This proposed change in Maryland law to define "aggravated circumstances" as severe physical abuse, sexual abuse, life-threatening neglect, or torture was intended to clarify the specific circumstances in which local social services could petition the court that reasonable reunification efforts are not required. Despite the fact that the proposal passed both Houses of the General Assembly, Governor Larry Hogan vetoed the House bill on May 12, 2015.[75] However, the governor did sign the Senate bill, accomplishing the same result.[76]

The three exceptions to moving to TPR per the 15/22 month rule have gutted the rule. These exceptions apply if: (1) the child is in the care of a relative; (2) services have not been provided to the parent; or (3) the state does not believe that TPR is in the child's best interests.[77] These exceptions that must be documented by the states

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[67] S.B. 150, 2015 Leg., 432d Sess. (Md. 2015); H.B. 171, 2015 Leg., 432d Sess. (Md. 2015).

[68] Ovetta Wiggins, *Md. House Passes Bill to Keep Kids Out of Potentially Dangerous Homes*, WASH. POST, Mar. 6, 2015, at B1.

[69] *Id.* at B1, B3.

[70] *Id.* at B1.

[71] *Id.* at B3.

[72] *Id.*

[73] *See supra* note 67.

[74] Adoption and Safe Families Act of 1997 § 101, 42 U.S.C. § 671(a)(15) (2012) (listing abandonment, torture, chronic abuse, and sexual abuse as part of the illustrative list of aggravated circumstances that would trigger a bypass of reasonable efforts).

[75] Letter from Lawrence Hogan, Jr., Md. Governor, to Michael E. Busch, Md. Speaker of the House (May 12, 2015), http://mgaleg.maryland.gov/2015RS/veto_letters/hb0171.pdf [http://perma.cc/9VRF-DY4H].

[76] *Id.*

[77] 42 U.S.C. § 675(5).

to be "compelling" have become the rule. Herein lies what is known as the problem of the clocks. The clocks on the mothers who are substance abusers, mentally ill, or in prison are out of sync with the child's 15/22 month clock. Each of the clocks is timed to different events.

The child's clock must be responsive to the child's developmental needs for safety, permanency, and well-being. The extensive work on the critical periods in the development of an infant's brain has not been connected to the laws and policies in child protection. "For example, evidence shows that the simple act of singing to a six-month-old baby significantly stimulates both the auditory and visual areas of the brain, whereas the lack of such stimulation can lead to delayed language development and compromise the brain's ability to respond to auditory stimuli."[78]

In the early drafts of ASFA, the clock was timed to the child's age.[79] For entrants into foster care, from birth to six months the time for TPR was three months; for six months to twelve months the clock was six months; from twelve months of age the clock read one year to permanency.[80] The early drafts never saw the light of day due to the extent of controversy that these deadlines stirred up.[81] The child's clock was sensitive to the child's sense of time and needs for attachment and bonding, i.e., these deadlines were truly child-centered, but not politically feasible. Thus, the final legislation requires a permanency hearing at one year to determine the goals for the child, but the child can remain in foster care for twenty-two months, or almost two years.[82] This deadline continues to be highly controversial because the deadline is child-centered and does not make automatic exceptions for substance abuse, mental illness, or prison terms.[83]

It is estimated that some 600,000 children are impacted by parental substance abuse each year, with about 170,000 of those put into foster care.[84] It is argued that substance-abusing parents must have accessible and available recovery services to successfully lead a sober life and make a safe home for the child.[85] The opponents

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[78] Statuto Bevan, *supra* note 62, at 52.

[79] *H.R. 867, The "Adoption Promotion Act of 1997": Hearing on H.R. 867 Before the Subcomm. on Human Res. of the H. Comm. on Ways & Means*, 105th Cong. 12–13 (1999) [hereinafter *H.R. 867 Hearing*] (text of H.R. 867).

[80] Based on conversations the author had during negotiations on the legislation, which are on file with author.

[81] *H.R. 867 Hearing*, *supra* note 79, at 46 (statement of Marylee Allen, Dir., Child Welfare & Mental Health Division, Children's Defense Fund).

[82] 42 U.S.C. § 675(5).

[83] *See generally* Statuto Bevan, *supra* note 62.

[84] Nancy Young & Sid Gardner, *ASFA Twelve Years Later: The Issue of Substance Abuse*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 93, 94 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[85] *Id.*

of a child-centered child protection system raise three major objections: (1) the parent's recovery clock expects relapses whereas the child's clock views relapses as opportunities for abuse of the child and makes no exceptions; (2) services must be accessible and available to allow the parent to enroll in and complete the program, and ASFA did not provide more money for more treatment services; and (3) the utilization rate of public services for low-income families and families of color results in a disproportionate risk that this population will be tested for illegal drugs.[86] ASFA does not make exceptions to the 15/22 month rule based on parental substance abuse.[87] But states do use this circumstance to petition the courts for a waiver of the 15/22 month rule, citing that TPR would not be in the best interests of the child.[88]

Mentally ill parents have different diagnoses and treatment options. The extent to which mentally ill mothers can take personal responsibility for their actions is compromised by the severity of the illness, access to treatment, and effectiveness of known treatment models.[89] ASFA can exacerbate the problems of the mentally ill by removing the child and causing trauma to the parent and the child.[90] Opponents argue that mental illness comes and goes so that a parent who harms a child at one point in time may not be a threat at another point in time or that medication might be effective for years and then suddenly lose its effectiveness.[91] And finally, there is the position that mental illness is a psychiatric disability under the Americans with Disabilities Act (ADA)[92] and therefore parents with this disability should be allowed "reasonable accommodations" to the TPR deadline.[93] Some parents with mental illness are making progress but still will not meet the deadline in time to get their children returned. ASFA's clock ticks despite parental mental illness.[94] But states may use exceptions to argue that appropriate services were not provided, thus extending the child's stay in limbo.

The number of children with an incarcerated mother has more than doubled between 1991 and 2009 in the general population;[95] for children in the child protection

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[86] *Id.* at 96–98.

[87] Statuto Bevan, *supra* note 62, at 54.

[88] *Id.*

[89] Barbara J. Friesen et al., *Parents with a Mental Illness and Implementation of the Adoption and Safe Families Act*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 102, 106–08 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[90] *Id.* at 107.

[91] *Id.* at 108.

[92] Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117 (2012).

[93] Friesen et al., *supra* note 89, at 109.

[94] *See* Statuto Bevan, *supra* note 62, at 54.

[95] Martha L. Raimon et al., *Sometimes Good Intentions Yield Bad Results: ASFA's Effect on Incarcerated Parents and Their Children*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES

system, the estimate is as many as 51,000.[96] Opponents of the 15/22 month rule argue that when the parent is incarcerated, visitation with one's children is very difficult.[97] Jails are often located in remote areas that are not easily accessible by public transportation.[98] Additionally, prison rules limit phone calls, and the visiting area environment is often not accommodating for children.[99] Thus, parents in prison lack the opportunity to play a role in the child's life, as contact is very limited. Moreover, prisons most often do not have parenting classes, anger management services, or substance abuse treatment centers that would help the parent become a better parent upon release.[100] ASFA makes no exceptions to the 15/22 month rule when a parent is in jail,[101] even when the parent's sentence is likely to end before two years. However, the exception to the 15/22 month rule is often made by social services claiming that TPR is not in the child's best interests when the parent is in jail.[102]

This list of opponents to the 15/22 month rule is not exhaustive. Federal child protection law has never had a timetable for the length of a child's stay in foster care. Many children were growing up in the foster care system and aging out at eighteen, only to become homeless.[103] There were many in the Administration who argued that ASFA would create legal orphans.[104] However, the Adoption and Foster Care Analysis and Reporting System (AFCARS) preliminary data show a high of 71,381 children in 2009 waiting to be adopted whose parental rights for all living parents were terminated, compared to a low of 58,887 in 2013.[105] Despite the 15/22 deadline, recent AFCARS data show that more than half of children stay one year or more in foster care.[106] Failing to fully implement the three provisions that would expedite a child's stay in out-of-home care is consigning the child to more time without a loving, safe family. The objections are all biased in the direction of the parent

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ACT 121, 122 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[96] *Id.*

[97] *Id.*

[98] *Id.* at 125.

[99] *Id.*

[100] *Id.*

[101] *Id.* at 126.

[102] *See* Statuto Bevan, *supra* note 62, at 54.

[103] *See, e.g.*, MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, at 3, 12 (2011), https://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf [http://perma.cc/9478-WQ69].

[104] Ernestine S. Gray, *Judicial Viewpoints on ASFA*, *in* URBAN INST. & CTR. FOR THE STUDY OF SOC. POLICY, INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 60, 61 (2009), http://www.cssp.org/publications/child-welfare/top-five/intentions-and-results-a-look-back-at-the-adoptions-and-safe-families-act.pdf [http://perma.cc/6D2M-UDLX].

[105] THE AFCARS REPORT, *supra* note 18, at 1.

[106] *Id.* at 2.

or adult. Liberals seem to think that when a child is abused there are two victims—the abusing parent and the child. ASFA makes it clear that the child's health and safety must be the paramount concern.

CAPTA language on the "aggravated circumstances" where reasonable efforts are not required to be made is similar to the ASFA statute.[107] Thus, states receive the same language on when to bypass reasonable efforts twice in federal law. One would assume this would strengthen the provision, but it appears that giving states the discretion to define when reasonable efforts to preserve or reunite the family are not required is tantamount to giving states the discretion to ignore the law altogether.

Liberal resistance to CAPTA's plan of safe care for infants exposed to illegal drugs or alcohol comes from many sources. There are some opponents who see the plan as punitive toward the mother in that it leads to a report to child welfare. Opposition is based on the fear that any notification to CPS would be taken as a referral for suspected child abuse.[108] Some in the right-to-privacy camp do not want to label any maternal behavior that adversely impacts the baby *in utero* as "abuse" because they fear a slippery slope.[109] As stated earlier, the plan of safe care is clear in its language that CPS be notified of the birth and develop with the mother—and, if available, the father—a safe plan of care when the child leaves the hospital.[110] Implementation of this provision varies widely across communities and states, but the result is the same—an infant that is less unsafe.

Conflict arises when advocates view the identification of infants born drug addicted or suffering from Fetal Alcohol Syndrome as profiling. Advocates claim that minority infants born in public hospitals are more likely to be tested for prenatal exposure to illegal drugs and/or alcohol than white infants born in private hospitals.[111] However, there are no data related specifically to CAPTA's plan of safe care to support the case for profiling. Any attempts to make this testing universal likely would have raised the cost so greatly as to be prohibitive to the hospitals, insurance companies, and Medicaid. Here again, the conflict is over the mother's right to privacy and the infant's right to health care, meaning that again, the adult-centered position is supported by most professionals in the field.

The opposition to these child protection reforms takes the position of supporting the rights of the family over the needs of the infant. Why are abusing families given every effort even when efforts become unreasonable and put babies at risk of harm and death? Many families in the child protection system are poor, under- or unemployed, and/or living in violent, drug-plagued communities; families are often headed by a single mom with little to no child support, as many young black men are incarcerated. Children who come from these environments have few opportunities to

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[107] *See* 42 U.S.C. § 5106a (2012).

[108] Interview with Cathleen Palm, Founder of the Ctr. for Children's Justice (Feb. 10, 2015).

[109] ROBERTS, *supra* note 65, at vii.

[110] *See supra* note 53 and accompanying text.

[111] ROBERTS, *supra* note 65, at 50–51.

succeed. Schools do not have books, teachers do not have the skills, and employers do not hire within that zip code. Parents who need support to parent effectively do not get it. Despite the failure of Great Society programs and the proliferation of anti-poverty programs, poverty is still in our midst. And there is hope in the heart of many liberals that redistribution of wealth will improve outcomes for children who emerge from these poor and crumbling communities.

Although redistribution of wealth is not likely, the next best strategy is to fight for every government dollar an advocate can get through whatever funding stream is available. Community development, childcare, housing subsidies, low-income energy assistance, minority loans for small businesses, and even funding for services to child abuse prevention and treatment are resources that should go to impoverished communities.

Liberals blame the government for the condition of poor communities. Liberals also hold communities responsible for the behavior of the abusing mother. Liberals see supporting big government and closing the divide of income inequality as one of the best strategies for reforming the child protection system. In this view, the responsibility for the behavior of individuals, families, and communities rests with the government. It is simply not possible to commit to child-centered programs, policies, and laws to protect children if the accountability for the abuse does not rest firmly on the shoulders of the perpetrators. Overwhelmingly, these are the parents.

I believe that when four or five children die every day from severe abuse and neglect, this is not a system failure. The child does not fall through the cracks of the child protection system. The child falls through somebody's fingers.