(DE)FUNDING FAMILY SEPARATIONS

*Josh Gupta-Kagan**

Federal foster care funding exists in tension with foundational family law principles. The law protects family integrity: the state may only separate parents and children in extreme cases, and, when it does, the state must work to reunify families. Yet the federal funding system directs billions of federal dollars to support CPS agencies and pay subsidies to foster parents, adoptive parents, and guardians. It does so via an open-ended entitlement, so that the more families a state separates, the more federal funds it receives. This system makes it relatively cheaper for CPS agencies to take custody of children, incentivizes states to support the permanent destruction of families and creation of new ones through terminations of parental rights and subsequent adoptions, and diminishes state courts' role in checking state agency power by enlisting them in efforts to maximize federal funding. The federal funding system also incentivizes families to agree to parent-child separations as a condition of aiding kinship caregivers and encourages foster parents to seek permanent destruction of families and new permanent custody arrangements.

The federal funding system's history and operation demonstrate how it serves to divert public benefits from parents to CPS agencies and kinship and non-kinship foster parents, adoptive parents, and guardians. Any reforms need to enable parents to receive necessary public benefits—which an increasing body of research shows limits child maltreatment and CPS agency involvement—and provide aid to kinship caregivers without requiring family separation or incentivizing family destruction.

This Article proposes a range of reforms to align financial incentives with the law's commitment to family integrity and thus push the system towards separating families only when necessary. First, it proposes a set of incremental reforms to limit the worst incentives of the present system. Second, it proposes a mechanism to provide support to kinship caregivers

* Clinical Professor of Law, Columbia Law School. The author would like to thank Maxine Eichner, Barb Fedders, Avni Gupta-Kagan, Mical Raz, Emily Suski, Richard Wexler, and members of the University of North Carolina School of Law Faculty Colloquium for helpful comments on earlier drafts, and Maddie Everett for excellent research assistance.

without requiring the separation of parents and children. Third, it advocates a fundamental rethinking of the federal funding system: Congress should repeal the open-ended entitlement nature of the federal funding system and direct similar funds to states to invest in efforts to prevent child maltreatment and prevention activities or foster care costs.

Introduction

Foundational legal principles governing state regulation of families to protect children from neglect or abuse can be stated succinctly: The Due Process Clause protects parents' rights to the care, custody, and control of their children, and of children's reciprocal rights to live with their parents.[1] While other due process rights are under attack today, parental rights are secure[2] and enjoy bipartisan

1. *E.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). The Supreme Court's parents' rights holdings are widely applied by lower courts to hold that children have reciprocal rights to live in their parents' custody. *E.g.*, Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977); Shanta Trivedi, *My Family Belongs to Me: A Child's Constitutional Right to Family Integrity*, 56 Harv. C.R.-C.L. L. Rev. 280 (2021).

2. The right of parents to raise their children is "deeply rooted in this Nation's history and tradition" and thus passes the present Supreme Court's test for when to recognize a substantive due process right. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 231 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

support.[3] The state has a strong interest in protecting children from maltreatment by parents.[4] But, in disputes between parents and the state, these fundamental substantive due process rights tip legal questions towards parents even when parents keep children out of high school, commit children to mental institutions, or have abused or neglected them and failed to reunify with them over an extended period of time.[5] This shared right of parents and children to family integrity limits state intervention in response to suspected or alleged neglect or abuse.[6]

William Blackstone wrote that the parent-child relationship was "the most universal relation in nature." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446. At common law, fathers "'possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture . . .,'" Hodgson v. Minnesota, 497 U.S. 417, 483 (1990) (Kennedy, J., concurring in part) (quoting J. SCHOULER, LAW OF DOMESTIC RELATIONS 337 (3d. ed. 1882)), and "the right[s] of parents and guardians to the custody of their minor children or wards" were well established, Robertson v. Baldwin, 165 U.S. 275, 282 (1897). The U.S. Supreme Court has recognized the constitutional status of parental rights for more than a century. Meyer v. Nebraska, 262 U.S. 390, 399 (1923). The Court declared it "beyond debate" that the "primary role of the parents in the upbringing of their children" is "an enduring American tradition." Wisconsin v. Yoder, 406 U.S. 205, 232 (1972). The importance of parental rights was a prominent feature of criticisms of slavery—which forcibly separated parents and children by way of the auction block—and thus informed adoption of the 14th Amendment. PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1998).

3. *E.g.*, Testimony of Rebecca Jones Gaston, Comm'r, Admin. On Children, Youth & Families, U.S. Dep't of Health & Hum. Servs., before the S. Finance Comm. 2 (May 22, 2024) [hereinafter Jones Gaston] ("keeping families together and preventing unnecessary involvement with the foster care system."); U.S. Dep't of Health & Hum. Servs., Admin. on Children, Youth & Families, No. ACYF-CB-IM-21-01, at 2, 3 (Jan. 5, 2021), https://www.acf.hhs.gov/cb/policy-guidance/im-21-01 [https://perma.cc/BLV6-2LDR] (stating Trump administration's goal of "strengthening families" and critiquing "federal funding streams" that limit how agencies support families).

4. *E.g.*, Stanley v. Illinois, 405 U.S. 645, 652 (1972).

5. Wisconsin v. Yoder, 406 U.S. 205 (1972) (permitting Amish parents to keep children out of high school); Parham v. J.R., 442 U.S. 584 (1979) (approving state laws making it relatively easy for parents to place children in state-operated mental institutions); Santosky v. Kramer, 445 U.S. 745, 753 (1982) (holding that parental rights remain "vital" and demand a heightened standard of proof when the state seeks to terminate them, even when "they have not been model parents or have lost temporary custody of their child to the state").

6. *See* RESTATEMENT OF THE LAW, CHILDREN AND THE LAW ch. 2 introductory note on child abuse and neglect (AM. L. INST.) (emphasizing that family integrity generally serves children's welfare, and grounds for state intervention are correspondingly high, because "the state's goal is to assist parents to provide adequate care to their children" and rooting these points in constitutional principles) [hereinafter RESTATEMENT OF CHILDREN AND THE LAW]. Consistent with this view, the Supreme Court has recognized a hierarchy of rights: while parents and children have a fundamental constitutional right to remain together, there is no constitutional right to state protection from parental maltreatment. DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 203 (1989).

State child protective service (CPS) agencies[7] may remove children from their parents only when such family separations are necessary to protect children from significant and imminent harm and only after the agencies have worked to keep the family together.[8] After a family separation, the state must work with families to reunify them, and family courts should order families reunified when the safety issue necessitating separation is resolved.[9] Even when parents and children cannot reunify, CPS agencies and family courts should explore options for new permanent family arrangements that maintain parents' and children's relationships whenever possible.[10]

However, this black letter law is far from the end of the story.[11] Federal funding laws provide billions of dollars to state CPS agencies and substitute caretakers while largely declining to fund state efforts to provide parents with financial support and many services that could prevent family separations and reunify separated families.[12] Federal funding laws make it cheaper for states to separate families and place children in state custody, place wedges between parents and other family members who could help them take care of their children despite difficulties, and incentivize states and foster parents to take steps to trigger permanent terminations of the legal relationships between parents and children. While foundational legal principles protect family integrity, these federal funding streams subsidize family separations.[13]

This Article makes several claims to describe and critique this federal family separation funding system. First, analyzing this funding

7. Specific agencies' names vary widely across jurisdictions, so I will refer to these agencies as "CPS agencies," following the commonly used acronym for child protective services.

8. Restatement of Children and the Law, *supra* note 6, §§ 2.30, 2.40–2.44.

9. *Id.* at § 2.50 & comment d.

10. *See, e.g.*, U.S. Dep't of Health & Hum. Servs., Admin. on Children, Youth & Families, No. ACYF-CB-IM-21-01, at 3 (Jan. 5, 2021), https://www.acf.hhs.gov/cb/policy-guidance/im-21-01 [https://perma.cc/BLV6-2LDR] ("We should offer them the opportunity to expand family relationships, not sever or replace them.").

11. *See* Susan Mangold & Catherine Cerulli, *Follow the Money: Federal, State, and Local Funding Strategies for Child Welfare Services and the Impact of Local Levies on Adoptions in Ohio*, 38 Cap. U. L. Rev. 349, 351 (2009) (describing federal, state, and local funding systems as a "second triangle" that shapes the family regulation system, after the first triangle—the competing rights of parents, children, and the state).

12. *Infra* Part I.D.

13. *Cf.* Caitlyn Garcia, *Replacing Foster Care with Family Care: The Family First Prevention Services Act of 2018*, 53 Fam. L.Q. 27, 30 (2019) (describing this "tension" in the 1980 Adoption Assistance and Child Welfare Act); Mangold & Cerulli, *supra* note 11, at 351 ("[T]he fiscal incentives [of federal family regulation funding rules] are sometimes contrary to the substantive goals of the legislation.").

system is crucially important for understanding the present family regulation system[14] even though it has received relatively little scholarly attention until recently.[15] In particular, Title IV-E of the Social Security Act, the largest source of federal CPS agency funding,[16] is so large that "no state could feasibly reject Title IV-E funding."[17] Yet, much scholarship has focused on Title IV-E's micro impacts through its specific substantive demands of state family regulation systems without analyzing the billions of dollars it provides to CPS agencies to support temporary and permanent family separations.[18]

---

14. The "family regulation system" refers to the constellation of CPS agencies, family courts, and other legal actors that intervene in family integrity with a stated goal of protecting children from maltreatment. I follow other scholars in using this phrase as a more accurate description than "child welfare system," a phrase which invokes troubling historical connections with welfare (that is, public benefits) systems. *See* Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing Our Language*, IMPRINT (July 28, 2020, 11:45 PM), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/D5TT-HZ58] (noting the many voices "inside and outside the agency lament the lack of welfare services that the system is able to offer" and describing the "child welfare" name as a product of the "state's imagination"); *see also* Dorothy Roberts, *Abolishing Policing Also Means Abolishing Family Regulation*, IMPRINT (June 16, 2020, 5:26 AM), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480 [https://perma.cc/VL28-QQLS] (referring to "the misnamed 'child welfare' system").

15. For recent critical work, see *infra* note 21. For rarer examples of earlier work, see Michele Goodwin & Naomi Duke, *Parent Civil Unions: Rethinking the Nature of Family*, 2013 U. ILL. L. REV. 1337, 1347 (2013); Vivek Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REF. 281 (2007).

16. *E.g.*, KRISTINA ROSINSKY, MEGAN FISCHER, & MAGGIE HAAS, CHILD TRENDS, CHILD WELFARE FINANCING SFY 2020: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 16 (2023), https://cms.childtrends.org/wp-content/uploads/2023/04/ChildWelfareFinancingReport_ChildTrends_May2023.pdf [https://perma.cc/Z3R5-M9FV]; Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know*, 29 CHILD LAW PRACTICE 33, 37 (2010).

17. Leanne Gale & Kelly McClure, *Commandeering Confrontation: A Novel Threat to the Indian Child Welfare Act and Tribal Sovereignty*, 39 YALE L. & POL'Y REV. 292, 329 (2020).

18. Title IV-E is frequently cited as one tool to achieve discrete policy goals. *E.g.*, Madison Wurth, *The Neglected Problem in the Child Welfare System: The Instability in Foster Care Placements*, 61 U. LOUISVILLE L. REV. 367, 402–04 (2023) (IV-E as tool to limit congregate care and improve foster placement stability); Garcia, *supra* note 13 (same); Christina Cullen, *Legislative Update: New Title IV-E Dollars for Child and Parent Legal Representation Presents a Tremendous Opportunity to Improve Outcomes for Families*, 40 CHILD. LEGAL RTS. J. 45, 49 (2020) (expanding access to counsel for parents and children through accessing IV-E funding); Lauren van Schilfgaarde & Brett Lee Shelton, *Using Peacemaking Circles to Indigenize Tribal Child Welfare*, 11 COLUM. J. RACE & L. 681, 699–702 (2021) (using IV-E funding to empower tribal child welfare agencies).

Second, this Article deepens a growing critique of Title IV-E funding as a significant contributor to a system that removes children—especially poor and disproportionately Black and Indigenous children—unnecessarily. As Dorothy Roberts has written, "Title IV-E offers enormous federal backing for the philosophy of addressing the needs of impoverished families by destroying them" because it subsidizes state agencies' family separations.[19] As Michele Goodwin and Naomi Duke have noted, federal spending "provide[s] . . . unlimited funding for out-of-home placement while providing capped, reduced funding for prevention of placement or reunification strategies."[20] An expanding list of scholars have raised similar concerns in recent years.[21] The critique rests in where IV-E money goes: it literally funds family separations by subsidizing state costs of paying foster parents to take care of children removed from poor families, paying subsidies to adoptive parents and guardians when those family separations become permanent, and paying the administrative costs of CPS agency efforts to separate families and take care of children in state custody.[22] Moreover, Title IV-E spending is an entitlement for state agencies, meaning there is no limit on how many families an agency can separate and still trigger federal financial assistance.[23]

This Article expands on this literature by analyzing the range of incentives federal funding laws create for both CPS agencies and

19. Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families and How Abolition Can Build a Safer World 143 (2022); *see also id.* at 144 ("Bottom line: most federal funding for child welfare services becomes available to families only after their children have been placed in state custody, and the money is spent primarily on the costs of family separation.").

20. Goodwin & Duke, *supra* note 15, at 1347. Goodwin and Duke wrote in 2013, before Congress amended Title IV-E to provide more prevention funding. But this has not changed the basic critique. *Infra* Part I.E.

21. Robyn Powell criticizes IV-E for "resolutely supporting" a system that separates families unnecessarily, especially families headed by parents with disabilities. Robyn M. Powell, *Achieving Justice for Disabled Parents and Their Children: An Abolitionist Approach*, 33 Yale J.L. & Feminism 37, 54 (2022); *see also* Charisa Smith, *The Conundrum of Family Reunification: A Theoretical, Legal, and Practical Approach to Reunification Services for Parents with Mental Disabilities*, 26 Stan. L. & Pol'y Rev. 307, 340 (2015) (criticizing Title IV-E for "encourag[ing] states to keep a larger number of children in foster care rather than to return them to their homes of origin"); Richard Wexler, *You Get What You Pay For: The Federal Government Should Stop Paying for Foster Care*, 1 Fam. Integrity & Just. Q. 56 (Summer 2022); Miriam Mack, *The White Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System*, 11 Colum. J. Race & L. 767, 778 (2021) (criticizing "federal government spending on maintaining states' foster systems and fast tracking adoptions" for "dwarf[ing] spending on family preservations").

22. *Infra* Part I.D.

23. *Infra* note 87.

individuals. Federal funding makes it cheaper for states to separate families[24] and incentivizes the permanent destruction of families over reunification.[25] It also enlists state family courts in making findings necessary for receiving federal funds, transforming courts from checks on state executive branch action into providers of state funding.[26] Federal funding rules incentivize kinship caregivers to push parents away even if caregivers could support parents by living with them.[27] And federal funding, coupled with tax law, provides all substitute caregivers with financial incentives to become permanent caretakers and support state terminations of the parent-child relationship.[28] Moreover, the present federal funding system has failed to exercise effective federal policy control over the family regulation system, leading to what federal measures widely conclude is a dysfunctional system.[29]

Third, this Article describes and critiques a central feature of federal funding laws for the family regulation system: these funding streams effectively transfer public benefits designated for poor parents to state CPS agencies and substitute caretakers and operate as a form of welfare payments. This transfer has been surprisingly explicit throughout the history of the federal foster care funding system. At its origin, that system gave states a choice: provide welfare payments to parents or take care of their children in some substitute environment. States may only receive federal funds when they separate children from parents who would otherwise receive public benefits.[30] As kinship foster care became more common, agency leaders saw foster care funding explicitly as a means to keep some welfare spending in low-income and Black and Latino communities.[31] Today, authorities and advocates support present-day efforts to expand kinship foster care as a tool to provide financial benefits to kinship caregivers—at the cost of breaking up families.[32] When Congress limited welfare payments to parents generally, it also gave states greater flexibility to shift welfare funds to pay CPS agencies—something multiple states continue to use to support family separations.[33]

---

24. *Infra* Part II.A.
25. *Infra* Part II.B.
26. *Infra* Part II.C.
27. *Infra* Part III.B.
28. *Infra* Part III.C.
29. *Infra* Part I.G.
30. *Infra* notes 57–59 and accompanying text.
31. *Infra* note 333 and accompanying text.
32. *Infra* notes 258–259 and accompanying text.
33. *Infra* notes 155–161 and accompanying text.

This Article presents a range of ideas to uproot a funding system that has long spent money to support family separations and the new families created after destroying old ones while refusing to spend equivalent money on families of origin. Broad change can better align federal spending with the law's commitment to family integrity. Most significantly, this Article endorses shifting Title IV-E funds from a state agency entitlement to support for any family separation to an equally large but more flexible grant to states for wide-ranging efforts to keep families intact (subject to federal oversight to ensure the funds support families as intended).[34] This proposal would end the problematic federal financial incentives on state agencies, family courts, and individuals, and align federal funding with the law's commitment to family integrity. Moreover, policymakers can develop alternative funding streams for the most valuable parts of Title IV-E spending. Kinship caregivers should be able to seek support for their role, especially when they help keep parents and children together, without using the family regulation system. This Article will propose a mechanism for providing such support via Medicaid funding, analogizing to expanded Medicaid funding for kinship caregiving for adults with disabilities or the elderly.[35]

Finally, this Article proposes a set of incremental reforms within the present legal system: (1) remove the more blatant financial incentives for family separations and terminations, (2) disallow states from shifting federal public benefits for families to support family separations, (3) use the existing funding system to expand kinship placements and support kinship caregivers helping parents and children stay together, and (4) strengthen the reasonable efforts requirement to require more emphasis on efforts to keep families together.[36]

Part I depicts Title IV-E, its history, and its essential importance. Part II describes and critiques the financial incentives Title IV-E creates for state agencies and how the role it demands for state family courts diminishes their role as a check on state executive branch agencies. Part III chronicles and critiques the financial incentives Title IV-E creates for individuals in the family regulation system, especially kinship and non-kinship foster caregivers. Part IV describes how this funding system operates as a diverted welfare benefits system. Part V outlines reform proposals, ranging from relatively modest changes to the existing funding system to more dramatic changes, including shifting federal funding away from family separations and towards family preservation,

34. *Infra* Part V.A.
35. *Infra* Part V.B.
36. *Infra* Part V.C.

and creating mechanisms to provide welfare payments to kinship caregivers who help keep families together and children out of state custody—without resorting to the family regulation system.

I. Federal Family Separation Funding

Federal, state, and local governments spend more than $36 billion a year on family regulation systems. These legal systems investigate allegations that parents have neglected or abused their children, separate some parents from their children, and place and maintain those children in foster care until they reunify, leave foster care for a new permanent family, or age out of state custody.[37] A large proportion—42%—comes from federal sources, and this proportion has been fairly stable in recent years.[38] This federal share of funding is sufficiently large to give the federal government tremendous power over state family regulation systems.[39]

This federal funding system for state and local CPS agencies emerged from a disturbing history of Civil Rights Era efforts by states to deny welfare benefits to families they deemed unsuitable. The federal government's response to those efforts, codified first in 1960 federal agency guidance and subsequently in legislation, provides the architecture of the present-day funding system. Through the resulting

37. States report spending at least $15.2 billion in federal funds in FY 2020, though this "is understated by an unknown amount." Rosinsky, Fischer, & Haas, *supra* note 16, at 15. Federal funds account for 42% of all spending among the 31 states who provided sufficient data. *Id.* at 13. If that percentage holds nationally, then the $15.2 billion in federal spending indicates $36.5 billion in total spending.

38. *Id.* at 2. State agencies also reported using $251 million in "third party income" to fund their activities, including children's Social Security disability or survivor benefits diverted to agencies and parents mandated to pay child support to offset the cost of foster care. *Id.* These funds account for less than 1% of the more than $36 billion in total family regulation system spending. But they amount to a more significant cost to the children and parents from whom these funds are taken, and these practices have been criticized accordingly. *E.g.*, Maria Cancian et al., *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster Care*, 72 Child & Youth Servs. Rev. 100, 109 (2017); Daniel L. Hatcher, *Collateral Children: Consequence and Illegality at the Intersection of Foster Care and Child Support*, 74 Brook. L. Rev. 1333, 1334 (2009). The federal government issued 2022 guidance discouraging states from using this practice. U.S. Dep't of Health & Hum. Servs., Children's Bureau, Child Welfare Policy Manual § 8.4C(5) (2022), https://acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=170 [https://perma.cc/JU44-GWF3].

39. *See supra* note 17 and accompanying text. For comparison, the federal government is an essential policy player in primary and secondary education despite covering an average of only 11% of public schools' budgets. Nat'l Ctr. for Educ. Stat., U.S. Dep't of Educ., Public School Revenue Sources: Condition of Education (2024), https://nces.ed.gov/programs/coe/indicator/cma [https://perma.cc/H7ZD-BZFS].

system, Congress exercises its spending power to fund certain activities of state agencies and requires state legal systems to meet a list of federal requirements as a condition of receiving those funds.[40] That system funds family separations while de-emphasizing spending on efforts to prevent such separations.

This section briefly describes how the present federal funding system was built, and how one portion of that system—Title IV-E—emerged as the most important federal funding source. It then describes what activities IV-E does and does not support—in particular, how it funds family separations by funding foster care, adoption, and guardianship subsidies and CPS agency overhead, and does not fund most efforts to preserve and reunify families. It then places Title IV-E in both historic and theoretical context—its relationship to welfare policies and its role in "fiscal federalism"—both of which provide context for critiques of the status quo.

A. Title IV-E's Origins: How the Flemming Rule Separated Federal Foster Care Funding from Welfare Funding

Federal foster care funding has, from its modern origins, featured "deep entrenchment" with public benefits.[41] The federal government established that funding system following a conflict with states "over welfare payments to single-parent households."[42] Early 20th century welfare programs generally excluded Black families, but this discrimination became increasingly untenable in the post-World War II era. As was common in the Civil Rights Era, states nonetheless sought ways to resist helping Black families equally. By 1960, 24 states imposed rules requiring parents to provide a "suitable home" for their children as a condition of receiving Aid to Families with Dependent Children (AFDC) welfare payments.[43] These states declared that many

40. *See, e.g.*, 42 U.S.C. § 671(a) (listing state plan requirements for accessing Title IV-E funds).

41. Goodwin & Duke, *supra* note 15, at 1351.

42. Off. of the Assistant Sec'y for Plan. and Evaluation, U.S. Dep't of Health & Hum. Servs., ASPE Issue Brief: Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field 3 (2005) [hereinafter ASPE Issue Brief].

43. Roberts, *supra* note 19, at 116–17; Susan Vivian Mangold, *Poor Enough to be Eligible? Child Abuse, Neglect, and the Poverty Requirement*, 81 St. John's L. Rev. 575, 584 (2007). The name AFDC was developed in 1962, after "Aid to Dependent Children" had been used. Off. of the Assistant Sec'y for Plan. and Evaluation, U.S. Dep't of Health & Hum. Servs., Aid to Families with Dependent Children: The Baseline 4 (1998), https://aspe.hhs.gov/sites/default/files/private/pdf/167036/1history.pdf [https://perma.cc/8VUN-W78B]. For ease of reference, I refer to AFDC throughout.

families—disproportionately Black—did not provide suitable homes for their children and accordingly denied them AFDC benefits.[44] This practice generated criticism, especially after several southern states cut off tens of thousands of families, the vast majority Black, from AFDC benefits while taking no additional action to help those families.[45] Some critics explicitly worried that denying these children welfare benefits would lead their families to fall deeper into poverty, which would lead their children to fall into foster care.[46]

The federal government—which provided AFDC funds to states—responded in 1961 with the "well-meaning but ultimately disastrous" Flemming Rule, named after Arthur Flemming, the then-Secretary of Health, Education, and Welfare.[47] The federal government declined to attack racism in states' suitable home rules or to insist that states keep families intact whenever possible while supporting all families equally. Rather, the Flemming Rule took states' assertion of families' unsuitability as a given and criticized states for cutting families off from welfare payments and doing nothing more.[48] The rule provided that if states wanted to keep their AFDC funding, labeling families as "unsuitable" required the states to provide out-of-home placements to children.[49]

The next year, Congress codified the Flemming Rule, providing federal funding to help states pay to break up AFDC-eligible, i.e., poor, families deemed unsuitable.[50] Congress permitted states to remove children from homes found by a judge to be "contrary to the welfare of" the child,[51] a provision that remains in Title IV-E.[52] The Supreme Court later described how Congress created the federal foster

44. Claudia Lawrence-Webb, *African American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, 76 Child Welfare 9, 10–12 (1997); Laura Briggs, Taking Children: A History of American Terror 37–43 (2020).

45. Lawrence-Webb, *supra* note 44, at 12; Briggs, *supra* note 44, at 39–41.

46. Lawrence-Webb, *supra* note 44, at 22.

47. Briggs, *supra* note 44, at 42; Alan J. Dettlaff, Confronting the Racist Legacy of the American Child Welfare System: The Case for Abolition 61–62 (2023).

48. Lawrence-Webb, *supra* note 44, at 14–16.

49. Mangold, *supra* note 43, at 586; Jane Spinak, The End of Family Court: How Abolishing the Court Brings Justice to Children and Families 164–66 (2023).

50. S. Rep. No. 1589, at 14 (1962); Resol. 606, at 7 (Am. Bar Ass'n 2022) [hereinafter ABA Resolution 606], https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf [https://perma.cc/G3Z8-ES5U].

51. S. Rep. No. 1589, at 14 (1962); ABA Resolution 606, *supra* note 50, at 7.

52. 42 U.S.C. § 672(a)(2)(A)(ii); *see also* ABA Resolution 606, *supra* note 50, at 8 (describing this requirement as "[b]uilding on the Flemming Rule").

care funding system "in the aftermath" of the Flemming Rule,[53] with "a fundamental purpose . . . to facilitate removal of children from their homes."[54]

Alongside this newfound federal financial support for family separations, the Flemming Rule "decoupled" financial support and rehabilitative services for parents.[55] States would *either* provide parents financial support through AFDC benefits *or* would intervene to separate families. By the 1970s, this separation hardened as CPS agencies developed into independent entities from public benefits agencies in many states, and did not provide direct financial support.[56]

When Congress codified the Flemming Rule, it limited federal CPS agency funding to those cases in which states could have provided AFDC benefits, a provision which remains in current funding law. For a state agency to receive IV-E funds in an individual case, the state must be separating a family so poor that the family would have qualified for AFDC "as in effect on July 16, 1996."[57] Quite literally, the Title IV-E system subsidizes state efforts to separate poor families.[58] More mundanely, states must document the poverty of the families they separate to access IV-E funding, imposing high administrative costs to access the funding.[59] That requirement incentivizes states to hire consultants to help them effectively document families' poverty to maximize federal revenue,[60] further focusing CPS agencies on the poorest families.

---

53. Miller v. Youakim, 440 U.S. 125, 138 (1979); *see also* Mangold, *supra* note 43, at 586 (describing Congress' codification of the Flemming Rule).

54. *Miller*, 440 U.S. at 139; *see also* King v. Smith, 392 U.S. 309, 323–25 (1968) (describing Flemming Rule's history and subsequent congressional codification). Congress also "took steps to 'safeguard' intact family units from unnecessary upheaval," *Miller*, 440 U.S. at 139, but did not fund such safeguards.

55. Spinak, *supra* note 49, at 166; *see also* Child. Welfare Info. Gateway, Childs. Bureau, U.S. Dep't of Health & Hum. Servs., Separating Poverty From Neglect in Child Welfare 4 (2023), https://www.childwelfare.gov/resources/separating-poverty-neglect-child-welfare/ [https://perma.cc/NX7G-G6Z3] (critiquing the "separation" between financial support and child neglect interventions).

56. Leroy H. Pelton, For Reasons of Poverty: A Critical Analysis of the Public Child Welfare System in the United States 18 (1989).

57. 42 U.S.C. § 672(a)(1)(B), (a)(3)(A)(i). Congress enacted welfare reform in 1996, ending AFDC and creating Temporary Aid to Need Families. *Infra* Part I.F. For a detailed summary and critique of the IV-E requirement linking federal foster care funding to family poverty and AFDC eligibility, see Mangold, *supra* note 43.

58. Roberts, *supra* note 19, at 143.

59. Goodwin & Duke, *supra* note 15, at 1353.

60. Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 Ariz. L. Rev. 675, 702 (2010).

B. Congress Built Title IV-E on the Flemming Rule's Foundation

Since codifying the Flemming Rule, Congress built out Title IV-E through a series of laws adding requirements on states for accessing federal foster care funds and identifying new family separation-related activities that Congress would fund. All these statutes maintained and expanded the Flemming's Rule's core: providing federal funds to help state CPS agencies pay the costs of separating poor families, as opposed to financial support or services to the families at issue.

This effort began with the Adoption Assistance and Child Welfare Act of 1980 (AACWA).[61] AACWA added a new category of federally-required and federally-supported spending: adoption subsidies intended to help support foster parents who adopted foster children and to induce more people to do so.[62] AACWA also required that state family courts find that state agencies made reasonable efforts to keep families together, reunify families when they are separated, and when reunification is impossible, to help the child leave foster care to a new permanent family.[63] This reasonable efforts requirement sought to ensure the appropriate balance in every case—that agencies only removed children from their parents when necessary, reunified families whenever possible, and did not let children languish in foster care.[64] Crucially, however, AACWA provided funding for adoption subsidies, not for efforts to preserve and reunify families. Further, it did not define "reasonable efforts," leaving state courts to determine if state actions were adequate and thus whether the state could access federal funds in individual cases. To further ensure children did not remain in foster care too long, Congress required states to hold hearings after 18 months to determine if children should remain in state custody, return home, or move to a new permanent family.[65]

Congress revisited some of these provisions in the Adoption and Safe Families Act of 1997 (ASFA), which did little to change

---

61. 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.).

62. *Id.* at § 101(a)(1), 94 Stat. at 501–06 (codified as amended at 42 U.S.C. §§ 671(a)(1), 673(a)-(c) & 674(a)(2)).

63. H. R. REP. NO. 96-136, at 50 (1979).

64. In re James G., 943 A.2d 53, 69–70 (Md. Ct. Spec. App. 2008) (describing legislative intent); *see also* Kathleen S. Bean, *Reasonable Efforts: What State Courts Think*, 36 U. TOL. L. REV. 321, 324–25 (2005) (noting congressional concern for children staying in foster care rather than reunifying); Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 269–72 (2003) (describing goal of minimum quality family preservation and reunification services).

65. Adoption Assistance and Child Welfare Act of 1980 § 101(a)(1), 94 Stat. at 511 (codified as amended at 42 U.S.C. § 675(5)(C)(ii)).

Title IV-E's overall funding structure but added several provisions which increased both the importance of IV-E's substantive elements, and their tension with key legal principles.[66] ASFA amended Title IV-E to require states, with certain exceptions, to file petitions to terminate parent-child relationships[67] whenever a child had been in foster care for 15 months.[68] ASFA also created especially direct incentives for states to permanently destroy families, paying state agencies bonuses for arranging more adoptions.[69] ASFA has generated a large degree of well-earned criticism for how it pushed states to terminate parent-child relationships frequently and seek to arrangement permanent placements in more adoptive families.[70]

Congress has subsequently tweaked Title IV-E, making some discrete policy changes and providing some additional funding for foster care systems but not dramatically changing the flow of federal funding.[71] For instance, in 1999, Congress provided additional funds to support CPS agencies' work with older youth in foster care as they transitioned out of state custody.[72] In 2008, Congress allowed states to draw down federal funding to support kinship guardianship subsidies.[73] Congress simultaneously expanded federal support for

66. Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2115 (1997).

67. Such actions are frequently referred to as "termination of parental rights" or TPR cases. *E.g.*, Santosky v. Kramer, 455 U.S. 745, 750, 760, 765 (1982). The phrase "terminate parent-child relationships" more completely encapsulates what is terminated—both parents' rights to their children and children's relationship with their parents. It is also occasionally the statutory term used. *See, e.g.*, D.C. CODE § 16-2353 (2022) ("Grounds for termination of parent and child relationship.").

68. § 103(a)(3), 111 Stat. at 2118 (codified at 42 U.S.C. § 675(5)(E)). ASFA included other provisions that push towards terminations and adoptions. It required states to hold permanency hearings after a child had been in foster care for 12 months (rather than 18 months under AACWA), and created some exceptions to states' obligations to make reasonable efforts to prevent removals and reunify families. *Id.* at §§ 101(a) & 302 (codified at §§ 671(a)(15)(D) & 675(5)(C)).

69. *Infra* notes 230-233 and accompanying text.

70. *E.g.*, S. Lisa Washington, *Time and Punishment*, 134 YALE L.J. 536, 567–76 (2025); Shanta Trevedi, *The Adoption and Safe Families Act is Not Worth Saving: The Case for Repeal*, 61 FAM. CT. REV. 315, 317, 319–23 (2023); Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997: The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 722, 725 (2021); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, Bad Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 197, 202–03 (2004).

71. A full accounting of these changes is beyond the scope of this article. Part I.D, *infra*, outlines in more detail specific activities IV-E now pays for.

72. Foster Care Independence Act of 1999, Pub. L. 106-169, § 101, 113 Stat. 1822, 1284 (1999) (codified at 42 U.S.C. § 677).

73. Fostering Connections to Success and Increasing Adoptions Act, Pub. L. 110-351, § 101(a), 122 Stat. 3949, 3950 (2008) (codified at 42 U.S.C. § 673(d)).

adoption subsidies, phasing out the AFDC link for adoption subsidies so they would be available regardless of the poverty of families from which children were permanently removed.[74] In 2014, Congress added requirements for states to engage in certain case planning steps when children appeared likely to remain in foster care until reaching the age of majority.[75] Congress has added other substantive regulations, requiring each state to have a state plan that includes, for instance, to conduct criminal and child abuse and neglect registry background checks for prospective foster parents,[76] to notify all adult relatives of a foster child that the child is in state custody and that the relatives can try to become a placement resource for the child,[77] and to make "reasonable efforts" to place siblings together and, when siblings are placed separately, to ensure frequent contact between them.[78] None of these additions changed what IV-E does and does not fund.[79]

C. Title IV-E is the Most Important Federal Funding Source

Federal sources beyond Title IV-E support state CPS agencies.[80] But three features establish why Title IV-E funding is essential to the present system. First, Title IV-E is by far the largest single source of federal family regulation system funding. Title IV-E now accounts for $10.4 billion annually[81] and a majority—57% in FY 2022—of federal family regulation system spending.[82] A hodge-podge of other sources make up the remainder: Temporary Aid to Needy Families (19%), Social Services Block Grants (10%), Medicaid (7%), and Title IV-B of the Social Security Act (4%).[83] Title IV-E spending grew significantly

74. That phase out was complete by 2018. *Id.* at § 402 (2008) (codified at 42 U.S.C. § 673(a)(2)(A)(ii) & (e)). Without these provisions, the AFDC look back would apply. 42 U.S.C. § 673(a)(2)(A)(i)(I)(aa)(BB). The incentive for state agencies created by this change is discussed *infra* notes 224–229 and accompanying text.

75. Preventing Sex Trafficking and Strengthening Families Act, Pub. L. 113-183, § 112, 128 Stat. 1919, 1926–27 (2014) (codified at 42 U.S.C. § 675a).

76. 42 U.S.C. §671(a)(20).

77. 42 U.S.C. §671(a)(29).

78. 42 U.S.C. §671(a)(31).

79. A potentially more dramatic change came with the Family First Prevention Services Act, which is discussed *infra* Part I.E.

80. *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., IF10590, CHILD WELFARE: PURPOSES, FEDERAL PROGRAMS, AND FUNDING 1 (2022) (noting CPS agency funding from Title IV-E, the Child Abuse Prevention and Treatment Act, Social Services Block Grants, and Temporary Aid to Needy Families).

81. *Id.* at 2; *see also* ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 18 (counting at least $8.2 billion in state expenditures in survey-responding states).

82. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 16.

83. *Id.* The Congressional Research Service omits TANF and SSBG from their breakdown, presenting Title IV-E foster care ($5.9 billion), IV-E adoption and

through the 1980s and 1990s—an average of 17% per year from the passage of AACWA in 1980 to ASFA in 1997, a rate outpacing the already significant increase in the number of IV-E eligible children in foster care.[84] Its proportion of federal family regulation spending continues to grow modestly.[85] Meanwhile, other sources' funding levels—especially the ones that supported efforts to prevent family separations like Title IV-B—stagnated.[86]

Second, Title IV-E provides CPS agencies with entitlement funding, a feature that has helped fuel its growth. CPS agencies claim federal reimbursement for allowed expenditures for all eligible children that the agency separates from their parents with no upper limit.[87] If a state's population of children living in foster care, with adoptive parents, or with legal guardians increases, so does federal support to state agencies which pay regular stipends to these guardians.

Third, unlike the other federal funding sources, Title IV-E now includes features that pervasively shape how state agencies and family courts handle cases. These include its requirements for states to pursue terminations after a child spends 15 months in foster care, for agencies to make reasonable efforts to preserve and reunify families, and for family courts to enforce the requirements. These Title IV-E obligations apply to every case—even those not individually eligible for IV-E funding—thus amplifying its impact.

D. What Title IV-E Does and Does Not Pay For

The substantive law's emphasis on reserving and reunifying families exists in tension with what Title IV-E actually pays for. Title IV-E requires states to make "reasonable efforts" to "preserve

---

guardianship assistance ($4.4 billion), and IV-E older youth services ($186 million) as accounting for an even larger proportion of federal family regulation system funding. *See* STOLTZFUS, *supra* note 80, at 1.

84. The number of IV-E eligible children in foster care increased roughly three-fold from 1981 to its peak in 1998. Total IV-E funding increased roughly ten-fold in that period. ASPE ISSUE BRIEF, *supra* note 42, at 4.

85. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 16. Title IV-E's proportion of federal family regulation system spending increased from 53% in 2010 to 57% in 2022.

86. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 2; *see also id.* at 16 (noting that federal Social Services Block Grant provides 10% of federal family regulation system spending, Medicaid 7 %, Title IV-B 4% and other federal sources 3%). Accounting for inflation, Title IV-B funding—which is intended to cover prevention activities—has declined from $652 million in 2010 to $563 in 2020. *Id.* at 37; *see also* ROBERTS, *supra* note 19, at 143–44 (describing how Title IV-E expenditures now dwarf IV-B and other federal prevention spending).

87. EMILIE STOLTZFUS, CONG. RSCH. SERV., CHILD WELFARE: STATE PLAN REQUIREMENTS UNDER THE TITLE IV-E FOSTER CARE, ADOPTION ASSISTANCE, AND KINSHIP GUARDIANSHIP ASSISTANCE PROGRAM 1 (2014).

and reunify families."[88] Yet Title IV-E does not provide funding for states to provide support or services to families to achieve that goal. Instead, IV-E funds the costs incurred by CPS agencies separating families. As the federal government has recognized, "the vast majority of the federal child welfare budget goes toward reimbursing state and tribal title IV-E agencies for some costs associated with foster care."[89] Taken together, federal expenditures on foster home placements, adoption and guardianship subsidies, and administrative costs to support them account for 86% of federal family regulation system spending.[90] State expenditures are roughly similar—80% of state CPS agency spending is on the same activities.[91]

These funds support state action to separate families, not keep them together. First, Title IV-E provides states with funding for the infrastructure of family separations. Title IV-E entitles states to 75% reimbursement for training staff[92] and training foster parents[93] and 50% reimbursement for developing and managing case management and data tracking software[94] and for all other costs incurred "for the proper and efficient administration of the State plan."[95] Through the latter category, known as "administrative costs," the federal government supports state recruitment and licensing of foster families,[96] determinations of the precise amount of foster care maintenance payments to pay foster parents,[97] development of case plans for foster children,[98] preparation for court hearings at which agencies seek to justify and often extend family separations,[99] and a "proportionate share of related agency overhead."[100] Importantly, these "administrative cost" reimbursements increase when CPS agencies increase the number of families they separate. If agencies hire more case workers and recruit more foster homes to handle more

88. 42 U.S.C. § 671(a)(15)(B).
89. U.S. Dep't of Health & Hum. Servs., Admin. on Child., Youth and Fams., ACYF-CB-IM-20-06, Foster Care as a Support to Families 2, at 3 (2020) [hereinafter HHS, Foster Care as a Support].
90. 49% of federal funding supports temporary foster care placements, 24% supports permanent out-of-home placements through adoption and guardianship subsidies, and 13% supports CPS agency investigation and supervision of families. Rosinsky, Fischer, & Haas, *supra* note 16, at 3, 56.
91. *Id.*
92. 42 U.S.C. § 674(a)(3)(A).
93. § 674(a)(3)(B).
94. § 674(a)(3)(C)-(D).
95. § 674(a)(3)(E).
96. 45 C.F.R. § 1356.60(c)(2)(vii).
97. § 1356.60(c)(2)(viii).
98. § 1356.60(c)(2)(iv).
99. § 1356.60(c)(2)(ii).
100. § 1356.60(c)(2)(ix).

children removed from their parents, they will receive more funding to train those individuals and to administrate placements in foster care; if agencies reduce their scope and separate fewer families, their federal reimbursements will decline. These "administrative cost" subsidies can be substantial—up to 43% of federal costs provided for foster care subsidies, though the figures vary widely by state.[101]

Second, Title IV-E funds help states pay material support—most prominently in the form of direct cash assistance—for people *other than parents* to take care of children. When a CPS agency places a child in any foster home, it must pay that caregiver "foster care maintenance payments."[102] By law, these payments must cover "food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals," and more.[103] If the foster parents adopt or become permanent guardians of the children, these monthly payments can be converted into adoption[104] or guardianship subsidies,[105] regardless of the financial need of the adoptive parents or guardians.[106] And if CPS agencies succeed in creating new families and destroying old ones via terminations of parent-child relationships and adoptions in enough cases, the agencies become eligible for bonuses paid by the federal government.[107] Federal data shows that states have received nearly $1 billion in such payments since they were created in 1997.[108]

These foster care maintenance payments are significantly greater than what caregivers can receive through any other public benefits option. In New York, the family regulation system pays foster parents up to $1,282.53 per child per month and up to $1,123 per month in lower-cost upstate counties.[109] In Texas, the minimum licensed foster

101. Goodwin & Duke, *supra* note 15, at 1358.
102. "Foster care maintenance payments" is the Title IV-E statutory term. 42 U.S.C. § 672.
103. *Id.* § 675(4)(A).
104. *Id.* § 673(a).
105. *Id.* § 673(d).
106. *Id.* § 673(a)(3).
107. *Id.* §673b(d).
108. The federal government counted $942,229,875 in such payments from fiscal years 1998 through 2022. *Adoption and Legal Guardianship Incentive Payment Program—Earning History by State: FY 1998—FY 2022*, U.S. Dep't Health & Hum. Servs., Admin. Child. & Fams., https://www.acf.hhs.gov/sites/default/files/documents/cb/algipp-earning-history-by-state.pdf [https://perma.cc/2598-V7PK].
109. *Maximum State Aid Rates for Foster Boarding Home Payments and Adoption Subsidies 2023-24 Rate Year (July 1, 2023, through March 31, 2024)*, N.Y. Off. Child. & Fam. Servs., https://ocfs.ny.gov/main/rates/assets/docs/rates/fc-b/FC-Board-Rates-2023Jul01-2024Mar31.pdf [https://perma.cc/7HEM-X4PE].

family payment is $812.10 per month.[110] In Florida, it is $517.94 for young children and $621.77 for teens.[111] In Wisconsin, the minimum rates range from $441 to $572.[112] These payments are more than the federal government paid families during the now-expired COVID-era expanded child tax credit (up to $300 per month per child),[113] more than the average SNAP benefit (under $300 per month per person),[114] and hundreds of dollars greater than the per child amount of TANF benefits parents and other caregivers can receive.[115] This differential—foster care subsidies amounting to significantly more support than other form of public benefits—is longstanding. When the Supreme Court ruled that kinship caregivers could access this funding in 1979,[116] the kinship caregivers were seeking a 67% increase in benefits from what they were paid in welfare compared with what they should have been paid

110. Calculated based on a $27.07 minimum daily rate. *24-Hour Residential Child Care Reimbursement Rates*, TEX. DEP'T FAM. & PROTECTIVE SERVS., https://www.dfps.texas.gov/Doing_Business/Purchased_Client_Services/Residential_Child_Care_Contracts/Rates/default.asp [https://perma.cc/C4T7-YH69].

111. Fla. Dep't of Child. and Fams., Memorandum on Implementation of Chapter 2022-68, Laws of Florida (Senate Bill 7034) (July 1, 2022), https://www.myflfamilies.com/sites/default/files/2023-05/20220701-Memo_Implementation_of_SB7034.pdf.

112. *Understanding the Uniform Foster Care Rate, Effective January 1, 2024 - December 31, 2025*, WIS. DEP'T CHILD. & FAMS., https://dcf.wisconsin.gov/files/publications/pdf/0142.pdf [https://perma.cc/UY7T-ZZSB].

113. Zachary Parolin et al., *The Effects of the Monthly and Lump-Sum Child Tax Credit Payments on Food and Housing Hardship*, 113 AEA PAPERS & PROCEEDINGS 406, 406 (2023).

114. *A Quick Guide to SNAP Eligibility and Benefits*, CTR. FOR BUDGET & POL'Y PRIORITIES (Sept. 30, 2024), https://www.cbpp.org/research/food-assistance/a-quick-guide-to-snap-eligibility-and-benefits [https://perma.cc/24UC-M8KR].

115. TANF rates vary by state. In Texas, a monthly child-only TANF grant is $121 (compared to more than $800 for foster parents). *TANF Cash Help*, TEX. DEP'T HEALTH & HUM. SERVS., https://www.hhs.texas.gov/services/financial/cash/tanf-cash-help [https://perma.cc/DK3G-UYKD]. In New York, benefits are higher, but still far less than the foster care rates noted above. *Temporary Assistance (TA), Frequently Asked Questions, How Much do Recipients Receive?*, N.Y. OFF. OF TEMP. & DISABILITY ASSISTANCE, https://otda.ny.gov/programs/temporary-assistance/faqs.asp [https://perma.cc/PV45-7UWD].

116. Miller v. Youakim, 440 U.S. 125, 146 (1979). That rule has taken on increased importance as kinship foster now provides placements for more than one-third of all children in foster care. U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILD. YOUTH & FAMS., ADMIN. ON CHILD. AND FAMS., THE AFCARS REPORT: PRELIMINARY FY 2022 ESTIMATES AS OF MAY 9, 2023—NO. 30 2 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/K8WH-JRPR] [hereinafter HHS, *AFCARS FY'22*]. That compares with 24 percent on September 30, 2005. *Cf.* U.S. DEP'T OF HEALTH & HUM. SERVS., ADMIN. CHILD. & FAMS., THE AFCARS REPORT: PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006 1 (2006), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport13.pdf [https://perma.cc/5L9T-853F].

as licensed foster parents.[117] That differential is important; whenever families have a choice between formal foster care and some other legal status, that differential creates a strong financial incentive to choose the formal status.

Title IV-E also provides funds to support older youth whom state agencies have separated from their parents but have not placed with new permanent families, including funding for higher education, vocational training, housing, counseling, employment, and a range of other services.[118] These supports depend on family separations; eligibility is for "children who have experienced foster care at age 14 or older"[119] and, for some assistance, for those "who have aged out of foster care," meaning, remained separated from their parents and in state custody until reaching age 18 or 21.[120]

In contrast to all of the above family separation spending, Title IV-E does not pay for any financial support to parents[121]—despite a large and growing body of research demonstrating that financial support can reduce incidence of neglect and CPS agency involvement.[122] If an agency wants to provide childcare assistance, housing assistance, or cash or gift cards for parents to purchase groceries or clothing for their children, Title IV-E will not provide any aid—even though Title IV-E requires states to provide such funds for foster families. Consider the case at the center of the 2022 Pulitzer-Prize winning book, *Invisible Child*: a family with an open case with the local CPS agency faced poor housing conditions.[123] Title IV-E would not reimburse the agency for costs of repairing the family's apartment or paying for another one. The CPS agency did not offer such assistance, though it did use the housing conditions as a reason to separate the eight children from their father.[124] The family separation triggered the agency to spend about

117. The Youakims were paid $63 per month in welfare benefits compared to licensed foster parents who were paid $105 per month. *Youakim*, 440 U.S. at 131.

118. 42 U.S.C. § 677(a).

119. § 677(a)(1), (2), (3).

120. § 677(a)(4), (5), (6).

121. The U.S. Department of Health and Human Services has even codified this rule to prevent any of the more ambiguous categories of federal reimbursement from being interpreted to support services to parents of foster children. 45 C.F.R. § 1356.60(c)(3).

122. Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 Iowa L. Rev. 1541, 1560–65 (2024). Other scholars have modeled how different packages of expanded public benefits would reduce maltreatment and CPS agency involvement. *See, e.g.*, Jessica Pac et al., *The Effects of Child Poverty Reductions on Child Protective Services Involvement*, 97 Soc. Serv. Rev. 43, 72 (2023).

123. Andrea Elliott, Invisible Child: Poverty, Survival & Hope in an American City (2021).

124. *Id.* at 341–42, 349–50, 368–76 (2021).

$33,000 per month to keep the family separated,[125] and those funds were eligible for a partial federal reimbursement.

The limited federal spending on prevention—largely through sources other than IV-E—provides relatively little to parents. Federally funded foster care prevention spending largely goes to "parent skill-based programs and caseworker visits and administration," with each accounting for about 40% of prevention dollars spent.[126] The former seeks to change parental behaviors through parenting classes and other services. The latter represents federal prevention dollars paying for state CPS agency employees and overhead—not direct benefits to families.

One exception exists to the description of what Title IV-E does and does not cover: Since 2019, Title IV-E funds have supported providing legal services to parents and children with active family court cases and who are at risk of foster care. The first Trump administration first permitted IV-E "administrative costs" to include provision of these legal services through administrative guidance,[127] and the Biden administration codified this guidance into regulation.[128] Although overall spending on legal services remains a small proportion of overall IV-E spending, the federal government has spent over $300 million to support this legal representation across a majority of states.[129]

One could categorize this funding of legal representation as part of Title IV-E's funding of family separations because the separations trigger due process, including a right to counsel to challenge the state action.[130] This funding nonetheless differs from the rest of IV-E in that it

125. Those funds included elevated foster care maintenance payments to the various foster homes due to some of the children's disabilities, and case management fees to a foster care agency. *Id.* at 405.

126. Rosinsky, Fischer, & Haas, *supra* note 16, at 57–58.

127. *Child Welfare Practice Manual § 8.1B, Question 30*, U.S. Dep't Health & Hum. Servs., Admin. Child. & Fams. (2019), https://www.acf.hhs.gov/cwpm/public_html/programs/cb/laws_policies/laws/cwpm/policy_dsp.jsp?citID=36 [https://perma.cc/R8CB-ZDGF]. The Children's Bureau also retracted 2004 guidance which limited IV-E legal expenses to agency expenses. *See id.* at Question 18 ("Deleted 01/07/2019").

128. U.S. Dep't of Health and Human Services, Administration for Children & Families, Final Rule, 89 Fed. Reg. 40400 (May 10, 2024) (codified at 45 C.F.R. § 1356.60).

129. Sara Tiano, *Most States Now Access Federal Funds for Family Court Lawyers*, Imprint (Feb. 27, 2024), https://imprintnews.org/top-stories/states-access-federal-funds-for-family-court-lawyers/247752 [https://perma.cc/7QPC-GUKK]; *see, e.g.*, Nat'l Assoc. Counsel for Child., States' Experiences Claiming Title IV-E for Parent and Child Attorneys (2023), https://naccchildlaw.org/wp-content/uploads/2023/03/iv-e_two_pager.pdf [https://perma.cc/95D6-YG5J] (reporting survey results of state agencies conducted with the National Center for State Courts and the American Bar Association).

130. The Supreme Court has held that this right is not of a federal constitutional stature. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981). But state courts routinely

flows to offices outside of CPS agencies whose task is to provide checks and balances against CPS agency intervention in families. Funding such attorneys is welcome, especially following evidence that effective, multidisciplinary representation of parents helps children reunify with parents faster, even exit foster care to guardianship faster, and without negative safety outcomes to children.[131]

However, the funding system for legal representation is oddly structured: Title IV-E funds CPS agencies, so this new IV-E funding stream requires CPS agencies to seek federal funding for lawyers defending parents or children against the interventions those very agencies seek. It is as if criminal defense attorney funding flowed through police departments or departments of corrections. The research demonstrating the effectiveness of family defense suggests that state CPS agencies should feel an incentive to seek this funding to help achieve similar impacts—a message the federal Children's Bureau and researchers have sought to spread.[132] Yet it does not take much cynicism to worry that some significant number of CPS agencies will avoid sending funds to family defense attorneys. Indeed, one 2024 analysis revealed twenty states and the District of Columbia had not yet received any such funds, and those leading efforts to expand this funding note the "culture shift" required for an agency "to fund [its] adversary."[133] Even in one state that has been receiving funds, a substantial minority of counties have declined to access these funds, thus denying family defenders and their parent and child clients the benefit of these funds.[134]

---

appoint such attorneys as a matter of state statutory or constitutional law, as the Supreme Court recognized. *Id.* at 30 n.6.

131. Lucas A. Gerber et al., *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child. & Youth Servs. Rev. 42, 42 (2019); *see also* Lucas A. Gerber et al., *Understanding the Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 116 Child. & Youth Servs. Rev. 42, 42 (2020) (explaining how vigorous parent representation achieved these goals).

132. U.S. Dep't Health & Hum. Servs., Admin. Child. & Fams., ACYF-CB-IM-21-06, Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being (2024), https://www.acf.hhs.gov/cb/policy-guidance/im-21-06 [https://perma.cc/53GX-N8VQ]. Martin Guggenheim, a leading advocate for parent defense, has argued "Family Defense Advances the Interests of Everyone," including CPS agencies. Martin Guggenheim, *The Importance of Family Defense*, 48 Fam. L.Q. 597, 604-06 (2015).

133. Tiano, *supra* note 129.

134. Leslie Bonilla Muniz, *'Money on the Table': One in Five Counties Abstain from Federal Payback for Child Welfare Defense*, Ind. Cap. Chron. (Aug. 26, 2024), https://indianacapitalchronicle.com/2024/08/26/money-on-the-table-one-in-five-counties-abstain-from-federal-payback-for-child-welfare-defense/ [https://perma.cc/PP7Y-ASA3]; *Reimbursement History: State & Federal Funds*, Ind. Comm'n Ct. Appointed

And at least one state appears to charge "a 5% administrative processing fee," diverting some money away from family defenders and to the CPS agency itself.[135]

The structure of this funding system raises concerning questions for the future. CPS agencies now serve as funders of public defense systems representing families. Over time, those public defense systems will face important strategic decisions, including identifying ideal caseloads, and determining how aggressively to challenge CPS agency actions and whether to develop special litigation units to bring affirmative litigation against CPS agencies. CPS agencies now have a seat at the proverbial table for making these decisions. Will a CPS agency resist providing funding for reduced caseloads? Or to an office it considers to take an overly aggressive litigation stance?[136] Or to an office that wants to help clients seek affirmative relief? The IV-E funding stream for legal representation provides welcome funding but risks empowering CPS agencies to shape the future of family defense and children's defense.

E. Family First has Not Changed Much of the Above Structure

Congress enacted reforms in 2018 that were described as making dramatic changes to IV-E spending by funding CPS agencies to provide services that would prevent family separations.[137] That goal, encapsulated in the statute's name, the Family First Prevention and Services Act,[138] has largely failed to change how state CPS agencies spend their IV-E funds. Before enactment, the Congressional Budget Office predicted that the bill would provide $130 million in Title IV-E funds to some prevention

---

Att'ys (Oct. 29, 2024), https://www.in.gov/ccaa/funding-and-reimbursement-history/ [https://perma.cc/9UWE-42GL].

135. Ill. Dep't Child. & Fam. Servs., *Checklist for New County Legal Cost Reimbursement Under Title IV-E Foster Care for Representing DCFS Clients/Families Against DCFS* (undated, on file with author).

136. Indeed, some agency staff believe family defenders are overly aggressive. Gerber et al., *supra* note 131.

137. *See, e.g.*, Jeffrey Waid & Mimi Choy-Brown, *Moving Upstream: The Family First Prevention Services Act and Re-imagining Opportunities for Prevention in Child Welfare Practice*, 127 Child. & Youth Servs. Rev. 106098, at *1 (2021) (describing Family First as "landmark . . . legislation); *see also NYS OCFS Announces Successful Implementation of Federal Family First Prevention Services Act to Transform the New York State Foster Care System*, N.Y. Off. Child. & Fam. Servs. (2021), https://ocfs.ny.gov/main/sppd/family-first.php [https://perma.cc/RV2J-K3DL] (describing Family First as "sweeping federal law . . . that will significantly transform the foster care system").

138. Family First Prevention Services Act of 2018, Pub. L. No. 115-123, 132 Stat. 232 (codified at 42 U.S.C. § 671(e) and scattered sections of 42 U.S.C.).

services annually—out of more than $10 billion in IV-E spending.[139] Actual implementation is even slower than the CBO predicted, with only $112 million spent on these prevention activities out of a total of $10.4 billion in IV-E outlays in FY 2022.[140]

Even if total Family First spending increases more significantly, several structural elements make it unlikely to change the central problematic incentives of Title IV-E. First, while Family First provides additional federal financial support to CPS agencies, Title IV-E continues to supply billions of dollars in assistance to family separation activities.[141] All the problematic incentives from IV-E's funding of family separations, outlined in Parts II and III, remain. Another central problem rests with the Family First Act's conception of what services it sought to fund—"[m]ental health and substance abuse prevention and treatment" and "in-home parent skill-based programs."[142] While surely important in many cases, this narrow range of services seeks to correct for some parental deficiency or pathology (real or perceived). Moreover, these services would be provided during intervention and surveillance by CPS agencies and thus come "with the ever-present threat of taking [parents'] children."[143] And this modest step of adding some IV-E dollars to support such services is optional for states.[144] Accordingly, multiple commentators and advocates have criticized Family First's approach.[145]

---

139. Cong. Budget Off., Cost Estimate: H.R. 5456 Family First Prevention Services Act of 2016 4 (2016), https://www.cbo.gov/publication/51704 [https://perma.cc/MU4S-2VSP] (estimating an increase in spending of $1.3 billion over 10 years). The CBO estimated that annual spending might increase further in later years—to $250 or $330 million. *Id.* This is still a small fraction of the IV-E funds spent on family separations.

140. Stoltzfus, *supra* note 80, at 1. The CBO had predicted that states would be spending $150 million through Family First by 2022. Cong. Budget Off., *supra* note 139, at 4. One cause may be slow review by the federal Prevention Services Clearinghouse, which must approve services as evidence-based or promising before states can access federal funds to support them. 42 U.S.C. §§ 671(e)(4)(C), 676(d)(2). The federal government reported in May 2024 that it had reviewed less than one-quarter of all programs recommended to it. Jones Gaston, *supra* note 3, at 6.

141. 42 U.S.C. 671(e)(1); Wexler, *supra* note 21, at 64.

142. 42 U.S.C. § 671(e)(1)(A)-(B).

143. *See* Roberts, *supra* note 19, at 144.

144. 42 U.S.C. § 671(e)(1).

145. *See, e.g.*, Roberts, *supra* note 19, at 144–45; Maya Pendleton, Alan J. Dettlaff & Kristen Weber, UpEND, Framework for Evaluating Reformist Reforms vs. Abolitionist Steps to End the Family Policing System 8 (2023) (criticizing FFPSA for only "providing families with supports that reinforce individual pathology, such as mental health, drug treatment, and parenting classes," and "expand[ing] the reach of the family policing system through the creating of a new service track"); Alan J. Dettlaff, Confronting the Racist Legacy of the American Child Welfare System: The Case for Abolition 129 (2023) (criticizing FFPSA for maintaining surveillance and control of families); Miriam Mack, *The White*

Family First does not change other limits on Title IV-E spending: it does not support state efforts to help families find housing, obtain child care, transportation to work, or any support or service beyond those listed above.[146] All interventions funded by Family First are focused on changing parental behavior rather than providing parents with supports.[147] Family First thus perpetuates the "political choice"[148] long made in Title IV-E and the family regulation system more broadly: focus on troublesome parental behaviors divorced from social and economic context, and thus pathologize parents when problems are often interwoven with poverty and other broader issues.[149] Family First therefore cannot address family poverty despite evidence that stronger direct financial support can limit the need for any CPS agency involvement.[150]

F. 1990's Welfare Reform's Close Connections with Federal Foster Care Funding

Connections between family regulation system funding and public benefits law extend beyond the Flemming Rule to 1990s welfare reform. Conservative political trends in the 1990s led to important changes in both public benefits and family regulation law, and these changes allowed the diversion of welfare funds to pay for CPS agencies. This shift is ironic in light of increasing evidence demonstrating that public benefits help prevent maltreatment and help families avoid CPS agency involvement; for instance, expanding Temporary Aid to Needy Families (TANF) access decreases foster care placements while restricting TANF access increases self-reported maltreatment, CPS agency-substantiated maltreatment, and CPS agency family separations to foster care.[151]

Supremacy Hydra: How the Family First Prevention Services Act Reifies Pathology, Control, and Punishment in the Family Regulation System, 11 COLUM. J. RACE & L. 767, 770 (2021) (arguing that Family First "in no way challenges the fundamental pillars upon which the family regulation system rests"—"pathology, control and punishment of Black mothers"); Wexler, *supra* note 21, at 62–63; Amy Reavis, *Better Together: Toward Ending State Removal of Substance-Exposed Newborns from Their Parents*, 46 N.Y.U. REV. L. & SOC. CHANGE 362, 396–97 (2022); DeLeith Duke Gossett, *The Client: How States Are Profiting from the Child's Right to Protection*, 48 U. MEM. L. REV. 753, 809–10 (2018).

146. Mack, *supra* note 145, at 790.

147. *Id.* at 791–92.

148. *Id.* at 794.

149. *E.g.*, PELTON, *supra* note 56, at 40–41, 50; Gupta-Kagan, *supra* note 122.

150. *Supra* note 122 and accompanying text.

151. CHAPIN HALL POL'Y BULL., THE ROLE OF TANF IN ECONOMIC STABILITY AND FAMILY WELL-BEING AND CHILD SAFETY 2 (2023), https://www.chapinhall.org/wp-content/uploads/Chapin-Hall.TANF_Policy_Brief_7_6_23.pdf [https://perma.cc/NTH9-CENB]; *see also supra* note 122 and accompanying text.

Welfare reforms enacted in 1995 replaced Aid to Families with Dependent Children (AFDC)—which provided a federal entitlement to limited public benefits for poor families—with TANF. Crucially, TANF ended that entitlement and provided fixed sums, often called "block grants," to states, which had wide flexibility to spend as they saw fit.[152] In light of criticism that these changes would take resources away from poor parents, welfare reform advocates noted that CPS agencies could continue to rely on IV-E's uncapped entitlement.[153] Their message was that CPS agencies were the ultimate safety net for poor children, which reinforced the Flemming Rule: the federal government would fund foster care to take care of children whose parents would not receive welfare benefits. Indeed, following welfare reform, Congress increased federal spending on foster care while decreasing spending on public benefits.[154]

Granting states flexibility over how to spend TANF funds has further shifted welfare funds from aiding poor parents to foster care systems. TANF allows states to use funds for a variety of purposes.[155] States have used this flexibility to fund various state agencies and activities, leaving only 22 percent of TANF funds for direct cash assistance to poor families.[156] States have spent more than $2.5 billion annually in TANF funds for family regulation agency activities—19% of all federal funding for those agencies,[157] and that figure hides

152. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103, 110 Stat. 2105, 2112–61 (codified as amended at 42 U.S.C. §§ 601–10, 612, 613, 615–17).

153. Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447, 459 (1997).

154. ROBERTS, *supra* note 19, at 120–23.

155. Congress created TANF as part of a 1996 welfare reform bill, which replaced AFDC's entitlement to limited public benefits for poor individuals and families with Temporary Aid to Needy Families' ("TANF") block grants to states to spend within wide bounds. Personal Responsibility and Work Opportunity Reconciliation § 103.

156. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 38.

157. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 16, 39; *see also, e.g.*, CONG. RSCH. SERV., RL32760, THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 3 (2023), https://sgp.fas.org/crs/misc/RL32760.pdf [https://perma.cc/B469-8V35] (reporting $2.7 billion in TANF funds spent on "child welfare"); Eli Hager, *A Mother Needed Welfare. Instead, the State Used Welfare Funds to Take Her Son.*, PROPUBLICA (Dec. 23, 2021, 5:00 AM), https://www.propublica.org/article/a-mother-needed-welfare-instead-the-state-used-welfare-funds-to-take-her-son [https://perma.cc/9NHF-PQ3X] (describing how Arizona spends sixty-one percent of TANF dollars on its CPS system and only thirteen percent on welfare payments, and that the average state diverts eight percent of TANF dollars to their CPS systems); Jenni Bergal, *States Raid Fund Meant for Needy Families to Pay for Other Programs*, STATELINE (July 24, 2020, 12:00 AM), https://stateline.org/2020/07/24/states-raid-fund-meant-for-needy-families-to-pay-for-other-programs/

significant state-by-state variation.[158] CPS agencies use those funds for a variety of purposes, including family preservation services in fifteen states.[159] But the most common CPS agency uses of TANF funds are to cover costs associated with separating parents and children, not to provide assistance to poor parents: "other child welfare services" (thirteen states), helping to pay kinship foster care, guardianship, or adoption subsidies (nine states), limited benefits to "informal kinship caregivers,"[160] or foster care supports in cases when the CPS agency cannot claim IV-E funds.[161]

This diversion of anti-poverty funds to family separation activities builds on a long-standing trend of reducing expenditures on public benefits while increasing them on foster care. As welfare reform was debated, enacted, and implemented throughout the 1990s, Congress increased federal spending on foster care while decreasing spending on public benefits.[162] Just as states have used the flexibility created by welfare reform to use TANF funds for CPS agencies, Congress has tapped a TANF contingency fund to help pay state CPS agencies bonuses for arranging permanent family separations and adoptions for children in foster care.[163] Taken in that context, states' TANF expenditures for CPS agencies reflects a widespread willingness to divert funds that could provide financial support to poor families to helping to pay for family separations and adoptions.

The increase in IV-E funding—both in absolute terms and relative to TANF funds—results in part from IV-E remaining a federal entitlement, so state CPS agencies can receive unlimited federal reimbursements for family separations. In contrast, the 1996 welfare reform ended poor parents' entitlement to public benefits, replacing it with TANF which would be time limited and subject to additional state restrictions and, indeed, state diversion of funds to support CPS agencies' family separation activities. Taken together, they represent a continued federal investment in family separation and disinvestment in public benefits now understood to keep families together and prevent CPS agency intervention.[164]

[https://perma.cc/6RKK-94JT] (describing state diversion of TANF funds to programs including CPS agencies).

158. Rosinsky, Fischer, & Haas, *supra* note 16, at 39.
159. *Id.* at 41.
160. *Id.* at 41.
161. *Id.* at 38, 40.
162. Roberts, *supra* note 19, at 120–23.
163. *Id.* at 122.
164. *Supra* note 122 and accompanying text.

G. Federal Foster Care Funding's Uneasy Place in Fiscal Federalism

Title IV-E is an example of "fiscal federalism": federal funding for a legal system directly operated by the states.[165] In theory, Title IV-E establishes federal policy leadership over a particular area while giving states the financial ability to continue engaging in certain activities even during recessions.[166] Title IV-E's federal policy leadership is not as strong in practice as it may seem—it often encourages some states to adopt innovations that others have already developed using their own funds. Title IV-E's policy leadership also comes with other significant caveats—it incentivizes overall revenue maximization strategies while disincentivizing state innovation and weakly incentivizing compliance with individual federal requirements. Accordingly, the policy leadership argument does not justify Title IV-E. The federal government's continued support of foster care spending when state funds become less available ensures that states can more easily continue the status quo of separating families even when budget pressures might otherwise force states to explore how to reduce the scope of state intervention—and thus reduce costs—without reducing child safety.[167]

1. Reconsidering Title IV-E's Federal Policy Leadership

Title IV-E lists conditions states must meet to receive federal funding, which reflect federal policy priorities for states' operation of foster care systems,[168] ranging from the "reasonable efforts" discussed above,[169] to providing background checks for prospective foster parents,[170] efforts to place siblings together in foster care,[171] and holding "permanency hearings" to determine whether a child in foster care can return home and if not, where that child should live permanently.[172]

Those federal policy priorities can shape state CPS agency behavior and what happens in state family courts because conditions for receiving those funds include requirements for certain court hearings

165. *See generally* David A. Super, *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).
166. *Infra* Part I.G.iii.
167. *See infra* notes 214–217 and accompanying text (summarizing evidence that it is possible to reduce foster care numbers significantly while keeping children safe).
168. *See, e.g.*, 42 U.S.C. 671(a) (codifying a list of "state plan requirements" that state CPS agencies must follow to obtain federal funding).
169. 42 U.S.C. § 671(a)(15).
170. 42 U.S.C. § 671(a)(20).
171. 42 U.S.C. § 671(a)(31).
172. 42 U.S.C. § 675(5)(B)-(C).

and findings.[173] State legislatures have predominantly incorporated these requirements into state statutes—so IV-E shapes what happens in cases even when no federal dollars flow.[174] As Jane Spinak has detailed, changes to Title IV-E in the late 20th century "completed the transformation of family court from an independent judicial body whose jurisdiction was to determine whether the state had rightly intervened in a family's life to protect a child . . . into a willing partner in administering federal child welfare policy on a vast scale."[175]

Despite those realities, Title IV-E's federal policy leadership is weaker than the preceding paragraphs suggest. It is difficult to point to major developments in the field that began with Title IV-E. Rather, Title IV-E's policy provisions predominantly push to expand policy innovations that began at the state level, often only modestly. One result is that federal funds will reimburse states for what most were already doing rather than incentivize states to do more. Consider Congress's 2008 decision to begin funding kinship guardianship subsidies.[176] Subsidized guardianship is a significant policy innovation and provides a path to permanency for foster children who cannot reunify that does not require termination of the parent-child relationship.[177] But Congress only acted after a majority of states had begun providing guardianship subsidies with their own funds—28 states plus the District of Columbia had begun doing so by 2004.[178] Since Congress offered states support for kinship guardianship subsidies, the total number offering those subsidies has grown to 42 plus the District of Columbia, Puerto Rico, the U.S. Virgin Islands, and 11 Indigenous tribes.[179] In the majority of

173. 42 U.S.C. §§ 672(a)(2)(A)(ii), 675(5)(C).

174. For example, Title IV-E requires states to hold "permanency hearings" when children have been in foster care for at least 12 months. 42 U.S.C. § 675(5)(C). States have incorporated these requirements into their own statutes directly governing family courts. *E.g.*, N.Y. Fam. Ct. Act § 1089 (McKinney 2024).

175. Spinak, *supra* note 49, at 201.

176. Other examples exist. For instance, in 1997, ASFA imposed a rule requiring states to file termination of parental rights petitions after a child spends 15 months in foster care. *Supra* notes 67–68. But states had already begun adopting these practices. *See* 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, 132–34 (1995) (analyzing and critiquing such efforts). ASFA was certainly impactful—it accelerated other states' adoption of similar practices. But it accelerated an existing trend; it did not start the trend.

177. For a description of guardianship and how it changes permanency decisions, see Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1 (2015).

178. Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. Rev. L. & Soc. Change 237, 257 (2004).

179. Annie E. Casey Foundation, Family Ties: Analysis from a State-by-State Survey of Kinship Care Policies 5 (2024), https://assets.aecf.org/m/

impacted states, therefore, the bulk of the difference from Congress's action was *not* to induce a new policy but to begin reimbursing states for policies they were implementing already, and to help those states direct state funds to some other portion of their family regulation system. Even for the minority of states that initiated a new policy after congressional action, it is difficult to conclude that they would not have done so but for the new federal funding.

Title IV-E includes a range of requirements meant to ensure that state CPS agencies provide high-quality case management, but Title IV-E has not achieved that goal. The federal Children's Bureau—the same agency that funnels federal funds to state CPS agencies—conducts regular "child and family services reviews" of state performance.[180] These reviews consistently find state performance far below federal benchmarks. A review of three rounds of these reviews found that states earned a "substantial conformity or strength" rating in only a minority—and a fairly small minority at that—of areas measured.[181]

Federal funding can also stifle state innovation, especially if states think the federal government will eventually expand funding to cover the innovation.[182] Vivek Sankaran has described this phenomenon to the family regulation system as "innovation held hostage" by this fiscal gamesmanship.[183] Applied to the guardianship subsidy example, some states in the early 2000s might have been open to joining the trend towards providing such subsidies with their own funds. But thinking that the federal government might start subsidizing this activity, those states might have waited until they could see the contours of that federal support. Even though federal funding incentivizes delayed innovations, states nonetheless lack strong incentives to attack federal policy leadership in the field because removing that leadership could easily lead to a loss of federal funding in the short or long term.[184]

Some detailed Title IV-E policy prescriptions can inhibit state experimentation in important areas. For instance, parents should generally be provided more time to rehabilitate and reunify than the

---

resourcedoc/Report-familyties-2024.pdf [https://perma.cc/LH8F-8RSP].

180. 45 C.F.R. §§ 1355.31–.37 (2012).

181. A majority of states earned this rating in only 11 of 45 measures on round 3 of the reviews, which ended in 2018. Haksoon Ahn, Danielle DeLisle & Denise Conway, *Child and Family Services Review (CFSR) and Child Welfare Outcomes in the United States*, 16 J. PUB. CHILD WELFARE 679, 683–85 (2022).

182. Super, *supra* note 165, at 2568.

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

184. Super, *supra* note 165, at 2585.

15 months, after which Title IV-E provides that states should generally file termination petitions. Yet, fear of jeopardizing IV-E funds disincentivizes states from fully exploring such options.[185] Indeed, a debate about the frequency of terminations continues to rage,[186] but IV-E's termination timeline limits state experimentation. These termination provisions also demonstrate how IV-E can effectively drive state innovation underground. Data reveal significant variation—a "wild west of TPR practices"—in the rates at which states terminate parental rights.[187] Some state experimentation regarding more or less rigorous compliance with ASFA's timelines is plainly occurring, yet there is little discussion of state practices or pilot programs—perhaps in part to avoid risking IV-E funding.

While Title IV-E can disincentivize state policy innovation, it does incentivize a different kind of innovation—federal revenue maximization. Importantly, IV-E does not require states to maximize their compliance with federal pushes for quality practice because violations do not lead to any significant reduction in IV-E funding. This discrepancy between what IV-E funds and central policy goals explains Michele Goodwin and Naomi Duke's finding of no empirical relationship between the amount of federal funding received by states and compliance with federal measures of quality practice,[188] and the federal government's similar findings a few years prior.[189] Title IV-E does incentivize states to claim federal funds for as many activities as possible, as Daniel Hatcher has documented. This incentive frames families' cases as part of a state "revenue strategy."[190] The federal funding scheme incentivizes states to pursue "self-interested revenue strategies" and "gamesmanship," with an industry of private contractors happy to help states maximize revenue—for a significant fee which diverts federal funds away from helping families.[191] States then invest in this gamesmanship to take advantage of the complex rules.[192] A common strategy: work to increase the "penetration rate"—the percentage of

185. Sankaran, *supra* note 183, at 298–99.
186. *Supra* note 70.
187. Vivek S. Sankaran & Christopher E. Church, *The Ties that Bind: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 Fam. Ct. Rev. 246, 249–53 (2023).
188. Goodwin & Duke, *supra* note 15, at 1366. Goodwin and Duke used Child and Family Services Reviews (CFSRs) state scores to measure quality practice. *See* 45 C.F.R. §§ 1355.31–.37 (2012) (describing CFSR process).
189. ASPE Issue Brief, *supra* note 42, at 14.
190. Daniel L. Hatcher, The Poverty Industry: The Exploitation of America's Most Vulnerable Citizens 12 (2016).
191. *Id.* at 26.
192. *Id.*

foster children whose cases are eligible for federal funding.[193] One need not accept Hatcher's thesis to see a more modest point: the complexity of federal funding streams and their different rules and administrative processes impose high compliance costs on state and local agencies.[194]

2. A Block Grant like TANF or Entitlement like AFDC?

Before the 1996 welfare reform legislation, poor families had a legal entitlement to public benefits through AFDC. If a recession or another event created more poor people than typical, they would not have to fight for scarce funds. They could instead claim their entitlement to modest benefits, and the federal government—which could and did engage in deficit spending—would pay the bill. The 1996 welfare reform eliminated AFDC and replaced it with TANF. While any eligible family was entitled to AFDC benefits, TANF provided a set amount of money to states; if the need for assistance rose, the federal funds remained the same. Debates over entitlement versus block grants for public benefits have largely followed liberal-conservative lines. Liberals favor entitlements to ensure poor individuals can receive benefits. Conservatives favor block grants to limit federal spending, impose incentives on states to limit the number of welfare recipients, and to give states more flexibility to use those funds for activities of their choosing.

Whether the same ideological divide should apply to Title IV-E is not at all clear. The recipients differ—IV-E funds not poor parents but state CPS agencies, and both kinship and non-kinship foster parents, adoptive parents, and guardians, many of whom are not poor. And the incentives from limiting state funds would differ—capping foster care funds would incentivize states to save foster care costs by reducing family separations.

Nonetheless, this block-grant ideological divide extended to early 2000s debates over Title IV-E. President George W. Bush's administration proposed converting Title IV-E from an entitlement to a block grant,[195] offering several critiques of the present system. First, IV-E funding rules are complicated and, in the language of conservatives seeking to limit federal regulation, "burdensome" on states to follow, with wide variations in the amounts different states receive (measured

193. *Id.* at 46.
194. Mangold & Cerulli, *supra* note 11, at 365–69; *see also id.* at 349 (describing federal funding policies as evolving "to rectify new problems, sometimes created by their prior reform.").
195. ASPE Issue Brief, *supra* note 42, at 18.

in both absolute and per eligible child terms).[196] Second, little evidence connected the amount of federal funding to actual quality of services.[197] Third, the funding system emphasized family separations.[198] To combat these problems, the Bush administration proposed granting states the same amount of money they were anticipated to receive via Title IV-E, and allow states to spend it on a broader range of activities, including some prevention activities—what they called a "capped flexible allocation."[199] This proposal triggered opposition from advocates who sought to defend Title IV-E's entitlement structure.[200] The opponents won, and IV-E has remained structured as an entitlement that funds state agencies whose primary activity is to investigate, surveil, and separate poor families.

3. Maintaining the Status Quo When State Revenues Fall

Among the impacts of Title IV-E's entitlement structure is that Title IV-E funding helps states maintain the status quo of foster care systems even during recessions or other pressures on state budgets. David Super explained this feature of many fiscal federalism programs: most states are legally required to balance their budgets, which creates significant pressure on state funding, especially for any program serving poor individuals, when state revenues fall.[201] Continued federal funding makes it easier for states to maintain spending levels on such programs,[202] thus reducing incentives for innovation.

The entitlement structure means that federal funding is calibrated to the size of the state program. If Title IV-E instead provided states with the same amount of money regardless of the number of families in which CPS agencies intervened, CPS agencies could intervene in fewer families—at a lesser cost to states—and receive the same federal financial support. That structure would create an incentive to reduce the most invasive and expensive intervention—separating parents and

196. *Id.* at 1, 5–11.
197. *Id.* at 2, 11–14.
198. *See id.* at 2 (noting that 87% of federal funding then supported foster care and adoption subsidies).
199. *Id.* at 18–19.
200. Wexler, *supra* note 21, at 67–68 (criticizing the criticism of Bush's block grant plan). In broader welfare politics, block grants had long been "seen as a first step toward reductions in federal spending," engendering mistrust. *See* CONG. RSCH. SERV., 96-823 EPW, CHILD ABUSE AND CHILD WELFARE LEGISLATION IN THE 104TH CONGRESS 6 (1996), https://www.everycrsreport.com/files/19961011_96-823_f7497ec00396626b09718ee9e5aa3b986a17bf9c.pdf [https://perma.cc/N8JW-PH64] (describing criticism of earlier block grant proposal).
201. Super, *supra* note 165, at 2555.
202. *Id.* at 2549.

children and placing children in state custody, foster care. Entitlement funding mitigates the incentive to reduce a program's size: a CPS agency that reduces the number of families it separates will also reduce the federal funding it receives, limiting the cost savings.

Second, Congress has repeatedly increased Title IV-E funding to states during recessions—an explicit federal financial lifeline to state family regulation systems in times of declining revenue. In response to the 2008 recession, the American Recovery and Reinvestment Act provided relief to state budgets by temporarily increasing each state's Medicaid reimbursement rate.[203] Congress repeated this action in the early days of the COVID-19 pandemic.[204] These actions increased states' Title IV-E reimbursement rates for foster care, adoption and guardianship subsidies, which are pegged to the Medicaid rates.[205] Accordingly, even amid recessions, federal funding has mitigated state budget pressures to limit their foster care population.

Superficially, these features of federal funding reflect the federal government's leadership role in public benefits programs to serve "the macroeconomic stabilization function and for income redistribution in the form of assistance to the poor."[206] But federal foster care funding is a complicated case for this role because it does not represent direct "assistance to the poor" (except kinship care and older youth payments, discussed in Part IV.A). They do account, in theory, for aid to low-income children but only for those children who have been separated from their parents and only as a reimbursement to a state agency.[207] Moreover, the law of child neglect suggests something different—CPS agency intervention is not a benefit to families, but an invasion of fundamental rights that the law reserves for extreme cases. Therefore, Title IV-E's impact is less to ensure public benefits to poor individuals, and more to enable CPS agencies to continue their activities—including separating poor families and diverting funding for those families to others—in the midst of state fiscal challenges.

---

203. Pub. L. 111-5, § 5001 (2009).

204. Families First Coronavirus Response Act, Pub. L. 116-127, § 6008 (2020).

205. 42 U.S.C. § 674(a)(1)-(2).

206. Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. Econ. Lit. 1120, 1121 (1999).

207. *See* ASPE Issue Brief, *supra* note 42, at 3 ("[W]hile Title IV-E eligibility is often discussed as if it represents an entitlement of a particular child to particular benefits or services, it does not. Instead, a child's Title IV-E eligibility entitles a State to Federal reimbursement for a portion of the costs expended for that child's care."); Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 Ariz. L. Rev. 675, 688 (2010) ("Although Title IV-E funds are considered income to the individual children, in reality the funds are paid to the states to provide federal financial participation in foster care services.").

II. Incentives to State and Local CPS Agencies and Family Courts

The federal funding system described in Part I creates financial incentives that operate in tension with the law's commitment to family integrity.[208] Title IV-E makes it cheaper than it would otherwise be for states to separate families, while providing no funding for vital financial support to keep families together. Federal funding rules create incentives for agencies to terminate relationships between parents and children and move children toward adoption by foster families. Additionally, Title IV-E enlists state courts to enforce substantive provisions—but by linking state court decisions to agency funding, Title IV-E has incentivized courts to issue rulings necessary for agencies to get funding rather than fulfill their duty to provide checks and balances on state executive branch action.

A. Federal Funding Makes It Cheaper to Separate Families

The paramount feature of federal family regulation system funding is that it supports state action to separate poor families through subsidizing foster care maintenance payments, adoption and guardianship subsidies, and administrative costs to support foster care programs. When the state separates a family that would have been eligible for AFDC benefits, the federal government provides matching funds for the central costs of separating that family.[209] As Daniel Hatcher has explained, "the greater the percentage of poor children removed by the courts into foster care, and the longer those children are held in foster care compared to nonpoor children, the more money" then flows from the federal government to state Title IV-E agencies.[210] This does not mean that Title IV-E allows states to make money off of family separations; as I have explained elsewhere, placing children in state custody is still greater than doing nothing.[211] Rather, federal funding makes separations less expensive to state agencies than they would otherwise be, and sometimes cheaper than other (and better) options that state agencies might consider.

Consider a case in which a family's poor housing conditions is one ground for a CPS agency's involvement, as agencies report is the case

208. *Supra* notes 1–10 and accompanying text.
209. *Supra* Part I.d.
210. Daniel L. Hatcher, Injustice, Inc.: How America's Justice System Commodifies Children and the Poor 35 (2023).
211. Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 Stan. L. Rev. 841, 885–86 (2020).

in 11% of all cases—nearly 20,000 each year.[212] Housing likely plays a role in a range of other scenarios: new housing can help a parent move away from an abusive partner and stable housing can mitigate various stressors on a family. The agency could provide housing assistance to this family to help avoid the trauma of a parent-child separation. However, federal family regulation system funding does not offer assistance to states for such expenditures. So, the agency is faced with a choice—spend thousands of dollars to help stabilize the family's housing or separate the family and place the child in foster care. The former scenario would require states to use exclusively state funds. In the latter scenario, federal funding law would require the state to pay a foster parent a monthly subsidy—which, ironically, includes costs for housing—and the agency could seek federal reimbursement for part of that cost. Neither option is cheap, and both require providing housing to the child. But, federal family regulation system funds will help the state pay the cost of housing the child with strangers after separating the child from his parents, while the same funding source will not help the state to provide housing directly to the family. Richard Wexler presents precisely this scenario to show how the federal support for foster care can make family separation cheaper to the state agency than housing support.[213]

The present family regulation system does appear to remove more children than necessary, suggesting correction to the present system's financial incentives is warranted—even if attributing causation to those incentives is difficult. While a full exploration of the present system's over-use of removals is beyond the scope of this Article, evidence of it comes from a range of studies. The drop in removals during the COVID-19 pandemic did not lead to an increase in bad safety outcomes to children.[214] Vigorous legal advocacy for parents has been shown to reduce the length of children's stays in foster care without harming their safety—suggesting children spend too long in foster care, especially in cases without such legal advocacy.[215] Some outlier jurisdictions have been able to reduce daily foster care populations by large amounts—90%

212. HHS, *AFCARS FY'22*, *supra* note 116, at 3; *see also* Stephanie Stokes, *When Families Need Housing, Georgia Will Pay for Foster Care Rather than Provide Assistance*, ProPublica (Jan. 18, 2024, 6:00 AM), https://www.propublica.org/article/georgia-housing-assistance-foster-care [https://perma.cc/6W5B-Y2AK].

213. Wexler, *supra* note 21, at 58.

214. *E.g.*, Melissa Friedman & Daniella Rohr, *Reducing Family Separations in New York City: The COVID-19 Experiment and a Call for Change*, 123 Colum. L. Rev. F. 52, 69–71 (2023); Anna Arons, *An Unintended Abolition: Family Regulation During the COVID-19 Crisis*, 12 Colum. J. Race & L. F. 1, 18–19 (2022).

215. Gerber et al., *supra* note 131, at 1.

in New Orleans—without harming children.[216] Other scholars have reached the same conclusion through further-reaching critiques of the family regulation system.[217]

B. Federal Funding Incentivizes Family Destruction Post-Removal

Once state agencies separate families, they and family courts must consider what should happen to the child over the long run. Will the child and parent reunify and, if not, will the child leave foster care to a new permanent family through adoption or guardianship? Once again, the substantive law exists in tension with the incentives federal funding rules put on state and local agencies. Reunification accounts for about half of all exits from foster care and is, by far, the greatest single pathway for children exiting care.[218] Both constitutional and statutory law governing the family regulation system emphasize reunification. Even after the state separates a family, the Due Process Clause protects families against further destruction, especially against permanent destruction through termination of the parent-child relationship and adoption.[219] The Supreme Court stated in *Santosky v. Kramer* that "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of the children to the State."[220] Title IV-E requires states, as a condition of receiving IV-E funds, to make "reasonable efforts" to reunify families separated by foster care.[221]

One would expect, then, that the federal funding scheme would provide incentives to work towards and achieve reunification. Yet in several important ways, Title IV-E funding pushes states in the opposite

---

216. Joshua Gupta-Kagan et al., *The New Orleans Transformation: Foster Care as a Rare, Time-Limited Intervention*, 27 LEWIS & CLARK L. REV. 417, 423 (2023).

217. *E.g.*, ROBERTS, *supra* note 19.

218. Reunification accounted for 46% of all foster care exits in 2022, followed by adoption (27%) and guardianship (11%). HHS, *AFCARS FY'22*, *supra* note 116, at 4.

219. State laws require exclusive parenthood, meaning one parent relationship must be terminated before another may be formed by adoption. State law could provide for adoption without terminations, and one state provides this option in its statute. I have argued that this model is attractive for many foster care situations. Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015). Because the norm remains that adoption requires termination, this section will take that link as a given.

220. 455 U.S. 745, 753 (1982).

221. 42 U.S.C. § 671(a)(15)(B)(ii). The ALI has described this statutory requirement to work towards reunification as constitutionally-informed: "if the state removes a child, the state has an obligation, rooted in the Fourteenth Amendment, to make reasonable efforts to reunify the family." RESTATEMENT OF THE LAW, CHILDREN AND THE LAW § 2.50, comment a (AM. L. INST., Tentative Draft No. 4, 2022).

direction. First, just as Title IV-E funding makes it less costly for states to separate families in the first instance, it makes it cheaper for states to keep children in foster care for longer periods of time, thus reducing a fiscal incentive for reunification.[222]

Second, Title IV-E funding is not generally available to support services and support to parents to facilitate reunification, while it will support foster parents' monthly subsidies and costs. If parents' access to housing or childcare is important, Title IV-E's response is ironic—it requires states to support *foster* families' housing and subsidizes state expenditures to do so, but neither requires nor subsidizes similar efforts for parents.

Third, in the aggregate, states will get *more* federal supports when they permanently destroy families and place their children in new adoptive families than when those same children are in foster care. When children are in foster care, states may only seek federal reimbursement for foster care costs for children whose families meet strict (and not entirely logical)[223] eligibility guidelines—they must be so poor that they would have qualified for Aid to Families with Dependent Children, the public benefits program that has been defunct since 1996.[224] As time passes, that line becomes lower and lower due to inflation.[225] Accordingly, the percentage of all foster children for whom state agencies can seek federal funding is now steadily declining—down from 46% in FY 2018 to 41% in FY 2020.[226] However, states can access more federal funding when they terminate the legal relationship between those children and their parents and then have those children adopted by their foster family. In 2008, Congress amended the funding scheme to phase out the AFDC link for adoption subsidies, and that phase out was complete by 2018.[227] As a result, the state can often save money if foster families become adoptive families—a point adoption

222. *Supra* Part II.a.

223. Mangold, *supra* note 43, at 583–84.

224. 42 U.S.C. § 672(a)(1)(B), (a)(3)(A)(i).

225. Inflation has affected eligibility significantly. The median 1996 AFDC eligibility standards amounted to sixty percent of the federal poverty guidelines in 1996, but only thirty-six percent in 2019. Emilie Stoltzfus, Cong. Rsch. Serv., The Title IV-E Income Test Included in the "Lookback" 3 (2019), https://www.cwla.org/wp-content/uploads/2019/09/CD_lookback_4_2019.pdf [https://perma.cc/NT73-7E4B].

226. Rosinsky, Fischer, & Haas, *supra* note 16, at 22–23. The precise rate varies by state. *Id.* And, IV-E funds covered a somewhat higher percent of days children spent in foster care—45% versus the 41% of eligible foster children—suggesting that state agencies kept IV-E eligible children in foster care somewhat longer than ineligible children.

227. *See* 42 U.S.C. § 673(a)(2)(A)(ii).

advocates took pains to explain after Congress acted.[228] Indeed, federal spending on adoption subsidies increased steadily—13% from 2018 to 2020, for instance.[229]

Finally, Title IV-E gives bonuses to state agencies for every foster child above a certain baseline level that they permanently separate from their families of origin through adoption or guardianship. The bonuses range from $4,000 to $10,000 per permanent family separation,[230] and states are free to use these funds for any other activity envisioned by the federal law.[231] These bonuses also provide slightly higher bonuses to states who terminate a parent and child's legal relationship and then arrange the child's adoption by a new parent than when the state arranges a guardianship (which does not terminate the parent-child relationship).[232] Although these payments reflect a small proportion of overall federal spending, they still amount to tens of millions of dollars in payments to states each year, and a total of nearly $1 billion in payments to states since their enactment in 1997.[233] A CPS agency director deciding whether to invest limited funds in a new effort to increase family preservation or to increase family destruction and creation of new families via adoption is faced with this reality regarding federal financing law: only the latter could trigger bonus payments to her agency from the federal government.[234] As others have argued, it is difficult to square these financial incentives with the law's emphasis on reunification.[235]

---

228. North American Council on Adoptable Children, Implementing the Adoption Assistance Provisions of the Fostering Connections Act 4 (2009), https://fosteringconnections.org/tools/assets/files/Implementing-Adoption-Assistance.pdf [https://perma.cc/2TJW-K79H]; *see also* Rosinsky, Fischer, & Haas, *supra* note 16, at 28 (noting agencies can seek federal reimbursement for a higher percentage of children receiving adoption subsidies than for IV-E subsidies).

229. Rosinsky, Fischer, & Haas, *supra* note 16, at 26–27.

230. 42 U.S.C. § 673b(d).

231. *Id.* § 673b(f).

232. *Compare id.* § 673b(d)(1)(A) (providing $5,000 bonus for each adoption over a baseline) *with* § 673b(1)(D) (providing $4,000 bonus for each guardianship over a baseline).

233. Annual payments to states have ranged from $41 to $70 million from FY 2012-2022. *Adoption and Legal Guardianship Incentive Payment Program—Earning History by State: FY 1998—FY 2002*, *supra* note 108.

234. Adoption is already cheaper for states than foster care because it requires only adoption subsidies and minimal administration costs, compared with ongoing case management by social workers, services to children, services to parents, and legal costs of litigating open court cases. Mary Eschelbach Hansen & Josh Gupta-Kagan, *Raising the Cut-Off: The Empirical Case for Extending Adoption and Guardianship Subsidies from Age 18 to 21*, 13 U.C. Davis J. Juv. L & Pol'y 1, 22 (2009).

235. *E.g.*, Hatcher, *supra* note 190, at 171; Wexler, *supra* note 21, at 56.

C. Federal Funding Erodes Separation of Powers

Title IV-E also indirectly governs state family courts. Title IV-E conditions federal funding to state CPS agencies on state family courts making certain findings in individual cases. Through these provisions, Congress has effectively enlisted state family courts to enforce central provisions—that CPS agencies have made reasonable efforts to preserve and reunify families,[236] and that family separations only occur and only continue when keeping families together would be "contrary to the welfare" of the child.[237] In theory, these reasonable efforts findings are the lynchpin of the entire federal funding system. They are a crucial mechanism to ensuring that state agencies only separate families—and receive federal financial support for doing so—when they have tried to keep parents and children together but the parent's maltreatment of the child leaves no other choice but to remove the child. But this lynchpin's design is fundamentally flawed, and has not led state family courts to serve as a strong check on state agency actions.

From their origins, family courts have seen themselves as having a different, and more problem-solving role than most courts, as Jane Spinak has detailed.[238] Family courts got no better at checking CPS agency authority when Title IV-E turned courts into the gateway for state CPS agencies to get funding—a fundamentally different task than adjudicating disputes between a powerful state agency and the parents whose children they seek to remove. That shift in the court's role has led commentators to argue that the reasonable efforts requirements—which should protect families from unnecessary state intervention—instead lead courts to rubber stamp state intervention so agencies can get federal funds.[239] Indeed, in one telling survey, more than 40% of judges admitted to making reasonable efforts findings when the agency

236. States must include reasonable efforts in their Title IV-E state plan. 42 U.S.C. § 671(a)(15). But to receive IV-E funds in an individual case, a state family court judge must make a finding that the state has fulfilled its reasonable efforts obligation. 42 U.S.C. § 672(a)(2)(A)(ii).

237. 42 U.S.C. § 672(a)(2)(A)(ii).

238. SPINAK, *supra* note 49, at 225 (noting that "[d]espite layering on some formal and adversarial processes, the court retained its role as a place to help families resolve their problems").

239. Multiple reviews have found widespread failures by agencies to make reasonable efforts; the federal government's own reviews have found failures to make reasonable efforts to reunify in 51% of cases and to assess parental needs adequately in 58% of cases. ADMIN. FOR CHILD. & FAM., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-21-01, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 13–14 (2021). Yet family courts often find that agencies made reasonable efforts "by rote." Deborah Paruch, *The Orphaning of Underprivileged Children: America's Failed Child Welfare Law & Policy*, 8 J.L. & FAM. STUD. 119, 136 (2006).

had failed to make reasonable efforts, and 90% said they "rarely" or "never" declined to make reasonable efforts findings.[240]

The timing of Congress's imposition of the reasonable efforts rule only exacerbated family courts' unwillingness to apply it strictly. Congress imposed the rule in 1980 through the Adoption Assistance and Child Welfare Act. Soon after, the federal government began cutting services to impoverished families, leaving CPS agencies with fewer services to provide to families. In that context, courts became hesitant to hold agencies accountable for failing to provide enough services to families; after all, doing so would only further deprive agencies of funds.[241]

In the following decade, Congress used Title IV-E to pressure states to move more quickly from attempts to reunify families to attempts to achieve "permanency" for foster children, especially by terminating parents and children's legal relationships and finding new adoptive families for those children. Since Congress amended IV-E via ASFA in 1997, Title IV-E has required courts to hold permanency hearings after children have been in foster care for 12 months and to review permanency every 12 months thereafter.[242] ASFA also amended IV-E to require, with exceptions, that CPS agencies file termination petitions when children have been in foster care for 15 months.[243]

Taken together, these provisions put family courts in the role of supervising CPS agencies' efforts to move towards the permanent destruction of families and the creation of new adoptive families rather than checking state exercises of power over families. If family courts wanted state agencies to have more federal dollars (ostensibly to serve the families on the courts' dockets), then they should go easy on agencies when it comes to reasonable efforts to preserve and reunify families, and go hard on parents when it comes to permanency. This two-part federal funding pressure served to "impinge on the courts fundamental responsibility to protect the constitutional right of family integrity."[244]

240. Muskie Sch. Pub. Serv. & Am. Bar Assoc., Ctr. Child. & L., Michigan Court Improvement Program Reassessment 105 (2005); *see also* Leonard Edwards, Opinion, *Ignoring Reasonable Efforts: How Courts Fail to Promote Prevention*, Imprint (Dec. 5, 2018, 7:00 AM), https://imprintnews.org/top-stories/ignoring-reasonable-efforts-why-court-system-fail-promote-prevention/32974 [https://perma.cc/M797-5G9R] (retired family court judge suggesting many judges made reasonable efforts findings to avoid costing local agencies federal funds).

241. Spinak, *supra* note 49, at 182–85.

242. 42 U.S.C. § 675(5)(C).

243. 42 U.S.C. § 675(5)(E).

244. Spinak, *supra* note 49, at 202.

Title IV-E's role for state courts in helping agencies secure federal funding has led to some particularly egregious problems. Daniel Hatcher has documented how some courts have become sub-grantees for CPS agency IV-E funds—so when those courts rule that the agency has made reasonable efforts, they unlock federal funds that flow to the courts themselves. These courts include those in one Ohio county in which "IV-E revenue provided over half of the court's total budget,"[245] as well as courts in at least six additional states.[246] This blatant conflict of interest—courts issuing decisions which directly impact courts' own budgets—flows directly from the role that IV-E has created for family courts.

III. Incentives for Kinship Caregivers, Kinship and Non-Kinship Foster Parents, and Older Foster Youth

The federal funding system directs significant funds through CPS agencies to individuals selected by those agencies as substitute caregivers for children they have removed from their parents. CPS agencies also direct significant federal funds to older youth whom they have separated from their parents. These expenditures support sympathetic and often vulnerable groups but at the cost of creating strong financial incentives that run contrary to the legal system's goals of family reunification.

A. Incentives on Families to Use Kinship Foster Care: Federal Funding Puts a Price on Family Control vs. State Custody

1. Federal Funding Incentivizes Kinship Foster Care over Kinship Custody or Informal Kinship Care at the Outset of a Case

Kinship care for CPS-involved families is quite common. Kinship foster homes account for more than one-third of all children in foster care at any given moment[247] as well as tens or perhaps hundreds of thousands more in hidden foster care—informal kinship caregiving arranged by CPS agencies but without opening a court case or using the formal foster care system.[248] Family courts place thousands more children in kinship caregivers' legal custody.[249]

245. Hatcher, *supra* note 210, at 33–35.
246. Daniel L. Hatcher, *Commodified Inequality: Racialized Harm to Children and Families in the Injustice Enterprise*, 61 Fam. Ct. Rev. 341, 344 (2023).
247. The federal Children's Bureau reported 123,294 children living in kinship foster care on September 30, 2022, 34% of all children in foster care on that date. HHS, AFCARS FY'22, *supra* note 116, at 2.
248. Gupta-Kagan, *supra* note 211, at 856.
249. For state statutes providing this option, see, e.g., D.C. Code § 16-2320(a)(3)(C) (2001); N.Y. Fam. Ct. Act. §§ 1017(3) & 1055(a)(i) (McKinney 2024). Some

A child's precise legal status—hidden foster care, court transferring legal custody to a kinship caregiver, or a court transferring legal custody to a CPS agency which then places the child with kin (kinship foster care)—triggers a tradeoff: legal authority or financial support? In the first two options, the CPS agency does not provide foster care maintenance payments to kinship caregivers because the children are not in foster care. But in those options, the CPS agency does not have legal custody of the child, leaving more authority (at least in theory[250]) with the kinship caregiver or parent. The kinship caregiver often remains free, for instance, to allow the parent to stay with her and the child. In contrast, if the child is in kinship foster care, the kinship caregiver receives relatively generous foster care maintenance payments in exchange for surrendering authority to the CPS agency, which has legal custody and, in Title IV-E terminology, "placement and care . . . responsibility."[251] Moreover, Title IV-E requires kinship foster parents to keep parents at an arm's length as a condition of receiving IV-E foster care maintenance payments; that funding is only available for kinship foster parents who "provide . . . 24-hour substitute care for children *placed away from* their parents or other caretakers."[252] Kinship caregivers are disproportionately poor,[253] so they face particularly strong incentives to surrender custody in exchange for IV-E supported foster care maintenance payments.

That trade off—kinship foster care subsidies in exchange for CPS agency custody and separation of parents—can impose real harms. It cuts parents off from people who have been or could be significant supports to them and thereby hurts parents' rehabilitation and reunification

---

states report non-foster care kinship placements ordered by courts. *See, e.g.*, S.C. Dep't of Soc. Servs., Placement Types for Youth in Foster Care on June 30, 2023 (2023), https://dss.sc.gov/media/4685/placement-types-for-children-in-foster-care.pdf [https://perma.cc/WVM3-859C] (reporting 398 children in "Court Ordered Unlicensed Relative" placements). In addition, 16% of all "short stayers"—children who leave foster care within 30 days of entering—are discharged to the custody of relatives. Vivek S. Sankaran & Christopher Church, *Easy Come, Easy Go: The Plight of Children Who Spend Less than Thirty Days in Foster* Care, 19 U. Pa. J.L. & Soc. Change 207, 219 (2016). That rate is significantly higher in some jurisdictions. *See also* Gupta-Kagan et al., *supra* note 216, at 427–28 (reporting higher rates of quick discharges to relative custody in New Orleans, Louisiana).

250. In hidden foster care, agencies do not take legal custody, which remains with parents. Families often experience this as coercive, as I have argued elsewhere. Gupta-Kagan, *supra* note 211, at 866–69.

251. 42 U.S.C. § 672(a)(2)(B).

252. *Id.* § 672(c)(1)(A)(ii)(II) (emphasis added).

253. Christina M. Riehl & Tara Shuman, *Children Placed in Kinship Care: Recommended Policy Changes to Provide Adequate Support for Kinship Families*, 39 Child. Legal Rts. J. 101, 109 (2019).

efforts. One particularly harmful result occurs when this insistence that parents live apart from kinship caregivers makes parents homeless. For instance, journalist Elizabeth Brico described how she was staying with her in-laws when she was accused of leaving her children home alone; the system let her children stay with her in-laws, but insisted that she move out.[254] Like most neglect allegations, the allegation against Brico does not mean that she is a clear and present danger who needs to be kept away. Even if she *had* left her children alone (Brico denied the allegation), the solution would be to have *more* adults around her children, not fewer.

The financial payments can also damage complex family relationships. Kinship caregivers and parents can have fraught relationships, full of love and support but also frustration and distrust. When kinship caregivers start receiving money on the condition that they keep children away from parents, a conflicted caregiver may take a more adversarial posture towards the parent and can expand parents' feelings of distrust in the kinship caregiver. To paraphrase Upton Sinclair, it can be hard for a kinship caregiver to understand that their family member can safely raise their child when that caregiver's generous subsidy depends on her not understanding it.[255]

This financial wedge can also extend a child's time in state custody. Consider parents who are homeless but otherwise able to reunify and whose children are in kinship foster care.[256] An obvious potential solution exists: the parent could move in with the kinship caregiver. But this step would come at a cost, as the kinship caregiver would have to give up the foster care subsidy even though she is going to continue providing support to the child and his parent. Some in that situation—and many agencies and family courts reviewing that situation—will prefer the status quo, which keeps the money coming, and keeps the parent and child separated.

The absurdity of this situation should be obvious. This system is supposed to keep parents and children together and help parents rehabilitate and reunify as soon as possible. The system-induced

254. Elizabeth Brico, *To 'Protect' My Kids, the State Made Me Homeless*, Rewire News Group (July 31, 2020, 12:03 PM), https://rewirenewsgroup.com/2020/07/31/to-protect-my-kids-the-state-made-me-homeless/ [https://perma.cc/48GZ-KDML]; Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—And How Abolition Can Build a Safer World 68–69 (2022).

255. *See* Upton Sinclair, *I, Candidate for Governor: And How I Got Licked*, Oakland Trib. (Dec. 11, 1934), at 19 ("It is difficult to get a man to understand something, when his salary depends on his not understanding it!").

256. I have argued elsewhere that housing concerns should not delay reunification, but they frequently do. Gupta-Kagan, *supra* note 122, at 1598-99.

separation from kinship caregivers spites these goals. These separations harm parents—causing and exacerbating depression and increasing the risk of both mental and physical health problems—as Shanta Trevedi has cataloged[257]—making it even *more* difficult to address any challenges the parent already has.

Policy trends accentuate these concerns. Significant reform energy is directed towards expanding financial support to kinship caregivers by expanding the ranks of kinship foster parents—an explicit push for more kinship caregivers to accept foster care maintenance payments in exchange for giving the state legal custody. The federal Administration for Children and Families (ACF) has made licensing kinship caregivers as foster parents easier, arguing that this regulation would serve equity goals because of the frequency of "informal" kinship caregiving in rural areas, Black families, and Indigenous families.[258] ACF implied that providing more financial support to rural, Black, and Indigenous caregivers could address equity concerns—but ignored the reality that it could only do so if rural, Black, and Indigenous parents and kinship caregivers surrendered legal custody of their children to the state. As Dorothy Roberts argued in 2001, "transferring parental authority to the state is the price poor people must often pay for state support of their children."[259] Nearly a quarter century later, the federal government has explicitly written that price into policy.

Individual kinship caregivers thus face a financial incentive to follow a less flexible arrangement that cedes power to CPS agencies and requires parents to be excluded from the home. These monetary incentives are so strong that lawyers for children have even tried—as of this writing, unsuccessfully—to elevate the right to a placement in subsidized kinship foster care rather than unsubsidized kinship custody as a constitutional right.[260] Advocates for expanding foster

257. Shanta Trevedi, *The Hidden Pain of Family Policing*, 49 N.Y.U. Rev. L. & Soc. Change 15–22 (forthcoming 2025).

258. Separate Licensing or Approval Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 66700, 66701–02 (Sept. 28, 2023) (to be codified at 45 C.F.R. 1355–56).

259. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 Chi.-Kent L. Rev. 1619, 1621 (2001).

260. B.B. by Rosenthal v. Hochul, 2023 WL 5935803, *6–*9 (E.D.N.Y. 2023). The U.S. District Court dismissed the case for lack of standing, suggesting that denying kinship caregivers foster care licenses only serves to "deprive them of money," not separate children from their kin. *Id.* at *13. In a California case, lawyers argued that the state should take custody of a child who was living with a relative and place the child with the same relative as a foster parent, so that the relative could get "cash benefits that are only available through the dependency [foster care] system." *Bishop v. Superior Court of Calif., County of Los Angeles*, Petition for Writ of Mandate, 14 (2024) (confidential juvenile filing, on file with author).

care maintenance payments in exchange for more separation of parents and children miss an opportunity to induce states to provide financial support without that separation.[261]

I am not arguing that making kinship foster care licensing easier, or providing kinship foster care payments are bad things. Rather, I am describing the price these families must pay to access that monetary assistance under the current funding system and arguing that this price should often not be applied and, at a minimum, should not be accepted uncritically. When kinship caregivers can be supported without transferring custody to the state or forcing a parent away from a child, the legal system should seek to do so, and that would require reevaluating the present funding system.

2. *Federal Funding Incentivizes Kinship Caregivers to Seek a Permanent Parent-Child Separation*

Federal spending on relatively generous kinship foster care and guardianship subsidies also incentivize making those arrangements permanent. Consider the following scenario: a parent develops a substance use disorder which leads the state CPS agency to remove her 4-year-old son. The parent names her sister as a caregiver, and the state licenses and places the child with her, paying her foster care maintenance payments. The parent remains involved and close with her son and goes through treatment and eventually becomes sober. In the meantime, the foster care subsidy provides major benefits—it allows the child to visit a private therapist not covered by Medicaid, or a parochial school, or simply provides a level of financial stability that the family previously lacked. A strong case exists to reunify parent and child. But such reunification would come with the loss in foster care maintenance payments—hundreds of dollars a month or more to the family.[262] That financial impact could impose pressure on delicate intra-family conversations about whether a parent should seek reunification or whether a kinship caregiver should seek guardianship, and parents may choose to forego reunification in part to protect the subsidies used to support their children.

Indeed, multiple studies conclude that children in kinship foster care are less likely to reunify with their parents and more likely to leave

261. A proposal to achieve this goal is discussed *infra* Part V.B.

262. Kinship care critics recognize the point: subsidies for kinship caregivers "present . . . a straightforward economic incentive for poor families to place their children in foster care and arrange for kinship-care placements." Naomi Schaefer Riley, *Reconsidering Kinship Care*, NAT'L AFFS. 3, 9 (2018). Schaefer Riley argues for reducing kinship care and increasing stranger foster care, something I do not support.

foster care, whether to reunification or other outcomes, more slowly than children in non-kinship foster care. A 2018 study found that children in non-kinship foster care "were 2.2 times more likely than children in kinship care to be reunified,"[263] and that guardianship was a particularly common outcome for children living with kin. Earlier studies similarly concluded that kinship care delayed reunification and/or made it less likely.[264] It is not difficult to imagine the financial cost of reunification contributing to parents' declining to seek reunification or to kinship caregivers resisting reunification and instead pressuring parents to consent to guardianship. At a minimum, the role of financial incentives cannot be excluded as an explanation for kinship care's impact on reunification and ought to feature in future research.

B. Federal Funding Incentivizes Permanent Family Destruction

Federal guidance and constitutional law regarding the roles of foster parents send a different message than the financial incentives provided to them by the federal funding system. Foster parents' role is to support parents' efforts to reunify with their children, while funding laws create incentives for them to act adversely, offering financial support for efforts to adopt foster children and thereby permanently separate parents and children.

1. Federal Funding Incentivizes Foster Parents to Seek to Keep Foster Children Permanently

Federal guidance calls on CPS agencies to build "reunification-focused relationships between parents and resource families"[265] and to recruit foster families "committed to serving as a support to families with children in foster care," not those seeking to supplant families by adopting foster children.[266] The guidance argues that such supportive relationships will help engage parents in services to "enhance parental capacity to meet the needs of their children, and achieve safe, timely reunification," and "dispel the fears that are often present for parents" that foster parents will seek to forever separate parents and children

263. Marc A. Winokur et al., *Matched Comparison of Children in Kinship Care and Foster Care on Child Welfare Outcomes*, 89 FAMS. IN SOC'Y 338, 342 (2018).
264. Andrew Zinn, *Foster Family Characteristics, Kinship, and Permanence*, 83 SOC. SERVS. REV. 185, 187 (2009) (collecting studies). *But see id.* at 208–09 (finding no link between kinship placements and permanency outcomes after controlling for foster family age, race/ethnicity, and income).
265. HHS, FOSTER CARE AS A SUPPORT TO FAMILIES, *supra* note 89, at 8.
266. *Id.* at 10.

by adopting them.[267] This guidance is consistent with parents' greater constitutional status than foster parents. The Supreme Court has declined to recognize a due process right in foster parents' relationships with children, even long-term foster parent-child relationships, because foster families have their "source in state law and contractual arrangements," while parents' and children's right to family integrity are rooted in "intrinsic human rights."[268] Moreover, the Court was reluctant to grant foster parents rights in a way that would "derogat[e] from the substantive liberty" protections granted the parent-child relationship.[269]

Yet foster parents often do not act as supports to parents and instead act as fundamentally adverse parties. "[Y]ears of practice discouraged resource families from actively engaging in open relationships with the parents of children in their care."[270] Foster care agencies frequently conflate recruitment of foster parents with recruitment of adoptive parents.[271] The widespread practice of "concurrent planning"—working towards reunification of parents and children while simultaneously making "an alternative permanency plan . . . in case reunification efforts fail"—makes the parent-foster parent relationship even more fraught and more likely to become adversarial.[272] Moreover, lawyers for foster parents who want to adopt have aggressively pushed for greater rights to intervene in family court cases to pursue such adoptions.[273]

Adding to these problematic practices, the federal funding system provides significant financial incentives for foster parents to become adoptive parents, incentives which are at odds with federal policy

267. *Id.* at 5; *see also id.* at 1 (calling on CPS agencies to "build[] and support[] relationships between resource families and parents to facilitate improved engagement of parents, promote timely reunification . . . ").

268. Smith v. Org. of Foster Fams. for Equal. and Reform, 431 U.S. 816, 845 (1977).

269. *Id.* at 846.

270. HHS, Foster Care as a Support to Families, *supra* note 89, at 2.

271. *E.g.*, *Become a Foster or Adoptive Parent to a Child in Foster Care*, N.Y.C. Admin. for Children's Servs., https://www.nyc.gov/site/acs/child-welfare/become-foster-adoptive-parent.page [https://perma.cc/G2NB-J2S5] (last visited Apr. 29, 2024).

272. *Concurrent Planning for Timely Permanency for Children*, U.S. Children's Bureau 1 (2021), https://www.childwelfare.gov/resources/concurrent-planning-timely-permanency-children/ [https://perma.cc/U3U2-FW3H].

273. Eli Hager, *When Foster Parents Don't Want to Give Back the Baby*, New Yorker (Oct. 16, 2023), https://www.newyorker.com/magazine/2023/10/23/foster-family-biological-parents-adoption-intervenors [https://perma.cc/E9GS-TL58] (describing "increasingly popular legal strategy" of foster parents intervening in family court cases and seeking to adopt foster children even when CPS agencies do not support that action, and counting "[a]t least fifteen states" that permit foster parents to file directly to terminate parents' relationship with their children).

guidance about foster parents' role to help seek reunification. First, federal funding law makes monthly subsidies available to foster parents who adopt children from the family regulation system. States must enter "adoption assistance agreements" with such foster parents,[274] which cover both costs of arranging the adoption itself and ongoing payments.[275] Federal funding law explicitly frames these payments as incentives for foster parents to adopt: these payments may be made when "it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section."[276] State and local agencies consider the vast majority of children adopted out of foster care to meet this standard—the federal government supports 83% of all children receiving an adoption subsidy.[277] These subsidies are typically the same amount as foster care subsidies, and add up to billions in total expenditures—$3.2 billion in federal spending in 2020,[278] with the total spending likely about double that figure when state spending is accounted for.[279]

Federal funding law is also clear why the federal government pays for such incentives: to recruit foster parents to adopt. Federal funds for adoption assistance payments are available when "there exists with respect to the child a specific factor or condition (*such as ethnic background, age, or membership in a minority or sibling group*, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps)" which renders financial incentives necessary to arrange adoption.[280] The law by its plain text anticipates that CPS agencies will not, without financial incentives, find adoptive parents for anyone other than healthy, typically-abled, White infants. Unsurprisingly, non-White children and children with disabilities are well over-represented in foster care.[281] Economic literature also describes adoption subsidies

274. 42 U.S.C. § 673(a)(1)(A).
275. *Id.* § 673(a)(1)(B).
276. *Id.* § 673(c)(1)(B).
277. Rosinsky, Fischer, & Haas, *supra* note 16, at 28.
278. *Id.* at 27.
279. *See id.* at 113–14 (providing an incomplete tabulation of state adoption subsidy spending).
280. 42 U.S.C. § 673(c)(2)(B)(i) (emphasis added).
281. *See, e.g.*, Youngmin Yi, Frank R. Edwards, & Christopher Wildeman, *Cumulative Prevalence of Confirmed Maltreatment and Foster Care Placement for US Children by Race/Ethnicity, 2011-2016*, 110 Amer. J. Pub. Health 704, 706 (2020) (reporting that 9% of all Black children enter foster care in their childhood compared with 5% of all White children, and higher rates for all groups compared to White children except Asian/Pacific Islander children); Lindsay Shea et al., *Foster Care Involvement Among Youth with Intellectual and Developmental Disabilities*, 178 JAMA Pediatrics 384, 388 (2024) (finding overrepresentation of children with intellectual disabilities and autism spectrum disorder in foster care); Kristen Sepulveda et al., *Children and Youth*

as an effort to induce more individuals to choose to adopt, with increased subsidies incentivizing more adoptions.[282]

In addition to the ongoing monthly subsidies, federal law provides generous one-time adoption tax credits to further incentivize adoption. The tax code provides for a minimum $10,000 tax credit for anyone who adopts from foster care "a child with special needs"[283] (whose definition tracks the same phrase governing Title IV-E adoption subsidies.)[284] The tax credit also covers up to $16,810 in adoption-related expenses, including legal fees.[285] The tax code thus incentivizes foster parents to retain their own lawyers, many of whom will take a particularly aggressive approach to intervene in cases and seek adoption in direct tension with the system's overarching rehabilitative and reunification orientation.[286] In addition, many states—21 by one recent count—offer state adoption tax benefits on top of these federal benefits.[287]

The adoption tax credit emerged out of a conservative effort to create alternative and more traditional family structures to take care of poor children who might be left vulnerable by an eroding safety net. The tax credit was first proposed in House Republicans' 1994 "Contract with America" as part of an explicit effort to "reinforce" the traditional

---

with Special Health Care Needs in Foster Care, CHILD TRENDS (Dec. 2020) (finding "at least 24 percent" of children in foster care have some special health care need).

282. Mary Eschelbach Hansen, *Using Subsidies to Promote the Adoption of Children from Foster Care*, 28 J. FAM. ECON. ISSUES 377, 384 (2007).

283. 26 U.S.C. § 23(a)(3).

284. Both require "that there exists with respect to the child a specific factor or condition (such as ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing [adoption] assistance." 26 U.S.C. § 23(d)(3); 42 U.S.C. § 673(c)(2). The only difference is that the tax code includes the bracketed term "adoption" while Title IV-E does not.

285. 26 U.S.C. § 23(d)(1); *Topic no. 607 - Adoption Credit*, INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc607 [https://perma.cc/DV8R-GRHA] (last visited Feb. 16, 2025). The amount cited is for tax year 2024; it will increase in future years. *Id.* Some advocacy organizations advise "[y]ou may be eligible for the maximum amount of the credit regardless of whether you had any qualifying expenses." Generations United, *Adoption and Guardianship for Children in Kinship Foster Care: National Comparison Chart*, https://www.gu.org/app/uploads/2021/10/2021-Grandfamilies-Adoption-Guardianship-Chart.pdf [https://perma.cc/A53Z-P5MS] (last visited Apr. 30, 2024).

286. *Supra* note 273.

287. Charlotte Lozier Institute, *Adoption Tax Credits: Utilization, State Expansions, and Taxpayer Savings (2022)*, https://lozierinstitute.org/adoption-tax-credits-utilization-state-expansions-and-taxpayer-savings-2022/ [https://perma.cc/3PFR-VCH7] (last visited Apr. 30, 2024). States vary in the mechanism used—state income tax deduction or credit. *Id.*

family.[288] Following Republicans' victory in 1994, President Bill Clinton endorsed the idea as he emphasized moderate-to-conservative policies, seeking "to outflank the Republicans on social issues" and present "a 'values agenda' of his own on issues related to families and children."[289] Three months later, Congress enacted the adoption credit.[290]

The context of this tax credit reflects its tension with a system oriented around parental rehabilitation and reunification and the federal funding system's overlap with welfare policy discussed above.[291] Republicans sought—and Clinton eventually agreed—to end poor parents' entitlement to public benefits through Aid to Families with Dependent Children, a central part of welfare reform legislation also enacted in 1996.[292] An early criticism of welfare reform was that it would make it more difficult for poor parents to raise their children. Conservatives responded by arguing that the state could place those children in state custody or institutions.[293] The adoption tax credit provided a policy answer: states would remove some of those poor children from their families and place them in foster care, and the federal government would offer a financial incentive for foster parents to adopt them.[294]

---

288. *The Republican Contract with America* (1994), *available at* https://global.oup.com/us/companion.websites/9780195385168/resources/chapter6/contract/america.pdf [https://perma.cc/GU7Y-4GUX].

289. Alison Mitchell, *Clinton Backs Republicans' Bill on Tax Credit for Adoptions*, N.Y. Times, May 7, 1996, at A19.

290. Congress set the initial credit as $6,000 for a "special needs" adoption. Small Business Job Protection Act of 1996, Pub. L. 104-188, § 1807(a) (Aug. 20, 1996) (codified at 26 U.S.C. § 23). Congress expanded the credit to $10,000 in 2001 as part of President George W. Bush's signature tax cuts. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16, § 202 (2001). Congress then required state CPS agencies to inform foster parents considering adoption of the tax credit. Fostering Connections to Success and Increasing Adoptions Act, Pub. L. 110-351 § 403 (2008) (codified at 42 U.S.C. § 671(a)(33)).

291. *Supra* Part I.F.

292. Personal Responsibility and Work Opportunity Reconciliation Act § 103.

293. Charles Murray, *The Coming White Underclass*, Amer. Enter. Inst. (Oct. 29, 1993), https://www.aei.org/articles/the-coming-white-underclass. The claim was made most infamously by then Speaker-designate Newt Gingrich in 1994. *See, e.g.*, Howard Markel, *Orphanages Revisited: Some Historical Perspectives on Dependent, Abandoned, and Orphaned Children in America*, 149 Archives Pediatrics & Adolescent Med. 609, 609 (1995) (summarizing the debate Gingrich started and discussing history of orphanages that housed large number of children whose "parents were simply too poor to support them").

294. *See generally* Mical Raz, Breaking Families, Making Families: A Political History of Adoption in 1990s Child Welfare Reform (Under Contract, UNC Press).

2. *Federal Funding Incentivizes Foster Parents to Seek Adoption Rather than Guardianship*

Federal financing law shapes incentives for foster parents regarding another decision: when reunification with parents will not likely happen, what permanent legal status should the foster parent seek? Foster parents can seek adoption—which generally requires termination of the existing parent-child relationship—or guardianship, which does not. Which option foster parents prefer matters tremendously. Both CPS agencies and court decisions implicitly acknowledge that foster parent preferences are often decisive through recognition that they must consider guardianship when foster parents resist seeking adoption.[295]

Any financial incentives should rest in favor of the minimally necessary invasion into family rights, which requires using terminations and adoption sparingly—when any ongoing relationship between parent and child is harmful. Under current law and practice, adoption requires the termination of children's relationships with their parents; the state must extinguish that original parent-child relationship before it can create a new one via adoption.[296] Terminations permanently extinguish the relationship between parents and children. The Supreme Court has described such terminations as a "unique kind of deprivation."[297] That uniqueness calls for caution in its application because it can harm children significantly, even when parents cannot be primary caretakers.[298] Following this view, the American Law Institute's new Restatement of the Law on Children and the Law provides that terminations should only occur after the court examines "whether there are alternatives that further the state's permanency goals but do not require termination of the parent's rights."[299]

---

295. *See, e.g.*, N.Y. Off. of Child. & Fam. Servs., Know Your Permanency Options: The Kinship Guardianship Assistance Program 13 (2023) (providing foster parents with checklist to help determine what permanency option to pursue and advising foster parents to explore guardianship if they are not "willing to pursue adoption"); N.J. Div. of Youth & Fam. Servs. v. P.P., 852 A.2d 1093 (N.J. 2004) (instructing lower court to consider guardianship if potential permanency resources "decline to adopt"). The Restatement of the Law on Children and the Law has listed consideration of "permanency alternatives to terminations," including guardianship, as a requirement before ordering a termination. Restatement of the Law, Children and the Law § 2.80(b)(3), cmt. m (Am. L. Inst. 2024).

296. 42 U.S.C. § 672(a)(2).

297. Santosky v. Kramer, 455 U.S. 745, 759 (1982) (quotation and citation omitted).

298. Sankaran & Church, *supra* note 187, at 258.

299. Restatement of the Law, Children and the Law Tentative Draft No. 5 § 2.80 cmt. m (Am. L. Inst. 2023).

Federal guidance pushes even harder against foster parents choosing adoption and termination over guardianship. The federal Children's Bureau has indicated its preference for guardianship over adoption, advising: "Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them."[300] Moreover, when a foster parent seeks termination of the parent-child relationship and adoption, federal guidance advises state agencies to push foster families away from that position: foster families "who wish to sever the child's family connections for any reason other than safety should receive training and supportive counseling to understand the impact that will have on the child."[301]

Yet in tension with this guidance, the federal funding system incentivizes foster parents to choose the more invasive option—adoption and termination of parental rights—over the less invasive option of guardianship in two ways. First, the adoption tax credit is, as its name suggests, only available to foster parents who adopt, not those who seek guardianship—representing a lump sum payment of at least $10,000 to foster families who choose adoption and termination over guardianship.[302] Second, monthly permanency subsidies are more widely available to foster parents who seek adoption than to those who seek guardianship—especially for non-kinship foster parents. Federally-supported guardianship subsidies are only available to kinship foster parents,[303] while adoption subsidies contain no such restriction.[304] Although some states make guardianship subsidies available using state funds regardless of kinship status,[305] this is not the norm in law, and guardianship is frequently discussed as an option for kin only.[306] Some empirical evidence suggests significant numbers of non-kinship foster parents would be open to guardianship.[307] Nonetheless, in most states, non-kinship foster parents face a strong incentive to choose adoption as the only means to secure an ongoing adoption subsidy. In practice, adoption continues to be used far more frequently than guardianship:

300. Admin. Child. & Fams., Achieving Permanency for the Well-being of Children and Youth 10 (Jan. 5, 2021), https://www.acf.hhs.gov/cb/policy-guidance/im-21-01 [https://perma.cc/7DTL-L6LG].
301. *Id.* at 19.
302. 26 U.S.C. § 23(d)(1).
303. 42 U.S.C. § 673(d)(3)(A)(i)(II).
304. *Id.* § 673(a)–(c).
305. Gupta-Kagan, *supra* note 177, at 28 n.64.
306. *Id.* at 26–30; *see also, e.g.*, N.Y. Soc. Serv. L. § 458-B(1)(a) (limiting guardianship subsidies to relative).
307. Gupta-Kagan, *supra* note 177, at 29–30.

in 2022, for instance, there were 52,985 adoptions of foster children compared with 22,842 guardianships.[308]

C. Federal Funding Incentivizes Older Youth to Stay in Care

> *After the state removed her and her siblings from their parents, causing a years-long separation from her mother, step-father and siblings, Dasani wanted to reunify with her family. But her mother was unhoused, and reunification would mean returning with her mother to the shelter system. And it would mean foregoing housing benefits that the foster care system would provide to her—only if she stayed in state custody. Before the court hearing that would consider whether to reunify the family, Dasani's lawyer advises her client: she could "stay in foster care, receiving a financial stipend, free housing, help with college, and other perks. Or they can part with all that and go back to their mother, which means returning to poverty and homelessness. 'You'll go into a shelter,' the lawyer says repeatedly."*[309] *Facing a choice between housing and her family, Dasani chooses family. She speaks her mind to the judge, and the agency and court soon let them reunify, returning to the shelter system.*[310]

About 100,000 foster children—more than one-quarter of all foster children—are teenagers or young adults.[311] The federal law's goal for these children is permanency—to leave foster care to reunify with parents or to a new permanent family. One of Title IV-E's substantive provisions makes remaining in foster care until adulthood a narrow exception.[312] And for good reason: social science research demonstrates that youth who remain in foster care until the age of majority have particularly poor adult outcomes.[313]

---

308. HHS, AFCARS FY'22, *supra* note 116, at 4.

309. ELLIOTT, *supra* note 123, at 502–03. This story comes at the climax of this Pulitzer Prize-winning book that follows Dasani and her family through various systems that should have helped them address their deep poverty, including the family regulation system.

310. *Id.* at 503–06.

311. The most recent federal report counts 93,576 foster children who are 13-17 years old. An additional 14,404 foster youth are 18-20. The total number of foster children was 368,530. HHS, AFCARS FY'22, *supra* note 116, at 2.

312. The permanency plan that leads to children "aging out" of foster care rather than reunifying with a parent or leaving foster care to a new permanent custodial arrangement is known by the awkward phrase "another planned permanent living arrangement." *E.g.*, 42 U.S.C. 675(5)(C)(i). In 2014, Congress amended Title IV-E to limit when states could use this permanency option—only when children were 16 and older and only when a variety of other requirements were met. Pub. L. 113-183, *Preventing Sex Trafficking and Strengthening Families Act* § 112 (2014), *codified at* 42 U.S.C. §§ 675(5)(C)(i) & 675a.

313. Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD & YOUTH

Yet the federal government spends hundreds of millions of dollars creating a different incentive for teenaged foster youth: stay in state custody to take advantage of programs only available to those who do so until adulthood. Staying in state custody until age 18 will ensure that the child can maintain Medicaid health insurance coverage until age 26, even if they are not otherwise financially eligible for Medicaid.[314] This automatic Medicaid eligibility, however, depends on remaining in state custody until at least the child's 18th birthday.[315] Leaving foster care to reunify before turning 18 sacrifices this automatic Medicaid eligibility.

Other federal funding rules create analogous incentives to be eligible for what are known as "Chafee services"—services and financial support made available through the John H. Chafee Foster Care Program for Successful Transition to Adulthood.[316] These include access to financial assistance for housing from ages 18 through 21 and vouchers up to $5,000 per year to support the cost of higher education or post-secondary vocational training.[317] Although total state expenditures on these programs represent a relatively small proportion of total foster care spending,[318] these supports are unquestionably significant to the youth who receive them. Yet these financial supports are limited by statute "to youths who have aged out of foster care."[319] Another form of housing assistance adds to this incentive: some foster youth can seek a housing choice voucher to pay for housing for up to 5 years—but only if a teenager stays in foster care until at least age 18. Youth are eligible for these "family unification program" (FUP) vouchers only if they have a "transition plan" developed pursuant to a provision of Title IV-E which defines such plans for teenagers within 90 days of their 18th birthday.[320]

Servs. Rev. 1229, 1236 (2009) (finding older youth "still struggled with relational issues" even when they received "financial, educational, and technical supports" from CPS agencies); Brea L. Perry, *Understanding Social Network Disruption: The Case of Youth in Foster Care*, 53 Soc. Probs. 371 (2006); Mark Courtney & Richard Barth, *Pathways of Older Adolescents out of Foster Care: Implications for Independent Living Services*, 41 Soc. Work 75 (1996).

314. 42 U.S.C. § 1396a(a)(10)(A)(i)(IX)(bb).

315. *Id.* at § 1396a(a)(10)(A)(i)(IX)(cc).

316. 42 U.S.C. § 677.

317. § 677(a)(4)-(5).

318. States reported spending $169 million in "Chafee Program/ETV" funds in 2020. Rosinsky, Fischer, & Haas, *supra* note 16, at 33.

319. § 677(a)(4)-(5).

320. *Fact Sheet: Housing Choice Voucher Program Family Unification Program (FUP)*, U.S. Dep't of Hous. & Urb. Dev. (Dec. 2023), https://www.hud.gov/sites/dfiles/PIH/documents/FUP%20Fact%20Sheet-Revised%20December%202023.pdf [https://perma.cc/KRG8-JX98] (42 U.S.C. § 675(5)(H). FUP vouchers can last for 36 months and can be extended an additional 24 months. *Id.*

Older youth in foster care can also obtain additional Chafee services—"transitional services" such as help in completing high school and finding post-secondary education options, vocational training and placement, and "training and opportunities to practice daily living skills" like financial literacy and driving skills.[321] Some of these transitional aids are available through federal grants to state agencies intended to help "youth who have experienced foster care at age 14 or later."[322] On one hand, that formulation means a 14-year-old in foster care can reunify and maintain their eligibility. Notably, this flexibility is not available for the more financially significant benefits—housing and educational or vocational training supports.[323] This flexibility also shifts the incentive to a younger age—12- and 13-year-olds and their parents have an incentive to remain in foster care until 14.

The Chafee services statute adds one more provision to further subordinate reunification: if that 16-year-old left foster care to adoption or guardianship, they would be eligible for at least the Chafee services and benefits.[324] Those who reunify do not have the same options.

Altogether, a 16-year-old foster child who reunifies with a parent stands to lose automatic health insurance, tens of thousands of dollars in housing assistance, and thousands of dollars in educational and vocational assistance. White papers by leading players in the field acknowledge these incentives. One annual "permanency report card" goes so far as to suggest that the benefits of permanency for older youth are "less clear" because permanency of any form "may deprive older youth of additional resources that are conditional on aging out."[325] That financial reality informs the advice of Dasani's lawyer in this section's epigraph. While Dasani rejected that advice and reunified, an increasing percentage of teenagers now stay in state custody rather than leave to reunify with their parents or live with guardians or adoptive parents.[326]

---

321. § 677(a)(1).
322. *Id.*
323. *Supra* note 319.
324. § 677(a)(6).
325. Sarah A. Font, American Enterprise Inst., How Long Do States Let Children in Foster Care Wait for Permanent Families? Timely Permanency Report Cards 3 (2023), https://www.aei.org/research-products/report/how-long-do-states-let-children-in-foster-care-wait-for-permanent-families-timely-permanency-report-cards/ [https://perma.cc/G4CJ-HFWE].
326. Annie E. Casey Foundation, Fostering Youth Transitions 2023: State and National Data to Drive Foster Care Advocacy 3 (2023), https://www.aecf.org/resources/fostering-youth-transitions-2023 [https://perma.cc/V32P-V4VT].

IV. Foster Care Funding as Diverted Welfare

The federal foster care system's collection of perverse incentives helps demonstrate that it serves a different function than what is commonly articulated: the system provides public benefits to a sympathetic group—kinship caregivers and children who grew up in foster care—when more broadly-based public benefits may not be politically possible. As such, they represent diverted welfare—taking funds that would otherwise be given to poor parents and instead sending those funds (and more) to CPS agencies and substitute caregivers. Strikingly, the family regulation system is frequently presented as a means to provide financial support, especially to kinship caregivers. As a means of providing financial assistance to these individuals, foster care funding is both fairly inefficient and comes at the cost of separating parents and children.

From its origins with the Flemming Rule, federal foster care financing has required denying welfare payments to parents.[327] Federal dollars no longer flow to those parents, and instead flow to CPS agencies to both support those agencies' activities and subsidies to the foster families selected by the agencies. This section explores that diverted welfare function of federal foster care funding, both for children placed in both kinship and non-kinship foster homes, and on a macroeconomic level.

A. The Federal Funding System Shifts Public Benefits from Parents to CPS Agencies and Foster Parents

The Flemming Rule gave states a choice: provide public benefits to children in their families or put those children into new families. In the more than half-century since the Flemming Rule, the present foster care funding system has added a corollary to that rule: when the state separates families and places children with foster families, the state effectively shifts public benefits from the families of origin to those alternative families. Indeed, the present system provides more generous public benefits to foster families than to children's families of origin.[328]

The shift in public benefits from poor parents to non-kinship foster parents is evident on an individual-case level. When CPS agencies remove children from their parents, parents lose out on essential public benefits, including TANF, food assistance, housing assistance programs, children's Social Security benefits, and child-related tax benefits.[329] This

327. *Supra* Part I.A.
328. *Supra* notes 109–117 and accompanying text.
329. Gupta-Kagan, *supra* note 122, at 1588–92.

result is particularly troublesome given research showing that harming parents financially makes reunifying families *more* difficult.[330] After cutting off these benefits, the family regulation system provides more generous benefits, in the form of foster care maintenance payments, to strangers found by the state to take in foster children. The federal government also supports those payments when states have taken children away from the poorest families—those who would have been eligible for AFDC.

The history of welfare reform and federal family regulation funding reform in the 1990s demonstrates this shift on a systemic level. In 1996, Congress limited AFDC payments to poor families and ended poor parents' entitlement to public aid to raise their children. That same year, Congress directed new funds to foster parents who sought to adopt children via the adoption tax credit. Some states—at least nine—even started using their TANF grants, created via 1996 welfare reform, to provide adoption or guardianship subsidies to the state-installed parents or caregivers of children removed from their parents.[331] These changes shifted public benefits spending to middle- and upper-middle-class parents who adopted overwhelmingly poor children from foster care. Those children would still receive some financial support from the government—but only after CPS agencies destroyed their families and placed them in new adoptive families.

---

330. For instance, a 2016 study found a straight-line correlation between TANF benefits and reunification likelihood: parents who gained benefits after losing their children to foster care had a reunification rate of 83.8%, those who maintained their previous TANF benefits had a 71.2% rate, those with "short spells" of TANF 66.3%, and those who lost TANF benefits 58.3%. JiYoung Kang et al., *Dual-System Families: Cash Assistance Sequences of Households Involved with Child Welfare*, 10 J. PUB. CHILD WELFARE 352, 365 (2016). Earlier studies similarly found that parents who maintained public benefits were more likely to reunify and did so more quickly than parents who lost public benefits when the state took their children into foster care. DAVID B. MARSHALL ET AL., WASH. DEP'T OF SOC. & HEALTH SERVS., EFFECT OF TANF CONCURRENT BENEFITS ON THE REUNIFICATION OF CHILDREN FOLLOWING PLACEMENT IN OUT-OF-HOME CARE 1–5 (Nov. 2013), https://www.dshs.wa.gov/sites/default/files/rda/reports/research-11-198.pdf [https://perma.cc/EB5Q-8FRR]; Kathleen Wells & Shenyang Guo, *Reunification of Foster Children Before and After Welfare Reform*, 78 SOC. SERV. REV. 74, 87–88 (2004); Katherine Kortenkamp, Rob Geen & Matthew Stagner, *The Role of Welfare and Work in Predicting Foster Care Reunification Rates for Children of Welfare Recipients*, 26 CHILD & YOUTH SERVS. REV. 577, 586, 588 (2004). Research similarly found that charging parents child support payments when the state has taken their children delays reunification. Maria Cancian et al., *Making Parents Pay: The Unintended Consequences of Charging Parents for Foster* Care, 72 CHILD & YOUTH SERVS. REV. 100, 108 (2017); *see also* Jennifer L. Hook et al., *Trajectories of Economic Disconnection Among Families in the Child Welfare System*, 63 SOC. PROBS. 161, 174–75 (2016) (associating "economic destabilization" with reduced reunification likelihood).

331. ROSINSKY, FISCHER, & HAAS, *supra* note 16, at 41, 97–98.

B. Federal CPS Funding Provides Welfare for Kinship Caregivers

Financial assistance to kinship foster parents represents the most obvious reflection of how federal funding for family separations operates as a public benefit. This spending amounts to government aid to disproportionately poor individuals[332] whom the state has charged with taking care of children who are themselves poor. This fact has led multiple advocates in recent decades and through the present to see kinship foster care subsidies as a form of public benefits—often explicitly framing questions of placement in formal foster care with kin as a matter of providing money to kinship caregivers. Yet, those payments do not erase the conflict they create with the law's commitment to family integrity.

Some actors within the family regulation system have long been explicit about using kinship foster care subsidies as a means of directing funds to poor individuals and communities. When Robert Little, the commissioner of foster care in New York City in the early 1990s, expanded the use of kinship foster care, "Little heard critics complain that foster care was now being used as a form of economic development for the black community, a back-door method of income redistribution. But he saw nothing wrong with that."[333] Other jurisdictions expanded kinship care funding in the same era with similar impacts.[334] Indeed, many of the financial support for older youth and kinship caregivers are frequently discussed in public benefits terms. Youth aging out of foster care are at high risk of becoming unhoused;[335] providing housing assistance seeks to mitigate that risk.[336] Kinship caregivers—especially those who have custody via the family regulation system—are, in the aggregate, disproportionately poor.[337] This fact leads many mainstream voices to advocate providing "economic and concrete supports" as a means to alleviate poverty and thus "increase and maintain kinship foster homes by reducing challenges and providing resources that

---

332. Riehl & Shuman, *supra* note 253, at 109.

333. Nina Bernstein, The Lost Children of Wilder: The Epic Struggle to Change Foster Care 376 (2001).

334. Schaefer Riley, *supra* note 262, at 9–10.

335. *E.g.*, Amy Dworsky, Laura Napolitano & Mark Courtney, *Homelessness During the Transition from Foster Care to Adulthood*, 103 Supp. 2 Amer. J. of Pub. Health S318, S318 (2013) (reviewing studies finding that 11 to 36% of youth aging out of foster care "become homeless during the transition to adulthood").

336. The federal government has stated a goal of linking former foster youth to housing assistance programs to reduce this risk. *E.g.*, U.S. Dep't Health & Hum. Servs., Admin. Child. & Fams., Leveraging the U.S. Department of Housing and Urban Development's Foster Youth to Independence (FYI) Program for Eligible Youth Experiencing or At-Risk of Experiencing Homelessness (2024).

337. Riehl & Shuman, *supra* note 253, at 109.

support stability."[338] These voices further frame the issue as a matter of racial justice—financial support to kinship caregivers can reduce biases of state officials in evaluating non-white kinship caregivers.[339]

These mainstream calls for providing financial support to older foster youth and kinship caregivers depend on separating parents from children. Older foster youth have access to various supports on the condition that they remain in state custody until a certain point in time.[340] The path most frequently identified for providing financial support to kinship caregivers is for them to become licensed foster parents and for the state to place children with them. As the Annie E. Casey Foundation—a major think tank and consultancy in the family regulation field—wrote in 2024, "[l]icensing kin as foster parents can open the door to services and financial resources for the caregivers and children."[341]

These public benefits are welcome but come at a tremendous cost. First, and most obviously, they all depend on a separation between parents and children. Additionally, the emphasis on providing important financial benefits to kinship caregivers risks skirting over questions of the necessity of a separation. Indeed, documents urging steps to transform kinship placements into licensed foster homes generally take as a given the need for parent-child separations.[342]

Second, these public benefits require kinship caregivers to acquiesce to CPS agency control; the agency retains legal custody of the child and thus has the power to decide whether to move the child to another placement. Even when parent-child separations are necessary, it remains unclear why kinship caregivers should have to exchange legal custody for financial support. Kinship care is favored because kin have a pre-existing bond with the child or the child's parent and commitment to raise the child, and because of a wealth of empirical evidence demonstrating that kinship care leads to better outcomes than placement

338. Claire Kimberly, Chapin Hall, Promoting Stability in Kinship Foster Homes 1 (2023), https://www.chapinhall.org/wp-content/uploads/Chapin-Hall_Promoting-Stability-in-Kinship-Foster-Homes_Policy-Brief_Sept-19-2023.pdf [https://perma.cc/VK3Z-WRKW].

339. *Id.*

340. *Supra* Part III.A.

341. Annie E. Casey Foundation, Family Ties: An Analysis from a State-by-State Survey of Kinship Care Policies 6 (2024), https://www.aecf.org/resources/family-ties [https://perma.cc/6CGW-GDGH]; *see also* Kimberly, *supra* note 338, at 3 (urging authorities to "[m]aximize opportunities to approve or license kinship caregivers to ensure families receive payments to care for these children.").

342. *E.g.*, Family Ties, *supra* note 341, at 4–5 (describing kinship care as "a critical resource for children and youth who come to the attention of the child welfare system" without evaluating the need for parent-child separations).

with strangers. Absent some concern about the kinship caregiver, it is difficult to see why a formal placement in state custody is necessary—other than to open the IV-E funding spigot. Indeed, the Congressional Research Service noted in 1996 the perverse incentive that welfare reform created for states: by limiting states' TANF funds while maintaining states' entitlement for IV-E funds, Congress created an incentive for states to bring kinship families into foster care to access IV-E funds.[343]

Moreover, these public benefits to substitute caregivers contrast with the family regulation system's general refusal to provide such benefits to parents. The status quo subordinates parents' public benefits to kinship caregivers' and older foster youths' benefits—despite the fields' increasing appreciation of the importance of financial support to parents as a means to prevent neglect, abuse, and agency intervention in families, and analogously, to better facilitate reunification when family separations do occur.[344]

The family regulation system is also a remarkably inefficient way to provide public benefits to older youth and kinship caregivers. The trigger for such benefits is not a means-tested application, but a sprawling administrative and judicial apparatus that determines when to separate parents and children and manages removed children's foster care cases. That apparatus has its own incentives. When Robert Little expanded kinship care, private foster care agencies sought "a piece of the action"—the fees paid by the city agency to manage kinship foster care cases.[345] Not only did those significant case management fees eat up funds, but they created a set of special interests invested in the status quo; those private foster care agencies would only be paid for children separated from their parents and placed in state custody. To avoid this problem, reformers should seek means of providing financial assistance to kinship caregivers without requiring parent-child separations and grants of custody to CPS agencies.[346]

---

343. Cong. Rsch. Serv., *supra* note 200, at 5.

344. *See, e.g.*, U.S. Dep't Health & Hum. Servs., Child Welfare Info. Gateway, Separating Poverty from Neglect in Child Welfare 2 (2023), https://www.childwelfare.gov/pubPDFs/bulletins-povertyneglect.pdf [https://perma.cc/EPQ9-CL5F] ("What is increasingly clear is that helping families move out of poverty decreases the risk to children."); Emma Kahle Monahan et al., Chapin Hall, Economic and Concrete Supports: An Evidence-based Service for Child Welfare Prevention (2023), https://www.chapinhall.org/research/economic-and-concrete-supports-are-key-ingredients-in-programs-designed-to-prevent/ [https://perma.cc/NT4S-SFZQ] (advocating for "economic and concrete supports" as a crucial tool to reducing child neglect and abuse and family separations).

345. Bernstein, *supra* note 333, at 376–77.

346. Whether policymakers can identify alternative ways to give kinship caregivers aid without separating parents and children or placing children in the state's legal custody is explored in Part V.b.

V. Defunding Family Separations

The existing federal funding system creates systemic and individual incentives that conflict with the law's commitment to family preservation and reunification. Reforming that system thus requires removing the perverse incentives that infuse the present family regulation system and replacing them with incentives aligned with the law's commitments.

This section thus begins with a far-reaching proposal: end Title IV-E's entitlement structure and limitation on funding to preserve and reunify families. This idea builds off of the George W. Bush administration's proposal to turn IV-E into block grants: end the present system and replace it with one that sends equivalent but limited funds to states to support family preservation and reunification efforts. Such a change aligns incentives with the law's goals: states would bear the full financial consequence of separating families, putting a fiscal finger on the scale towards avoiding such separations and reunifying families whenever possible. Such dramatic change is worth considering, both to reduce the incentives to separate families and to free states to pursue policies that differ from problematic elements of Title IV-E.

This section then proposes a way to provide the vital public benefits offered by the present system to kinship caregivers without triggering the family separations required by Title IV-E. Federal funding law should support families who support parents without separating them from their children.

Finally, this section identifies a range of discrete reforms to the present structure that could mitigate problems in the existing system. Identifying such reforms is important given the unknown political appetite for more dramatic overhaul of the federal funding system.

A. Ending Title IV-E As We Know It[347]

The problems with Title IV-E show why it should not continue in its current form. This section argues for a structural change to federal family regulation system financing: the federal government should continue to provide the existing level of financial support to states but should not direct it towards family separation activities and should not

347. This phrase is a play on President Bill Clinton's pledge to "end welfare as we know it," a promise kept via the 1996 welfare reform legislation discussed *supra* Part I.f, and remains associated with that effort. *E.g.*, Alana Semuels, *The End of Welfare as We Know It: America's Once-Robust Safety Net is No More,* Atlantic (Apr. 1, 2016). Some advocates have borrowed the phrase when seeking dramatic changes to the present family regulation system. Alan Dettlaff *et al., What It Means to Abolish Child Welfare As We Know It,* Imprint (Oct. 14, 2020), https://imprintnews.org/race/what-means-abolish-child-welfare/48257 [https://perma.cc/U2EC-DZ44].

provide state agencies with an entitlement to unlimited federal funding regardless of the number of families they separate. Instead, Congress should fund states to engage in a range of activities—prevention services, including those providing direct financial supports to families that Title IV-E does not currently support, and including services and supports offered by agencies other than CPS.

Title IV-E's central problem is that it funds family separations and not efforts to preserve families, thus creating financial incentives in tension with the law's commitment to preserve and reunify families. To remedy these perverse incentives, two key elements of IV-E should change. First, Congress should end IV-E's entitlement status and convert it to a fixed grant to states regardless of the number of families in which the state intervenes. More modestly, Congress could give states the choice of continuing with the current IV-E system or accepting a fixed grant. Giving states a set amount of funds (to increase with inflation)[348] regardless of the number of families they separate provides a financial incentive consistent with the substantive law and in favor of family preservation. If a state keeps more families together, it reaps the benefits from reduced foster care costs (and should be required to invest such savings in other aid to families). States would continue to remove children suffering severe abuse or neglect from families, but each additional family separation would cost the state more money. That cost would no longer be mitigated by increased federal assistance.

Second, Congress should allow states to spend money currently reserved for foster care on family preservation and reunification. Providing states freedom to spend the federal money they have either to preserve families or support foster care (or divide the federal funds between those activities) rectifies the federal funding law's longstanding funding imbalance between family separations and family preservation. States should have flexibility to direct funds to any of the concrete financial supports that an increasing body of research shows would reduce child maltreatment and CPS agency intervention in families,[349] and to provide these funds outside of CPS agencies to avoid incentivizing referrals to these agencies as a means to access these supports.[350] Federal oversight can ensure states spend these funds directly on services and supports to families or existing IV-E supported activities rather than being diverted to other purposes. Federal oversight can further ensure state reforms achieve the goal of safely reducing the number of family separations and the number of children in state custody.

348. *See* Wexler, *supra* note 21, at 68 (proposing same).
349. *Supra* note 122.
350. *Infra* note 386 and accompanying text.

One might reasonably question whether Congress should *require* rather than merely allow states to spend these federal funds on prevention activities, and prohibit using the funds for family separations via foster care and permanency subsidies. I do not make that proposal for several reasons. The first is out of recognition that vested and powerful interests—state governments—depend on IV-E funding to fund their agencies and existing family regulation activities, and would likely oppose any dramatic changes. Moreover, a such a federal mandate would trigger debate along familiar federalism lines. While responses exist to these arguments, the political forces in support of them would be powerful. And one need not defeat those forces to remove the perverse incentives created by the present funding structure. To achieve that goal, Congress need only remove the entitlement nature of IV-E funds and permit states to spend those funds on costs other than foster care suffices, which would create incentives to keep children safely with their parents.

This proposal builds on earlier successful, but discontinued experiments. In the late 1990s through the early 2000s, the federal government experimented with waivers to states for "child welfare demonstration projects" that allowed states to invest IV-E dollars in more prevention services.[351] States had some freedom to innovate in how they spent these waiver dollars—the federal government was waiving their obligation to follow some of IV-E's restrictions on expenditures. States could spend IV-E dollars on preservation and reunification activities, which reduced the number of children in state custody and thus the family separation costs that IV-E typically funds. These waivers yielded positive results, especially increased "likelihood that at-risk children could remain safely in their homes" and reduced rates of family separation to foster care.[352] Unfortunately, Congress replaced authority for such waivers with the narrower funding flexibility created by Family First.[353] Rather than the limited services funded by Family First, Congress should provide states the flexibility to provide a range of prevention services—both financial supports and professional rehabilitation services to parents—and thus prevent family separations and the costs that come with them.

351. ASPE Issue Brief, *supra* note 42, at 16. Removing the entitlement nature of Title IV-E echoes the George W. Bush administration's failed effort to create a "capped flexible allocation." *Supra* note 199 and accompanying text. Importantly, the proposal is not to eliminate entitlements as a means to constrain spending on the poor, but to eliminate perverse incentives to separate families.

352. ASPE Issue Brief, *supra* note 42, at 17.

353. Wexler, *supra* note 21, at 63.

Relatedly, this proposal would allow Congress to eliminate the link between IV-E funding and AFDC eligibility without creating problems that would emerge from removing that link and without further changes to the federal funding structure. Removing that link without changing anything else would increase funding of IV-E agencies because, coupled with IV-E's current entitlement structure, it would allow states to claim federal reimbursements for all families' separations, not only poor families' separations. This reality has led some advocates to argue (reasonably) for keeping the AFDC link to avoid providing more funding to CPS agencies, even if that link is, at best, anachronistic.[354] Shifting to a block grant avoids this problem. By giving states a fixed amount of money regardless of how many families are separated, the AFDC eligibility of any family becomes moot. CPS agencies would no longer face any financial incentive to separate poor families and would be spared the administrative burden of documenting AFDC eligibility. Moreover, removing the entitlement to IV-E funds would reduce the fear that ending this AFDC link would lead to funding more family separations.

These reforms could proceed without changing the substantive regulation currently provided by Title IV-E. Congress could still force states, as conditions of receiving their grants, to work to place siblings together, notify relatives that they can seek to become kinship caregivers of children in state custody, and hold regular permanency hearings.[355] Congress could maintain other, more troublesome, substantive conditions, such as its requirement that states file termination petitions when children have been in custody for 15 months.[356] However, it would be advisable for Congress to revisit those conditions (especially the termination petition requirement) that, like the funding system, exist in tension with fundamental precepts of family regulation law.

While the value of existing substantive federal regulation is largely beyond the scope of this Article, one element of IV-E deserves some greater attention: Title IV-E's enlistment of state family courts

354. As inflation and the AFDC link gradually reduce the percentage of cases in which state CPS agencies can claim federal financial support, some advocates have called for Congress to eliminate the AFDC eligibility requirement or otherwise reform this provision of federal funding law. *E.g.,* PEW CHARITABLE TRUSTS, TIME FOR REFORM: FIX THE FOSTER CARE LOOKBACK 3, 7–8, https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/FixtheFosterCareLookbackpdf.pdf. Yet this step without other reforms would simply result in funding *more* family separations; states could see reimbursement in vastly more cases. *See* Wexler, *supra* note 21, at 64–65 (advocating for maintaining the AFDC link to prevent that scenario).

355. 42 U.S.C. §§ 671(a)(29) & (31), 675(5)(C).

356. 42 U.S.C. § 675(5)(E).

to enforce CPS agencies' obligation to provide reasonable efforts to preserve and reunify families. By asking state family courts to become the gatekeepers to state agencies receiving federal funds, the current structure has eroded state courts' proper role as a check on CPS agency action.[357] To remedy that problem, Congress should separate any state court findings regarding reasonable efforts from federal funding, thereby removing the incentive for state courts to act as gatekeepers to state agency funding and increasing the incentive to instead focus on their inter-branch oversight role. As a matter of substantive law, states should, of course, make efforts to preserve and reunify families, and state courts should enforce that requirement with substantive consequences: consistent with case circumstances, a finding of no reasonable efforts should lead to the return of a recently removed child home with a mandate for the agency to provide certain efforts,[358] an order to provide specific efforts on an expedited basis to aid a prompt reunification, or a bar on the state using a parent's failure to reunify against them when the state has failed to make reasonable efforts. These provisions are already possible under state law,[359] and removing the link to federal funding will remove one obstacle to enforcing such provisions more strictly.[360]

B. Creating a Path to Kinship Assistance without Separating Families and Placing Children in State Custody

Providing financial benefits to kinship caregivers is one of the most redeeming qualities of the existing federal funding system, though, under Title IV-E, those benefits come at the cost of parent-child separations and state custody. It is possible to provide financial support to kinship caregivers without those requirements. In other contexts, Medicaid funding provides financial support to kinship care that keeps

357. *Supra* Part II.c.

358. A narrow exception to this remedy may exist when the failure to make reasonable efforts leads to an unacceptably dangerous situation upon return.

359. These provisions are already possible under state law. Some state permanency hearing laws already permit courts to order agencies to provide specific services to meet reasonable efforts requirements. *E.g.*, N.Y. Fam. Ct. Act § 1089(d)(2)(viii) (McKinney 2024). Some state termination of parental rights statutes can also require the agency to make reasonable efforts before finding that a parent is permanently unfit. *See, e.g.*, N.Y. Soc. Serv. L. § 384-b(7)(a) (requiring, as a condition of finding "permanent neglect," that a parent remains unfit "notwithstanding the agency's diligent efforts" to rehabilitate the parent).

360. I do not mean to underestimate the difficulty of this task. State family courts have resiliently resisted a role as a check and balance on state CPS agencies. *See generally* Spinak, *supra* note 49 (describing this resilience and calling for the family court's abolition).

families together. Medicaid funding supports home health aides who are kin of and chosen by disabled or elderly patients. This growing system can serve as a model for funding kinship care without separating families or turning children's legal custody over to the state.

State Medicaid systems have increasingly funded this form of kinship care, especially since the COVID-19 pandemic, as states sought to keep elderly and disabled people out of nursing homes and struggled to fill home health aide job vacancies. At least 37 states used COVID-era funding flexibility to expand ways to pay kinship caregivers to help take care of elderly and disabled family members.[361] As COVID receded, that expanded kinship caregiving funding has remained, with 30 states making some form of this funding permanent.[362]

This kinship caregiving funding serves various goals. In Medicaid jargon, it forms part of a "consumer-directed" funding stream. This means the kinship caregiver to whom the money flows is chosen by the person needing assistance, thus empowering that person.[363] It allows that person to be cared for by a family member rather than a stranger. It saves the state money by paying kinship caregivers to help take care of family members in their homes, thus reducing the need for more restrictive and expensive options such as nursing homes.[364]

A separate (and more limited) Medicaid funding rule serves similar goals. For many years, Medicaid would pay for parents to place children with severe needs in residential treatment centers but not to provide care for them at home. That created a perverse and

361. Alice Burns, Maiss Mohamed & Molly O'Malley Watts, Kaiser Family Foundation, Pandemic-Era Changes to Medicaid Home-and Community-Based Services (HCBS): A Closer Look at Family Caregiver Policies (2023). As an example, New York's "consumer directed personal assistance program" allows qualifying Medicaid recipients to chose "any . . . adult relative" to be their paid (by Medicaid) personal assistant to provide home-based care. N.Y. Soc. Serv. L. § 365-f(3). Restrictions apply to keep costs in check; personal assistance costs paid to relatives may not be higher than they would be for a non-relative home health aide hired. *Id.*

362. Burns et al., *supra* note 361 (noting 17 states had made such policies permanent and 13 "currently in the process" of doing so).

363. Salom Teshale, Wendy Fox-Grage & Kitty Purington, Administration for Community Living, Paying Family Caregivers through Medicaid Consumer-Directed Programs: State Opportunities and Innovations 3 (2021). As the New York legislature described the purpose of its version of this program, it seeks to give 'chronically ill and/or physically disabled individuals receiving home care services . . . greater flexibility and freedom of choice in obtaining such services. N.Y. Soc. Serv. L. § 365-f(1).

364. *See* Teshale et al., *supra* note 363, at 3 (describing growth in Medicaid-funded kinship care as following "increasing interest in home-and community-based care over institutional care").

heartbreaking incentive for parents who could take care of children at home with some assistance, but who could not pay for such assistance. Such parents could only access Medicaid funding if they separated their families and placed their children in institutions. Congress addressed the problem by allowing state Medicaid agencies to pay for these children's care at home, keeping families together and avoiding institutional placements.[365] Through these provisions, Medicaid funding increasingly supports kinship care without disrupting relationships and without even requiring a family court or foster care case.

The same rationale that supports Medicaid's kinship caregiver funding applies to the family regulation system. When kinship caregiving can help the parent and child and can keep the family safely together, funding should support it. Like the Medicaid kinship caregiving funding, such funding would support parents' choices of living arrangements and caregivers. It would help avoid the more invasive and expensive options that separate families. Indeed, the present disparity between Medicaid and Title IV-E kinship caregiving funding is hard to justify: when a parent with a disability needs help taking care of herself, many states' Medicaid programs will pay a kinship caregiver to help take care of her. But if that same parent needs help taking care of her child and the family regulation system is involved, the foster care system will only pay the same kinship caregiver if she kicks the parent to the curb.

Congress should expand Medicaid kinship care funding to allow kinship caregivers to help children *and* their parents. Medicaid funding avoids the wedge that the foster care system places between parents and kinship caregivers, and the various other risks and harms that come from unnecessary family regulation system involvement. Using Medicaid funding also permits families to access these funds without going through CPS agencies, and thus avoiding the coercion, surveillance, and legal risk inherent in that system. Also, Medicaid funding allows CPS agencies to refer parents and kinship caregivers to Medicaid funding without further CPS or family court surveillance or regulation required.

This path is particularly apt for parents with disabilities. The most frequently used Medicaid kinship caregiving waivers are for people with intellectual disabilities,[366] and focusing on that population provides a

365. For a more detailed description, see B.U. Sch. Pub. Health Catalyst Center, The TEFRA Medicaid State Plan Option and Katie Beckett Waiver for Children—Making It Possible to Care for Children with Significant Disabilities at Home (2016), https://ciswh.org/wp-content/uploads/2016/07/TEFRA.pdf [https://perma.cc/B4RB-MYLZ]. Congress codified this policy in 1982 via what have become known as Katie Becket Waivers. *Id.*; 42 U.S.C. § 1396a(e)(3).

366. Burns et al., *supra* note 347.

strong analogy to the family regulation system. Parents with disabilities are significantly overrepresented in the family regulation system—accounting for nearly one in five children in foster care—and disparities regarding parents with intellectual disabilities are particularly wide.[367] Focusing on this population would address longstanding concerns about the family regulation system's treatment of parents with disabilities, which are significant (and beyond the scope of this Article).[368] A crucial gap in support for parents with disabilities is the absence of governmental programs to help parents with disabilities care for their children.[369]

Scholars and disability advocates have also provided essential insight applicable to all families, regardless of disability. Parents frequently seek and even need help raising their children. But, that does not mean that they are unfit parents who are threats to or should be separated from their children. Unfortunately, the family regulation system often sees a disabled parent's request for assistance as a confession of unsuitability to parent. As Sarah Lorr writes, reformers must "rebut the myth of independence by identifying that the need for support is evidence of a parent's humanity, not their unfitness."[370] When a parent with a disability both identifies a need for assistance and a kinship caregiver to provide that assistance, Medicaid should pay that kinship caregiver to help that parent and keep the family together, and thus provide the support that is sometimes needed without involving the family regulation system. For other parents and kinship caregivers, policymakers should explore other funding streams separate from the foster care system.[371]

---

367. Robyn Powell, *Parents and Children with Disabilities* in CHILD WELFARE LAW AND PRACTICE: REPRESENTING CHILDREN, PARENTS, AND AGENCIES IN NEGLECT, ABUSE, AND DEPENDENCY CASES 4TH ED. 113, 120–21 (Josh Gupta-Kagan, LaShanda Taylor Adams, Melissa Dorris Carter, Kristen Pisani-Jacques, Vivek S. Sankaran Eds. 2022).

368. For a comprehensive summary, see NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN (2012).

369. *Id.* at 25. The National Council for Disability called on Medicaid authorities to expand funding to help parents with disabilities raise their children. *Id.*

370. Sarah Lorr, *Disabling Families*, 76 STAN. L. REV. 1255, 1316 (2024).

371. Possible sources include Social Security (caregivers who receive Social Security retirement benefits and are primary caretakers of a child could receive extra benefits); TANF (which already provides benefits to some kinship caregivers who are not licensed foster parents); state-funded benefits programs (*see, e.g.*, D.C. Code § 4-251.1–.07; § 251.21–.27); and some as-yet-created benefits program.

C. *Reforms Within the Present Structure*

Even if Title IV-E's basic structure remains, there is room for useful reforms to avoid some of the perverse incentives described in this Article and to take initial steps towards a better system.

The first category of these modest reforms should remove the most egregious federal financial incentives to separate more families. Congress can prohibit the diversion of TANF funds—intended to support the poorest families—to fund CPS agency operations. State flexibility with TANF funds—a tenet of 1996 welfare reform—could remain, with a prohibition on using TANF funds to support agency operations to separate parents and children (though states could still provide TANF funds to income-eligible kinship caregivers).[372] In addition, Congress should repeal provisions providing bonuses to states for permanently destroying more families.[373] These adoption and guardianship bonuses represent a particularly perverse set of incentives for state agencies. Relatedly, Congress should eliminate financial incentives to choose adoption over guardianship: IV-E should finance guardianship subsidies regardless of kinship status and Congress should either repeal adoption tax credits or expand them to include guardianships.

Second, regulations providing federal funds to support family defense and children's representation should be removed from IV-E and placed in their own funding stream. That new stream should direct federal funds to state offices providing or funding legal services—thus bypassing the awkward CPS agency middleman. That funding stream should continue on an entitlement basis; individuals facing legal action to invade their constitutional right to family integrity should not have funding for their counsel programs diluted simply because the state increases the number of families it brings to court; each litigant should be entitled to adequately-funded representation, and such representation is likely to make the entire system run better.[374] This step will let those pivotal fields further develop without the risk that CPS agencies would use their funding power to inhibit vigorous representation.[375]

---

372. More broadly, states should spend more TANF funds on direct financial assistance to poor individuals. *E.g.*, Diana Azevedo-McCaffrey & Ali Safawi, Ctr. on Budget & Pol'y Priorities, To Promote Equity, States Should Invest More TANF Dollars in Basic Assistance (2022), https://www.cbpp.org/research/family-income-support/states-should-invest-more-of-their-tanf-dollars-in-basic-assistance [https://perma.cc/5QWN-G55X]. For this Article's purposes, I cabin the proposal to limiting the diversion of TANF funds to support family separations.

373. *Supra* notes 230–235 and accompanying text.

374. Gerber et al., *supra* note 131, at 10–11.

375. *Supra* notes 131–134 and accompanying text.

Third, Congress and the federal Children's Bureau should relax the requirement that kinship caregivers must keep children's parents separated from the child.[376] When a kinship caregiver reasonably believes that she can help the parent and child stay together, she should be able to allow the parent to stay in her home without sacrificing state support. Indeed, by providing caretaking to the child while preventing a parent-child separation, the kinship caregiver serves two crucial roles. Some recent foster care funding reforms suggest the potential for such a change. The Children's Bureau now recognizes that kinship foster care differs from stranger foster care and has authorized states to create separate licensing standards for kinship foster homes.[377] In addition, Title IV-E now has two exceptions to its general rule that parents must remain separate from children. It provides foster care maintenance payments for children "placed *with a parent* who is in a licensed residential family-based treatment facility for substance abuse."[378] And, when a teenager in foster care is also a parent, Title IV-E has long provided foster care maintenance payments to support the foster home's care for both the foster teenager and her child, with the child remaining in his parent's legal and physical custody.[379]

Policymakers should put these ideas together. When a parent seeks help from a kinship caregiver—or when the state seeks to enlist that kinship caregiver to provide help—the state should support their relationship by providing funding to keep them together, supporting each other and safely raising a child. In such cases, the federal government should remove the requirement that children must be "placed away from" parents for kinship care arrangements.[380]

---

376. 42 U.S.C. § 672(c)(1)(A)(ii)(II).

377. Separate Licensing or Approval Standards for Relative or Kinship Foster Family Homes, 88 Fed. Reg. 66700, 66704 (2023) (codified at 45 C.F.R. § 1355.20(a)(2) (2023)) ("Agencies may establish one set of foster family home licensing or approval standards for all relative or kinship foster family homes that are different from the set of standards used to license or approve all non-relative foster family homes.").

378. 42 U.S.C. § 672(j)(1) (emphasis added). Congress added this provision in 2018, as part of the same compromise that included the Family First Act. Bipartisan Budget Act of 2018, Pub. L. 115-123, § 50712 (codified at 42 U.S.C. § 672(j)). Unfortunately, the law still requires the child to be in the state's legal custody, an unnecessary barrier that has kept use of this funding limited. U.S. Dep't Health and Hum. Servs., Office Assistant Sec'y Plan. & Evaluation, Office Hum. Servs. Pol'y, How Some States Use Title IV-E Foster Care Funding for Family-Based Facilities that Treat Substance Use Disorders 2 (2021).

379. 42 U.S.C. § 675(4)(B). Both situations are limited exceptions to the requirement that states place children *away* from parents.

380. *Id.* § 672(c)(1)(A)(ii)(II).

Fourth, Congress could amend Title IV-E reimbursement rates to align financial incentives with one predominantly shared policy goal: to increase the rate of kinship placements. The federal government could pay a higher proportion of the cost of foster care maintenance payments to kinship caregivers than to non-kinship caregivers and remove any reimbursements for institutional placements. To its credit, the Biden administration proposed a more modest version of this idea—paying a reimbursement rate 10% higher for kinship placements.[381] Congress could go further and create a larger differential.[382]

Fifth, Congress could reduce the perverse incentives for youth to remain in foster care to obtain housing and other benefits.[383] Congress could require states to provide the equivalent services and supports available to youth aging out of foster care to any youth who leaves foster care to reunification, adoption, or guardianship above a certain age. This is already the case for some educational supports for older youth, and could be expanded to all such older youth services and supports.[384]

Sixth, the federal Children's Bureau could promulgate regulations defining reasonable efforts to increase the cost of separating families. I have proposed elsewhere defining reasonable efforts to require CPS agencies to expend at least as much money working to keep families intact and reunify families as they would on separating families.[385] This requirement would reduce (if not eliminate) the current perverse incentive to remove by increasing the cost of removals by requiring states to expend additional funds to get that federal financial support. The downside of this proposal—and with any proposal seeking to expand the services and supports offered by the family regulation system—is that it can create an incentive for families, or those working with them, to seek out CPS agency involvement to obtain this assistance.[386] But the cost

381. U.S. Dep't Health and Hum. Servs., Fiscal Year 2025: Budget in Brief 142 (2024), https://www.hhs.gov/sites/default/files/fy-2025-budget-in-brief.pdf [https://perma.cc/BQZ9-37P6]; John Kelly, *Biden Proposes Major Spending Shifts to Prioritize Kin, Foster Care Prevention*, Imprint (Mar. 28, 2022), https://imprintnews.org/youth-services-insider/biden-prioritize-kin-foster-care-prevention/63821 [https://perma.cc/5K8Z-5J8W].

382. The same reimbursement rates should continue for adoptions or guardianships to avoid any incentive to move toward permanency and claim a higher reimbursement rate.

383. *Supra* Part III.C.

384. *Supra* note 321 and accompanying text.

385. Gupta-Kagan, *supra* note 122, at 1603–06.

386. Indeed, many professionals who report families to state child protection hotlines assert that they do so not to trigger an investigation or removal but to access services for families. Kelley Fong, *Getting Eyes in the Home: Child Protective Services Investigations and State Surveillance of Family Life*, 85 Amer. Soc. Rev. 610, 620–21 (2020).

to CPS agencies of this enhanced reasonable efforts requirement would increase financial incentives on these agencies to limit their caseload.

Conclusion

The federal funding system for the family regulation system demands reform. Where the substantive law emphasizes family preservation and reunification, federal spending policies incentivize family separations, both temporary and permanent. These incentives operate on all entities and individuals that can receive supports through federal funding, including state CPS agencies, non-kinship foster parents, kinship caregivers, and older youth in foster care. Collectively, these perverse incentives significantly contribute to a system that intervenes in families too often and too invasively, and turns the CPS system into an alternative public benefits system, especially for kinship caregivers.

Incentives created by any federal spending system must align better with the substantive law and provide important financial support that avoids the perverse incentives of the status quo. Policymakers should explore all possible ways to achieve that alignment. Most modestly, policymakers should enact incremental reforms to eliminate or mitigate the worst incentives of the present system. Policymakers should create and expand mechanisms to support kinship caregivers without the invasiveness of the foster care system. Most ambitiously, policymakers should fundamentally rethink the federal funding system, and replace the open-ended entitlement structure for CPS agencies with a provision of similar funds to states to invest in efforts to prevent child maltreatment and family separations—and create incentives for states to preserve rather than separate families.