

Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights

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Introduction

In second grade I learned the word ‘precious.’ Seeing the definition for the first time, I was overcome with a longing to be precious to somebody. Dear. Beloved. Of great value. I spent my childhood in a series of about 30 placements in foster homes, kinship care, shelter care, correctional institutions, treatment facilities, and group homes. Over the years I was in the system there were hundreds of people who had some responsibility for me, yet I aged out without finding a “forever family.” I entered adulthood knowing that, for the rest of my life, there would be no parents to whom I would ever be ‘precious.’¹

Misty’s story is just one example of a foster child’s desire for a “forever family.” As of September 30, 2009, there were an estimated 423,773 children in foster care in the United States.² The United States government estimates that there are roughly 129,000 children waiting to be adopted in this country, many of whom are “legal orphans” whose biological parents no longer have parental rights.³

Termination of parental rights (TPR) is a legal action required to “free” children for adoption.⁴ It permanently severs all

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1. Misty Stenslie, *The Privilege of Family*, CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Spring 2009, at 28, 28.

2. Children’s Bureau, U.S. Dep’t of Health & Human Servs., *Foster Care Statistics 2009*, CHILD WELFARE INFO. GATEWAY (May 2011), <http://www.childwelfare.gov/pubs/factsheets/foster.pdf>.

3. CHILDREN’S BUREAU, U.S. DEPT OF HEALTH & HUMAN SERVS., AFCARS REPORT #14, at 5 (2008), available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.pdf. This figure does not include children older than sixteen, as their goal is generally emancipation rather than adoption. *Id.*

4. See Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in*

legal and, in most cases, physical bonds between parents and children.⁵ Typically, the only right a biological parent has after TPR is a notification of his or her child's death or terminal illness.⁶ Federal legislation plays a major role in child welfare practices, but ultimately the particulars of TPR proceedings are addressed at the state level.⁷ Since passage of the Adoption and Safe Families Act of 1997 (ASFA),⁸ the number of legal orphans in this country has increased⁹ due to the shortened deadlines by which counties must file petitions for TPRs.¹⁰ However, adoption levels since its passage have not increased as predicted, resulting in more legal orphans "aging out"¹¹ of the foster care system without permanent placement.¹² These children who emancipate¹³ or age out of the foster care system without a permanent family are shown to have consistently negative life outcomes.¹⁴ For instance, nearly twenty-

the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. 226, 244 (1975).

5. *Id.* at 245.

6. See, e.g., MINN. STAT. § 259.27 (2010) (describing the process and conditions by which birth parents are to be notified of their child's death or terminal illness).

7. See, e.g., RAQUEL ELLIS ET AL., CHILD TRENDS, PUB. # 2009-40, THE TIMING OF TERMINATION OF PARENTAL RIGHTS: A BALANCING ACT FOR CHILDREN'S BEST INTERESTS 4-5 (2009), available at http://www.childtrends.org/Files/Child_Trends-2009_09_09_RB_LegalOrphans.pdf. All fifty states have their own specific statutes relating to the procedures for TPRs. *Id.*

Common grounds across states for filing a TPR petition include physical or sexual abuse, child neglect, parental abandonment, failure of a parent to maintain child contact or extreme disinterest, mental illness or deficiency, alcohol- or drug-induced incapacity, felony conviction or incarceration, loss of parental rights of another child, failure of parent to provide support, and murder or manslaughter of a sibling child.

Id.

8. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

9. Sania Metzger, *Promoting Permanence for "Legal Orphans,"* CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Spring 2009, at 27, 27 (explaining that ASFA requires a TPR petition to be filed whenever a child has been in foster care fifteen of the most recent twenty-two months and that the number of TPRs across the nation rose from 74,000 to 84,000 from 2005 to 2007); see also ELLIS ET AL., *supra* note 7.

10. See 42 U.S.C. § 675(a)(5)(E) (2006).

11. Keely A. Magyar, *Betwixt and Between but Being Booted Nonetheless: A Developmental Perspective on Aging Out of Foster Care*, 79 TEMP. L. REV. 557, 557 (2006) (describing the process of aging out). Most often the process occurs when the foster child turns eighteen and the state cuts off financial support; in some states support is extended until age twenty-one. *Id.*

12. Metzger, *supra* note 9.

13. Magyar, *supra* note 11, at 565-67 (describing the emancipation process as similar to aging out because once a child is emancipated, he or she officially has no support or ties to the child welfare system).

14. MARCI MCCOY-ROTH ET AL., FOSTERING CONNECTIONS RES. CTR., ANALYSIS NO. 1, NUMBER OF YOUTH AGING OUT OF FOSTER CARE CONTINUES TO RISE; INCREASING 64 PERCENT SINCE 1999, at 1-2 (2010), available at http://www.fosteringconnections.org/tools/assets/files/Connections_Agingout.pdf.

five percent of those who age out do not have a high school diploma or a graduate equivalency degree (GED)¹⁵ and only two percent receive a college degree.¹⁶ One study showed more than one in five former foster children experienced homelessness within their first year of independence.¹⁷

Many of these individuals do not have to remain legal orphans, waiting in limbo with severed parental connections and no adoptive placement identified. Given the right regulatory framework, many could avoid the negative life outcomes associated with aging out.

This Article suggests combating the legal orphan problem and promoting permanency by looking to Native American tribal customary law.¹⁸ Tribal law achieves permanency for children through legal adoptions, but avoids the step that creates the most negative impact, TPR. This practice, called tribal customary adoption (TCA), is a legal adoption where the adopting parents receive all the rights any other adoptive parent would, but where TPR does not occur.¹⁹ California, Minnesota, and Washington have laws recognizing and requiring TCAs to be an option in pursuing permanent placement for Indian juveniles.²⁰ If the government is seeking to alleviate the negative impacts of TPRs on children and their families, customary adoptions should be a permanent option for all juveniles.

It is important to recognize that any change to the government's approach to child welfare will disproportionately affect children of color. Fourteen percent of children in America are African American, but African Americans constitute thirty-one

15. MARK COURTNEY ET AL., CHAPIN HALL CTR. FOR CHILDREN AT THE UNIV. OF CHI., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 21, at 26 (2007), *available at* http://www.chapinhall.org/sites/default/files/ChapinHallDocument_2.pdf.

16. PETER PECORA ET AL., CASEY FAMILY PROGRAMS, IMPROVING FOSTER FAMILY CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 36 (2005), *available at* http://www.casey.org/resources/publications/pdf/improving_familyfostercare_es.pdf.

17. *Id.* at 37.

18. Some of the Indian tribes that focus on the customary adoptions referred to in this Article are: White Earth Band of Ojibwe, California Soboba Band of Luiseño Indians, Morongo Band of Mission Indians, and the Pechanga Band of Luiseño Indians.

19. See CAL. WELF. & INST. CODE § 366.24 (West Supp. 2012); MINN. STAT. § 259.67, subd. 4(a)(3)(iii) (2010); WASH. REV. CODE ANN. §§ 13.38.010 et seq. (West Supp. 2012).

20. See CAL. WELF. & INST. CODE § 366.24; MINN. STAT. § 259.67 subd. 4(a)(3)(iii); WASH. REV. CODE ANN. §§ 13.38.010 et seq.

percent of the child welfare population.²¹ Although the parents of African-American and Hispanic children have a significantly lower risk of having their parental rights terminated,²² children of color are significantly less likely than White children to be adopted.²³ This Article focuses on legal orphans of color, the orphans who stay in the system the longest waiting for adoptive homes and who have the bleakest life outcomes.²⁴ This Article will further limit its analysis to situations in which parental rights are terminated involuntarily.²⁵

Part I of this Article will provide a brief history of tribal customary law and Indian views on TPRs and TCAs. Part I will also provide a description of the evolving federal approach to TPRs and permanency. Part I will conclude with a brief description of statutes in California, Minnesota, and Washington that incorporate TCAs as a required permanency option for Indian children.

Part II.A. of this Article will outline the shortcomings of the Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA) in addressing both the legal orphan problem created by ASFA and the emphasis placed on obtaining TPRs. Part II.B. will then examine how customary adoption can ameliorate these problems through incorporation as a permanency option for non-Indian children. Finally, Part II.C. will present the ways in which incorporation of customary adoption would be especially beneficial for older children of color—the youth population that is both the most overrepresented in the child welfare system and the least likely to be adopted.

Adding customary adoptions as a permanency option for non-Indians will not by itself solve the legal orphan problem. It will, however, help promote the achievement of permanent adoptive homes for a number of children leaving the foster care system.

21. *Addressing Racial Disproportionality in Child Welfare*, CHILD WELFARE INFO. GATEWAY (2011), http://www.childwelfare.gov/pubs/issue_briefs/racial_disproportionality. “Child welfare population” is defined as the children of families that are experiencing the involvement of government agencies, including foster placements and in-home monitoring. *Id.*

22. Kelly Noonan & Kathleen Burke, *Termination of Parental Rights: Which Foster Care Children Are Affected?*, 42 SOC. SCI. J. 241, 253 (2005).

23. CHILDREN’S BUREAU, *supra* note 3.

24. See, e.g., Ruth McRoy, *Expedited Permanency: Implications for African-American Children and Families*, 12 VA. J. SOC. POL’Y & L. 475, 476 (2005) (describing the increased length of time children of color face when waiting for an adoptive home as opposed to the time that White children experience).

25. See Randi J. O’Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362, 364 (2010) (“A child cannot be adopted unless his parents’ rights have been terminated, either voluntarily or involuntarily.”).

I. Congressional, State, and Tribal Approaches to Permanency

The federal government developed its policies on TPRs and permanency in multiple phases, becoming more willing and eager to employ TPR over time.²⁶ These policies are in direct conflict with tribal views that reject TPRs.²⁷ This conflict in the approach to adoption is why the recent official recognition of TCAs by California, Minnesota, and Washington demonstrates a model through which customary adoptions can be incorporated into federal and state child welfare laws, allowing more children to achieve and sustain permanency.

A. *The Federal Government's Historical Approach to TPRs and Promoting Permanency for Foster Care Children*

1. The Evolution of Federal Government Intervention in the Parent-Child Relationship

The government's approach to TPRs developed along with its views on children and the proper role of government in the parent-child relationship. Children were traditionally viewed not as individuals with rights or liberty interests, but as property of their parents.²⁸ Because parents had complete control over the lives of their offspring, government did not often intervene or seek to impede that relationship.²⁹ The first federal entity to address child welfare issues, the United States Children's Bureau, was not created until 1912.³⁰ Maintaining the well-being of the child thus became a recognized vested interest of the government. This interest justified intervention into the parent-child relationship in cases of maltreatment, communicating to parents that they had

26. Meghan T. Kelley, *The Effect of Federal Child Welfare Legislation on Termination of Parental Rights in Minnesota: Establishing a Baseline* 33 (June 17, 1999) (unpublished M.P.A. thesis, University of Minnesota), available at http://www.cehd.umn.edu/SSW/cascw/attributes/PDF/publications/Fed_CW_Legislation_Parental_Rights.pdf.

27. *Customary Adoption*, NAT'L INDIAN CHILD WELFARE ASS'N (2011), <http://www.nicwa.org/adoption/> ("Historically and traditionally, adoption has been practiced in most tribal communities through custom and ceremony.... Unfortunately, adoption became a negative thing due to forced assimilation policies; it was used as a tool to destroy Indian families and culture.").

28. Barbara Bennett Woodhouse, *From Property to Personhood: A Child-Centered Perspective on Parents' Rights*, 5 GEO. J. ON FIGHTING POVERTY 313, 314 (1998).

29. *Id.*

30. Act of Apr. 9, 1912, ch. 73, 37 Stat. 79.

failed in their responsibilities in caring for the child.³¹ This concept became known as *parens patriae*, the principle that the state must care for those who cannot take care of themselves.³² This concept has since evolved from one where the state recognizes its *jurisdiction* over parent-child matters into one in which it is the *responsibility* of the state to protect the child's interests when a parent has failed that responsibility.³³ Today, the overarching consideration for states in determining child welfare matters is what decisions would be in the "best interests of the child," and sometimes this means a determination that it is in the child's best interests to be apart from the child's biological parents.³⁴

Notwithstanding the justifications for increasing intervention into parent-child relationships, the Supreme Court has recognized parents' fundamental right to raise their children. The Court has ruled that a parent's interest in the "companionship, care, custody and management of his or her children" is a constitutionally protected right.³⁵ When it comes to TPRs, courts are especially careful to respect the seriousness of the action. This is because parents' fundamental liberty interest "does not evaporate simply because they have not been model parents."³⁶ In all child welfare matters, both the child and the child's parents share "a vital interest in preventing erroneous termination of their natural relationship."³⁷ Terminations based on the deemed "unfitness" of the parent occur but are supposed to be used only in extreme circumstances.³⁸ The standard for making a determination to terminate parental rights is one of "clear and convincing evidence."³⁹

The vast majority of children who enter the child welfare system enter as a result of neglect and not of child abuse.⁴⁰ While

31. Helen Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parents*, 39 U. DET. L.J. 347, 347-92 (1962).

32. See BLACK'S LAW DICTIONARY 1221 (9th ed. 2009).

33. See, e.g., Brian G. Fraser, *The Child and His Parents: A Delicate Balance of Rights*, in CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 315, 324 (R.E. Helfer et al. eds., 1976).

34. See Barbara M. Rose, *Termination of Parental Rights—An Analysis of Virginia's Statute*, 15 U. RICH. L. REV. 213, 213-14 (1980).

35. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

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

37. *Id.* at 760.

38. See *id.*

39. See *id.* at 769; Robert A. Wainger, *Santosky v. Kramer: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369, 369 (1982).

40. See CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at ix (2009), available at <http://www.acf.hhs.gov/programs/>

TPRs can be performed due to reasons such as abuse, abandonment, mental illness, and extended incarceration,⁴¹ many are performed due to statutory limits in federal legislation relating to the length of time a child has been placed outside the home.⁴² In other words, the parents have not met the state's requirements necessary to have their children returned to their care. In many cases, this affects parents who have substance abuse issues and are not able to achieve or maintain sobriety before a TPR petition is filed and executed.⁴³ Even though there has historically been a hesitancy to invoke involuntary TPRs because of the severity of their consequences and the invasive nature of the government intruding into the lives of families,⁴⁴ TPRs have increased due to recent federal legislation,⁴⁵ demonstrating that such hesitancy is lessening.

2. The Adoption and Safe Families Act of 1997

The Adoption and Safe Families Act of 1997 (ASFA) resulted in a marked increase in the number of TPRs and thus a large increase in the number of legal orphans.⁴⁶ A dramatic piece of child welfare legislation, ASFA sought to increase the facilitation of adoptions by terminating parental rights quickly as a means of moving foster children to adoption more quickly.⁴⁷ However, since the passing of ASFA, adoption numbers have remained level and

cb/pubs/cm09/cm09.pdf (noting that 78.3% of children entering the child welfare system suffered neglect, 17.8% suffered physical abuse, 9.5% suffered sexual abuse, and 7.6% suffered from psychological maltreatment).

41. See *Grounds for Involuntary Termination of Parental Rights*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/systemwide/laws_policies/statutes/groundtermin.cfm (last visited Mar. 16, 2012).

42. See *id.*

43. Esther Wattenberg et al., *When the Rehabilitation Ideal Fails: A Study of Parental Rights Termination*, 80 CHILD WELFARE 405, 414 (2001) (finding that a parent's substance abuse is the main factor in termination of parental rights in over half the cases); see also Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 361 (2010).

44. See Noonan & Burke, *supra* note 22.

45. 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.); *Foster Care Independence Act of 1999*, Pub. L. No. 106-169, 113 Stat. 1822 (codified as amended in scattered sections of 42 U.S.C.); *Adoption and Safe Families Act of 1997*, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

46. Metzger, *supra* note 9 ("National data estimates the number of children whose parental rights were terminated rose from 74,000 in 2005 to 84,000 in 2007.").

47. See *id.*

have not gone up as expected, least of all for older foster youth.⁴⁸ The number of children aging out of foster care without legal permanency has also increased.⁴⁹ While ASFA was well intentioned, its results were unintended and many critics argue that it has done more harm than good.⁵⁰

B. Federal and State Responses to ASFA

The harmful effects of TPRs on children are evident.⁵¹ “Children who experience such losses may be particularly vulnerable to angry behavior and disrespect toward adults and are at risk of falling into a cycle of negative behavior and weakened connections with adults.”⁵² Over the past decade these negative effects have caused a “culture shift” in child welfare agencies and their approach to handling the large number of legal orphans.⁵³ This culture shift has come in the form of recognition by the federal and many state governments of the positive effects of maintaining ties between children and their biological families.⁵⁴ More specifically, it has been recognized that in order to achieve and sustain permanency, child welfare laws should “reconsider the role of [the] birth family as planning and permanency resources.”⁵⁵

1. The Congressional Response

As a response to the negative outcomes of legal orphans aging out without a permanent family, Congress passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 (FCSIAA).⁵⁶ The Act provides federally funded grants to state

48. *In re Jayson T.*, 118 Cal. Rptr. 2d 228, 230 (Cal. Ct. App. 2002) (noting that adoptability is not currently a consideration when deciding whether or not to terminate parental rights or if an adoptive home has been identified); Metzger, *supra* note 9 (“The number of children adopted [since ASFA was enacted] has remained level at approximately 50,000 over the six-year period that ended in 2007 while the number of children who exited foster care without legal permanence has increased.”).

49. See BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 255–56 (2010).

50. See, e.g., Metzger, *supra* note 9, at 27.

51. MARCY VIBOCH, THE VERA INST. OF JUSTICE, CHILDHOOD LOSS AND BEHAVIORAL PROBLEMS: LOOSENING THE LINKS 5 (2005), available at <http://www.vera.org/download?file=91/Childhood%2Bloss.pdf>.

52. *Id.*

53. Madelyn Freundlich, *Adolescents in the Child Welfare System: Improving Permanency and Preparation for Adulthood Outcomes*, CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Spring 2009, at 5, 5.

54. *Id.*

55. *Id.*

56. Fostering Connections to Success and Increasing Adoptions Act of 2008,

foster care agencies for the purpose of developing long-term plans for youth who will age out, including resources for planning and placement with their biological and extended families.⁵⁷ More specifically, it provides tangible benefits such as financial support and health care for foster youth until age twenty-one if permanency has not been reached, as well as adoption assistance and incentives to attempt to recruit more adoptive families.⁵⁸ FCSIAA also established, for the first time, that Indian families would receive the same federal adoption assistance as non-Indian families.⁵⁹ In addition, the Act emphasized the requirement of notifying the child's relatives within thirty days of out-of-home placement to provide them with the opportunity to be involved in caring for the child.⁶⁰ This legislation has been one of the most comprehensive attempts to assist legal orphans and promote permanency.

2. State Responses

Since ASFA, states have also tried to address the "legal orphan problem" by passing many novel initiatives and pieces of legislation. As of today, at least eight states have passed legislation allowing the reinstatement of parental rights under certain conditions when it is in the best interests of the child.⁶¹ Most commonly, this type of legislation affects children whose parents have had their rights terminated, and have subsequently resided in foster care for a year or more.⁶² This legislation is novel

Pub. L. No. 110-351, 122 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.); see also Mark Courtney, *The Difficult Transition to Adulthood for Foster Youth in the US: Implications for the State as Corporate Parent*, 23 SOC. POL'Y REP. 3, 10-11 (2009) (stating that the purpose of the FCSIAA is to provide support to youth in foster care until the age of twenty-one to better assist in their transition out of foster care).

57. Courtney, *supra* note 56, at 11.

58. *Fostering Connections to Success and Increasing Adoptions Act*, CASEY FAM. PROGRAMS (Dec. 2009), <http://www.casey.org/Resources/Publications/pdf/FosteringConnectionsSummary.pdf>.

59. *Id.*

60. See *Fostering Connections to Success and Increasing Adoptions Act* § 103.

61. The states are California, Hawaii, Illinois, Louisiana, Nevada, New York, Oklahoma, and Washington. CAL. WELF. & INST. CODE § 388(II)(2) (West 2008 & West Supp. 2012); S.B. 292, 150TH GEN. ASSEM., REG. SESS. (GA. 2009); HAW. REV. STAT. § 571-63 (2006); 705 ILL. COMP. STAT. 405/2-28, 405/2-34 (West 2007 & West Supp. 2011); LA. CHILD. CODE ANN. art. 1051 (West Supp. 2012); NEV. REV. STAT. ANN. §§ 128.160, 128.170 (LexisNexis 2010); N.Y. JUD. CT. ACTS, FAMILY CT. ACT §§ 635-37 (McKinney 2012); OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West 2009); WASH. REV. CODE ANN. § 13.34.215 (West Supp. 2012).

62. Only two states, Hawaii and Louisiana, require the minimum amount of only one year, while many others require two years or more. See HAW. REV. STAT.

because, prior to these laws, the majority of states held that biological parents lacked standing under any circumstance to petition the court after their rights had been terminated.⁶³ This would mean that if parental rights were terminated and the adoption of the child failed, the birth parents would be barred from re-adopting their own child.⁶⁴

In addition to reinstatement legislation, multiple states now allow foster care youth to stay in foster care and receive support until age twenty-one.⁶⁵ Research has shown that youth who take advantage of that opportunity and stay in until age twenty-one have a much easier transition out of the system than those who emancipate at eighteen.⁶⁶

C. Tribal Approaches to TPRs and Customary Adoptions

Indians typically view legal relations as existing between groups and not necessarily between individuals.⁶⁷ Among the features common to Indian cultures are a "greater value placed on the tribal group and the belief that the whole is necessary for the existence of the individual."⁶⁸ Tribes view the natural parent-child relationship as something the court cannot permanently and

§ 571-63; LA. CHILD. CODE ANN. art. 1051.

63. See, e.g., ALA. CODE § 26-10A-28 (LexisNexis 2009) (providing an avenue to adoption for "a grandfather, a grandmother, great-grandfather, great-grandmother, great-uncle, great-aunt, a brother, or a half-brother, a sister, a half-sister, an aunt or an uncle of the first degree and their respective spouses," but not for the parents of the child); FLA. STAT. ANN. § 63.0425 (West 2005 & West Supp. 2012) (providing for a grandparent's adoption of a child in the case of TPR); N.J. ANN. STAT. § 9:3-48 (West 2002) (allowing petition for adoption after TPR by a brother, sister, grandparent, aunt, uncle, birth father, stepparent, or resource family parent); see also Taylor, *supra* note 43, at 327.

64. See Taylor, *supra* note 43, at 327. Some parents have argued that it is a denial of equal protection not to allow them to petition to re-adopt their child. *Id.* at 346.

65. See, e.g., MINN. STAT. § 260C.451 (2010) (allowing a youth to stay in foster care if he or she is: enrolled in a secondary education program, a program leading to an equivalent credential, an institution that provides postsecondary or vocational education, or a program or activity designed to promote or remove barriers to employment; employed for at least eighty hours per month; or is incapable of doing any of these activities due to a medical condition).

66. Adrienne L. Fernandes, *Federal Programs and Policies for Transitioning Foster Youth*, CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Spring 2009, at 12, 13.

67. VINE DELORIA, JR. & CLIFFORD M. LYTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* 80 (1983).

68. Suzanne D. Painter-Thorne, *One Step Forward, Two Giant Steps Back: How the "Existing Indian Family" Exception (Re)Imposes Anglo American Legal Values on American Indian Tribes to the Detriment of Cultural Autonomy*, 33 AM. INDIAN L. REV. 329, 334 (2008).

legally sever.⁶⁹ This is not to say that tribes condone a practice of allowing children to remain in dangerous living environments with their biological parents. Rather, in situations when it has been decided it is not in the child's best interests to return to the biological family, tribes employ TCAs, where all legal authority goes to the adoptive parents, but without a TPR.⁷⁰ In short, a TCA is an "adoption by and through the tribal custom, traditions, or law of an Indian child's tribe."⁷¹

D. Combining State and Tribal Approaches for Indian Children

States concerned with the increased number of legal orphans are becoming more and more aware of the potential and realized benefits of TCAs as a means of achieving permanency for Indian children.⁷² A few states, namely California, Minnesota, and Washington, have implemented the practice into their child welfare statutes as a required permanency option for Indian children who cannot return to their biological parents.⁷³

1. The California Approach

California publicly acknowledged that under both state and federal law, adoption is the primary permanency goal for dependent children who cannot be returned to their biological parents in a timely manner.⁷⁴ "Customary adoptions, when appropriate, could be a valuable tool for finding safe, permanent homes for Indian children in foster care while allowing them to maintain important family linkages."⁷⁵

Effective July 1, 2010, 287 A.B. No. 1325 added TCA as a permanency option that must be considered for Indian children who are wards of the juvenile court and meet the requirements of

69. *C.f. id.* at 360–61 (explaining the tendency in tribal cultures for extended family to take over care of a neglected child).

70. CAL. WELF. & INST. CODE § 366.26 (West 2008 & West Supp. 2012).

71. *Id.* § 366.24.

72. Child Welfare Info. Gateway, *What Are Some Promising Practices in Successful Tribal-State Relations?*, CHILD WELFARE INFO. GATEWAY, http://www.childwelfare.gov/pubs/issue_briefs/tribal_state/promising_practices.cfm (last visited Mar. 17, 2012).

73. *Id.*

74. JUDICIAL COUNCIL OF CAL. ADMIN. OFFICE OF THE COURTS, REPORT TO THE JUDICIAL COUNCIL, JUVENILE LAW: TRIBAL CUSTOMARY ADOPTION 1–2 (2010), available at <http://www.courts.ca.gov/documents/20100423itema6.pdf> [hereinafter JUDICIAL COUNCIL OF CAL.].

75. CAL. STATE ASSEMB. COMM. ON APPROPRIATIONS, BILL ANALYSIS, A.B. 1325, at 2 (May 20, 2009).

Indian Child Welfare Act (ICWA).⁷⁶ These cases do not involve a transfer of jurisdiction to tribal court.⁷⁷

In all status review hearings involving an Indian child, the statute requires a demonstration that TCA was considered as a permanency option if reunification efforts fail.⁷⁸ This TCA consideration must be in consultation with the Indian child's tribal representatives.⁷⁹ If the child's permanency plan is TCA, the tribe designates individuals as the prospective adoptive parents.⁸⁰ In addition, many of the requirements of a regular adoption, such as a home study, are incorporated, and background checks are done by the tribe or representatives designated by the tribe.⁸¹

The courts must afford full faith and credit to an order for TCA.⁸² The TCA order includes a description of:

the modification of the legal relationship of the birth parents or Indian custodian and the child, including contact, if any, between the child and the birth parents or Indian custodian, responsibilities of the birth parents or Indian custodian, and the rights of inheritance of the child and the child's legal relationship with the tribe.⁸³

In general, there was support for this tribal-sponsored piece of legislation.⁸⁴ However, some criticized the legislation, evincing split views regarding whether the legislation should apply only to Indian children. One commenter argued that providing a permanency option to Indian children not available to non-Indian children is discriminatory and a potential violation of the Equal Protection Clause.⁸⁵ California attempted to handle these types of concerns and criticisms in their experiment with the incorporation of TCAs by including a sunset provision that, if not renewed, would force the statute to expire on January 1, 2014.⁸⁶

76. CAL. WELF. & INST. CODE § 16508.1.

77. JUDICIAL COUNCIL OF CAL., *supra* note 74.

78. CAL. WELF. & INST. CODE § 358.1(j).

79. *Id.* § 366.24(c).

80. JUDICIAL COUNCIL OF CAL., *supra* note 74, at 11.

81. *See* CAL. WELF. & INST. CODE § 366.24(c)(1)–(5) (requiring a home study to be completed by the tribe or the tribe's designee and a background check to be completed by the state, county, or tribe's designee).

82. *Id.* § 366.26(i)(2).

83. *Id.* § 366.24(c)(10).

84. JUDICIAL COUNCIL OF CAL., *supra* note 74, at 7.

85. *Id.*

86. CAL. WELF. & INST. CODE § 16508.1(f).

3. The Minnesota and Washington Approaches

Minnesota and Washington have very similar statutes through which TCAs can be performed in state court if it is not in the best interests of the child to return to his or her biological parents.⁸⁷ Minnesota also recognizes TCAs that are performed in tribal courts.⁸⁸ In both states, the biological parents' rights are modified instead of terminated.⁸⁹

II. Analysis

Currently, TCAs do not exist for any child not considered an "Indian child" under ICWA. TPR remains a mandatory step to be taken before a legal adoption can occur. However, this need not continue to be true. Developing customary adoptions modeled after tribal customary law will be beneficial for three important reasons. First, creating customary adoptions as a permanency option for non-Indian children will promote the goals set forth in FCSIAA, which was passed in response to the legal orphan problem created by ASFA.⁹⁰ Second, customary adoptions can also decrease the detrimental effects of TPRs on children and their biological families, which benefits society as a whole. Finally, customary adoptions for non-Indian children will address one of the main underlying problems in child welfare: the overrepresentation of children of color.

Admittedly, the policy of adding customary adoptions as a permanency option to reduce the negative effects of TPRs is not completely intuitive. Simply allowing states to conduct customary adoptions without TPRs will not likely result in a significantly larger number of adoptive homes for children who cannot return to their biological families. Customary adoption, when modeled after the tribal approach, emphasizes placement with the child's relatives, or "kinship care."⁹¹ In particular, customary adoption targets relatives of non-Indian children who already may be caring for the child, but who are hesitant to push for adoption because it

87. MINN. STAT. § 259.67, subd. 4(a)(iii) (2010); WASH. REV. CODE ANN. §§ 13.38.010 et seq. (West Supp. 2012).

88. MINN. STAT. § 259.67, subd. 4(3)(iv).

89. *Id.*; WASH. REV. CODE ANN. § 13.38.040(16).

90. See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 112 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.); Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

91. See 25 U.S.C.A. § 1915(b)(i) (West 2011) ("[P]reference shall be given, in absence of good cause to the contrary, to a placement with a member of the Indian child's extended family.").

involves a termination.⁹² Not wanting to see the legal axe of TPR come down between the child they love and the parent(s) the child loves, the child stays in foster care or is moved around because the state refuses to allow the child to return home.⁹³ Here, customary adoption would allow permanency to be reached, in the form of a legal adoption by the relatives, without the harsh mental and emotional consequences stemming from a TPR.⁹⁴

A. FCSIAA's Shortcomings in Addressing ASFA's Legal Orphan Problem

As discussed above, ASFA created a generation of legal orphans with no legal ties to their biological family and no adoptive family.⁹⁵ In 2008, Congress passed FCSIAA in an attempt to decrease the amount of TPRs occurring under ASFA.⁹⁶ While the Act was a commendable step in addressing the negative results following TPR, it did not go far enough in addressing the root of the problem: the overabundance of TPRs for children who do not have an adoptive home identified by the state.⁹⁷

92. See, e.g., AM. ASS'N OF RETIRED PERSONS, *LEAN ON ME: SUPPORT AND MINORITY OUTREACH GRANDPARENTS RAISING GRANDCHILDREN* 1, 7 (2003), available at http://assets.aarp.org/rgcenter/general/gp_2003_a.pdf (presenting data from the 2000 Census showing that more than 4.5 million children, or 6.3% of all children under the age of 18, live in households headed by a grandparent); Carole B. Cox, *Policy and Custodial Grandparents*, 11 MARQ. ELDER'S ADVISOR 281, 285 (2010) (describing the increased number of grandparents living in poverty who have nevertheless taken in their grandchildren). For example, though one woman had for many years cared for her grandchildren on an informal basis, she decided to seek legal custody, but not adoption; adoption would require obtaining a TPR, a "lengthy and painful legal process [that could] involve demonizing the parent." Sharon Olson & Mira Swanson, *Grandparent Kinship Care: A Personal Story*, CW360°: A COMPREHENSIVE LOOK AT A PREVALENT CHILD WELFARE ISSUE, Spring 2009, at 30, 30.

93. See, e.g., Eliza Patton, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 255 (2004) (criticizing the child welfare system for preferring adoption over other forms of extended-family caregiving more prevalent in minority cultures).

94. See Alexis T. Williams, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609, 635 (2008) for a description of the harsh mental and emotional effects TPRs have on children. See also *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) ("[T]he importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship."). Psychologists have increasingly been recognizing the impact that a TPR has on not only the mental state of a young child, but also on older youth and the biological parents involved. Williams, *supra*, at 613-14.

95. Metzger, *supra* note 9.

96. See *Fostering Connections to Success and Increasing Adoptions Act of 2008*, Pub. L. No. 110-351, 112 Stat. 3949 (codified as amended in scattered sections of 42 U.S.C.).

97. See, e.g., ATWOOD, *supra* note 49, at 258-59 (arguing that FCSIAA did not

1. FCSIAA as a Response to the Legal Orphan Problem Created by ASFA

ASFA was passed with good intentions. Congress saw the problem of too many children in the foster care system, and some members wanted to pass legislation that moved more children to permanency.⁹⁸ Senator Jay Rockefeller, a sponsor of the Act, stated, "The main objective of this bill is to move abused and neglected kids into adoptive or other permanent homes and to do so more quickly and more safely than ever before."⁹⁹ Congress, through ASFA, pushed permanency in the only way the law allowed: through TPRs. Because the TPR provisions did not include an adoptability requirement, ASFA dramatically increased TPRs, but without an accompanying increase in adoptions.¹⁰⁰ These consequences were largely due to strict deadlines under which states, absent certain conditions, were required to file termination petitions.¹⁰¹ A decade after ASFA was enacted, when presented with numerous studies demonstrating the detrimental effects TPRs had on legal orphans, Congress reacted by passing FCSIAA.¹⁰² FCSIAA demonstrated the commitment of the federal government to care for children who do not have adults to legally care for them and provide for their needs. Foster children, now legal orphans, are officially called "wards of the state," suggesting that they are dependent on the state to fill the role as parent when their parents have been taken away from them.¹⁰³ Ultimately, Congress passed FCSIAA as a measure to provide greater support for these wards than was available under ASFA.¹⁰⁴

go far enough in addressing the federal government's preference for TPRs, even without the identification of an adoptive home).

98. See Barbara Bennett Woodhouse, *The Adoption and Safe Families Act: A Major Shift in Child Welfare Law and Policy*, in *THE INTERNATIONAL SURVEY OF FAMILY LAW* 375, 380–84 (Andrew Bainham ed., 2000).

99. 143 CONG. REC. 12199 (1997) (statement of Sen. Rockefeller).

100. Metzger, *supra* note 9.

101. See 42 U.S.C. § 675(5)(E) (2006). ASFA did not require states to file a permanency petition if the child in question was being cared for by a relative at the option of the state, a compelling reason showed that petitioning to terminate parental rights would not be in the child's best interests, or the state failed to provide reasonable efforts to reunify the family as required by the Act. *Id.*

102. See Daniel A. Starett, *A Plea for Permanence After Termination of Parental Rights: Protecting the Best Interests of the Child in Ohio*, 56 CLEV. ST. L. REV. 419, 428–30 (2008) (describing the documented short- and long-term psychological effects on children who are exposed to the foster care system).

103. See, e.g., Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1626 (2001) (explaining the financial responsibilities of the state after the termination of parental rights).

104. MaryLee Allen & Beth Davis-Pratt, *The Impact of ASFA on Family Connections for Children*, in *INTENTIONS AND RESULTS: A LOOK BACK AT THE*

2. FCSIAA's Inability to Adequately Address the Government's Incessant Push for TPRs

Some have praised FCSIAA as being the most important statutory reform in child welfare since ASFA.¹⁰⁵ It provided children aging out of the foster care system with multiple benefits in their transition to adulthood while at the same time establishing financial incentives to encourage more adoptions of older legal orphans.¹⁰⁶ Despite these benefits, it did not adequately address the real issue: ASFA's creation of more legal orphans who do not have identified adoptive homes.¹⁰⁷ Legislation like FCSIAA does not address the root of the problem, and therefore causes children to suffer unnecessary loss, through TPRs, while waiting for mitigating measures from the state.¹⁰⁸ This backward thinking and acting must be addressed through a congressional re-evaluation of the need for speedy TPRs when adoption levels have not increased to meet the number of children who are waiting for adoption. If looked at through the economic perspective of supply and demand, it makes even less sense to create a supply of legal orphans, many of whom are older youth of color, when adoptive demand is low.¹⁰⁹

B. Customary Adoptions as a Means of Decreasing the Detrimental Effects of TPRs

Creating customary adoptions as a permanency option for non-Indian children will benefit society by increasing permanency

ADOPTION AND SAFE FAMILIES ACT 70, 77 (Urban Inst. Ctr. for the Study of Soc. Policy eds., 2009), *available at* http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf.

105. See Press Release, Pew Charitable Trusts, New Law Is Designed to Improve Lives, Outcomes of Nation's Foster Children and Youth (Oct. 8, 2008), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=45008.

106. See Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351.

107. Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 144 (2001) (explaining that the "legal orphan problem" was noticed in 2001, only four years after the Act's passage).

108. *Fostering Connections to Success and Increasing Adoptions Act*, CHILD. DEF. FUND, <http://www.childrensdefense.org/policy-priorities/child-welfare/fostering-connections/> (last visited Mar. 30, 2012) (listing the variety of services FCSIAA provides for children after termination of parental rights).

109. NAT'L FOSTER CARE COAL., FOSTERING CONNECTIONS TO SUCCESS AND INCREASING ADOPTIONS ACT: FREQUENTLY ASKED QUESTIONS ON THE PROVISIONS DESIGNED TO IMPACT YOUTH AND YOUNG ADULTS 9 (2009), *available at* <http://www.nationalfostercare.org/pdfs/NFCC-FAQ-olderyouth-2009.pdf> (noting that children who "age out of foster care without a family to rely on or return to" experience greater instances of "poverty, homelessness, [and] incarceration," rendering them unlikely or unable to live economically independent lives).

and the efficiency of child welfare resource allocation. First, this can be done by eliminating the mandatory prerequisite of TPRs, a practice with demonstrated negative consequences. Second, allowing customary adoptions will decrease the detrimental effects of TPRs on both legal orphans and their biological families, which often outweigh the positives. Finally, customary adoptions will benefit society as a whole by decreasing the amount of resources needed to care for the vast number of legal orphans created following ASFA.

1. Eliminating TPR as a Prerequisite for Adoption

The child welfare system is ever-changing as it takes into account shifting societal attitudes toward issues involving child protection.¹¹⁰ The requirement of a TPR in order to move children to adoption should be eliminated in light of the collective shift in legislative and societal attitudes in the decade following ASFA.¹¹¹ If permanency is the overarching goal of the child welfare system, and adoption is the preferred permanency outcome, why require TPR when there has been no real showing that increased TPRs lead to higher adoption numbers?¹¹² This question is not a new one. Both ASFA and FCSIAA have provided adoption assistance and poured resources into recruitment, but the adoption rate for teenagers has not increased.¹¹³

The government's continued insistence that TPR is the only means of moving children to adoptive homes is the result of many negative child welfare practices in the United States.¹¹⁴ Although Indian children have been removed at high rates since 1857, the

110. Gary A. Debele, *Custody and Parenting by Persons Other than Biological Parents: When Non-Traditional Family Law Collides with the Constitution*, 83 N.D. L. REV. 1227, 1239–52 (2007) (describing the development of many distinct periods of state intervention, including the “children’s rights movement” and how it continues to evolve today).

111. Laura Longhine & Nora McCarthy, “*I Want to Hold on to Them*”: ASFA’s Impact on Teens, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT, *supra* note 104, at 43, 43 (connecting ASFA with the increased number of children who aged out of foster care without permanent families and focusing on the reasons teens would not push for TPR and the impact TPR would have on the ties teens had with their biological parents as well as their siblings).

112. *Id.* (emphasizing that although ASFA increased the overall number of adoptions, those adoptions were of young children, and the Act produced a spike of older children who aged out without being adopted).

113. See Metzger, *supra* note 9.

114. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602–03 (2002) (describing the “cultural genocide” that was perpetrated by the United States government in the systematic removal of Indian children from their families and placement in boarding schools).

most well known government-sanctioned program, the Indian Adoption Project, ran for ten years starting in 1958.¹¹⁵ The Bureau of Indian Affairs (BIA) and Child Welfare League of America ran the Project, which resulted in thousands of Indian children being forcibly removed from their homes and placed for adoption with non-Indian families.¹¹⁶ The Project was premised on the government's view that Indian families' communal method of child rearing was damaging and the assumption that it was better to remove the children and spare them that upbringing.¹¹⁷ Ironically, it is the tribes that maintain a practice that could benefit non-Indian children and their families. Avoiding TPRs while still achieving permanency through customary adoption is a practice that should be pursued given the track record of the government on the issue.

2. The Detrimental Effects of TPRs Outweigh the Benefits

John Steinbeck said it best in his book *East of Eden*:

The greatest terror a child can have is that he is not loved, and rejection is the hell he fears And with rejection comes anger, and with anger some kind of crime in revenge for the rejection, and with crime guilt—and there is the story of mankind.¹¹⁸

In the past, the intervention of the state in child welfare matters was used as a means to *reduce* the amount of future crime committed by young adults.¹¹⁹ The government believed that

115. *Id.* at 603.

116. *Id.*

117. See H.R. Rep. No. 95-1386, at 10 (1978).

[T]he dynamics of Indian extended families are largely misunderstood. An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect and thus as grounds for terminating parental rights.

Id. For a detailed summary of the congressional hearings, see Russel Lawrence Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287 (1980).

118. JOHN STEINBECK, *EAST OF EDEN* 268 (Penguin Books 2003) (1952).

119. See Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 899 (1975).

For the poor, state intervention between parent and child was not only permitted but *encouraged* in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action.

Id. (emphasis added).

separating children from their parents in some cases would prevent future criminal behavior.¹²⁰ Today, the indirect results of the overuse of TPRs are apparent and disturbing.¹²¹ Most significantly, these results include criminal habits, lack of education, and teenage pregnancy.¹²² A 1998 study found that, of the legal orphans who age out of foster care, twenty-seven percent of males and ten percent of females are incarcerated within twelve to eighteen months.¹²³ Fifty percent of these former foster care children were unemployed, thirty-seven percent had not graduated from high school, thirty-three percent were on public assistance, and nineteen percent of the females had given birth to children of their own.¹²⁴

In assessing the negative impacts of creating legal orphans, the burden on the state to take care of these children should not be overlooked.¹²⁵ In speeding along TPRs, especially with older youth, the state should re-evaluate whether the negative effects that come with aging out of foster care are worth the action.

The states should also re-evaluate whether they provide effective services to counter the impact of TPR on a child. The availability of psychiatric services after a child ages out are dismal considering the extreme mental impact created when a child loses ties to his or her entire family.¹²⁶ Around thirty-three percent of the children in foster care have been diagnosed with three or more psychiatric problems.¹²⁷ Former foster children were less than half

120. *Id.*

121. See, e.g., Rebecca Bonagura, *Redefining the Baseline: Reasonable Efforts, Family Preservation, and Parenting Foster Children in New York*, 18 COLUM. J. GENDER & L. 175, 197 (2008) (noting the difficulties that foster children who age out have in becoming "self-sufficient participants in society").

122. Taylor, *supra* note 43, at 328–29 ("[C]hildren who age out of the foster care system without permanent homes or legal connections experience dire outcomes in an array of well-being indicators, including homelessness, criminal involvement, mental and physical health, education level, and reliance on public assistance.").

123. See Barbara Vobejda, *At 18, It's Sink or Swim*, WASH. POST, July 21, 1998, at A1 (quoting statistics compiled by Mark Courtney and Irving Plavin as a part of a study that was conducted at the University of Wisconsin School of Social Work).

124. *Id.*

125. Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 376 (2002).

126. See MARK COURTNEY, MACARTHUR FOUND. RES. NETWORK ON TRANSITIONS TO ADULTHOOD, ISSUE 19, YOUTH AGING OUT OF FOSTER CARE (2005), available at <http://www.transad.pop.upenn.edu/downloads/courtney--foster%20care.pdf> (explaining that mental health care after aging out is critical and not readily available).

127. Susan dos Reis et al., *Mental Health Services for Youths in Foster Care and Disabled Youths*, 91 AM. J. PUB. HEALTH 1094 (2001).

as likely to receive counseling or medication for mental health problems after aging out than when they were still in foster care.¹²⁸

Although FCSIAA has worked to improve those numbers by providing grants to the states for securing adoptions of older youth and endorsing kinship guardianship more strongly than ASFA, it still prioritizes adoption as the preferred permanency option, resulting in the need for TPR at an extremely fast rate.¹²⁹ Risking a host of detrimental impacts to the child through speedy TPR is in many cases not worth the potential detrimental effects, and should be avoided.

3. Customary Adoption's Benefits to Society as a Whole

If permanency is the goal of child welfare legislation, customary adoptions are the best means of ensuring that foster children who cannot return to their biological parents achieve this goal. Further, implementing customary adoptions as an additional permanency option for non-Indian children will have positive benefits for society as a whole, not just the children involved. For many years, child welfare agencies—in a trend still present in some states—purposefully avoided placing children with their relatives if an out-of-home placement was needed.¹³⁰ This “apple doesn’t fall far from the tree” mindset resulted in a financial burden on many states, and thus taxpayers, because states were not able to recruit and retain enough quality foster homes to take care of the children they were removing.¹³¹ These

128. COURTNEY, *supra* note 126.

129. Compare Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §§ 201–03, 303 (codified as amended in scattered sections of 42 U.S.C.), with Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, §§ 101, 401–02 (codified in scattered sections of 42 U.S.C.).

130. See David J. Herring et al., *Evolutionary Theory and Kinship Foster Care: An Initial Test of Two Hypotheses*, 38 CAP. U. L. REV. 291, 291 (2009) (“[K]in’ is regularly defined to include non-genetically related individuals who had established a relationship with the child prior to his or her placement in foster care (e.g., family friend, neighbor).”). See Rob Green, *The Evolution of Kinship Care Policy and Practice*, 14 FUTURE OF CHILD. 131, 132 (2004), for an overview of the mindset against placing foster children with their relatives.

131. See Megan M. O’Laughlin, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification*, 51 VAND. L. REV. 1427, 1451 (1998) (“Kinship foster care [offers] psychological benefits to children, [and] also has the potential to benefit state child welfare policy. Because most kinship caregivers are willing to care for sibling groups, the burden on agencies to find multiple foster homes for children and to recruit foster families is lessened.”); Marla Gottlieb Zwas, *Kinship Foster Care: A Relatively Permanent Solution*, 20 FORDHAM URB. L.J. 343, 354–55 (1993) (“In one study, 44% of foster children [placed with relatives] were placed with all their siblings in kinship

states' financial assets—instead of being used to provide needed resources to biological parents to become better parents or to relative placements where the child's familial ties could stay intact—were used on fostering services and attempting to recruit more foster families.¹³²

If tribal customary adoptions are used as a model, customary adoptions for non-Indian children will end up applying to many situations where the child's relatives are interested in a legal adoption, but without TPR. Taking advantage of any situation where a child has relatives who are willing to provide services and a permanent home to the child will also benefit society. Children who are fostered with relatives have a much lower number of placements, and life outcomes are significantly more positive.¹³³ Relatives and children are currently stuck between a rock and a hard place; to legally reach permanency for the children, relatives need to seek adoption, which requires severing all legal ties to the biological parents.¹³⁴ Customary adoptions, modeled after TCAs, will allow a simple modification or suspension of parental rights instead of permanently severing them.¹³⁵ If the adoption fails, a biological parent is not banned from petitioning the court to reinstate his or her parental rights by demonstrating that the parent has changed his or her life significantly enough to resume as the child's legal parent.¹³⁶ In many situations this occurs when a biological parent, typically the mother, is able to achieve and maintain sobriety, just not as quickly as required under ASFA.¹³⁷

Customary adoptions as a permanency option will help reduce the negative impacts of TPRs on children while achieving

homes.”).

132. Today states must give preference to kinship placements over nonrelative placements if the relatives meet the state's child protection standards. See 42 U.S.C. § 671(a)(19) (2006); MARIANNE TAKAS, KINSHIP CARE AND FAMILY PRESERVATION: OPTIONS FOR STATES IN LEGAL AND POLICY DEVELOPMENT 11 (final rev. ed. 1994).

133. See JUNE MELVIN MICKENS & DEBRA RATTERMAN BAKER, MAKING GOOD DECISIONS ABOUT KINSHIP CARE 5 (Yolande Samerson & Kendra John-Baptiste eds., 1997) (illustrating the importance put on finding a child a permanent home).

134. See Olson & Swanson, *supra* note 92.

135. *Indian Child Welfare Glossary and Flowchart*, NAT'L INDIAN CHILD WELFARE ASS'N, www.nicwa.org/Indian_Child_Welfare_Act/glossary.pdf (last visited Mar. 29, 2012).

136. See Randi J. O'Donnell, *A Second Chance for Children and Families: A Model Statute to Reinstate Parental Rights After Termination*, 48 FAM. CT. REV. 362, 370–72 (2010) for a description of specific situations where biological parents are allowed to petition the court for a reinstatement following a failed adoption.

137. *Id.* at 364 (“Under the ASFA requirements, if a child is in foster care for fifteen of the past twenty-two months, the state agency must file a petition to involuntarily terminate a parent's rights.”).

permanency and allowing the state to close child protection cases. It may not be intuitive that adding customary adoptions as another permanency option will decrease the negative effects of TPRs, but adding to the list of permanency options available and reducing the number of legal orphans aging out of foster care will lead to a decrease in crime, teenage pregnancies, and homelessness, because many of those negative outcomes are directly linked to the lack of a permanent family.¹³⁸

*C. Using Customary Adoptions to Address the
Overrepresentation of Children of Color in the Child
Welfare System*

Implementing customary adoptions for non-Indian children is important for a final, more meaningful reason. Children of color have historically been, and still are, overrepresented in every step of the child welfare process.¹³⁹ Beginning with the initial phone call to child protection, and continuing through foster care, TPR, and the long wait for an adoptive home, African-American and Hispanic children constitute a majority.¹⁴⁰ This is especially troubling given research showing that children of color are no more likely to be abused or neglected than other children.¹⁴¹ Minority groups, particularly African-American families, are often stereotyped as being abused or neglected at a higher rate because those families suffer from higher rates of the risk factors that correlate with removal of children, such as substance abuse and

138. See, e.g., Richard Wertheimer, *Youth Who "Age Out" of Foster Care: Troubled Lives, Troubling Prospects*, 59 CHILD TRENDS 1, 1 (2002), available at <http://www.childtrends.org/files/FosterCareRB.pdf> (describing the significantly greater challenges young adults face when the state has failed to locate a permanent family before they age out of foster care).

139. *Children of Color in the Child Welfare System: Perspectives from the Child Welfare Community*, CHILD WELFARE INFO. GATEWAY (2003), <http://www.childwelfare.gov/pubs/otherpubs/children/findings.cfm> (describing a study that highlighted several reasons for the overrepresentation of children of color in child welfare including: poverty-related issues, bias in reporting, media bias, and internal factors such as different practices of child-rearing).

140. *Id.* at 19 (emphasizing the effects of poverty on these communities and access to child welfare resources).

141. See Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871, 877 (2009) ("Obviously, [B]lack parents are neither inherently more likely to abuse and neglect their children than [W]hites, nor inherently more likely to be associated with poverty, single parenting, substance abuse, and other risk factors associated with child maltreatment. They are victims of historic and ongoing racial and economic injustice that has put them in a seriously disadvantaged position in our society." (emphasis omitted)); John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. & YOUTH SERVICES REV. 359, 360 (2003).

poverty.¹⁴² Study after study has attempted to find a solution to this problem, especially in light of the generation of minority child, teenage, and young adult “legal orphans” who have experienced consistently negative outcomes.¹⁴³

Children of color face greater challenges at the outset, even before child protection gets involved and the children are removed into foster care.¹⁴⁴ Children of color are already far more likely to grow up in one parent households,¹⁴⁵ with a large percentage having the mother as the only parent.¹⁴⁶ Further, in communities of color, a large percentage of kin help raise their nieces, nephews, or grandchildren on an informal basis without the states’ involvement.¹⁴⁷ Many of these communities share tribal views on communal methods of parenting; however, because it goes against the Anglo-American model of child rearing, it has been seen as “neglectful” parenting.¹⁴⁸ In many communities, particularly the African-American community, this is the opposite of neglectful, and is instead used as a way to protect the children when their parents are absent for one reason or another, in many situations due to substance abuse problems.¹⁴⁹ Due to these statistical trends, many have also begun to suggest that an Act similar to

142. Fluke et al., *supra* note 141.

143. See Taylor, *supra* note 43, at 349 (supporting a post-termination method of alleviating some of the problems for parents of legal orphans who have turned their lives around, but not fast enough to meet ASFA’s standards).

144. See *Children of Color in the Child Welfare System: Perspectives from the Child Welfare Community*, *supra* note 139 (describing the strong connection between poverty and the children who enter the foster care system).

145. ANNIE E. CASEY FOUND., KIDS COUNT INDICATOR BRIEF: INCREASING THE PERCENTAGE OF CHILDREN LIVING IN TWO-PARENT FAMILIES 1, 2 (2009), available at www.kidscount.org/~media/Pubs/Initiatives/KIDS%20COUNT/K/KIDSCOUNTIndicatorBriefIncreasingthePercentagTwo%20Parent%20Families.pdf.

This trend has disproportionately affected disadvantaged children and children of color: 65 percent of non-Hispanic [B]lack children, 49 percent of American Indian children, 37 percent of Hispanic children, 23 percent of non-Hispanic [W]hite children, and 17 percent of Asian American and Pacific Islander children lived in one-parent households in 2007.

Id.

146. *Id.* (“In 2007, nearly one-third of children in the U.S. (32 percent or 22 million children) were living with one parent, usually their mother.”).

147. See CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY 90–93 (1974) (showing that responsibility of raising children is spread over several households).

148. See PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 115 (1991) (stating that African-American women have been criticized because they supposedly “wield unnatural power in allegedly deteriorating family structures”); STACK, *supra* note 147, at 90–107.

149. See COLLINS, *supra* note 148, at 119 (“African and African-American communities have also recognized that vesting one person with full responsibility for mothering a child may not be wise or possible.”).

ICWA should be implemented to protect African-American children from removal based on biased practices.¹⁵⁰ Until this occurs, however, customary adoptions would allow the state agencies and the federal government to be satisfied that they have achieved legal permanency for these foster children while still allowing family units and ties to stay intact.

Conclusion

This has not been an argument for customary adoptions to become the only permanency option for children who cannot return to their biological parents, nor has it been an argument for customary adoptions to be mandatory. However, adding customary adoptions to the list of permanency *options*, even if only minimally increasing the chances for adoption, would be worthwhile.¹⁵¹ All cases involving TPRs operate on a case-by-case basis and it would be for the judge in the particular case to determine whether or not a customary adoption is in the best interests of the child.¹⁵²

Authorizing customary adoptions for non-Indian children will not be the one change that fixes the "legal orphan problem" created by ASFA. While federal and state legislative efforts to mitigate ASFA's effects have been commendable, the problem of finding permanent homes for children not allowed to return to their birth parents still exists, particularly for older children of color. Tribal customary law offers a solution to this crisis through a tribal law practice that has proven to be an effective means of keeping families together and helping to mitigate the damaging effects of TPRs on children. Retaining TPRs as a necessary procedure in all adoption cases is detrimental to not only the children, but also the biological parents and society as a whole. Older children of color—those who are most disproportionately represented in the child welfare system and who wait for adoption the longest—suffer the most in the current system as a result of

150. See Jessica Dixon, *The African-American Child Welfare Act: A Legal Redress for African-American Disproportionality in Child Protection Cases*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 109, 113 (2008) (arguing that the similar circumstances leading to enactment of ICWA indicate that similar legislation should be implemented to protect against the disproportionate removal of African-American children).

151. Especially with the increased push for permanency demonstrated through ASFA and FCSIAA, any method that can move foster children to a permanent home should be attempted.

152. See, e.g., *Myers v. DiDomenico*, 657 A.2d 956 (Pa. Super. Ct. 1995) ("[T]he courts . . . have consistently held that the ultimate consideration in custody matters is to determine that which is in the best interests of the child and that such determinations must be made on a case-by-case basis.").

the state's failure to fulfill its responsibilities to find a permanent home for these children after TPR. Changes to child welfare policy are difficult because policy is intrinsically tied to the views of society and its prejudices and preconceived notions. Providing customary adoptions for non-Indian children is a way to challenge those thoughts and fight the true injustice: stripping children of their families and sending them off into the world without a new one.

