The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights

by Vivek S. Sankaran & Christopher E. Church

Introduction

In July 2016, Claire took her step-grandson Adam to the emergency room to get him treatment for scabies.[1] Like many American families,[2] Claire was helping raise her grandchildren. At the hospital, the doctor noticed the severity of Adam's scabies and also discovered he had an unexplained fracture, so he called Child Protective Services ("CPS").[3] Claire told the CPS caseworker that Adam was developmentally delayed, his parents were using drugs, and she believed they had not provided appropriate care for Adam in the past.[4] Even though Adam was safe with his grandmother, CPS filed a petition in juvenile court.[5] After a brief stay with strangers in foster care, Adam was permitted by the juvenile court to live with Claire.[6]

Over the next year, Adam remained with his grandmother, while his mother struggled to comply with the State's reunification plan.[7] CPS ultimately filed a petition requesting the termination of his mother's parental rights.[8] The court

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[1] Facts taken from *A.R. v. D.R.* 456 P.3d 1266, 1272 (Co. 2020); *People in the Interest of A.R.*, 459 P.3d 645, 651 (Co. Ct. App. 2018). (Corresponding author served as counsel for *Amicus Curiae* National Association of Counsel for Children; A.R., 456 P.3d at 1270).

[2] *See, e.g.,* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 861 (2020).

[3] *A.R.*, 456 P.3d at 1272.

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.* at 1272-73.

[8] *Id.* at 1273.

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scheduled the Terminating Parental Rights (TPR) trial, but after hearing arguments from counsel, decided that "if the Court decided to place the child with … the grandparent [on a long term basis] in this case, that would be a less drastic alternative to termination."[9] This was one of several recognitions by the court that termination was unnecessary because other alternatives were available.

Several months later, the court held another hearing.[10] By this time, CPS had changed its position, asking the court not to terminate parental rights but to instead award custody to Claire.[11] Adam's guardian *ad litem*, however, said his best interests "necessitated termination."[12] The court encouraged the parties to resolve the disagreement, and set another review hearing nine days later.[13] During this hearing, CPS reversed its position and asked the court to issue the TPR order. After an evidentiary hearing, the court signed the order terminating Adam's mother's parental rights.[14] Adam's mother appealed the order.[15]

While the appeal was pending, the court held another review hearing, where it made a stunning admission:

> The order terminating the parental rights of Respondents is currently on appeal. The Court may have dropped the ball on this case early on. The child has extended family on both sides. There is a less drastic alternative to termination.[16]

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[9] *Id.* at 1274.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* (more than two years later, the Colorado Supreme Court reversed the TPR decision and remanded the matter back to the trial court).
[16] *Id.*

The only formal step the court took to acknowledge this was to issue an order stating, "[H]ad court known of extended family, it is likely the court would have denied the motion to terminate mother's parental rights."[17] Of course, this is the very court that placed Adam with his extended family at the outset of the proceedings.[18] So the court did know but chose to ignore that knowledge.

What is remarkable about this story is how unremarkable it is. Many of the salient facts of Adam's case occur as a matter of routine in America's child protection system. The child protection system ends the legal relationship between children and their parents more than 50,000 times each year.[19] Under the auspices of protecting children, the child protection system terminates parental rights even when parents pose no danger, even when children are benefiting from the relationship with their family, and even when the availability of other legal arrangements satisfy the State's *parens patriae* interests in keeping kids safe and providing long-term stability.

For example, despite the court in Adam's case acknowledging "it may have dropped the ball," it did nothing to correct the injustice. This seems to be in part

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[17] *Id.*

[18] *Id.* at 1272.

[19] CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION & FOSTER CARE ANALYSIS AND REPORTING SYSTEM (AFCARS) FOSTER CARE FILE, FFY 2010-2019 (2019) [hereinafter 201X FFY AFCARS DATASET]. Unless otherwise noted, data utilized in this Article were made available by the National Data Archive on Child Abuse and Neglect, Cornell University, Ithaca, New York. Data from the Adoption & Foster Care Analysis and Reporting System (AFCARS) are originally collected by state child welfare agencies pursuant to federal reporting requirements. Authors and collaborators at Fostering Court Improvement have analyzed the data and analyses are on file with the corresponding author. Neither the collector of the original data, the Archive, Cornell University, or its agents or employees bear any responsibility for the analyses or interpretations presented here. Data are reported for, and referenced by, the Federal Fiscal Year (FFY), which runs from October 1st in the preceding year through September 30th in the referenced year.

because TPR is part of a broader narrative, predicated on the supremacy of adoption as a permanency disposition,[20] that invites courts to terminate parental rights more often than necessary.[21] TPR is a central feature of the child protection system.

Yet this central feature does not serve the interests of children and their parents, or the system at large. This Article explores this claim from an empirical, clinical, and constitutional lens. Part I explores administrative data related to TPR, which like many child protection metrics, resembles nothing short of a wild west of practices and policies relating to how often and how fast child protection systems terminate parental rights. These data also reveal how TPR can unnecessarily delay legal permanency for children, particularly those children who are living with extended family, and how a State pursuing TPR can drain its own scarce resources, a system perpetually decrying insufficient resources.

Part II highlights the clinical research showing the need for children to have relationships with their birth parents, even with those who might be unable to care for them. This section also summarizes the research documenting the trauma experienced by parents who have their parental rights terminated, which might impact the parent's ability to care for other children in the future.

Part III discusses the unconstitutional features of the child protection system's overutilization of TPR. Well-established principles of constitutional law require courts to search for less restrictive alternatives prior to infringing on

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[20] Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1 (2015).

[21] *Id.* at 39-66 (2015); *see also* Ashley Albert & Amy Mulzer, *Adoption Cannot be Reformed*, 12 COLUM. J. RACE & L. 1, 22-29 (2022).

individuals' fundamental rights, like the right to direct the care of one's child. Still, child protection systems stubbornly persist in terminating parental rights, a thinly veiled effort held out as a means to achieve legal permanency for children despite TPR being neither necessary nor sufficient to achieve legal permanency for children.

The confluence of clinical research, administrative data, and legal principles envision a child protection system where TPR is exceedingly rare. Of course, TPR is deeply ingrained in the child protection system and seemingly cannot be untangled from foster care legal proceedings. But our own experience and the experience of those impacted by the child protection system have shown that "the ties that bind us … are tougher than [we can] imagine, or than anyone can who has not felt how roughly they may be pulled without breaking."[22] The child protection system has stubbornly pulled at those ties for decades, trying to break them, agnostic to how that might impact children and families. The time for the child protection system to instead honor those ties is overdue.

I. The Wild West of TPR Practices: Exploring the Prevalence of TPR through Administrative Data

Terminating parental rights is the most severe consequence a court can impose on a family during foster care proceedings, as its ramifications are long-

[22] Action Bell, *Agnes* Grey, 187-88 (The Project Gutenberg ed., 1996) (1847) https://www.gutenberg.org/ebooks/767.

term, often final,[23] and can cause irreversible harm and consequences.[24] When a court terminates parental rights, it permanently deprives a parent their right to direct the care of their children, one of the most fundamental and long-standing rights protected by the Constitution.[25] In addition to stripping a parent of their right, it can also lead to a series of collateral consequences including severing sibling relationships, family bonds, and community ties. Because of the severity of its consequences, courts have held that terminating parental rights should be done cautiously, and as a last resort only when needed to protect the safety and stability of children.[26]

Yet TPR remains an all-too-common feature in the child protection system. Between 2010 and 2015, a period of overall national foster care growth, the child protection system subjected more than 50,000 children each year to TPR.[27] But

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[23] Termination of parental rights was long seen as permanent and irrevocable in the child protection system. However, reinstatement statutes and other efforts have emerged to allow a pathway to reinstate parental rights in certain contexts. *See, e.g.,* Lashanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318, 331-344 (2010). (Reinstatement statutes and other novel legal arrangements that restore parental rights are not a solution, but evidence of the problem of the child protection's system overuse of termination of parental rights).

[24] *See Helen W. v. Fairfax Cty. Dep't of Hum. Dev.*, 12 Va. App. 877, 883, 407 S.E.2d 25, 28 (1991) (noting that the termination of [residual] parental rights is a grave, drastic and irreversible action); *In re Parental Rts as to N.D.O.*, 115 P.3d 223, 226 (Nev. 2005) ("courts have 'characterized parental rights termination as a "civil death penalty" because legal termination severs the parent-child relationship.'").

[25] *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[26] *See generally, M.E. v. Shelby Cty. Dep't of Hum. Res.*, 972 So. 2d 89, 102 (Ala. Civ. App. 2007) (noting that "termination of parental rights is a drastic measure and that it is the last and most extreme disposition afforded under the statute [and as such] Alabama reserves termination of parental rights only for *the most egregious cases in which less drastic alternatives are unavailable*.").

[27] 2010-2015 FFY ACFARS Dataset, *supra* note 19 (2010 FFY n = 52,000; 2011 FFY 51,306; 2012 FFY n = 51,849; 2013 FFY n = 53,564; 2014 FFY n = 56,557; 2015 FFY n = 59,995). Using a linked, longitudinal AFCARS dataset, Fostering Court Improvement created a TPR cohort, which is the dataset utilized in this Article for the referenced year, unless otherwise noted. The TPR cohort for a given year contains the records of all children who experienced their final TPR during the FFY,

between 2016 and 2019, despite a decline in the national foster care population, that number increased to at least 60,000 children annually.[28]

There is significant variance across the country as to the prevalence of those TPRs. Relative to its child population, West Virginia's child protection system subjects the most children to TPR: a rate of 51.1 children for every 10,000 children in the population ("per 10K"), more than five times the national rate of 8.9 per 10K.[29]

provided the date of removal preceded the date of TPR, and provided the TPR was the final TPR that resulted in the child having no legal connection to any adult. As to the first criteria, a small number of children with TPR dates had subsequent removal dates, and these children were censored from the dataset, creating an unduplicated TPR cohort. For the 2019 FFY, 327 children's records were censored for this reason, representing one half of one percent of all TPR records in the 2019 FFY. The second criteria typically means the date of TPR represents the date of the second TPR in the dataset, signifying both parents' rights have been terminated.

[28] *Id.* at 2016-2019 FFY (2016 FFY n = 64,724; 2017 FFY n = 65,396; 2018 FFY n = 67,548; 2019 FFY n = 65,139).

[29] *Id.* at 2019 FFY.

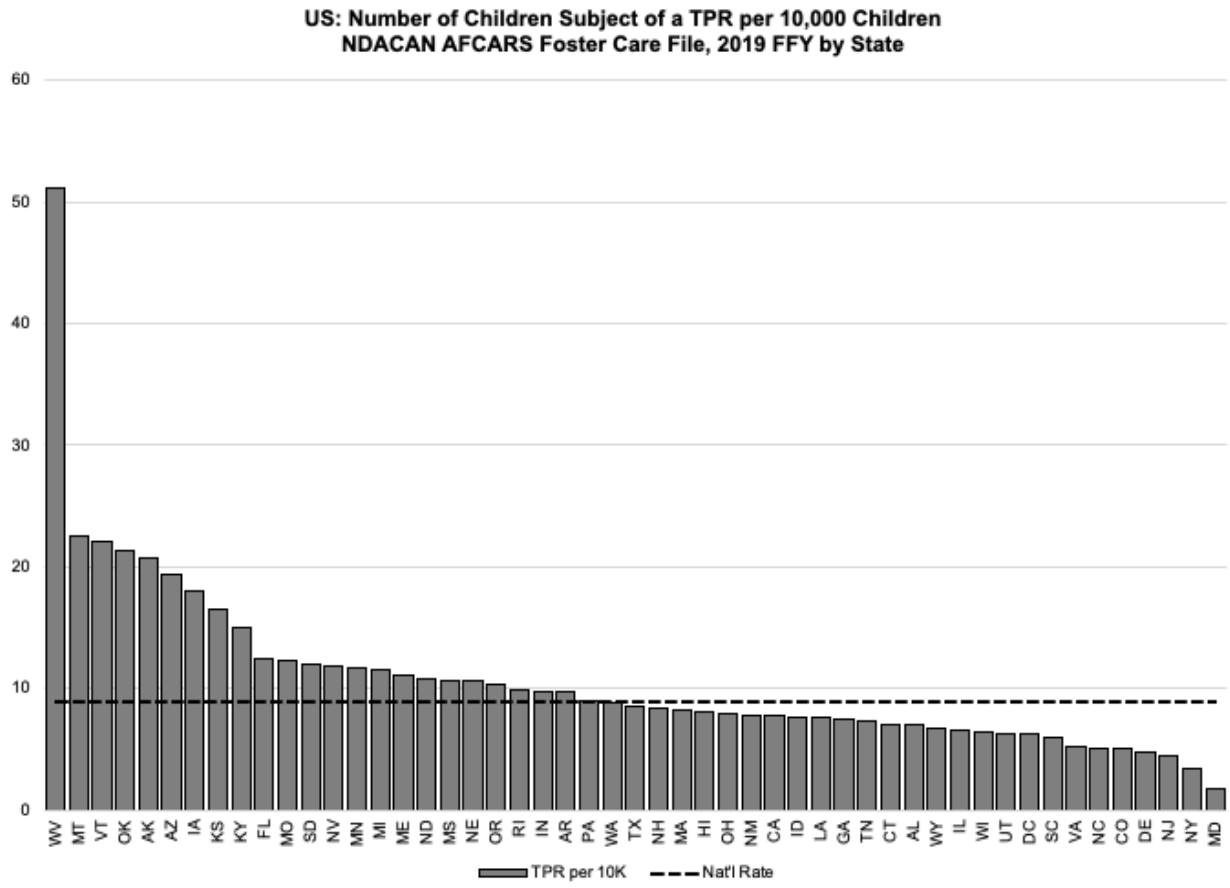

Figure 1: TPR Rate for 2019 FFY, by State

Figure 1 shows TPR rates across all 51 reporting jurisdictions for the 2019 FFY. West Virginia's TPR rate stands so far above the rest primarily because West Virginia boasts the nation's largest foster care population.[30] States like Arizona, Florida, and Oklahoma, for example, have smaller foster care populations than West Virginia, and thus children in those states are less proximate to a potential

[30] *Id.* at 2020 FFYa (as of March 31, 2020, there 7,637 children in foster care in West Virginia, a rate of 214 per 10K, more than three and a half times the national rate of 57.6 per 10K and the highest foster care utilization rate of any jurisdiction).

TPR proceeding initiated by the child protection agency. Still, such states' appetite for TPR concerning children in foster care is strong.[31]

Minority children[32] disproportionately bear the brunt of TPR proceedings. During the 2019 FFY, the rate of TPR for white, non-hispanic children was 8.5 per 10K, compared to 9.4 per 10K for minority children.[33] This imbalance is held in 40 of the 51 reporting jurisdictions, with several states reporting minority children experiencing TPR at a rate of three to four times that of white, non-hispanic children.[34]

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[31] *Id.* at 2019 FFY. As a matter of principle, the denominator of any rate should include all children eligible to be in the numerator. Furthermore, child population rates are more stable overtime and are not subject to the influence of the system responsible for initiating TPR proceedings. Thus, this Article uses child population, as opposed to foster care population, as the denominator for TPR rates. However, using the foster care population in this context is illustrative. In Arizona, West Virginia, and Oklahoma, about one in four children in care were the subject of a TPR. Thus, while the authors believe child population is the appropriate denominator, examining the prevalence of TPRs with respect to the foster care population is instructive and adds important context when exploring variance across geographies.

[32] We use the dichotomy of majority v. minority children. In AFCARS, there are 6 options for race and states are encouraged to indicate all that apply. There is also a separate field to indicate hispanic ethnicity. *See* NATIONAL DATA ARCHIVE ON CHILD ABUSE & NEGLECT, AFCARS Foster Care Annual File Code Book, at 22-28 (2021), https://www.ndacan.acf.hhs.gov/datasets/pdfs_user_guides/ afcars-foster-care-file-codebook.pdf. Each year from 2010 FFY to 2019 FFY, white, non-hispanic children represented the majority population (around 55% of the overall population). Thus, in this Article, majority children are defined as those reported in AFCARS as white only and non-hispanic. Minority children are defined as those that selected one or more non-white races and/or indicated hispanic ethnicity.

[33] 2019 FFY AFCARS Dataset, *supra* note 19.

[34] *Id.* (SD TPR'd minority children at a rate of 7.46 times that of white, non-hispanic children. ND was 4.86 times that of white, non-hispanic children. ME was 4.24 times that of white, non-hispanic children. MN was 3.26 times that of white, non-hispanic children. MT was 3.18 times that of white, non-hispanic children. In DC, only one white, non-hispanic child was subject to TPR in 2019FFY).

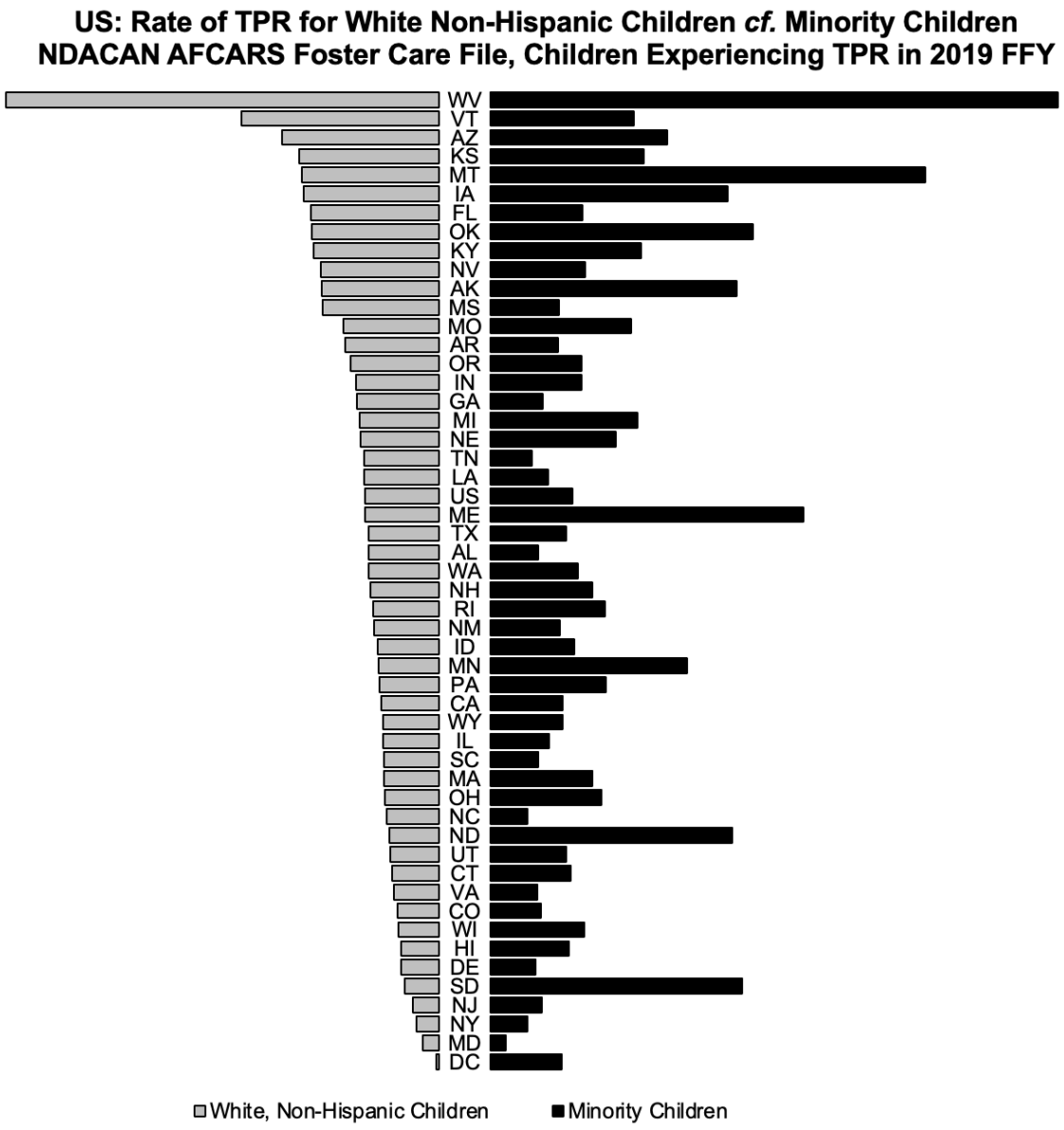

Figure 2: TPR Rate, Majority v. Minority Race

Not only do states vary in how frequently they terminate parental rights, but they also vary in how quickly they do so. Among the children experiencing TPR in 2019 FFY, the median time from removal to TPR was just shy of 18 months.[35] As Figure 3 shows, 72% of TPRs happened within two years of the child's removal and

[35] *Id.*

91% occurred within three years of the child's removal, skewing the distribution towards the first few years of a child's foster care episode.[36] Remarkably, one in four TPRs occurred within one year of a child's removal.[37]

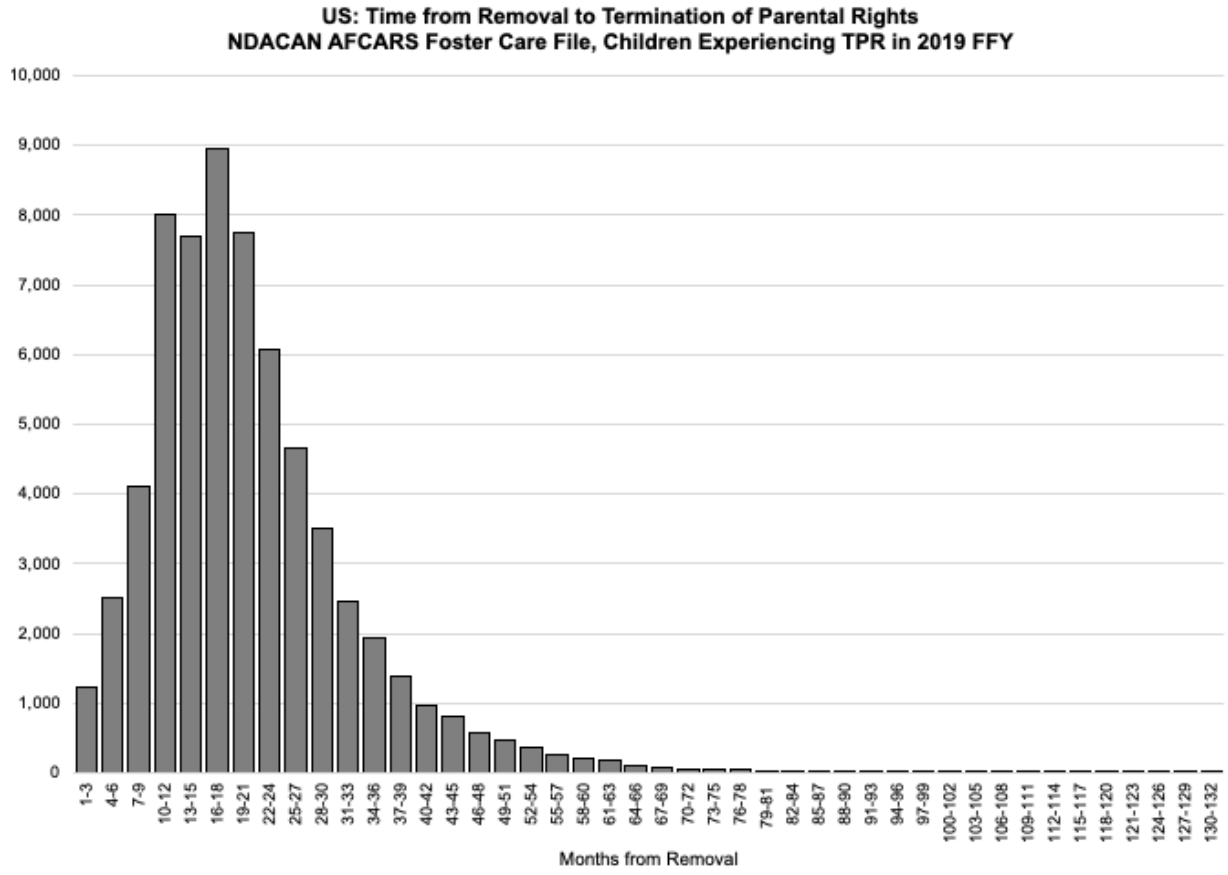

Figure 3: Time from Removal to TPR

Several jurisdictions stand out for the speed at which the State terminates parental rights. Florida and Utah terminate a parent's rights to a significant number of children at a very accelerated pace. Out of the more than 5,000 children in Florida that were TPRd during the 2019 FFY, 114 TPRs occurred within one

[36] *Id.*
[37] *Id.*

month of the child's removal, representing 2.2% of all TPRs.[38] This is similar to Utah's rate of 2.93% of TPRs occurring within 30 days of a child's removal.[39] Michigan also TPRs rather quickly, with 6.6% of all TPRs from the 2019 FFY occurring within 90 days of removal, similar to the rate of Florida (5.34%) and Utah (6.36%) for that timeframe.[40] Nationally, only 1.9% of TPRs are completed within 90 days of the child's removal.[41] But Texas, West Virginia, and Utah all completed more than half of their TPRs within one year of the child's removal.[42]

Like many child welfare metrics, whether parental rights are terminated and if so, how quickly it may happen, is significantly impacted by where the family lives. This arbitrariness alone should force advocates to carefully consider why termination of parental rights is necessary to serve the States' *parens patriae* interests.

A. TPR is Neither Necessary nor Sufficient to Achieve Legal Permanency

TPR is frequently justified by actors within state child protection systems as necessary to achieve legal permanency for children in foster care. Adam's GAL stated this explicitly.[43] This argument fails for two reasons. First, in nearly all state child protection systems, while TPR is necessary to finalize a legal adoption, it is

[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *A.R.*, 456 P.3d at 1274.

not sufficient.[44] TPR does not guarantee adoption. Of the 52,000 children subject to a TPR during the 2010 FFY, 12% were not adopted as of the 2019 FFY.[45] The outcomes for these children are dire.

Second, there are legal permanency dispositions that do not require TPR as a requisite legal action. These dispositions are creatures of state statute, but common dispositions include custody to a relative or guardianship.[46] Unsurprisingly, states that rely more heavily on these dispositions generally TPR fewer children. For example, as Figure 1 shows, Alabama has the 14th lowest TPR rate nationally, and discharges the most children to relative custody.[47] Wisconsin has the 11th lowest TPR rate and discharges 19% of children to guardianships, nearly double the national rate of 10% and the third most across all states.[48] North Carolina has the sixth lowest TPR rate and discharges the most children to guardianships.[49]

Of course, jurisdictions cannot be so cleanly characterized, and Kentucky represents an interesting counter-narrative. Despite discharging the second most children to relative custody (28% of all discharges), Kentucky has the 9th highest TPR rate.[50] Why is Kentucky subjecting so many children to TPR? Not all these

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[44] Josh Gupta-Kagan, *Non-Exclusive Adoption & Child Welfare,* 66 ALA. L. REV. 715, 721-24 (2015).
[45] 2010-2019 FFY ACFARS Dataset, *supra* note 19.
[46] Gupta-Kagan, *The New Permanency*, *supra* note 20, at 12-35; *see, e.g.,* S.C. Stat. § 63-7-20(13)-(16) (defining and distinguishing between legal guardianship of a child and legal custody of a child); S.C. Stat. § 63-7-1700(C)(2) (2022) (outlining permanency plans to include "custody *or* guardianship with a fit and willing relative") (emphasis added).
[47] 2019 FFY ACFARS Dataset, *supra* note 19 (Alabama discharged 30% of children to relative custody, 5 times the national rate of 6%).
[48] *Id.*
[49] *Id.* (22% of children discharged in NC during the 2019 FFY were discharged to Guardianship).
[50] *Id.* (KY's TPR rate was 15 per 10K children, and 17.3 per 10K for minority children).

children are being adopted: as of March 31, 2020, Kentucky had 2,303 legal orphans in foster care, a rate of 23 per 10K, more than double the national rate of 10 per 10K and the fourth most of any jurisdiction.[51] Unsurprisingly, Kentucky discharges more legal orphans to non-permanent dispositions,[52] such as emancipation.[53]

Although not unique to Kentucky, this highlights a different concern about the child protection system's utilization of TPR, in that it cannot be an end in itself. As Professor Gupta-Kagan states, the current child protection legal framework "emphasizes terminations as a default pathway to permanency, specifically, to traditional, exclusive adoption."[54] While there is some debate among scholars about how often TPR is needed,[55] that debate assumes TPR is "inextricably linked with permanency."[56] As Kentucky and other state data highlight, this is not the case. While the ideological underpinnings of termination of parental rights may be tethered to adoption, the effect of the child protection's system overutilization of TPR is that children languish in foster care as legal orphans, and some even reach adulthood without a legal connection to any adult.[57]

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[51] *Id.* at 2020 FFY AFCARS dataset.

[52] *Id.* (of the 1,464 children in Kentucky discharged to a non-permanent disposition (emancipation, runaway, death, transfer to another agency), 9% were legal orphans, more than double the national rate of 4% and the third most across all reporting jurisdictions).

[53] *See* NDACAN, *AFCARS Foster Care Annual File Codebook*, 98 (2021), https://www.ndacan.acf.hhs.gov/datasets/pdfs_user_guides/afcars-foster-care-file-codebook.pdf (defining emancipation as a discharge reason, characterizing children that "reached majority according to the law by virtue of age, marriage, etc.").

[54] Gupta-Kagan, *The New Permanency*, *supra* note 20, at 15.

[55] *Id.* at 15-16.

[56] *Id.*

[57] 2020 FFYa ACFARS Dataset, *supra* note 19 (On March 31, 2020, there were 72,936 legal orphans in foster care. Between April 1, 2019 and March 31, 2020, 2,774 legal orphans were discharged from foster care to a non-permanent disposition, the most common such disposition being emancipation).

B. A Case Study in Unnecessary TPRs: Relative Adoptions

In the case that opens this Article, Adam is very fortunate. Despite being in foster care, Adam had lived with his grandmother, Claire, for the entire duration of his foster care episode (sans a brief stay in stranger foster care upon removal).[58] Remarkably, nearly a third of all children TPR'd during the 2019 FFY were placed with a relative at the time of TPR.[59] In Maryland and Arizona, more than half of all children were living with a relative at the time of their TPR.[60] For minority children subject to a TPR in 2019 FFY, 54.7% were living with a relative at the time of their TPR. In California, Alaska, New Mexico, Hawaii, and DC, more than 4 out of 5 minority children were living with a relative at the time of their TPR.[61]

Claire repeatedly affirmed her interest in raising Adam.[62] In addition, a maternal grandmother came forward who was also willing to assume parental responsibilities for Adam.[63] She attempted to formally intervene in the TPR proceeding and informed the court on multiple occasions that she was willing to assume full parental responsibilities.[64] Adam had two caring grandparents willing and ready to assume full-time custody, which did not require terminating the mother's parental rights. Yet the court blithely proceeded to terminate parental

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[58] *A.R.*, 456 P.3d at 1272.
[59] 2019 FFY AFCARS Foster Care Dataset, *supra* note 19.
[60] *Id.* (Maryland = 62.5% and Arizona = 51.8%).
[61] *Id.* (California = 80.8%, Alaska = 84.3%, New Mexico = 87.1%, Hawaii = 90.1%, and all minority children in DC).
[62] *A.R.*, 456 P.3d at 1273.
[63] *Id.*
[64] *Id.*

rights despite the availability of other options that could have kept the parent-child relationship intact.[65]

As in Adam's case, many relatives who are willing to care for children are pushed towards adoption - which requires a TPR - even though other permanency options are available. During the 2019 FFY, there were nearly 64,000 children discharged from foster care to adoption.[66] Public adoption files contain information on about 54,000 of those children, or 85%.[67] Among those 54,000 children, nearly 20,000 were adopted by a relative, representing 35% of all adoptions.[68] In one of every three adoptions, actors within child protection systems were terminating the parental rights of a child in one instance - permanently severing ties to their family - and recreating those ties, in part at least, via adoption with a shuffled cast of characters.

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[65] *Id.* at 1273-74.

[66] 2019 FFY AFCARS Foster Care Dataset, *supra* note 19.

[67] *Id.* (AFCARS contains separate Foster Care and Adoption datasets for each FFY. Thus far, this Article has relied entirely on the Foster Care file. However, the adoption file contains additional data related to the children that are adopted and the families into which they are adopted. Fostering Court Improvement links these datasets. For the 2019 FFY, Fostering Court Improvement was able to link 85% of the adoption records in the Foster Care file to the Adoption file, hereinafter referred to as the 2019 FFY AFCARS Linked Adoption Dataset.).

[68] *Id.*

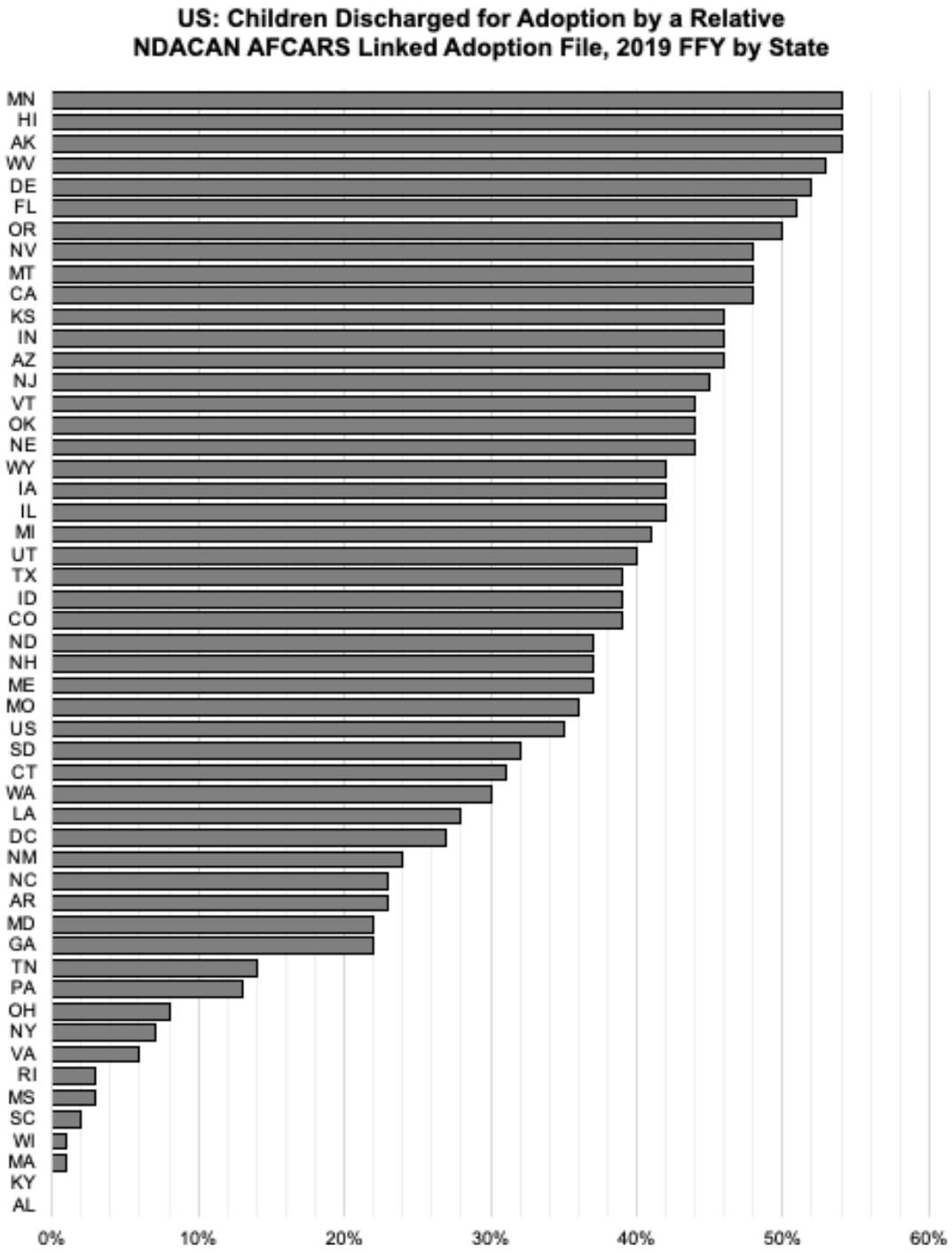

Figure 4: Relative Adoptions

In some jurisdictions, relative adoptions account for more than half of all foster care adoptions.[69] But adoption is not necessary to achieve permanency in these cases: alternatives such as guardianship or relative custody (that do not require a TPR) are available to legally secure the relationship between the child and their kin. Jurisdictions that rely more heavily on dispositions like guardianship or relative custody (that do not require a TPR) have far fewer relative adoptions. As Figure 4 reflects, Alabama and Kentucky reported zero relative adoptions in their public adoption files,[70] but Alabama and Kentucky discharge the most children to relative custody.[71] South Carolina reported that only 2% of adoptions were to a relative of the child, but South Carolina discharges the third most children to relative custody.[72]

Funneling relatives towards adoption as a means to achieve legal permanency for children in foster care is not without its costs. Relative custody and guardianship can both be achieved timelier than adoption. Nationally, the median time from removal to relative custody was 5.7 months.[73] The median time from removal to guardianship was 17.4 months.[74] Both of these legal dispositions take considerably less time to finalize than adoption, which has a median time from

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[69] *Id.* (2020 FFY AFCARS Linked Adoption Dataset (Alaska, Hawaii, Minnesota = 54%; West Virginia = 53%; Delaware = 52%; Florida = 51%; Oregon = 50%)).
[70] *Id.* (71% of AL adoptions and 75% of KY adoptions were able to be linked in the AFCARS Adoption and Foster Care datasets).
[71] *Id.* at 2019 FFY AFCARS Foster Care Dataset, *supra* note 19. (30% of Alabama discharges and 28% of Kentucky discharges were to the custody of a relative, compared to 6% nationally).
[72] *Id.* (27% of discharges in South Carolina were to relative custody).
[73] 2020 FFY AFCARS Foster Care Dataset, *supra* note 19.
[74] *Id.*

removal to discharge of 28.5 months.[75] Since adoption requires a court to terminate a parent's rights as a prerequisite, those proceedings might require a contested trial and lengthy appeals.

Returning to Adam's case, it is easy to see how the child protection agency's pursuit of TPR could significantly delay permanency for children. Adam was living with his grandmother, and she was willing to raise him.[76] A second grandmother was also willing to raise Adam.[77] The court had two options that would have allowed Adam to achieve legal permanency, and bring his foster care case to an end.[78] But rather than work with Claire or the other grandparent to finalize legal permanency via guardianship or custody, the child protection agency and guardian *ad litem* focused on pursuing termination of parental rights.[79] This involved drafting and filing a written motion, serving all parties, preparing for trial and litigating the matter: all these efforts take time and require the state to expend resources.[80] Once the child protection agency proved to the court that reunification was not appropriate, Adam could instead have been discharged from foster care to live with Claire.[81] If Claire needed financial assistance to care for Adam, the agency

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[75] *Id.*

[76] *A.R.*, 456 P.3d at 1272.

[77] *Id.* at 1273.

[78] Based on the facts of this case, one could easily argue Adam never had any need for foster care placement. He was being cared for by his grandmother, Claire, an arrangement often called informal kinship care, as is the living situation for millions of children across the nation. At the end of the case, Adam was likely going to remain in her care. It is difficult to pinpoint what state interest the child protection agency advanced by interfering in this family's affairs.

[79] *A.R.*, 456 P.3d at 1273.

[80] COLO. REV. STAT. § 19-3-602; 607-610 (2018).

[81] COLO. REV. STAT. § 19-3-702(4)(a)(III) (2021).

could have supported Claire via state welfare programs, such as TANF, and more directly with a subsidized guardianship.[82] Within six months of his removal, Adam could have been sent home with Claire via a subsidized guardianship.[83] Instead, the child protection system set its course on terminating parental rights to free Adam for an adoption that was not needed.

The State's emphasis on termination-imposed costs on both Adam and the State. Adam entered care in July 2016.[84] About a year later, the child protection agency filed a termination for parental rights.[85] At that time, presumably, reunification had been ruled out. Around July 2017, Adam could have been legally discharged to the custody of Claire, the person he had lived with for quite some time. Instead, the child protection agency and guardian *ad litem* argued it would be in Adam's best interest to stay in foster care while they pursued TPR.[86] Adam's mother's appeal – which successfully overturned the TPR – was resolved in 2020, with proceedings remanded to the juvenile court.[87] From July 2017 until early 2020, Adam remained in foster care. This required that Adam receive monthly visits from a caseworker who was already stretched too thin due to high caseloads.[88] It also

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[82] *See, e.g.,* COLO. REV. STAT. § 26-5-110 (2019).

[83] *Id.* at (2)(a)(II) (to be eligible for a subsidy under Colorado law, a child must have lived with a relative for six consecutive months); *see also, A.R.*, 456 P.3d at 1272 (Claire easily satisfied this criteria at the time the child protection agency indicated to the court it intended to file a motion for termination of parental rights).

[84] *A.R.*, 456 P.3d at 1272.

[85] *Id.*

[86] *Id.* at 1272-73.

[87] *Id.* at 1274.

[88] *See, e.g.,* Evan Wylode and Christopher Osher, *Colorado Child Protective Agencies Still Falling Short Despite Pledges to Increase Staffing,* THE DENVER GAZETTE (Jan. 3, 2021),

required that Adam be subjected to periodic court reviews involving attorneys, judges, court staff, and other professionals.[89] None of these expenditures of time and resources would have been necessary had Adam been discharged to Claire's custody.

If timely permanency is a core tenet of the child protection system, then legal discharges that minimize the time children spend in foster care should be prioritized. Presumably, adoption takes longer than other dispositions because it requires termination of parental rights as a prerequisite, a procedurally lengthy process that neither relative custody, nor legal guardianship, require. In fact, the median time from removal to TPR was 18 months, a month longer than the median time from removal to *discharge* to legal guardianship, and more than three times the median time to *discharge* to relative custody.[90] In other words, just getting past the procedural prerequisite to adoption - termination of parental rights - takes longer than *finalizing* a permanency plan of relative custody or guardianship. If timely permanency for children is a priority, relative custody and subsidized guardianship can help states achieve it. Every day Adam spent in foster care after around July 2017 - including the pendency of his mother's appeal to protect her fundamental right to maintain a relationship with Adam - represents an unnecessary day in foster care.

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https://www.9news.com/article/news/local/colorado-child-protective-agencies-still-falling-short/73-a29bc65c-74dd-48e3-928a-fabb428b1f6c.

[89] COLO. REV. STAT. § 19-3-702.5 (2019).

[90] 2020 FFY AFCARS Foster Care Dataset, *supra* note 19.

The data demonstrates that, not only is TPR used inconsistently across the country, pursuing it can delay permanency for children and waste scarce public resources. The next section details the clinical harm that TPR inflicts on families in the system.

II. Unnecessarily Terminating Parental Rights Harms Children, Parents And The Child Protection System

A. Children Often Remain Connected With Parents, Even If Parents Cannot Care For Them.

Each time a court terminates the rights of a parent to a child, it can inflict harm to children and parents. The child suffers the loss of a legally-protected relationship with their parent. But unlike other types of losses – like a death – which bring with them a sense of certainty and finality, terminating parental rights creates "ambiguous loss."[91] Such a loss occurs "when an individual experiences a lack of clarity about a loved one's physical and/or psychological presence."[92]

Research reveals that an ambiguous loss can be the most distressful of losses because "it is unclear, there is no closure, and without meaning, there is no hope."[93]

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[91] TPR has been characterized and referred to as the equivalent of the "civil death penalty." *See, e.g.,* Ashley Albert et. al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. OF RACE AND L. 861 (2021); Angel Philip & Eli Hager, *The Death Penalty of Child Welfare Cases: In Six Months or Less, Some Parents Lose Their Kids Forever,* PRO PUBLICA (Dec. 20, 2022), https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever; Stephanie Gwillim, *The Death Penalty of Civil Cases: The Need for Individualized Assessment & Judicial Education When Terminating Parental Rights of Mentally Ill Individuals*, 29 ST. LOUIS L. REV. 341, 344 (2009) (using the term throughout and also citing to judicial opinions that invoke this phrase). The research on ambiguous loss reveals how incorrect this characterization may be, and that TPR perhaps would be more appropriately characterized as far worse than the equivalent of the death penalty for civil cases.

[92] Monique Mitchell, *The Family Dance: Ambiguous Loss, Meaning Making, And The Psychological Family in Foster Care*. 8 J. OF FAMILY THEORY AND REV. 361 (Sept. 2016).

[93] *Id.* at 362.

According to Dr. Pauline Boss, the leading researcher on the topic, "[p]eople hunger for certainty.[94] Even certain knowledge of death is more welcome than a continuation of doubt."[95] Thus, Boss theorizes that the inability to resolve situations causes "pain, confusion, shock, distress and often immobilization," and that this pain can become "chronic."[96] It can also lead to "rigidity, denial, black-and white thinking,," and externalizing behaviors including "intense expressions of anger" and "bullying."[97] Exacerbating this impact, individuals dealing with these losses must often navigate these feelings on their own because, "society does not recognize the loss, lacks rituals to grieve the loss, or there is no end to the uncertainty, and therefore no hope for true closure."[98]

Studies have shown that children whose parents' rights have been terminated experience ambiguous loss. Children still maintain "significant psychological ties" to their birth family, and grieve their loss even as they bond with their adoptive parents.[99] Terminating parental relationships can raise a "lifetime of questions for children about their identities as members of their families of origin and their degree to which they can ever become 'real' members within a foster or

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[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] Robert E. Lee & Jason B. Whiting, *Foster Children's Expressions Of Ambiguous Loss*, 35 AM. J. FAM. THERAPY 419, 425-426 (2007); Pauline Boss, *Ambiguous Loss Research, Theory, And Practice: Reflections After 9/11*, 66 J. MARRIAGE & FAM. 553-554 (2004).

[98] Gina Miranda Samuels, *A Reason, A Season, Or A Lifetime: Relational Permanence Among Young Adults With Foster Care Backgrounds*, 13 CHAPIN HALL CENTER FOR CHILDREN (2008).

[99] Matthew B. Johnson, *Examining Risks To Children In The Context Of Parental Rights Termination Proceedings*, 22 N.Y.U. REV. L. & SOC. CHANGE 414 (1996); *see also* Margaret Beyer & Wallace J. Mlyniec, *Lifelines to Biological Parents: Their Effect on Termination of Parental Rights and Permanence*, 20 FAM. L.Q. 237-240 (1986) (describing the role of the family of origin as the child's "primary lifeline").

adoptive family system."[100] Adoptees who lack access to connecting with their birth families feel that, "no matter how they are loved, wanted, and wished for, they understand that a crucial part of them is lost."[101] Stories after stories of adopted children searching for their birth families highlight the connection so many adopted children yearn for. Even when birth parents cannot care for children full-time, children often look to them to "provide emotional support and a sense of relational continuity."[102]

The words of youth adopted out of foster care capture these feelings. One youth stated, "We never felt part of the [adoptive] family. . . . You know, no matter how much they tell you they love you, or how much they treat you . . . you always know that you don't belong."[103] Another noted, "I would drop my life at the drop of a dime if my mother needed me to do anything . . . It's so hard not to think about her or call her and talk to her."[104]

Consistent with these sentiments, one survey showed that only 41% of children over six adopted out of foster care expressed having a very warm and close

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[100] Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD. & YOUTH SERV. REV. 1229 (2009).
[101] GABRIELLE GLASER, AMERICAN BABY*, A MOTHER, A CHILD, AND THE SECRET HISTORY OF ADOPTION* 185 (2021).
[102] Kathleen Creamer & April Lee, *Reimagining Permanency: The Struggle for Racial Equity and Lifelong Connections*, 23(7) FAM. INTEGRITY AND JUST. Q. (2022).
[103] Nancy Rolock &Alfred G. Perez, *Three Sides to a Foster Care Story: An Examination of the Lived Experiences of Young Adults, Their Foster Care Record, and the Space Between*, 17 QUALITATIVE SOC. WORK 208 (2018).
[104] Reina M. Sanchez, *Youth Perspectives on Permanency* 9 (2004), CALIFORNIA PERMANENCY FOR YOUTH PROJECT, *available at* http://ocfcpacourts.us/wp-content/uploads/2020/06/Youth_Perspectives_001026.pdf.

relationship with their adoptive parent.[105] The same survey noted that a third of children adopted out of foster care had a relationship more difficult than they expected with their adoptive parent.[106] Often, in the words of researcher Monique Mitchell, "they are grieving the loss of their identities and their role within their psychological family."[107] So they experience feelings of fear, anger, abandonment, shame, embarrassment, and low self-esteem.[108]

These challenges are even greater for children whose legal relationship with their parents are terminated, but later "age out" of foster care instead of being discharged to live with a family. Since the enactment of the Adoption and Safe Families Act, more than 200,000 children have had rights to their parents terminated, but never achieved permanency.[109] These children are discharged from the foster care system without the support of a legal caretaker, and without a tether to anyone. They are often forced into a life of homelessness, incarceration, and unemployment.[110] Without legally secure relationships with caretakers to help guide them, these children are ill-equipped to navigate life on their own.

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[105] *Children Adopted from Foster Care: Child and Family Characteristics, Adoption Motivation and Well-Being*, ASPE RESEARCH BRIEF (2011), *available at* https://aspe.hhs.gov/reports/children-adopted-foster-care-child-family-characteristics-adoption-motivation-well-being-0.

[106] *Id.*

[107] Mitchell, *supra* note 92, at 369.

[108] Glaser, *supra* note 101, at 186, 189, 270.

[109] Martin Guggenheim, *The Failure to Repeal the Adoption and Safe Families Act Will Long be a Stain on this Period of American History,* 23(7) FAM. INTEGRITY & JUST. Q. (2022).

[110] *Id.* at 59. *See also*, *Santosky v. Kramer*, 455 U.S. 745, 766, n. 15 (1982) (observing that "termination of parental rights [does not] necessarily ensure adoption."); *New Jersey Div. of Youth & Fam. Servs v E.P.*, 952 A.2d 436, 448 (N.J. 2008) (observing that "[t]ermination of parental rights does not always result in permanent placement of the child" and that "too many children freed up for adoption do not in the end find permanent homes.").

The federal government, in a 2021 information memorandum, recognized that unnecessarily terminating parental rights can harm children. It observed that "children have inherent attachments and connections with their families of origin that should be protected and preserved whenever safely possible."[111] It further noted that "children in foster care should not have to choose between families."[112] Rather, the system "should offer them the opportunity to expand family relationships, not sever or replace them."[113]

Ironically, for decades, laws governing child custody disputes between parents have recognized the benefits children receive from maintaining relationships with parents, even those who cannot care for them.[114] Many states maintain a presumption that parents will share custody of their children, even if the parental relationship dissolves.[115] Family courts in private custody matters are very reluctant to deny visitation to a parent, absent exceptional circumstances.[116] Rarely - and only in situations of extreme abuse or abandonment - will a court even consider terminating a parent's rights in the context of a private custody dispute. Yet, in the foster care system, where a child protection agency persuades the court that a parent cannot care for a child, the system pivots to trying to terminate that parent's relationship with their children. There has been very little effort to explain

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[111] IM 21-01, *Achieving Permanency For The Well-being Of Children And Youth* 2 (Vol 22. No. 10), ADMINISTRATION FOR CHILDREN AND FAMILIES, (Jan. 5, 2021).
[112] *Id.* at 10.
[113] *Id.*
[114] Marsha Garrison, *Why Terminate Parental Rights*, 35 STAN. L. REV. 423, 454 (1983).
[115] Gupta-Kagan, *Non-Exclusive Adoption, supra* note 44.
[116] ROBERT MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW, 962-970 (4th ed. 2000).

the discordance between the laws and policies governing private custody disputes and those governing foster care.

B. *Parents Experience Pain And Trauma When Their Rights To Children Are Terminated.*

Not only does terminating parental rights have the potential of harming children, it also inflicts pain on parents. Parents with children permanently removed from their care often experience "disenfranchised grief," or grief not formally recognized and sanctioned by society.[117] One researcher wrote, "[m]ourners whose grief is disenfranchised are cut off from social supports. With few opportunities to express and resolve their grief, they feel alienated from their community and tend to hold onto their grief more tenaciously than they might if their grief was recognized."[118]

Unsurprisingly, parents report increases in mental illness, substance abuse, anxiety, and depression after they lose rights to their children.[119] The loss of their children also heightens their "structural vulnerability" by increasing risks of housing instability, intimate partner violence, and the initiation of drug use and sex work.[120] A study found that mothers used drugs to numb the pain of their loss and engaged in reckless behaviors because they no longer cared about bad things

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[117] McKegney, Sherrie, Silenced Suffering: The Disenfranchised Grief Of Birth Mothers Compulsorily Separated From Their Children 36 (2003), (thesis, on file with McGill University).
[118] *Id.* at 36.
[119] Elizabeth Wall-Wieler et al., *Maternal Health And Social Outcomes After Having A Child Taken Into Care: Population-Based Longitudinal Cohort Study Using Linkable Administrative Data*, 71 J. EPIDEMIOL. CMTY. HEALTH 1148-1150 (2017).
[120] Kathleen Kenny et al., *I Felt For A Long Time That Everything Beautiful In Me Had Been Taken Out: Women's Suffering, Remembering And Survival Following The Loss Of Child Custody*, 26 INT'L J. OF DRUG POL'Y 1158-1166 (2015).

happening to them.[121] One parent described that permanently losing custody of her children made it difficult to be around any kids, while another stated that it turned her into a "paranoid nut."[122] Another described the headaches and nosebleeds she started to experience, while another described her head as "always feeling tight."[123] A third stated that being separated from your children "changes your whole way of thinking, it makes you like a stone inside after. And that is what I feel like now. A stone."[124] Studies have shown that the physical and emotional manifestations of grief are not alleviated by a belief that their child might be in a better home.[125] Considering that many of these parents continue to raise other children, the impact of these effects might be felt for generations.[126]

C. Unnecessarily Terminating Parental Rights Harms Extended Family Members, Delays Permanency And Wastes Public Dollars.

The impact of a system that unnecessarily terminates parental rights extends beyond the harm to children and parents. A little over a third of children in foster care live with extended family members, many of whom do not want to terminate the parental rights of their kin.[127] Relying on extended family has long

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[121] *Id.*

[122] McKegney, *supra* note 117.

[123] Kendra Nixon et al., *Every Day It Takes A Piece Of You Away: Experience Of Grief And Loss Among Abused Mothers Involved With Child Protective Services*, 7 J. OF PUB. CHILD WELFARE 172-193 (2012).

[124] McKegney, *supra* note 117, at 62.

[125] Glaser, *supra* note 101, at 270.

[126] McKegney, *supra* note 117, at 65.

[127] Sarah Williams & Kristin Sepulveda, *The Share Of Children In Foster Care Living With Relatives Is Growing*, Child Trends (2019), https://www.childtrends.org/blog/the-share-of- children-in-foster-care-living-with-relatives-is-growing.

been prevalent in the African-American community, as reflective of both a culture of shared responsibility for children and as a strategy to cope with economic, social and political pressures.[128] As such, millions of children in the United States - outside of the foster care system - live in informal arrangements with relatives.[129]

And yet, when children enter the foster care system and live with kin, often the system forces those kin to adopt the children in their care, thereby necessitating the termination of parental rights. Many kin do not want to initiate TPR proceedings, because they do not want to disrupt family relationships.[130] To some relatives, termination of parental rights is seen as a "bureaucratic imposition," unnecessarily interjecting more adversarialness into an already tense situation that could be dealt with in other ways.[131] Rather than looking to the family to make a decision on what custodial arrangement may best suit their needs, the system often insists on terminating parental rights to facilitate an adoption that the extended family may not even want. As one author concluded, "[k]inship caregivers, unlike non-kin adoptive parents, are already related in meaningful ways, and they should not be forced to alter these relations in exchange for access to much needed and deserved benefits."[132] In other words, "some relatives may prefer to retain their

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[128] Sacha Coupet, *Ain't I A Parent - Exclusion Of Kinship Caregivers From The Debate Over Expansions Of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 606 (2010).
[129] *Id.* at 603-604.
[130] Gupta-Kagan, *Non-Exclusive Adoption*, *supra* note 44, at 722 (noting reluctance of many kinship caregivers to terminate parental rights).
[131] *Committee on Ways and Means: Hearing Before the Subcommittee on Human Resources,* House Representatives on H.R. 867, 105th Congress at 38 (1997) (statement of Jess McDonald, Dir., Ill. Dep't of Child. and Fam. Serv.).
[132] Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence"*, 34 CAP. U. L. REV. 405, 411 (2005).

extended family identity as grandmother, aunt or cousin rather than become mom or dad."[133]

The adversarialness that is created by the TPR process is not only off-putting to relatives, it also ends up delaying permanency for children and wasting scarce public dollars. As noted in Part I, when the State seeks to terminate parental rights, it often results in a highly contested trial that may last days, weeks, or sometimes months. The trial may drive a wedge in the family and may create even more distance between parents and those caring for their children. If a court terminates parental rights, an appeal may ensue – as it did in Adam's case – which might last several years. During all of this time, children languish in state custody.

In contrast, pursuing a custodial arrangement that does not involve terminating a parent's rights may result in a collaborative, consensual arrangement, like a guardianship. Research reveals that states that prioritized guardianship not only reduced the time to permanency for children in foster care, but they also saved considerable money due to the reduced numbers of days children spent in foster care.[134] For example, through a special guardianship waiver program, the Tennessee child protection system found that it had saved one million dollars.[135] Through a similar program, Illinois saved 54 million dollars over

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[133] 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, 510 (2005).
[134] US Dep't of Health and Human Services, SYNTHESIS OF FINDINGS, SUBSIDIZED GUARDIANSHIPS, CHILD WELFARE DEMONSTRATION DEMONSTRATIONS AT IV, 18 (2011).
[135] *Id.* at 4.

five years.[136] Establishing legally secure relationships through dispositions that did not require TPR saved money by expediting permanency for kids.

D. TPR Does Not Lead To More Permanent Placements

The harm that TPR inflicts on families and the system might be worth bearing if it led to more permanent, long-term placements for children. However, numerous studies by Mark Testa and others have shown that guardianships - which do not require terminating a parent's rights - are as legally secure as adoptions - which do require termination.[137] Testa found that a caregiver's commitment to the child, the child's sense of belonging, and the length of the placement bore very little relationship to the particular form of legal permanency chosen by the family.[138] Testa found that both guardianships and adoptions were quite stable once achieved, so there was no reason why the child protection system should necessarily favor one option over the other.[139] Based on the research, Testa concluded, "[i]n light of the absence of meaningful differences between guardianship and adoption for a child's sense of belonging and continuity of care, it is untenable to retain the [federal] requirement that a state" rule out adoption before providing a caregiver with a guardianship subsidy.[140] Even the federal government has conceded that children

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[136] *Id.* at 29.

[137] Testa, *supra* note 133, at 528; *See also* Coupet*, supra* note 128, at 610.

[138] Testa, *supra* note 133, at 528; *See also* Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997,* 4 MICH. ST. L. REV. 1079, 1090 (2013) (noting findings that the youth's desire for family connections were a far greater motivating factor in their desire for permanency than any notion of legal permanency).

[139] *Id.*

[140] Mark Testa, *Disrupting The Foster Care To TPR Pipeline: Making A Case For Kinship Guardianship As The Next Best Alternative For Children Who Can't Be Reunified With Their Parents*, 1(1) FAM. INTEGRITY AND JUST. Q. (2022).

discharged from foster care with legally secured guardianships have living arrangements just as stable as those in other legal statuses.[141]

While Testa's research demonstrates that termination of parental rights is unnecessary to afford children permanency, it is also important to note that statistics about the permanency of adoptions are incomplete, as most states do not track or report how many children re-enter foster care after an adoption.[142] Once a child is adopted, most states create a fresh federal identification number for that child.[143] Thus, in most states, it is simply impossible to track when an adopted child re-enters foster care. Only 16 states had federal identification numbers that allowed children from failed adoptions to be linked to prior foster care records.[144] Thus, any public reporting of the number of adopted children who once again enter foster care is likely an underestimate.

Even with these limited data, a recent study found that more than 66,000 adopted children ended up back in foster care between 2008 to 2020, an average of 12 a day.[145] A disproportionate number of those children were black; they faced more than a 50% greater risk of adoption failure than a white child.[146] After those adoptions failed and children re-entered foster care, 40% of those children spent

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[141] United States Dep't of Health and Human Services, *supra* note 131, at ii (noting no significant differences in entry to foster care between children in guardianships and adoptions).
[142] Bajak, Aleszu, *Broken Adoptions, Buried Records: How States' Adoption Data Is Failing Adoptees*, USA TODAY (May 19, 2022).
[143] *Id.*
[144] *Id.*
[145] Kwiatkowski, Marisa & Bajak, Aleszu, *Far From The Fairy Tale: Broken Adoptions Shatter Promises To 66,000 Kids In The US*, USA TODAY (May 19, 2022).
[146] *Id.*

time in group homes or institutional placements, such as a residential treatment facility.[147]

Neither these studies nor this Article is meant to suggest that an adoption is categorically inappropriate to meet the individual needs of children and their caretakers. When children have been severely harmed by their parents, or have been living with extended family for many years and parents have been completely absent, a termination of parental rights and a subsequent adoption might make some sense. But these studies should raise serious concerns about the overuse of TPRs under the false guise that it is necessary to achieve permanency for a child. That assertion is simply incorrect and has been disproven by multiple studies. Given the harms created by TPR and the research establishing the security of alternative custodial arrangements, a legal framework defaulting to TPR whenever reunification is ruled out is untenable.

IV. Unnecessarily Terminating Parental Rights Violates The Constitution

In addition to posing risks to the welfare of both children and parents, terminating a parent's rights also has significant constitutional implications – it erases a parent's constitutional right under the Fourteenth Amendment to direct the care, custody, and control of their child. This right, "perhaps the oldest of the fundamental liberty interests recognized,"[148] does not evaporate simply because [the parents] have not been model parents or have lost temporary custody of their

[147] *Id.*

[148] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

children to the state."[149] Rather, because "few consequences of judicial action are so grave as the severance of natural family ties,"[150] parents "faced with the forced dissolution of their parental rights have a more critical need for . . . protection than do those resisting state intervention into ongoing family affairs."[151]

Typically, when the state seeks to end a fundamental right, its actions are reviewed by courts under strict scrutiny. Under this standard, the state must demonstrate a compelling interest and show that its actions are narrowly tailored to achieve that interest,[152] that is, infringe upon a fundamental right "no more than the exact source of the evil it seeks to remedy."[153] The burden the state bears is an exacting one. To meet this burden, the government must demonstrate that "its purpose is both constitutionally permissible and substantial, and that its laws are necessary to the accomplishment of its purpose."[154] Where a statute is too broad, it is not narrowly tailored.[155] Rather, to survive strict scrutiny, it must further the state's compelling interest by the least restrictive means practically available.[156] In other words, the State cannot burden "more persons than necessary to cure the problem."[157]

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[149] *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).
[150] *M.L.B. v S.L.J.*, 519 U.S. 102, 119 (1996).
[151] *Santosky*, 455 U.S. 745, 753 (1982).
[152] *Citizens United v. Fed Election Comm'n*, 558 U.S. 310, 340 (2010).
[153] *Frisby v. Schultz*, 487 U.S. 474, 485 (1988); *see also Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).
[154] *Fisher v. University of Texas*, 570 U.S. 297, 309 (2013).
[155] *Zablocki*, 434 U.S. at 389-390.
[156] *Bernal v. Fainter*, 467 U.S. 216 (1984).
[157] Black's Law Dictionary 1278-1279 (10th ed. 2014).

While the United State Supreme Court has not had the opportunity to review the constitutionality of grounds for terminating parental rights, numerous state courts have made clear that this standard applies in assessing whether a TPR violates a parent's rights.[158] As stated succinctly by the Alabama Court of Appeals:

> That due-process right requires states to use the most narrowly tailored means of achieving the state's goal of protecting children from parental harm. Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). Thus, if some less drastic alternative to termination of parental rights can be used that will simultaneously protect the children from parental harm and preserve the beneficial aspects of the family relationship, then a juvenile court *must explore* whether that alternative can be successfully employed instead of terminating parental rights.[159] T.D.K. v. L.A.W., 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011) (emphasis added).[160]

Employing a strict scrutiny analysis would render many TPR decisions unconstitutional. Courts have repeatedly acknowledged that the State has compelling interests to keep children safe from unfit parents and to expedite their placement into permanent homes.[161] But the key question under this level of review is whether TPR is the least restrictive means available to accomplish the State's

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[158] *In the matter of the appeal in Maricopa County Juvenile Action No JS-7359*, 159 Ariz. 232, 236 (1989); *In re Welfare of C.B.*, 134 Wn. App. 336 (Wash. Ct. App. 2006); *In re Welfare of the Child of R.D.L.*, 853 N.W.2d 127 (Minn. 2014); *Ailport v. Ailport*, 2022 WY 43 (Wy. 2022); *State v. Abigail W.*, 797 N.W.2d 936 (Wisc. Ct. App. 2011); *In Interest of P.S.*, 766 S.W.2d 8331 (Tex. Ct. App. 1989); *In re D.C.D.*, 629 Pa. 325 (Pa. 2014); *Doe v. Doe*, 2017 Miss. App. LEXIS 62 (Miss. Ct. App. 2017); *Pitts v. Moore*, 2014 ME 59 (Me. 2014); *In re Adoption of K.A.S.*, 499 N.W.2d 558 (N.D. 1993); *In re the Adoption of J.K.W.*, 2007 Tenn. App. LEXIS 32 (Tenn. Ct. App. 2007); *Ex parte Beasley*, 564 So. 2d 950 (Ala. 1990); *Johnson v. Johnson*, 2000 ND 170, (N.D. 2000).

[159] *T.D.K. v. L.A.W.*, 78 So. 3d 1006, 1011 (Ala. Civ. App. 2011) (emphasis added).

[160] Numerous appellate courts in Alabama have struck down TPR decisions because other viable alternatives to TPR existed. *See*, *e.g.*, *B.A.M. v. Cullman County Dep't of Human Res.*, 150 So.3d 782 (Ala. Civ. App. 2014); *M.H. v. Calhoun County Dep't of Human Res.*, 848 So. 2d 1011 (Ala. Civ. App. 2002) *Ex Parte State Dep't of Human Res.*, 624 So. 2d 589 (Ala. 1993); Ex Parte Ogle, 516 So.2d 243 (Ala. 1987); *Moore v. Dep't of Pensions and Sec.*, 470 So.2d 1269 (Ala. Civ. App. 1985).

[161] *See*, *e.g.*, *Santosky*, 455 U.S. 745 at 766 (noting that the State's interest in a child protection proceeding is to keep a child safe and provide that child with a permanent home).

objectives. In other words, do any alternatives exist that could provide children with safety and permanency without terminating their parental rights? If so, then terminating that parent's rights would be constitutionally impermissible.

As noted above, research by Mark Testa and others demonstrates that other forms of permanency - mainly guardianships - are as permanent as adoptions but do not require terminating a parent's rights. Courts can order guardianships in a wide array of situations in which a child is living with either kin or non-kin.[162] Additionally, tribal courts have long permitted customary adoptions, which permit caregivers to adopt children while keeping parental rights intact.[163] California, Minnesota, and Washington all have laws permitting state courts to order customary adoptions in cases involving Indian children.[164] There is no reason why that practice could not be extended to all families in the foster care system.

When a child is living with another parent, permanency could be pursued through a private custody order, which again does not require a parent's rights to be terminated. Such orders - once entered into - are difficult to modify and require the parent who wants to change the order to demonstrate that there has been a substantial and material change of circumstances since the entry of the order and

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[162] Gupta-Kagan, *The New Permanency*, at 14-29, *supra* note 20.

[163] Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 L. AND INEQ. 401 (2012).

[164] *Id.* at 403.

that the modification is in the child's best interests. Appellate courts across the country have developed extensive case law applying this standard.[165]

The Constitution requires the foster care system to develop options that could keep children safe in permanent homes while also preserving parental rights whenever possible. For example, the federal government should offer subsidies to anyone who cares for a child long-term via a custody or guardianship arrangement, and not limit subsidies to those who adopt children or to relative caregivers who seek a guardianship, as it does right now.[166] The federal government should also require states, as a condition of receiving federal funding, to demonstrate that termination of parental rights is the least restrictive option to further the State's interest and TPR is necessary to achieve permanency for the child.

Until such a framework is adopted in a jurisdiction, advocates should challenge the constitutionality of TPR statutes, both on substantive grounds concerning a parent's fitness and whether TPR is the least restrictive alternative. For example, advocates have persuaded state courts to invalidate statutes permitting TPRs based solely on a parent's prior TPR,[167] on the fact that a child had spent a certain amount of time in foster care,[168] or on specific criminal convictions that failed to establish a parent's current unfitness.[169]

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[165] *See, e.g. Vodvarka v. Grasmeyer*, 259 Mich. App. 499, 513 (Mich. Ct. App. 2003) (holding that a custody order may only be modified when "the conditions surrounding custody of the child, which have or could have a significant effect on the child's well-being, have materially changed.").

[166] 42 U.S.C 673(d) (limiting federal guardianship subsidies to kinship caregivers).

[167] *In re Gach*, 315 Mich. App. 83 (Mich. Ct. App. 2016).

[168] *In re H.G.,* 757 N.E.2d 864, 874 (Ill. 2001).

[169] *In re S.F.*, 834 N.E.2d 453, 451 (Ill. App. Ct. 2005).

Additionally, advocates have succeeded in persuading courts to reverse TPRs where less restrictive alternatives, like a guardianship or a custody order, were available that would serve the state's interests while preserving the parent-child relationship.[170] If advocates have constitutional concerns with the state's actions, they should file a motion in the trial court raising those concerns to preserve issues for appellate review.

V. Conclusion

The child protection system severs the legal relationship between children and their parents in a manner that ignores both the fundamental rights of parents and the emotional needs of children and their families. Actors within the system have become complacent to this reality, blindly accepting the prevalence of TPRs as a necessary component of a functioning system. It is our hope that this Article will cause some to pause and reflect about why the child protection system must terminate the relationship between a parent and their child so often. Although admittedly, reflection might not be enough:

> I believe writing can be a moral instrument if it asks you to do more than read. *Do you?* How many times will you witness people being starved or worked to death, driven out of their homelands, the land blasted and lives destroyed, and be only quietly horrified? When will you finally be repulsed enough to throw a wrench in the works? When will

[170] *See, e.g.*, *L.M.W. v. D.J.*, 116 So.3d 220 (Ala. Civ. App. 2012) (holding that given the child's and parent's wishes to maintain a relationship, TPR was not in the child's best interest despite the grandparent's preference for adoption); *Matter of A.K.O.*, 850 S.E.2d 891 (N.C. 2020) (reversing TPR because 15 year old child had a strong bond with her parents, did not consent to adoption and TPR was unnecessary for legal guardianship); *Matter of R.D.D.G*, 442 P.3d 1100 (Or. 2019) (reversing TPR concluding that legal guardianship would preserve the child's relationship with her birth mother and extended family).

> you allow curiosity and integrity to tip over into urgency? *I'm asking you.* I'm asking myself to dig deep enough for the truth to flood in.[171]

Thus, our hope can also be characterized as one urging advocates "to throw a wrench in the works." Use the law, the data, and the research to demand systemic reforms that will relegate the use of TPR to only those rarest of circumstances when no alternative exists to satisfy the state's interest.

[171] IMANI PERRY, SOUTH TO AMERICA: A JOURNEY BELOW THE MASON-DIXON TO UNDERSTAND THE SOUL OF A NATION, 382 (HarperCollins 2022) (emphasis added).

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Abstract=
This Article explores the unnecessary termination of a child's relationship with their parent from an empirical, clinical, and constitutional lens. Part I explores administrative data related to TPR, which like many child protection metrics, resembles nothing short of a wild west of practices and policies relating to how often and how fast child protection systems terminate parental rights. These data also reveal how TPR can unnecessarily delay legal permanency for children, particularly those children who are living with extended family, and how a State pursuing TPR can drain its own scarce resources, a system perpetually decrying insufficient resources.
Part II highlights the clinical research showing the need for children to have relationships with their birth parents, even with those who might be unable to care for them. This section also summarizes the research documenting the trauma experienced by parents who have their parental rights terminated, which might impact the parent's ability to care for other children in the future.
Part III discusses the unconstitutional features of the child protection system's overutilization of TPR. Well-established principles of constitutional law require courts to search for less restrictive alternatives prior to infringing on individuals' fundamental rights, like the right to direct the care of one's child. Still, child protection systems stubbornly persist in terminating parental rights, a thinly veiled effort held out as a means to achieve legal permanency for children despite TPR being neither necessary nor sufficient to achieve legal permanency for children.

Keypoints=
-Terminating a child's relationship with their parent can inflict significant harm on the entire family.
-States vary on how often and how quickly they terminate parental rights.

-Unnecessarily terminating a parent's rights can needlessly delay legal permanency for children can drain scarce systemic resources.
-Terminating a parent's rights, where other less intrusive alternatives exist, raises serious constitutional concerns.

Keywords: foster care, family court, termination of parental rights, constitutional law, trauma, children