

2013

Permanency Puzzle

Cynthia Godsoe

Brooklyn Law School, cynthia.godsoe@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Family Law Commons](#), and the [Other Law Commons](#)

Recommended Citation

2013 Mich. St. L. Rev. 1113 (2013)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

PERMANENCY PUZZLE

Cynthia Godsoe*

2013 MICH. ST. L. REV. 1113

TABLE OF CONTENTS

INTRODUCTION	1113
I. THE PERMANENCY FRAMEWORK.....	1115
A. The Legal Framework.....	1115
B. The Child-Protection Population	1120
II. THE FRAMEWORK'S FLAWS.....	1122
A. Conflation of Legal and Psychological Permanency	1123
B. Rigid Construction of the Family	1126
C. Narrow Conception of Permanency.....	1128
III. SUGGESTIONS FOR REFORM.....	1131
A. Inform Policy with the Real Experiences of Children and Families.....	1131
B. Focus on Permanency Relationships—a Person Not a Place ...	1133
C. Build in Greater Flexibility	1135
CONCLUSION.....	1136

INTRODUCTION

Permanency lies at the heart of child-protection policy.¹ The Adoption and Safe Families Act (ASFA) directs that children in foster care who cannot be reunified with their birth families be adopted or, as a second choice, placed in one of a few narrow categories such as guardianship.² Unpacking permanency, however, reveals that the legal concept is based on rigid categories and flawed normative concepts of family, rather than on empirical

* Assistant Professor, Brooklyn Law School. J.D., Harvard Law School; A.B., Harvard College. I would like to thank the *Michigan State Law Review* for hosting this excellent symposium, and Shannon Smith for her careful editing. Sasha Coupet, Marsha Garrison, and Sarah Katz gave helpful comments, and Laura Solecki, Melissa Martin, and Amanda Aievoli provided valuable research assistance.

1. This reflects research findings that attachment to caring adults is correlated with stronger social-emotional development, health, and educational attainment in children and adolescents. Richard P. Barth & Laura K. Chintapalli, *Permanence and Impermanence for Youth in Out-of-Home Care*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 88, 88 (Benjamin Kerman, Madelyn Freundlich & Anthony N. Maluccio eds., 2009) [hereinafter *ACHIEVING PERMANENCE*].

2. 42 U.S.C. §675(5)(C) (2006).

data.³ This narrow conception of permanency undercuts the reality of children's and parents' experiences. It also ignores the modern psychological understanding of permanency as "an enduring relationship that arises out of feelings of belongingness."⁴ Under the latter definition, studies show that there is no difference between children being adopted and those being cared for by a guardian.⁵

The law has been slow to adapt, as evidenced by the ongoing funding prioritization of adoption and the preference for adoption, particularly closed adoption, over subsidized guardianship in state and federal law.⁶ The permanency framework tries to fit complex relationships and families into neat and tidy boxes. This approach is neither effective nor desirable, denying many children meaningful relationships with caring adults and devaluing certain kinds of families.

I focus on permanency for two reasons. First, an outline of the current permanency framework's flaws is necessary to rethinking the current ineffective approach to child protection. Second, the permanency framework illustrates how the differential treatment of parties in private and public family law results in significant inequalities between them.⁷ Inequality in

3. Psychiatrist Dr. Robert S. Marvin, for instance, observes that "developmental and clinical psychologists [researching children in the child-protection system] are struck by how little of [the psychological research and] knowledge has been transferred to the legal profession." Robert S. Marvin, *Quality of Permanence—Lasting or Binding? Legal Status v. Relationships*, 12 VA. J. SOC. POL'Y & L. 535, 537 (2005); see also Greta Cushing & Benjamin Kerman, *Permanence Is a State of Security and Attachment*, in ACHIEVING PERMANENCE, *supra* note 1, at 109, 110 (observing that "most research and legislation" focuses on legal categories such as adoption, rather than on broader, psychological conceptions of permanency).

4. Psychologist Mark Testa puts forth this definition. Mark F. Testa, *The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care As Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 499 (2005). Other experts recommend similar ones. See, e.g., Patricia O'Brien, Carol Rippey Massat & James P. Gleeson, *Upping the Ante: Relative Caregivers' Perceptions of Changes in Child Welfare Policies*, 80 CHILD. WELFARE 719, 744 (2001) (defining permanency as "warm and enduring relationships" between children and their caregivers); *Introduction*, ACHIEVING PERMANENCE, *supra* note 1, at 2 (detailing Casey Family Services' definition as "an enduring family relationship that is safe and meant to last a lifetime, offers the legal right and social status of full family membership, provides for physical, emotional, social, cognitive, and spiritual well-being, [and] assures lifelong connections to extended family, siblings, and other significant adults, along with family history and traditions, race, ethnicity, culture, religion, and language"). These conceptions starkly contrast with the purely legalistic view of permanency underlying ASFA framework. 42 U.S.C. § 675(5)(C) (2006).

5. See *infra* notes 48–53 and accompanying text (outlining Mark Testa's research).

6. Testa notes that historically the psychological definition was more predominant, but that ASFA and related child-protection policies have shifted the conception of permanency to one of a "legally enforceable" commitment, i.e. adoption. Testa, *supra* note 4, at 499.

7. Cf. Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV.

the treatment of families is the subject of this symposium. One significant, yet understudied, area of inequality is the public and private family law systems. Private family law focuses on the private distribution of wealth and applies primarily to middle- and upper-class families. Public family law concerns state public benefits systems and thus generally applies to lower-income people.⁸ Which system families enter, which “door” they come through, often has a significant impact on their custodial and other parental rights.⁹ One reason for this is the rigid and narrow conception of permanency.

Part I of this Essay outlines the system’s definition of permanency and gives a snapshot of children in the child-protection system. Part II explains how this definition is flawed, both starkly different from the reality of children’s experiences and fundamentally misguided as policy. Part III recommends some concrete changes to address these flaws.

I. THE PERMANENCY FRAMEWORK

A. The Legal Framework

Permanency is the central value underlying the child-protection system. Hence, agencies engage in permanency planning with families, both birth and adoptive; courts hold “permanency hearings”; and every child in foster care has a permanency goal.¹⁰ When it was enacted in 1996, the ASFA emphasized permanency as a reaction to the problem of “foster care drift.”¹¹ Thousands of children stayed in foster care for years, virtually their

1079 (noting that different standards apply to determine where children live; whereas the “best interests of the child” standard governs private family law, permanency is the main value in public family law).

8. For a critical discussion of these inequities, see generally Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113 (2013); Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002). There is also significant racial disproportionality in the child-protection system. For instance, whereas Black children make up 13.9% of the general population, they comprise 26% of the children in foster care. See *Race and Hispanic Origin Composition: Percentage of U.S. Children Ages 0-17 by Race and Hispanic Origin, 1980-2012 and Projected 2013-2050*, CHILDSTATS.GOV,

<http://www.childstats.gov/americaschildren/tables/pop3.asp?popup=true> (last visited Dec. 18, 2013).

9. See Godsoe, *supra* note 8, at 116.

10. For a full discussion of ASFA framework, see Godsoe, *supra* note 8, at 122-23.

11. H.R. REP. NO. 105-77, at 12 (1997). One dictionary definition of permanent is “not expected to change for an indefinite time; not temporary.” *English Dictionary Definition of “Permanent,”* COLLINS ENG. DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/permanent> (last visited Dec. 18, 2013). Foster care is designed to be inherently temporary, although average lengths of stay show that for many children it is not. See, e.g., CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH &

whole childhoods, without being returned to their parents or freed for adoption via a termination or surrender of parental rights. To facilitate permanency, the statute mandates terminations in many more cases and requires termination when a child has spent fifteen of the past twenty-two months in foster care.¹² It also permits concurrent planning, so that agencies can work simultaneously to reunify a child with her birth parents and for her to be adopted.¹³ Finally, ASFA requires that each child in foster care have a permanency goal, to be recommended by the agency and set by the court.¹⁴

The Department of Health and Human Services (HHS) defines permanency as “a legal, permanent family living arrangement, that is, reunification with the birth family, living with relatives, guardianship, or adoption.”¹⁵ Towards this end, ASFA specifies five possible permanency outcomes or goals, in order of preference:

1. Return to the Parent
2. Adoption
3. Legal Guardianship
4. Permanent Placement with a Fit and Willing Relative
5. Another Planned Permanent Living Arrangement (APPLA).¹⁶

HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2012 ESTIMATES AS OF NOVEMBER 2013, at 2 (2013), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> (reporting 2012 data).

12. 42 U.S.C. § 675(5)(E) (2006). ASFA also excuses states from aiding families to reunify in certain cases and prioritizes adoptions, bringing numerous new measures and funding sources to promote them. *Id.* §§ 671, 673, 675. Funding consists both of subsidies to adoptive families and incentive payments to states that increased adoptions from foster care.

13. *Id.* § 675(1)(B). Administrative law literature calls into question whether concurrent planning towards two such different aims is possible. See Cynthia Godsoe, *Just Intervention: Differential Response in Child Protection*, 21 J.L. & POL’Y 73 (2012).

14. 42 U.S.C. § 675(5)(C).

15. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., A REPORT TO CONGRESS ON ADOPTION AND OTHER PERMANENCY OUTCOMES FOR CHILDREN IN FOSTER CARE: FOCUS ON OLDER CHILDREN 2 (2005) [hereinafter HHS REPORT] (emphasis omitted), available at http://www.acf.hhs.gov/sites/default/files/cb/congress_adopt.pdf. Children are to be raised in as family-like a setting as possible, rather than institutional care. This policy reflects the better results children have in family-like settings, such as foster care, than in congregate care such as group homes. *Id.* at 3.

16. 42 U.S.C. § 675(5)(C). “Depending on the age and needs of the child, other permanent living arrangements can include long-term foster care, residential care, and independent living.” CHILD WELFARE INFO. GATEWAY, COURT HEARINGS FOR THE PERMANENT PLACEMENT OF CHILDREN 4 n.13 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/planning.pdf; see also DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP’T OF HEALTH & HUMAN SERVS., ADOPTION 2002: THE PRESIDENT’S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN, (1999) (detailing the permanency hierarchy under ASFA).

Reunification must be ruled out before a child can have adoption as a permanency goal.¹⁷ Adoption must be ruled out before a child can have a permanency goal of three or four.¹⁸ Finally, goal number five can only be assigned to a child with the documentation of a compelling reason.¹⁹ A child's goal is very significant, directing not only the long term plan for him, but also influencing the type of foster family, caseworker, and other services the child and his family will receive.²⁰ Accordingly, there should be a strong correlation between a child's placement, e.g. pre-adoptive foster home, and a child's goal, e.g. adoption.

Further narrowing the permanency framework is the culture of caseworkers.²¹ Caseworkers are trained to treat adoption as the "gold standard," far superior to other permanency arrangements.²² Positing adoption as a panacea for all children in foster care, many caseworkers continue to un-

17. See CHILD WELFARE INFO. GATEWAY, *supra* note 16. ("In those cases where reunification is not appropriate, adoption is viewed as providing the greatest degree of permanence. . . . Such options [as guardianship with relatives] do not provide the same level of permanency available through adoption . . ."). Reunification remains the most common goal and outcome for children in care. See *infra* Table 1 (noting that, in 2012, reunification was the goal for 53% of children in care).

18. DUQUETTE & HARDIN, *supra* note 16, at II-2, -4; see also Leslie Cohen, *How Do We Choose Among Permanency Options? The Adoption Rule Out and Lessons from Illinois*, in CHILDREN'S DEF. FUND, USING SUBSIDIZED GUARDIANSHIP TO IMPROVE OUTCOMES FOR CHILDREN 19, 20 (Mary Bissell & Jennifer L. Miller eds., 2004), available at <http://www.aecf.org/upload/PublicationFiles/CW3622H5063.pdf> (noting that, in Illinois, "there has been a 'rebuttable presumption' that a child should be adopted. As a matter of law, this means that one must prove to the court that adoption is not appropriate for a child and must defend any decision to pursue another permanency goal").

19. Two important types of APPLAs are (1) permanent placements with specific non-related foster families and (2) long-range placements in group or institutional settings, with special assurances of permanency and stability. See HHS REPORT, *supra* note 15, at 2, 10; HORNBY ZELLER ASSOCS., OFFICE JOB & FAMILY SERVS., OHIO CHILDREN IN PLANNED PERMANENT LIVING ARRANGEMENTS: TRENDS AND OUTCOMES 1 (2007) [hereinafter OHIO REPORT], available at http://jfs.ohio.gov/ocf/PPLAReportJune2007_final.pdf.

20. See, e.g., PERMANENCY THROUGH TEAMWORK, ILL. DEP'T CHILD. & FAM. SERVS. (2002), available at <http://www.state.il.us/dcf/docs/fpChapter3.pdf> (outlining the different type of potential foster parent roles and responsibilities vis-à-vis different permanency goals).

21. Legislators also over-prioritized adoption during the enactment of ASFA. See, e.g., 143 CONG. REC. 26,402 (1997) (statement of Sen. Grassley) ("Children need to know that they have permanency, which means successful, healthy reunification with their birth families or permanency in an adoptive home.").

22. Godsoe, *supra* note 8, at 143-44. Reflecting this bias towards adoption, states have cited "demystifying" other permanency options such as subsidized guardianship as a prerequisite to expanding permanency options. See CHILDREN'S DEF. FUND ET AL., MAKING IT WORK: USING THE GUARDIANSHIP ASSISTANCE PROGRAM (GAP) TO CLOSE THE PERMANENCY GAP FOR CHILDREN IN FOSTER CARE 19 (2012), available at <http://www.childrensdefense.org/child-research-data-publications/data/making-it-work-using-the.pdf>.

derutilize subsidized guardianship and other permanency options. They act as “gatekeepers” to various permanency options and frequently do not suggest guardianship to caregivers or children when it may be the most appropriate option.²³ Sometimes, they even pressure kinship caregivers to either adopt kids, which is impossible for some, or give them up.²⁴

Funding streams also significantly impact state permanency goals.²⁵ The Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCA), Congress’s largest child protection reform since ASFA, did not change the permanency goal structure *per se*.²⁶ It did, however, revamp some of the federal funding for foster care and adoption, which will likely alter the usage of different permanency goals. Specifically, the FCA allows federal IV-E funding for subsidized kinship guardianship.²⁷ Previously, this funding had only been available for foster care and adoption, so states had incentives to prefer adoption over guardianship.²⁸ Some states had sub-

23. ANNA ROCKHILL ET AL., CHILD WELFARE PARTNERSHIP, OREGON’S TITLE IV-E WAIVER DEMONSTRATION PROJECT EVALUATION 2004-2009: SUBSIDIZED GUARDIANSHIP COMPONENT 10 (2009) [hereinafter Oregon Report]; *see also* CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., SYNTHESIS OF FINDINGS: SUBSIDIZED GUARDIANSHIP: CHILD WELFARE WAIVER DEMONSTRATIONS, at iii (2011), *available at* http://www.acf.hhs.gov/sites/default/files/cb/subsidized_0.pdf (finding that workers “expressed reluctance to offer [subsidized guardianship] due to deep-seated professional beliefs regarding the preferability of adoption”).

24. OREGON REPORT, *supra* note 23, at 75; Kendra Hurley, *Preserving Family Ties*, 15 CHILD. WELFARE WATCH 8, 11-13 (2008); *see also* MaryLee Allen & Beth Davis-Pratt, *The Impact of ASFA on Family Connections for Children*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 70, 74 (2009) [hereinafter INTENTIONS & RESULTS], *available at* http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf (noting the inconsistent application of ASFA in California and also finding that the prioritization of adoption led caseworkers to pressure caregivers to adopt or risk losing custody of, and contact with, children in their care).

25. ASFA and related laws, such as the Adoption Promotion Act of 2003, have consistently prioritized funding for adoption over reunification or other exit placements from foster care, such as guardianship. For instance, in FY 2012, a conservative estimate shows that the federal government allocated \$4.29 billion for foster care, \$2.54 billion for adoption assistance, and only \$80 million for kinship guardianship. CHILD WELFARE LEAGUE OF AM., FEDERAL FUNDING RESOURCES FOR CHILD WELFARE (2012), *available at* <http://www.cwla.org/advocacy/financingfunding.pdf>.

26. *See* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).

27. Adoption is still funded more robustly than any other permanency outcome, and the FCA recently expanded the Adoption Incentive Funding Program. *See* Madelyn Freundlich, *Permanence for Older Children and Youth: Law, Policy, and Research*, in ACHIEVING PERMANENCE, *supra* note 1, at 127, 136-37.

28. The FCA also prioritizes other kinds of kin arrangements and provides funds for states to expand their searches for foster children’s families. § 102, 122 Stat. 3949. These measures also increase the desirability of a permanency goal of three or four.

dized guardianship systems, but the majority of states did not.²⁹ Despite the FCA reforms, the permanency structure remains narrow due to restrictive state definitions of kin for subsidized guardianship, the adoption rule-out, funding, and caseworker culture.

The FCA does not mandate any definition of kin for subsidized guardianship funding, instead letting states define it.³⁰ Many view kinship as a broad and flexible category.³¹ Reflecting this, some states have chosen broad definitions of kinship, expanding their definition of “relative” beyond persons related by blood, marriage, or adoption, to include persons who have a significant relationship with a child.³² Many states, however, have kept their definitions of relative narrow.³³ For instance, Idaho limits its definition to certain blood or legal relatives: “An individual having a relationship with a child by blood, marriage or adoption. Such individuals include grandparents, siblings and extended family members such as aunts, uncles and cousins.”³⁴

29. New York and Michigan both implemented subsidized guardianship programs only after the passage of the FCA. *See* 2010 N.Y. Sess. Laws 473-83 (McKinney) (amending the New York Social Services law and the New York Family Court Act to create the “Kinship Guardianship Assistance Program” (KinGAP)); Subsidized Guardianship Assistance Act of 2008, MICH. COMP. LAWS §§ 722.871-.881 (2013). Illinois provides an example of a state subsidized guardianship program that predated the FCA. 705 ILL. COMP. STAT. ANN. 405 / 2-27 (West Supp. 2013) (effective Jan. 1, 1988).

30. The FCA does, however, require that the kinship resource be a certified foster parent. States have cited this requirement as a significant impediment to guardianship for numerous children. *See infra* note 124.

31. Carol Stack’s work on this topic is perhaps the best known. *See* CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1974) (describing kinship networks of “those you count on,” which may not distinguish between blood relatives, friends, and neighbors).

32. This latter category is often referred to as “fictive kin.” States with broader definitions include: Alaska, California (federal approval pending), Colorado, District of Columbia, Hawaii, Louisiana, Maine, Maryland, Massachusetts, Montana, Nebraska, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Vermont, Washington (only for Native American children), and Wisconsin. CHILDREN’S DEF. FUND ET AL., *supra* note 22, at 7. A number of these, such as the District of Columbia, expanded their definitions to benefit from federal funding allowed under the FCA. *Id.*

33. *See, e.g.,* ARIZ. REV. STAT. ANN. § 8-501(A)(13) (2013) (“‘Relative’ means a grandparent, great grandparent, brother or sister of whole or half blood, aunt, uncle or first cousin.”).

34. IDAHO DEP’T HEALTH & WELFARE, STANDARD FOR GUARDIANSHIP ASSISTANCE 2 (2011), *available at* <http://www.healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/GuardianshipAssistance.pdf>; *see also* ARIZ. REV. STAT. ANN. § 8-501(A)(13); MICH. COMP. LAWS ANN. § 722.872(h).

B. The Child-Protection Population

The most recent child-protection data show that ASFA has in part achieved its goals, but only in part. The overall number of children in foster care has declined considerably since ASFA was enacted.³⁵ About a quarter of children in foster care, however, still have permanency goals other than reunification or adoption.³⁶ This leaves thousands of children in long-term foster care, many of whom “age out” of the system at age eighteen or twenty-one with no legal or emotional connection to an adult.³⁷ This is compounded by the large disconnect between children with goals of adoption and the number of pre-adoptive placements. Twenty-four percent of children had adoption as their goal in 2012,³⁸ but only 4% were in pre-adoptive homes.³⁹ Finally, subsidized guardianship is vastly underutilized as a permanency option. For instance, 4% of children in foster care had subsidized guardianship as their goal, far fewer than the 24% with an adoption goal, and even fewer than those having the admittedly undesirable goals of long-term foster care (5%) or emancipation (5%).⁴⁰ Further reflecting this underutilization, only 7% of children exiting foster care in 2012 went to guardianships, less than those who were legally emancipated (10%) or aged out of care with no legal ties to anyone.⁴¹

35. For instance, in the last seven years, the foster care population has dropped from 513,000 children to 399,546. *See infra* Table 1.

36. This discussion is based on the most up-to-date data available, comprised of estimates for 2012. CHILDREN’S BUREAU, *supra* note 8. This data is outlined in the tables below.

37. For instance, ASFA has significantly enlarged the gap between children who want to be adopted and those who are, creating thousands of “legal orphans.” *See* Freundlich, *supra* note 27, at 136-37 (reporting that between FY 1998 and FY 2003, the percentage of children aged nine and older waiting to be adopted increased from 39% to 49% while those who were adopted remained at 33%, and that during the same period, 37% of children nine or older whose parents’ rights were terminated had a permanency plan for emancipation or long-term foster care).

38. *See infra* Table 1.

39. *See infra* Table 2.

40. *See infra* Table 1; *see also* OREGON REPORT, *supra* note 23, at 9-10 (finding that subsidized guardianship is underutilized). Emancipation is a particularly undesirable permanency goal. Tellingly, an HHS report on permanency does not include emancipation in its “definition of permanency because it does not provide for a legal permanent family for the child (although the child may have a long-term emotional connection with a family).” HHS REPORT, *supra* note 15, at 2.

41. *See infra* Table 3.

Table 1: Number of Children in Foster Care by Year; Case Goals of the Children in Foster Care by Year

	2005	2006	2007	2008	2009	2010	2011	2012
Total Children in Foster Care	513,000	510,000	491,000	463,000	423,773	408,425	400,540	399,546
Reunify with Parent(s) or Principal Caretaker(s)	262,706 (51%)	248,054 (49%)	235,655 (48%)	226,867 (49%)	202,065 (49%)	202,389 (51%)	199,123 (52%)	205,033 (53%)
Live with Other Relative(s)	21,722 (4%)	20,359 (4%)	19,058 (4%)	16,922 (4%)	14,763 (4%)	14,092 (4%)	13,420 (3%)	13,149 (3%)
Adoption	100,949 (20%)	117,380 (23%)	118,867 (24%)	111,225 (24%)	102,615 (25%)	96,772 (25%)	94,629 (25%)	93,165 (24%)
Long Term Foster Care (APPLA)	37,628 (7%)	43,773 (9%)	40,871 (8%)	37,522 (8%)	32,361 (8%)	24,697 (6%)	22,744 (6%)	20,095 (5%)
Emancipation (APPLA)	31,938 (6%)	30,662 (6%)	31,906 (6%)	29,556 (6%)	26,547 (6%)	24,131 (6%)	20,635 (5%)	20,251 (5%)
Guardianship	15,653 (3%)	20,945 (4%)	21,447 (4%)	18,266 (4%)	15,990 (4%)	14,574 (4%)	14,593 (4%)	14,829 (4%)
Case Plan Goal Not Yet Established	42,403 (8%)	28,827 (6%)	23,197 (5%)	22,642 (5%)	16,280 (4%)	18,102 (5%)	19,324 (5%)	18,614 (5%)

Table 2: Number of Children in Foster Care by Year; Placement Settings of the Children in Foster Care by Year

	2005	2006	2007	2008	2009	2010	2011	2012
Total Children in Foster Care	513,000	510,000	491,000	463,000	423,773	408,425	400,540	399,546
Pre-Adoptive Home	18,691 (4%)	17,351 (3%)	19,007 (4%)	17,485 (4%)	17,280 (4%)	14,886 (4%)	14,213 (4%)	14,253 (4%)
Foster Family Home (Relative)	124,153 (24%)	124,571 (24%)	123,760 (25%)	112,643 (24%)	101,688 (24%)	103,943 (26%)	107,995 (27%)	109,619 (28%)
Foster Family Home (Non-Relative)	236,775 (46%)	236,911 (46%)	225,138 (46%)	217,243 (47%)	200,179 (48%)	194,900 (48%)	188,222 (47%)	185,257 (47%)
Group Home	43,440 (8%)	33,433 (7%)	32,066 (7%)	29,122 (6%)	25,302 (6%)	25,066 (6%)	23,624 (6%)	23,776 (6%)
Institution	51,210 (10%)	53,042 (10%)	48,167 (10%)	47,165 (10%)	40,502 (10%)	36,607 (9%)	34,656 (9%)	34,253 (9%)

	2005	2006	2007	2008	2009	2010	2011	2012
Supervised Independent Living	5,918 (1%)	5,872 (1%)	5,468 (1%)	5,217 (1%)	4,690 (1%)	4,050 (1%)	3,868 (1%)	4,073 (1%)
Runaway	10,930 (2%)	12,213 (2%)	10,769 (2%)	9,766 (2%)	8,047 (2%)	6,563 (2%)	5,870 (1%)	4,973 (1%)
Trial Home Visit	21,883 (4%)	26,606 (5%)	26,624 (5%)	24,358 (5%)	23,010 (5%)	21,340 (5%)	20,568 (5%)	22,010 (6%)

Table 3: Number of Children Exiting Foster Care by Year; Reasons for Discharge

	2005	2006	2007	2008	2009	2010	2011	2012
Total Children Exiting Foster Care	287,000	289,000	293,000	285,000	276,266	254,114	245,260	241,254
Reunification with Parent(s) or Primary Caretaker(s)	155,608 (54%)	154,103 (53%)	153,868 (53%)	148,340 (52%)	140,061 (51%)	128,913 (51%)	125,908 (52%)	122,401 (51%)
Living with Other Relative(s)	31,362 (11%)	30,751 (11%)	27,720 (9%)	23,944 (8%)	21,424 (8%)	20,423 (8%)	20,076 (8%)	19,671 (8%)
Adoption	51,323 (18%)	50,379 (17%)	52,235 (18%)	54,284 (19%)	55,684 (20%)	52,340 (21%)	49,866 (20%)	51,229 (21%)
Emancipation	24,407 (9%)	26,517 (9%)	29,730 (10%)	29,516 (10%)	29,471 (11%)	27,854 (11%)	26,286 (11%)	23,439 (10%)
Guardianship	12,881 (4%)	15,010 (5%)	18,158 (6%)	19,941 (7%)	19,290 (7%)	16,208 (6%)	15,707 (6%)	16,424 (7%)
Transfer to Another Agency	6,440 (2%)	6,683 (2%)	6,118 (2%)	5,195 (2%)	6,291 (2%)	5,114 (2%)	4,560 (2%)	4,256 (2%)
Runaway	4,445 (2%)	5,049 (2%)	4,697 (2%)	2,324 (1%)	2,141 (1%)	1,504 (1%)	1,387 (1%)	1,216 (1%)
Death of Child	534 (0%)	509 (0%)	473 (0%)	456 (0%)	417 (0%)	338 (0%)	343 (0%)	328 (0%)

II. THE FRAMEWORK'S FLAWS

The failure of ASFA to achieve permanency for more children is in large part due to flaws in the existing permanency framework. I will focus here on three flaws in particular—the conflation of legal permanency with psychological permanency; the framework's rigidity, particularly in contrast to the private family law system; and the narrow definition of permanency. These flaws perpetuate inequality for many children in the child-protection

system by denying their relationships familial status, with all of the financial and societal benefits that this status brings.

A. Conflation of Legal and Psychological Permanency

ASFA permanency framework outlined above assumes that only legally permanent relationships can lead to psychological permanency (or best lead to it). This rubric is backward. Rather than beginning with legal permanency, and reasoning from that about the needs and wishes of children, the legal system should derive permanency options from the psychological data about child–family relationships and then construct legal protections from these relationships.

This problem is in part due to ASFA’s reliance on idealized notions of family and adoption, rather than data about psychological permanency and attachments for children in foster care.⁴² As Professor Sacha Coupet puts it: “child welfare policy . . . continues to laud adoption as the singularly ideal ‘happy ending’ in the sad tale of foster care.”⁴³ That is not to say that ASFA has it all wrong—there is certainly ample evidence to support the legislative findings that long-term foster care is not beneficial to children and that healthy development requires a meaningful attachment to an adult.⁴⁴ ASFA, however, is based upon an outdated and flawed concept of appropriate adults to whom children can be attached.⁴⁵ Two bodies of recent research—on children and youth’s perceptions of permanence in various living arrangements and on failed adoptions—demonstrate that this rubric likely underestimates the permanency of subsidized guardianship and some other relationships, while overestimating the permanency of adoption.

Recent studies by Mark Testa, Madelyn Freundlich, and others show that guardianship can bring the same feelings of permanence as adoption to

42. See, e.g., Naomi R. Cahn, *Children’s Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1189-91 (1999); Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence,”* 34 CAP. U. L. REV. 405, 410 (2005) (describing the “nuclear family ideal” underlying the child-protection system). Another reason for the default to legal permanency is its easier measurability. The number of adoptions can be counted, but more nuanced permanency attachments, such as children living with another relative, require more qualitative assessment.

43. Coupet, *supra* note 42, at 405.

44. As to the first point, every major study on the subject has concluded that children have worse outcomes on every scale—education, employment, criminal justice involvement—from being in foster care than similarly situated children left home. See Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 AM. ECON. REV. 1583, 1583 (2007); Catherine R. Lawrence, Elizabeth A. Carlson & Byron Egeland, *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 68-72 (2006). As for the second, see Cushing & Kerman, *supra* note 3, at 110-13 (outlining psychological attachment theory).

45. See Godsoe, *supra* note 8, at 121-29.

children formerly in foster care.⁴⁶ Dr. Testa sought to measure psychological permanency, defined as “an enduring relationship that arises out of feelings of belongingness.”⁴⁷ To this end, he questioned children and their caregivers and compared them to a control group. Testa found that legal permanence, i.e. adoption, did not improve outcomes for children as compared to subsidized guardianship.⁴⁸ There were no significant differences between the two groups of children in terms of intent, belongingness, and continuity.⁴⁹ Testa’s findings indicate that we should not automatically equate legal permanence with psychological permanence or assume that higher levels of the former result in higher levels of the latter.⁵⁰

Freundlich and others’ interviews of former foster youth from New York City revealed similar patterns.⁵¹ About 43% of the former foster youth were assigned an APPLA goal; 27% had reunification; 10% placement with or adoption by a relative; and 20% did not know if they had a goal or what it was.⁵² The study found that youth with an APPLA placement often fail to receive the services that would enable them to successfully age out of foster care and that there is not an attempt to develop “family-based permanency plans” for these youth.⁵³ Significant gaps in the current legalistic permanency model include its lack of focus on youth’s “emotional security”⁵⁴ and its failure to account for siblings, although being with siblings is “a critical component” for many youth.⁵⁵ ASFA permanency structure ignores these

46. Madelyn Freundlich et al., *Permanency Options and Goals: Considering Multifaceted Definitions*, 35 CHILD. YOUTH CARE F. 355 (2006).

47. Testa, *supra* note 4, at 499. This article came out of his evaluation of the largest subsidized guardianship program in the country, Illinois.

48. *Id.* at 528.

49. *Id.*

50. *Id.* at 533 (noting that the study’s findings “suggest that legal status may be less important for lasting family relationships than extra-legal factors, such as kinship and prior time spent together”).

51. Freundlich et al., *supra* note 46, at 356 (recommending that “long-term security and stability” should underlie permanency, which is possible in a broader range of relationships than adoption and guardianship).

52. *Id.* at 365.

53. *Id.* at 357, 365.

54. Lauren Frey et al., *Achieving Permanency for Youth in Foster Care: Assessing and Strengthening Emotional Security*, 13 CHILD & FAM. SOC. WORK 218, 218-19 (2008) (documenting this failure and noting its impact on long-term outcomes for former foster youth).

55. *Id.*; see also Mark E. Courtney, *Outcomes for Older Youth Exiting the Foster Care System in the United States*, in ACHIEVING PERMANENCE, *supra* note 1, at 40, 52 (reporting study results that 88% of former foster youth with a sibling visited him or her at least once after being discharged from foster care). In contrast, subsidized guardianship has been praised for keeping siblings together. See, e.g., CHILDREN’S DEF. FUND ET AL., *supra* note 22, at 8.

realities by assuming that children and families feel more psychological permanency the more the arrangement is granted legal permanency.

This conflation results in a system that is both over and under inclusive. Just as psychological permanency is devalued, legal permanency is overvalued. Broken and failed adoptions do occur, particularly adoptions from the foster care system, and this risk increases with the age of the child at adoption.⁵⁶ Exact numbers of failed adoptions are very hard to come by, largely because agencies do not track them well and often do not track them at all once the adoption is finalized. Adoptions disrupt, i.e. the placement fails before the adoption is legally finalized, at estimated rates of 10% to 25%.⁵⁷ Adoptions dissolve or fail after they are finalized at estimated rates of 3% to 15%.⁵⁸ Attorneys and others working in the child-protection system confirm that broken adoptions are not uncommon, although the real scope of the problem is unknown.⁵⁹ Some studies have concluded that adoption failure rates are comparable to those of subsidized guardianships where the subsidy rates are the same.⁶⁰ In sum, it is not clear that adoption is more permanent in this most basic sense than guardianships.

Broken adoptions are devastating to the children and youth involved, sometimes all the more so because the permanency of adoption has been so widely touted.⁶¹ As one youth who was adopted twice out of foster care

56. Ruth G. McRoy & Elissa Madden, *Youth Permanence Through Adoption, in* ACHIEVING PERMANENCE, *supra* note 1, at 244, 254-55.

57. CHILD WELFARE INFO. GATEWAY, ADOPTION DISRUPTION AND DISSOLUTION 2 (2012), available at http://www.childwelfare.gov/pubs/s_disrup.pdf.

58. *Id.* at 6; see also Susan Scarf Merrell, *Adoption's Dirty Secret*, DAILY BEAST, (Apr. 17, 2010), <http://www.thedailybeast.com/articles/2010/04/17/adoptions-dirty-secret.html>. Both of these numbers are likely underestimates as name changes and other correlations to adoption make tracking dissolutions very difficult.

59. See, e.g., Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437 (2012) (documenting this problem in the New York City child-protection system and noting the agency's failure to track failed adoptions from the foster care system).

60. See Testa, *supra* note 4, at 528-30 (reporting low disruption rates for children in subsidized kinship guardianships); CHILDREN'S DEF. FUND ET AL., *supra* note 22, at 10 (discussing the number of children benefitting from guardianship assistance programs throughout the nation).

61. See, e.g., Meribah Knight, *Failed Adoptions Create More Homeless Youths*, N.Y. TIMES (Dec. 30, 2011), http://www.nytimes.com/2011/12/30/us/failed-adoptions-create-more-homeless-youths.html?_r=0&adxnnl=1&pagewanted=all&adxnnlx=1388351272-Z6NoaxDcOM91u41Ez1a1fA (telling the story of one youth who was devastated when his adoptive mother of twelve years abandoned him at age seventeen, shortly before the end of the subsidy for his care). Research demonstrates that this is not an isolated case. See MADELYN FREUNDLICH & JANA BOCKSTEIN, CHILDREN'S RIGHTS 86 (2008), available at http://www.childrensrights.org/wp-content/uploads/2008/06/permanent_solutions_seeking_family_stability_for_youth_in_foster_care.pdf (reporting that some adoptive parents she interviewed saw their role in a child's

said: “Kind of weird. It’s not that permanent. I didn’t even know that could happen [that it could end].”⁶² This reality has led many youth to be, rightly, skeptical of adoption as a “cure-all.” One young woman in foster care explained:

I didn’t wanna be adopted because I knew that [it] wouldn’t benefit me . . . I definitely wanted the relationship. [But] to me being adopted doesn’t necessarily mean you’re gonna have a good relationship . . . It’s just a paper that says you belong to someone . . . [W]hat’s on paper isn’t what’s important to me.⁶³

B. Rigid Construction of the Family

A second, and related, flaw of the current permanency framework is that its rigidity does not reflect actual family attachments and structures. The current framework follows a strict hierarchy, demonstrated by the adoption rule-out, which compels all or nothing choices. Once reunification within ASFA time lines is ruled out, children in foster care are meant to sever all ties with the biological family and be adopted into an entirely new family.⁶⁴ This does not account for the reality of most foster children’s attachments to multiple adults.⁶⁵ It also ignores the traditional caregiving patterns of certain racial or cultural groups, particularly Native American and African-American families.⁶⁶

This framework prioritizes the parent–child dyad over other kinship connections, ignoring the nuance of family relationships.⁶⁷ The number of children in kinship care has increased dramatically in recent years; as of

life not as “lifelong,” but rather as lasting only until the child became a legal adult, and perhaps not coincidentally until the adoption subsidy ceased, at age eighteen or twenty-one).

62. See OREGON REPORT, *supra* note 23, at 96.

63. GINA MIRANDA SAMUELS, A REASON, A SEASON, OR A LIFETIME: RELATIONAL PERMANENCE AMONG YOUNG ADULTS WITH FOSTER CARE BACKGROUNDS 48 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/415.pdf.

64. Annette Appell has termed this flawed assumption the “separation myth,” i.e., the false belief that children can be totally emotionally separated from their parents, even when they are living with or adopted by others. Annette Ruth Appell, *The Myth of Separation*, 6 NW. J.L. & SOC. POL’Y 291 (2011). This myth of separation contributes to the flawed permanency framework I am discussing.

65. See Godsoe, *supra* note 8, at 130–31.

66. See Barbara Ann Atwood, *Achieving Permanency for American Indian and Alaska Native Children: Lessons from Tribal Traditions*, 37 CAP. U. L. REV. 239, 281–85 (2008) (outlining the preference among many tribes for extended family caregiving, guardianship, and open adoption over a termination of parental rights and closed adoption frameworks). This structure compounds the problematic racial disproportionality in the system. See *supra* note 8 and accompanying text.

67. As Coupet points out, “[k]inship caregivers, unlike non-kin adoptive parents, are already related in meaningful ways.” Coupet, *supra* note 42, at 411.

2011, over a quarter of foster children were living in kinship care.⁶⁸ Studies show that children in kinship placements fare better on many counts than children in non-kin foster care. For instance, children in kinship care are more likely to report that they like the adults with whom they live—93% vs. 79% in non-kin foster care and 51% in congregate or group care.⁶⁹ They were also more likely to report wanting their current placement to be their permanent home—61% vs. 27% in non-kin foster care and 2% in congregate care. Children in kinship care have fewer behavioral problems than children in non-kinship care and are less likely to run away from their foster care placements.⁷⁰ Yet kin caregivers continue to be urged to adopt, even if another arrangement, such as guardianship, would be a better, and equally permanent, fit for them and the children for whom they are caring.⁷¹ This focus on adoption sometimes “scare[s] away” children’s extended families who could be valuable permanency resources.⁷²

The framework’s rigidity also impedes the development of creative ways for children to reach permanency, particularly for the mostly older children in APPLA placements. Illustrating this, Freundlich’s study found that most of the youth said they would have preferred more permanency options beyond adoption, reunification, or APPLA.⁷³ Child-protection professionals also felt constrained by the limited range of options.⁷⁴ One professional told researchers: “We always reduce things to these formulas and put families with real lives and real situations into boxes. There’s got to be a

68. CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., THE AFCARS REPORT: PRELIMINARY FY 2011 ESTIMATES AS OF JULY 2012, at 1 (2012), *available at* <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport19.pdf> (reporting 2011 data).

69. TIFFANY CONWAY & RUTLEDGE Q. HUTSON, CTR. LAW & SOC. POLICY, IS KINSHIP CARE GOOD FOR KIDS?, at 1 (2007), *available at* <http://www.clasp.org/admin/site/publications/files/0347.pdf> (outlining research). The data is somewhat mixed, likely due to the greater levels of poverty and poor health among kinship caregivers. *See, e.g.*, Aron Shlonsky, *A Fine Balancing Act: Kinship Care, Subsidized Guardianship, and Outcomes*, in *ACHIEVING PERMANENCE*, *supra* note 1, at 176, 177, 182–83 (outlining some of the drawbacks, in addition to the benefits, of kinship foster care). Children in kinship care also have lower reunification rates with their parents than children in other types of foster care, but this might be based upon kin caregivers’ greater willingness to allow non-custodial parents ongoing contact with children in their care. *See* Barth & Chintapalli, *supra* note 1, at 91–92.

70. *Id.* at 1–2 (noting that 6% of children in foster care run away from home, compared to 16% in non-kin foster care and 35% in group care). Other benefits of kinship care include greater stability and less stigma than stranger foster care placements. *See* Testa, *supra* note 4, at 505, 530.

71. *See supra* text accompanying notes 23–24; *see also* O’Brien, Massat & Gleeson, *supra* note 4, at 723.

72. Freundlich et al., *supra* note 46, at 368; *see also* OREGON REPORT, *supra* note 23, at 10.

73. Freundlich et al., *supra* note 46, at 365.

74. *Id.* at 367.

broader set of solutions here . . . [Caseworkers] try to micromanage everything according to some formula or cookie cutter or whatever.”⁷⁵

Finally, the more nuanced division of the parental bundle of sticks in private law stands in stark contrast to ASFA all-or-nothing framework, further compounding inequities between families. In the private law system, joint custody or shared parenting is the preference in numerous jurisdictions.⁷⁶ Other authority supports this more flexible framework. The ALI Principles of Family Dissolution, for instance, outline categories of non-biological parents, including de facto parents and parents by estoppel.⁷⁷ This renders possible a system where a biological parent is not a legal parent, but nonetheless has parental rights and responsibilities.

C. Narrow Conception of Permanency

ASFA framework’s inflexibility, coupled with false assumptions about the needs and desires of adolescents, has resulted in a system that fails to find any permanency for significant groups of young people.⁷⁸ The myopic focus on adoption ignores the many children who do not want to be or will not be adopted.⁷⁹ This is particularly so for older children in foster care.⁸⁰ And there are many. Thirty thousand children a year exit the system with no legal ties to any family, about five times as many youth as are adopted.⁸¹ These children have very poor outcomes as adults across every parameter.⁸²

75. *Id.*

76. See Godsoe, *supra* note 8, at 120 (citing examples); see also ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 112-13 (1992) (reporting increasing patterns of joint custody in California in the first major study of joint custody).

77. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 2.04 (2002).

78. See, e.g., Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 859-62 (2000) (noting that ASFA “is not targeted to assist older children in foster care” and critiquing the 1999 Foster Care Independence Act for funding only “independent living” skills programming rather than “family supports” for older children who will age out of care).

79. See Godsoe, *supra* note 8, at 132, 133 n.110 (outlining the reasons why older children, sibling groups, and children with special needs are particularly unlikely to be adopted).

80. See Fred Wulczyn, *Foster Youth in Context*, in *ACHIEVING PERMANENCE*, *supra* note 1, at 13, 22-23 (“For children generally, [the likelihood of] adoption rates fall as the age [of] admission [to foster care] rises.”); *id.* at 27 (analyzing national data and reporting that 39% of children who exit foster care between ages sixteen and eighteen exit to “nonpermanen[cy]”).

81. CHILDREN’S BUREAU, *supra* note 8, at 3, 5 (showing 23,439 exiting due to emancipation and 5,226 teenagers adopted); CHILDREN’S BUREAU, *supra* note 68, at 3, 5 (showing 26,286 exiting due to emancipation and 5,152 teenagers adopted); CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., *THE AFCARS REPORT: PRELIMINARY FY 2010*

Several assumptions about older children in foster care have contributed to this crisis. First, many workers, and to some degree the system as a whole, assume that these children are unadoptable. For instance, some workers cite the child's age alone as a compelling reason for not terminating parental rights, and thus freeing the child for adoption.⁸³ Yet many of these youth want to be adopted, and are adoptable.⁸⁴ Although there have been recent campaigns to encourage more adoptions of adolescents, much work remains to be done.⁸⁵

Equally important, youth in foster care who do not want to be or will not be adopted still want and need permanency connections.⁸⁶ Indeed, experts have suggested that permanency may have a different meaning depending upon the age of the child.⁸⁷ In order to thrive, all young people, whether they will be adopted or age out of foster care, need a permanent lifelong connection to a caring adult. These youth want such connections, even if they do not come as part of a cohabitating family unit. As one youth explained:

A lot of people have this misconception like, "Oh, they're too old, they're gonna age out, they don't really need [permanency]" and stuff like that. Although most

ESTIMATES AS OF JUNE 2011, at 4, 7 (2011), available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport18.pdf> (showing 27,854 exiting due to emancipation and 5,452 teenagers adopted in 2010).

82. For instance, they are much more likely to have poor outcomes, such as dropping out of high school, becoming pregnant before the age of twenty-one, and being arrested, incarcerated, homeless, and unemployed. See *supra* note 44. These poor outcomes impose large costs on society. See IRA CUTLER, COST AVOIDANCE: BOLSTERING THE ECONOMIC CASE FOR INVESTING IN YOUTH AGING OUT OF FOSTER CARE I (2009), available at <http://www.jimcaseyyouth.org/cost-avoidance-bolstering-economic-case-investing-youth-aging-out-foster-care-0> (estimating the cost of outcome differences of the aging out population to be nearly \$5.7 billion annually).

83. See KRISTI CHARLES & JENNIFER NELSON, PERMANENCY PLANNING: CREATING LIFE LONG CONNECTIONS 14-15 (2000), available at <http://www.nrcyd.ou.edu/publication-db/documents/permanency-planning.pdf> (decrying this practice).

84. Freundlich et al., *supra* note 46, at 365, 367-68; CHARLES & NELSON, *supra* note 83, at 8 (noting that "youth have told us again and again that being an adolescent doesn't mean they don't want to be adopted or find a permanent family connection").

85. For examples of such campaigns, see e.g. Mary Boo, *Successful Older Child Adoption: Lessons from the Field*, ADOPTALK, Summer 2010, available at <http://www.nacac.org/adoptalk/OlderChAdoptions.html>.

86. Outcomes are better for youth who aged out of foster care when they retained a relationship with their birth parents whose rights had been terminated. CHARLES & NELSON, *supra* note 83, at 11-12 (citing studies).

87. Shirley A. Dobbin, *Facilitation of Systems Reform: Learning from Model Court Jurisdictions*, in ACHIEVING PERMANENCE, *supra* note 1, at 210, 217 ("Taken-for-granted concepts such as 'permanence' and 'well-being' have not been adequately operationalized, especially with respect to how they may differ for different populations of children.").

[youth] [in foster care] say they don't want it, ask [them] when they get older, [and they say] "You know, I wish I had somebody for me."⁸⁸

The child-protection system has focused on "independent[...]" living skills for this group of children, ignoring the facts that we are all interdependent and that young people without relationships with a caring adult are particularly at risk for problems.⁸⁹

These realities, coupled with the number of youth in foster care who will not be adopted, make the current treatment of Another Planned Permanent Living Arrangement (APPLA) placements very problematic. APPLA is treated largely as a purgatory or "dumping ground" for youth to bide their time until they age out of foster care, unprepared for adult life and lacking a meaningful connection to an adult.⁹⁰ Yet this population is quite significant in many states.⁹¹ In Ohio, for instance, almost one-third of children who are not going to be reunified have a goal of APPLA.⁹² A significant portion of these children, 36%, are thirteen years old or younger.⁹³ Very few children with this goal are adopted. Tellingly, in 2011, not one child in an APPLA placement was adopted.⁹⁴

88. Freundlich et al., *supra* note 46, at 365.

89. *Afterword: Making Families Permanent and Cases Closed—Concluding Thoughts and Recommendations*, in *ACHIEVING PERMANENCE*, *supra* note 1, at 357 (internal quotation marks omitted); *see also* DUQUETTE & HARDIN, *supra* note 16, at II-15 (recommending that APPLA be designated as the goal for children in very limited circumstances to avoid it being overused).

90. Making connections even more difficult is the fact that 15% of children in foster care, including a large proportion of older youth, live in congregate or group care. *See* CHILDREN'S BUREAU, *supra* note 8, at 1.

91. To help reduce this number, there are currently efforts being undertaken to limit the use of APPLA. *See* Amy Taylor, *Older Youth in Foster Care: Challenges and Opportunities*, CHILD. WELFARE LEGIS. POL'Y NEWSL. (Dec. 2010), <http://www.ncsl.org/research/human-services/child-welfare-legislative-policy-newsletter-decem.aspx>. For instance, Ohio permits APPLA placements only after a clear and convincing finding that it is in a child's best interest. *Id.* New York state mandates that case plans for children in APPLA placements must include an adult who is a "significant connection and permanent resource." *Id.*

92. OHIO REPORT, *supra* note 19, at 1, 3. This has led consultants to advise the Ohio agency that "APPLA [should be] a 'living arrangement that is truly planned and permanent,'" not a "catch all for whatever temporary plan is needed." *Id.* at 1.

93. *Id.* at 6. An additional concern arises from children placed in APPLA only because of their age. *Id.* at 2. Although Ohio law requires that children in APPLA be sixteen or older, be "counseled on the permanent placement options available," and be "unwilling to accept or unable to adapt to a permanent placement," experts are skeptical that the group in APPLA has always been appropriately counseled and that the finding of inadaptability is truly made as a last resort. *Id.* About one-quarter of kids in APPLA age out of foster care each year. *Id.* at 10. Twenty-three percent of kids have a case goal of returning home, but only a little over 5% actually do so. *Id.* No children in APPLA were adopted the year of the report. *Id.*

94. *Id.*

III. SUGGESTIONS FOR REFORM

This section proposes changes to the permanency framework. I do not here outline a wholesale reform, but rather make some modest suggestions within the current paradigm.⁹⁵ These suggestions, and examples of promising recent programs, can lead to greater equality and permanency for the wide range of children and young people in foster care.

A. Inform Policy with the Real Experiences of Children and Families

An effective permanency framework must take into account the realities of children's experiences. This requires using research about what permanency means to children in foster care to influence legal definitions rather than the reverse. Incorporating the real-world experiences of youth in care would entail involving youth themselves in the entire process—something most jurisdictions still fail to do.⁹⁶ Only by talking to the youth themselves can workers and judges learn which relationships youth value and need.⁹⁷

There are numerous ways this simple step could improve the current system. I consider a few examples. First, definitions of kin for subsidized guardianship funding could be expanded. As noted above, the federal FCA does not limit this definition and yet numerous states have adopted inflexible definitions of blood or other relatives.⁹⁸ Expanding the definition, particularly to include fictive kin, would both reflect the reality of children's and families' connections and maximize federal funding for the permanent outcome of subsidized guardianship. Hawaii provides a valuable illustration of such a definition, recognizing numerous categories of adults including: "[a] member of the child's extended family," fictive kin in the form of "[t]he child's godparents," "[a] person to whom the child, child's parents, and family ascribe a family relationship," or the traditional cultural category of "'hanai relative.'"⁹⁹

95. Comprehensive change would require completely rethinking ASFA and much of the child-protection system. To take one small data point, child-protection professionals have repeatedly noted that ASFA's strict timelines impede permanency for numerous children whose families and relationships are more complex. See Freundlich et al., *supra* note 46, at 369. Although thoroughly rethinking ASFA framework is an important project, this Article has more modest, and more politically realistic, aims.

96. Points of involvement for young people include permanency goal setting and court hearings, to name just a few.

97. This would have the additional beneficial effect of increasing both youth and family autonomy by allowing them to define their own structures. It would also incorporate a wider range of cultural and ethnic traditions.

98. See *supra* Section I.A.

99. HAW. GUARDIAN ASSISTANCE PROGRAM POLICY MANUAL, § 5.2.3 TITLE IV-E KINSHIP GUARDIANSHIP ASSISTANCE ELIGIBILITY, available at

Another way in which the permanency framework could incorporate real-life experiences is to allow youth to balance their old and new family connections, such as through open adoption.¹⁰⁰ Enabling youth to maintain connections to a wide range of people, including birth parents, former foster parents, siblings, and other relatives, increases the number of youths willing to be adopted and reflects the reality of many family structures.¹⁰¹ These more nuanced family arrangements are increasingly used both in private family law and in tribal law.¹⁰² Open adoption is now the most common form of adoption in the private system.¹⁰³ Flexible adoption arrangements in other areas of family law, which allow for ongoing contact with birth parents or families, are also commonly used in Native communities, even for children coming out of foster care.¹⁰⁴ Tribal adoption usually does not entail terminating parental rights, instead permitting the sharing of parental rights based on the best interests of the child and on a “recognition of where the child’s sense of family is.”¹⁰⁵ In addition to allowing for more permanency options, and thus greater support for children, open adoption also allows for

http://www.nrcpfc.org/fostering_connections/state_gap/Hawaii%205.2.3_Permanency_Assistance.pdf. A hanai relative is defined as:

an adult, other than a blood relative, whom the court or department has found by credible evidence to perform or to have performed a substantial role in the upbringing or material support of a child, as attested to by the written or oral designation of the child or of another person, including other relatives of the child.

Id. § 5.2.3(B)(3).

100. See FREUNDLICH & BOCKSTEIN, *supra* note 61, at 20.

101. All the research to date has found that children adopted in open adoptions have better psychosocial outcomes than those adopted in semi-open or closed adoptions. See *Research About the Impact of Openness on Adoptees*, INDEP. ADOPTION CENTER, <http://www.adoptionhelp.org/open-adoption/research> (last visited Dec. 18, 2013). Of particular significance is a California study that included only children adopted from foster care and reported that “[a]ll of the adoptive parents saw openness as helping their child deal with identity issues, and none felt that openness exacerbated the issues of adolescence.” *Id.* The adoptive parents reported that even “contact with birthparents who had mental health or substance abuse” issues benefitted the adopted children. *Id.*

102. A potential critique of flexibility is that the more discretion there is in decision making, the more likely it is that bias may enter the system. See DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* 55 (2002); Godsoe, *supra* note 8, at 134.

103. Mara Lemos Stein, *One Baby, Two Moms: A Rise in Open Adoptions*, WALL ST. J. (Aug. 14, 2012, 6:46 PM), <http://online.wsj.com/news/articles/SB10000872396390444184704577587150909159234> (noting that “the vast majority of [U.S.] adoptions are now open” and citing a 2012 study reporting that open adoptions have increased from 36% of adoptions in the late 1980s, to 79% in 1999, to 95% in 2012).

104. See, e.g., CAL. WELFARE & INST. CODE § 366.24 (West Supp. 2013) (defining tribal custody adoption as an “adoption by and through the tribal custom, traditions, or law of an Indian child’s tribe. Termination of parental rights is not required to effect tribal customary adoption”); see also Atwood, *supra* note 66, at 284-85 (discussing Salish and Kootenai tribal statutes allowing a tribal court to grant “residual parental rights” during a termination).

105. Atwood, *supra* note 66, at 287.

the preservation of cultural traditions.¹⁰⁶ Despite past calls for more open adoption, the child-protection system continues to prioritize traditional closed adoptions.¹⁰⁷ A few jurisdictions are, however, exploring open adoption and other arrangements to increase permanency for youth in foster care.¹⁰⁸

B. Focus on Permanency Relationships—a Person Not a Place

A related change would be a conception of permanency focused on connections, in all of their myriad forms, rather than on rigid boxes of placement categories.¹⁰⁹ This shift in view would both reflect real experiences and incorporate a psychological view of permanency.¹¹⁰ Recent studies into children's conceptions of permanency have shown that "'learned attachment and familiarity'" are more important than legal status or even than biological relationships.¹¹¹ In a sense, I am recommending that we reverse the direction of policy. Instead of moving from legal to psychological permanency, assuming that the former implies the presence of the latter, legal definitions of permanency should be informed to the maximum extent possible by children's actual attachments.

One very promising area for incorporation of this truth is in planning for children in APPLA and/or with a permanency goal of independent living. An important shift is to focus on permanency in terms of people rather than places, since we know a significant number of children will not be adopted or placed in guardianships.¹¹² Efforts should be made to establish a

106. See *id.* at 268-69; see also *In re Custody of S.E.G.*, 521 N.W.2d 357, 359-66 (Minn. 1994) (reversing an adoption of three Chippewa children by a white couple and finding that the children's permanency could be met in foster care with an Indian couple, and not only through adoption, as the connection to the tribe was important). It is important to note that this decision predated ASFA.

107. For instance, shortly after ASFA's enactment, Susan Mangold called for more "non-exclusive parenting" arrangements for children exiting foster care, including open adoption. Mangold, *supra* note 78, at 836-39.

108. See Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 238-39 (2006).

109. See, e.g., Freundlich et al., *supra* note 46, at 368 (calling for an individualized and broad definition of permanency that focuses on "creating and/or maintaining emotional connections with family and others").

110. See Cushing & Kerman, *supra* note 3, at 110 (noting that the focus on legal categories such as adoption and guardianship "obscures the importance of nurturing parental connections that are critically important for youth development, irrespective of whether the relationships are formally recognized with legal sanction").

111. Marvin, *supra* note 3, at 536 (discussing Testa's research). Marvin also points out that attachment theory supports these conclusions. *Id.*

112. This effort should be made in conjunction with efforts to teach adolescents in foster care independent living skills, as they need both permanency connections and adult-

meaningful relationship with at least one adult for these children.¹¹³ Ways to accomplish this include linking young people with mentors and other adults who, while perhaps not custodial resources, can help former foster youth become successful adults.¹¹⁴ These adults could be former foster parents, other relatives, teachers, sports coaches, or even birth parents whose legal rights have been terminated or who cannot be custodial resources.¹¹⁵

There is growing recognition of the need for a shift in this regard. For instance, the National Council of Juvenile and Family Court Judges passed a 2011 resolution stating that “No child should exit foster care without a life-long connection to a caring and responsible adult.”¹¹⁶ States are also trying to better prepare children in APPLA placements for life as successful adults. For instance, Michigan requires that youth in its APPLA-E program have an “established relationship with at least one significant supportive adult,” regardless of what type of placement they are in.¹¹⁷ Similarly, New

hood skills to flourish. *See Afterword: Making Families Permanent and Cases Closed—Concluding Thoughts and Recommendations*, *supra* note 89, at 360-61.

113. *See* Frey et al., *supra* note 54, at 221 (recommending that youth who are unable to be adopted or placed in guardianships may instead achieve permanence through “a non-legal commitment to be [a] family for a lifetime”). Many older youths are placed in congregate care, rather than in foster family homes. Young people in congregate care have even fewer opportunities to connect with caregiving adults than do those in foster family homes. *See* Courtney, *supra* note 55, at 41, 42 (noting that “a large percentage of [older youth in foster care] live in congregate care settings that are generally staffed by relatively young shift workers” who turn over frequently and are not charged with focusing on facilitating family or other relationships for youths).

114. Freundlich et al., *supra* note 46, at 358; *see also* Mangold, *supra* note 78, at 875-76 (recommending a federally subsidized mentoring system for youth aging out of foster care). Some youth are finding mentors on their own, but these relationships lack any legal recognition or other support from the child-protection system. *See* Cushing & Kerman, *supra* note 3, at 115.

115. Many youth who age out of foster care to “independent living,” or even those who are adopted or in guardianships, continue to be in contact with their biological parents and sometimes even live with them, regardless of the parents’ legal status. *See* Godsoe, *supra* note 8, at 131-33 (outlining data); *see also* Courtney, *supra* note 55, at 41-42 (reporting national data showing that 47% of youth aging out of foster care returned to their biological families upon discharge from state care). In recognition of this fact, and due to the many youth who age out of foster care as legal orphans, numerous states have recently enacted statutes allowing for the reinstatement of parental rights in certain circumstances. *See* Godsoe, *supra* note 8, at 148-51.

116. NAT’L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, KEY PRINCIPLES FOR PERMANENCY PLANNING FOR CHILDREN 1 (2011), *available at* http://www.ncjfcj.org/sites/default/files/keyprinciples.final_permplanning.pdf.

117. NICOLE HOSHOCK, LEAH HIGGINS & JUSTIN WROBEL, APPLA AND APPLA-E: DISTINCTIONS AND DILEMMAS 8 (2012), *available at* [http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/ChildWelfareServicesTraining/CWS Training Materials/Tab4_CWS_112712_APPLA_APPLA-E.pdf](http://courts.mi.gov/Administration/SCAO/OfficesPrograms/CWS/ChildWelfareServicesTraining/CWS%20Training%20Materials/Tab4_CWS_112712_APPLA_APPLA-E.pdf). “The goal [of this requirement] is to prepare the youth to leave foster care and become a self-supporting adult with documented supportive adult(s) to assist and provide guidance.” MICH. DEP’T OF

York City recently prioritized the goal of ensuring that youth who age out of foster care have “permanent connections with caring adults.”¹¹⁸

C. Build in Greater Flexibility

The third related reform is to build greater flexibility into the permanency definitions and system as a whole.¹¹⁹ This would give more options to families and workers in order to ensure best outcomes for all children in foster care.¹²⁰ Within the existing system, potential changes include broadening definitions of kin, as discussed above, and accommodating the unique needs of kin caregivers in the foster care licensing process. Broadly defined foster care licensing standards allow agencies the requisite flexibility to achieve results-oriented care and case-by-case decisions to, for instance, prioritize kinship care.¹²¹

My final recommendation is the elimination of the adoption rule-out.¹²² The rule-out impedes permanency for numerous youth, particularly older youth whose consent is required for adoption and children with kinship caregivers who cannot or will not adopt.¹²³ Although adoption is a very valuable permanency outcome, it should not be the only one. Adoption can still be prioritized through funding and other means. It should not, however, be deemed preferable to guardianship in all circumstances, particularly as the permanency outcomes have been demonstrated to be the same.

HUMAN SERVS., CHILDREN’S FOSTER CARE MANUAL 18 (2012), *available at* www.mfia.state.mi.us/olmweb/ex/fom/722-7.pdf.

118. N.Y.C. ADMIN. FOR CHILDREN’S SERVS., PREPARING YOUTH FOR ADULTHOOD 1 (2006), *available at* http://www.nyc.gov/html/acs/downloads/pdf/youth_for_adulthood.pdf. This policy is based on the recognition that “none of us lives independently of our networks of family [and] friends” and that the historic lack of these connections for aging out youth has led to very bad outcomes. *Id.* at 5.

119. For instance, as previously noted, permanency may best be defined differently for different age groups. *See supra* note 87 and accompanying text.

120. *See* Marvin, *supra* note 3, at 544 (decrying the “one-size-fits-all” decisions which predominate in the child-protection system).

121. *See* CHILDREN’S DEF. FUND ET AL., *supra* note 22, at 16 (noting rigid licensing standards as a barrier to success in implementing subsidized guardianship programs and discussing states that have overcome this by, for instance, allowing variances or waivers of certain standards for kin caregivers).

122. I do not mean to suggest that subsidized guardianship is the solution for all foster children, any more than adoption is. Subsidized guardianship itself brings costs to family reunification. *See, e.g.,* Katz, *supra* note 7, at 11-12. Building more flexibility into the system, however, would recognize that there are numerous routes to permanency.

123. *See supra* notes 73-75 and accompanying text; *see also* Testa, *supra* note 4, at 530 (cautioning “against taking too hard a line in enforcing [the] adoption rule-out”). Testa does, however, recommend that the adoption rule-out remain robustly enforced for children with non-kinship caregivers. Testa, *supra* note 4, at 531. I have doubts about this recommendation.

CONCLUSION

The concept of the family is currently in considerable flux. Family relationships of all types are being redefined, sometimes by legislatures and courts and sometimes by families themselves.¹²⁴ The child-protection system's definition of permanence between adults and children should similarly be re-thought. A more nuanced definition of permanency would reflect the truth that no relationship is perpetually legally binding or "forever," while also recognizing the diverse and complex relationships children and young people experience. By expanding those family structures granted legal recognition and support, a broader definition would ensure more children are connected to safe, loving adults—to real permanency.

124. This has most notably taken place with regards to marriage. *See, e.g.,* *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (declaring DOMA unconstitutional and giving legally married same-sex couples the same recognition as opposite-sex married couples under federal law); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013) (holding that proponents of Proposition 8 do not have standing to defend the constitutionality of a state statute limiting marriage to opposite-sex couples).