

**2022 CHILDREN IN COURT EDUCATION CONFERENCE**  
*Virtual*  
**Wednesday, March 23, 2022**

**Redefining How we Think about Permanency and APPLA**

We are accustomed to thinking about permanency in legal terms, such as reunification, adoption, or kinship legal guardianship. But other disciplines, apart from the law, define permanency as not only focusing on the legal dimensions but also three other components: physical, relational, and cultural. By hearing from youth with lived experience, this workshop will encourage all of us to think more broadly about permanency and also will highlight the importance of including youth in the process. The workshop will begin with a brief discussion on the different meanings of and perspectives on permanency. We then will have a facilitated discussion with three current or former foster youth on what their understanding of permanency has been - both generally and for each of them individually. The workshop will then conclude with Niambi London from the Office of Adolescent Services presenting on the most recent services and programs available to assist youth ages 14-21 to achieve permanency, however the youth is defining it.

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Additional Faculty TBA*

Additional materials will be distributed post event

## RE-EXAMINING AND RE-DEFINING PERMANENCY FROM A YOUTH'S PERSPECTIVE

RANDI MANDELBAUM\*

*Why do you guys keep asking me if I want to be adopted? You know it's not going to happen . . . . And I already have a Mama . . . . Why don't you guys ever talk about her?*<sup>1</sup>

### I. INTRODUCTION

Child welfare and judicial systems, while well-intentioned, are failing our older foster children—defined as children twelve years of age and older.<sup>2</sup> Federal and state laws mandate that efforts be made to find

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\* Clinical Professor of Law, Annamay Sheppard Clinical Scholar, and Director, Child Advocacy Clinic, Rutgers-Newark School of Law. This Article is dedicated to the many foster youth who have touched me in so many ways and who have framed my perspective on what family means and should mean. Your resilience and perspective is both awe-inspiring and, at times, heart-wrenching. I am also eternally grateful to Rutgers-Newark law student, Sarah Fletcher, for her phenomenal and invaluable research assistance. This Article would not have been possible without her assistance. And finally, a special thank you to the organizers of the 10th Annual Wells Conference on Adoption Law for permitting me to present my ideas for this Article and to the attendees for providing me with such insightful feedback.

<sup>1</sup> This is a quote from a former client. In her case, “Mama” was a former staff person from a congregate care facility, where she had once resided, with whom she maintained a relationship even after my former client and “Mama” were no longer involved with the facility. In many other situations, however, “Mama” is actually the youth’s biological mother, regardless of whether parental rights have been terminated.

<sup>2</sup> While this Article defines “older” children or youth as children aged twelve and above, it is important to acknowledge three points. First, all children develop at their own unique pace and, consequently, have different needs at varying times. *See* Laura Cohen & Randi Mandelbaum, *Kids Will Be Kids: Creating a Framework for Interviewing and Counseling Adolescent Clients*, 79 TEMP. L. REV. 357, 361–68 (2006). Second, some policies and legislative mandates may define “older” children or youth differently. *See id.* Where this is the case, it will be noted. And finally, it is important to acknowledge the comprehensive body of literature from the fields of social work, psychology, and medicine (neuroscience) indicating youth develop their emotional functioning, ability to reason, and maturity of judgment well into their twenties. *See id.* Thus, while most child welfare systems end their assistance somewhere between the ages of eighteen and twenty-one, most youth continue to need additional support both financially and emotionally. Some have termed this lengthened process of transitioning to adulthood as “emerging adulthood.” *See* JEFFREY JENSEN ARNETT,

permanent families for all children placed in foster care, first, by reunifying them with their birth families or, when this is not possible, by securing alternate families through adoption or guardianship.<sup>3</sup> Yet, for children older than age twelve in the foster care systems, there is less than a 50% chance this goal will be accomplished.<sup>4</sup>

While calls to better recruit and secure lasting and legally binding families for these youth must be heeded, a realistic approach that recognizes the systems are broken and the need for a drastic re-focusing is necessary. The current unrealistic expectations cause youth to feel rejected. Worse yet,

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ADOLESCENCE AND EMERGING ADULTHOOD: A CULTURAL APPROACH xii (5th ed. 2012). See also JEANNE HOWARD & STEPHANIE BERZIN, NEVER TOO OLD: ACHIEVING PERMANENCY AND SUSTAINING CONNECTIONS FOR OLDER YOUTH IN FOSTER CARE 1, 15–16 (Susan Smith & Adam Pertman eds., 2011); Rosemary J. Avery, *An Examination of Theory and Promising Practice for Achieving Permanency for Teens Before They Age Out of Foster Care*, 32 CHILD. & YOUTH SERVICES REV. 399, 400 (2010); EMILY BUSS ET AL., FROM FOSTER CARE TO ADULTHOOD: UNIVERSITY OF CHICAGO LAW SCHOOL FOSTER CARE PROJECT’S PROTOCOL FOR REFORM 11 (2008).

<sup>3</sup> See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113–183, § 475A, 128 Stat. 1919 (2014).

<sup>4</sup> See Christine Diedrick Mochel, *Redefining “Child” and Redefining Lives: The Possible Beneficial Impact The Fostering Connections to Success Act and Court Involvement Could Have on Older Foster Care Youth*, 40 CAP. U. L. REV. 517, 518 (2012) (“About 50% of youth in foster care are between the ages of nine and twenty, but over 70% of the children adopted are under the age of nine.”). In response to the low number of older youth being adopted, numerous specialized and creative programs have been developed around the country to identify, recruit, and make concerted and special efforts to match youth with caring and committed adults. *Enhancing Permanency for Youth in Out-of-Home Care*, CHILD WELFARE INFO. GATEWAY 10 (May 2013), <https://www.childwelfare.gov/pubs/focus/enhancing/enhancing.pdf> [hereinafter *Enhancing Permanency*]. One such program is “You Gotta Believe” (YGB) in New York City, which has been touted as being highly successful, but which still only has a success rate of approximately 50%. *Id.* (“In one 4-year federally funded study, 98 of the 199 youth referred to YGB achieved permanency.”). “You Gotta Believe is one of a precious few organizations in the U.S[.] and the only organization in the New York City Metro area that limits its practice to finding permanent parents and families for young adults, teens, and pre-teens in the foster care system.” *Mission & Philosophy*, YOU GOTTA BELIEVE, <http://yougottabelieve.org/about-us/mission-philosophy/> (last visited July 4, 2014). Likewise, permanency roundtables, initiated by Casey Family Programs in Georgia, had a success rate of 34% for teens at the 24-month follow-up mark. *Enhancing Permanency*, *supra*, at 13. “Permanency Roundtable [is a] process designed to help youth who had been in foster care the longest achieve permanency and to help staff learn new ways of addressing permanency barriers.” *Id.*

the lack of focus on stability and committed adult connections causes too many youth and young adults to leave foster care homeless, without having graduated from high school, and without the necessary emotional and financial foundations to make it on their own.<sup>5</sup> These negative outcomes will continue unless a serious re-evaluation of the overall objectives for older foster youth is undertaken and different, creative suggestions are made for this population.

This Article takes a critical look at the mandate of “permanency.” In Part I, the “numbers” are examined to clarify from the outset how many youth are waiting to be adopted; how many youth actually achieve “permanency” through adoption or guardianship; and how many have alternate “permanency” goals.<sup>6</sup> Then, in Part II, several studies and surveys are reviewed; these studies and surveys document how youth who “age out” of foster care are faring.<sup>7</sup>

With these outcomes in mind, Parts III and IV take a closer look at the term “permanency”: how it is defined in law and policy; how youth view the term; what youth are stating they need; and the often destructive effects on youth when permanency is not achieved.<sup>8</sup> In doing so, a broader and more contextualized understanding of permanency is explored. Part V then concludes with some specific recommendations. It calls for a re-framing of objectives for older foster youth with less emphasis on the goal of legally binding ties and an increased focus on stability, particularly with regard to a youth’s living situation, emotional support, and need to remain connected with biological family members. In fact, it is proposed that for older foster youth the term “achieving permanency” should be replaced with the term “achieving stability and connections.” Part V highlights the need for statutory reform and offers guidance to courts to help make these goals a reality and improve the long term prospects for older foster youth.<sup>9</sup>

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<sup>5</sup> GINA MIRANDA SAMUELS, A REASON, A SEASON, OR A LIFETIME: RELATIONAL PERMANENCE AMONG YOUNG ADULTS WITH FOSTER CARE BACKGROUNDS 2 (2008), available at [http://www.chapinhall.org/sites/default/files/old\\_reports/415.pdf](http://www.chapinhall.org/sites/default/files/old_reports/415.pdf).

<sup>6</sup> See discussion *infra* Part II.

<sup>7</sup> See discussion *infra* Part III.

<sup>8</sup> See discussion *infra* Parts IV & V.

<sup>9</sup> See discussion *infra* Part VI.

## II. THE NUMBERS

Roughly 25,000 youth “age out” of foster care in the United States each year.<sup>10</sup> Stated differently, since 2009, approximately 10% of children in foster care emancipate from this system each year.<sup>11</sup> This is up from 7% in 2002.<sup>12</sup> Depending on the state, youth must leave care at eighteen years of age, twenty-one years of age, or somewhere in-between.<sup>13</sup> Even in states where youth can remain in foster care until the age of twenty-one, many do not take advantage of this opportunity.<sup>14</sup> Instead, they choose to emancipate from care—often because they are fed up and frustrated.<sup>15</sup>

Other data reveals additional information about older youth in foster care. First, children eleven years of age or older account for nearly half

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<sup>10</sup> See U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, CHILDREN’S BUREAU, THE AFCARS REPORT 3 (2013) [hereinafter AFCARS], available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport20.pdf> (reporting 23,396 children emancipated from foster care in FY 2012). See also MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26 2 (2011), available at [http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation\\_Report\\_4\\_10\\_12.pdf](http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf) (reporting that approximately 28,000 children age out of foster care annually). This Article will use the terms “age out” and “emancipate” synonymously to refer to the formal end of the legal relationship between the State (typically represented by a state or local child welfare agency) and a youth, who prior to the age of majority was in the custody of the State (foster care). In most states, the age of majority is eighteen. See *Termination of Support-Age of Majority*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/termination-of-child-support-age-of-majority.aspx> (last updated Jan. 2014). In some states, youth will be able to remain involved with the child welfare agency until the age of twenty-one. See *id.* In other states, such involvement will end at eighteen. See *id.* And in still others, it will be something in between the age of eighteen and twenty-one. See *id.* The Foster Connections to Success and Increasing Adoptions Act, which was enacted in 2008 and went into effect in 2010, permits cases to remain open until the age of twenty-one and provides funding for states that choose to avail themselves of this option. See Foster Connections to Success and Increasing Adoptions Act of 2008 § 201, 42 U.S.C. § 675(8)(B)(iii) (2012).

<sup>11</sup> See AFCARS, *supra* note 10, at 1.

<sup>12</sup> See U.S. DEP’T OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN AND FAMILIES, CHILDREN’S BUREAU, THE AFCARS REPORT 8 (2006) [hereinafter AFCARS-2002], available at <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport12.pdf>.

<sup>13</sup> Henrika McCoy et al., *Older Youth Leaving the Foster Care System: Who, What, When, Where, and Why?*, 30 CHILD. & YOUTH SERVICES REV. 735, 735 (2008).

<sup>14</sup> *Id.* at 743.

<sup>15</sup> *Id.* at 742–43.

(42%) of the children in foster care.<sup>16</sup> Moreover, the percentage of older children leaving care to be adopted dropped over the past decade. Between FY2002 and FY2010, the percentage of children ages nine and older who were adopted decreased from 32% to 26%.<sup>17</sup>

Race is also a factor. Between 2000 and 2012, the percentage of African American children *adopted* ranged between five and nine percentage points lower than the percentage of African American children *waiting* to be adopted.<sup>18</sup> This is in contrast to white and Latino children, where the

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<sup>16</sup> See AFCARS, *supra* note 10, at 1.

<sup>17</sup> HOWARD & BERZIN, *supra* note 2, at 28. “In FY 2011, only 26.1 percent of all adoptions were of children ages 9 and older . . . . At the same time, 40.6 percent of children waiting for adoption were age 9 or older in FY 2011.” Heather Swope, *The Challenge of Older Youth Adoptions From Foster Care*, 25 THE ROUNDTABLE 1 (2012). “The 2011 child welfare data also shows that only twelve percent of the waiting children lived in pre-adoptive homes.” Meredith L. Schalick, *Bio Family 2.0: Can the American Child Welfare System Finally Find Permanency for “Legal Orphans” with a Statute to Reinstate Parental Rights?*, 47 U. MICH. J. L. REFORM 467, 474 (2014).

The median age of children adopted from foster care declined by over one full year between 1998 and 2010. This figure was either 6.3 or 6.4 in fiscal years 1998 through 2002, but then it started to decline, falling to 5.6 by FY2005, then to 5.2 in FY2007, where it has remained. . . . “These data suggest ASFA has not affected the adoption of older children.”

HOWARD & BERZIN, *supra* note 2, at 28 (quoting long-time adoption statistical analyst Penny Maza). There is limited research on why older children are not being adopted, but both the age at removal from the parent’s home and the child’s current age are seen as predictive factors. Sonya J. Leathers et al., *Predicting Family Reunification, Adoption, and Subsidized Guardianship Among Adolescents in Foster Care*, 80 AM. J. OF ORTHOPSYCHIATRY 422, 423 (2010). Moreover, youth who were able to develop positive relationships with foster parents were more likely to be adopted. *Id.* at 428. This was true regardless of whether the youth experienced behavioral or educational difficulties. *Id.*

<sup>18</sup> See AFCARS-2002, *supra* note 12, at 9, 12 (reporting that in FY 2000 44% of children waiting to be adopted were African American, while 38% of children adopted were African American); AFCARS *supra* note 10, at 4–5 (reporting that in FY 2012 26% of children waiting to be adopted were African American, while 23% of children adopted were African American). See also Schalick, *supra* note 17, at 475–76 (“Between 2000 and 2011, the adoption percentage of Black children has consistently been between five and nine percentage points lower than the percentage of waiting Black children.”).

percentages of children adopted matched the percentages of children waiting to be adopted.<sup>19</sup>

In terms of actual numbers, the U.S. Department of Health and Human Services (HHS) estimates there are roughly 102,000 children waiting to be adopted.<sup>20</sup> “This . . . figure includes children who have a goal of adoption and/or whose parental rights have been terminated.”<sup>21</sup> While some of these children will be adopted, many will not—especially those who are twelve years of age and older.<sup>22</sup> In fact, roughly 50,000 children have been waiting three or more years for an adoptive family.<sup>23</sup> “[This number] does not, however, include children sixteen years old and older whose parental rights have been terminated and who have a permanency goal of emancipation.”<sup>24</sup>

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<sup>19</sup> See AFCARS-2002, *supra* note 12, at 9, 12 (reporting that in FY 2000 34% of children waiting to be adopted were white and 13% were Hispanic, while 38% of children adopted were white and 15% were Hispanic); AFCARS, *supra* note 10, at 4–5 (reporting that in FY 2012 41% of children waiting to be adopted were white and 23% were Hispanic, while 46% of children adopted were white and 21% were Hispanic). See also Schalick, *supra* note 17, at 476 (“White children . . . were forty percent of waiting children and forty-five percent of adoptions, [and] . . . Hispanic children . . . were twenty-two percent of waiting children and twenty-one percent of adoptions in 2011.”).

<sup>20</sup> AFCARS, *supra* note 10, at 1 (reporting that 101,666 children were waiting to be adopted on September 30, FY 2012).

<sup>21</sup> LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-terminating Parental Rights*, 17 VA. J. SOC. POL’Y & L. 318, 326 (2010). See also AFCARS, *supra* note 10, at 1.

<sup>22</sup> See Ruth G. McRoy & Elissa Madden, *Youth Permanence Through Adoption, in ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 244, 244 (Benjamin Kerman et al. eds., 2009). Children for whom parental rights have been terminated but who never are adopted are often referred to as “legal orphans.” Dale Margolin, *Every Adolescent Deserves a Parent*, 40 CAP. U. L. REV. 417, 420 (2012) (defining “legal orphans” as children whose “parents’ rights were terminated while they were in foster care, and they were never adopted”). Stated differently, the state has terminated the parental rights of their biological parents, but has not replaced them with a new set of parents. See Taylor, *supra* note 21, at 325–26. Thus, they are effectively “legal orphans.” See *id.*

<sup>23</sup> McRoy & Madden, *supra* note 22, at 244. See also Schalick, *supra* note 17, at 474 (“Additionally, the 2011 data indicates that, on average, twenty-three months had elapsed since the rights of waiting children’s parents had been terminated. In other words, legal orphans in the American child welfare system were still waiting for a new family two years after their parents’ rights were terminated.”).

<sup>24</sup> Taylor, *supra* note 21, at 326; HOWARD & BERZIN, *supra* note 2, at 28 (“Youth 16 or older whose parents’ rights have been terminated and have a goal of emancipation are not included in the count of ‘waiting children.’”). In addition, there is also a small subset of

“Thus, this estimate is both over- and under-inclusive” as to the number of youth who will be emancipated from the system without an adoptive parent or legal guardian.<sup>25</sup>

### III. OUTCOMES FOR YOUTH WHO “AGED OUT”

It is crystal clear that the youth aging out of the foster care systems are not faring well.<sup>26</sup> Numerous studies in the last decade documented what those working in the field have known for years—former foster youth are struggling and face a myriad of challenges.<sup>27</sup> To put it bluntly, the outcomes for emancipated foster youth are abysmal, especially when compared to their non-foster youth peers.<sup>28</sup>

The most comprehensive study to date was performed by the Chapin Hall Center on Children at the University of Chicago.<sup>29</sup> This study followed youth in three states—Illinois, Iowa, and Wisconsin—from the ages of seventeen through twenty-six by checking in on as many of the youth as possible roughly every two years.<sup>30</sup> The final survey, conducted at the ages

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youth who have a permanency goal of emancipation whose parental rights have not been terminated. *See id.* at 11–12.

<sup>25</sup> Taylor, *supra* note 21, at 326.

<sup>26</sup> *See* Avery, *supra* note 2, at 399 (“The majority of youth who age out of foster care face enormous challenges.”); Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 232 (2006) (acknowledging and summarizing the serious and numerous challenges faced by youth who age out of foster care).

<sup>27</sup> *See* Madelyn Freundlich et al., *The Meaning of Permanency in Child Welfare: Multiple Stakeholder Perspectives*, 28 CHILD. & YOUTH SERVICES REV. 741, 744 (2006); COURTNEY ET AL., *supra* note 10, at 25–26; McCoy et al., *supra* note 13, at 735–45 (studying the outcomes of youth in eight counties in Missouri); THE FOSTER CARE ALUMNI STUDIES, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 1 (2005) [hereinafter CASEY] (examining, through case records and interviews, the outcomes for 659 former foster youth from Oregon and Washington during the period from September 2000 through January 2002); Thom Reilly, *Transition from Care: Status and Outcomes of Youth Who Age Out of Foster Care*, 82 CHILD WELFARE 727, 729 (2003) (interviewing 100 former foster youth—out of care for at least 6 months—from Nevada’s foster care system from September 2000 to January 2001 in order “to better understand the issues and challenges faced by youth formerly in foster care”).

<sup>28</sup> *See* COURTNEY ET AL., *supra* note 10, at 6; Reilly, *supra* note 27, at 740–41.

<sup>29</sup> *See* COURTNEY ET AL., *supra* note 10, at 3.

<sup>30</sup> *See id.* at 3–5. It is significant to note that only in Illinois could youth keep their child welfare case and court case open beyond the age of eighteen. CLARK PETERS ET AL., CONTINUING IN FOSTER CARE BEYOND AGE 18: HOW COURTS CAN HELP 1 (2008) (reporting that Illinois extends foster care services to youth up to age 21).



of 25–26, was very revealing. It not only illustrated how the youth were faring several years after they left foster care, but it compared outcomes of foster youth with non-foster youth of the same age.<sup>31</sup>

In all areas, former foster youth who aged out of the system experienced tremendous difficulties. Educational deficits, economic insecurities, homelessness, and untreated mental illnesses were common.<sup>32</sup> In addition, many of the female youth had children at unstable points of their lives.<sup>33</sup> Other youth in this population, especially males, ended up in the criminal justice system.<sup>34</sup>

Most former foster youth did not go to college.<sup>35</sup> By the ages of 25–26, only 4% of the surveyed youth completed a two-year college degree, and another 4% had degrees from a four-year college.<sup>36</sup> Compared to other young adults, former foster youth were three times less likely to have a high school diploma or GED and nine times less likely to have completed a four-year college degree.<sup>37</sup>

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<sup>31</sup> See COURTNEY ET AL., *supra* note 10, at 4–5.

<sup>32</sup> See *id.* at 6. With regard to mental health concerns, a study of former foster youth in the Northwest Alumni Study showed that within one year of leaving foster care, 54.4% of the youth “had clinical levels of at least one mental health problem, such as depression, social phobia, panic syndrome, post-traumatic stress disorder [(PTSD)], or drug dependence.” CASEY, *supra* note 27, at 1. Roughly 20% had three or more mental health disorders, and roughly 25% percent experienced PTSD. *Id.*

<sup>33</sup> See COURTNEY ET AL., *supra* note 10, at 74. In the study of 25- and 26-year-olds, nearly 80% of the former foster youth reported being pregnant, as compared to 55% of the non-foster care youth, with 41.6% of the female foster youth having had at least two children by the age of twenty-six. *Id.* at 74, 82. Moreover, 67.2% of the male former foster youth reported that they had impregnated a female, as compared to 39% of non-foster care male young adults. *Id.* at 77.

<sup>34</sup> See *id.* at 90 (“One-third of the young men and 18 percent of the young women in the Midwest Study reported engaging in at least one of 17 illegal behaviors during the past year.”).

<sup>35</sup> See COURTNEY ET AL., *supra* note 10, at 20. Many are not even finishing high school; by age twenty-five or twenty-six, 17.3% of the women and 23.2% of the men in the Chapin Hall study still do not have a GED or high school diploma. *Id.*

<sup>36</sup> *Id.* Although many more former foster youth appear to be trying out college, they are unable to complete it. *Id.* The Chapin Hall Study showed that 33% of the men and 45% of the women surveyed completed one year of college. *Id.* These outcomes are consistent with the study from the Northwest where only 2.7% were found to have completed college. CASEY, *supra* note 27, at 2.

<sup>37</sup> COURTNEY ET AL., *supra* note 10, at 21.

Many former foster youth also experience economic hardships upon leaving foster care and continue to suffer from these adversities for many years thereafter. In the Chapin Hall study, by the ages of 23–24, nearly 40% of the foster youth were homeless or had “couch-surfed” since exiting foster care.<sup>38</sup> Unemployment was also a pervasive problem. Although 94% reported that they held a job since leaving foster care, only 46% of the 25–26 year olds were working at the time of the survey compared to 80% of the non-foster youth population.<sup>39</sup> Moreover, if the foster youth was working, their earned income was very low.<sup>40</sup> This leads to numerous financial insecurities. In fact, approximately half of the foster youth who participated in the Chapin Hall study reported experiencing at least one of five “material hardships” compared to 20% of non-foster youth.<sup>41</sup>

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<sup>38</sup> AMY DWORSKY & MARK COURTNEY, ASSESSING THE IMPACT OF EXTENDING CARE BEYOND AGE 18 ON HOMELESSNESS: EMERGING FINDINGS FROM THE MIDWEST STUDY 1, 3 (2010). The study showed:

[A]lmost 30 percent of the young people in our study reported that they had been homeless for at least one night since exiting foster care. Being homeless was defined as “sleeping in a place where people weren’t meant to sleep, or sleeping in a homeless shelter, or not having a regular residence in which to sleep.” Nearly as many reported that, since exiting foster care, they had ever couch-surfed, which we defined as ‘moving from one temporary housing arrangement provided by friends, family, or strangers to another.

*Id.* Likewise, in the Nevada study, 36% indicated that there were times when they did not have a place to live since leaving foster care. Reilly, *supra* note 27, at 736. “Numerous studies have shown that a high percentage of the homeless population on the streets of U.S. cities and towns are former foster care youth.” Avery, *supra* note 2, at 403.

<sup>39</sup> COURTNEY ET AL., *supra* note 10, at 28.

<sup>40</sup> See Avery, *supra* note 2, at 403. The median annual income for former foster youth was \$8,950 as compared to \$27,310 for non-foster care young adults. COURTNEY ET AL., *supra* note 10, at 36. These outcomes were corroborated by the study conducted in Nevada where “60% [of the former foster youth] had an annual household income of \$10,000 or less, 34% made less than \$5,000 in 1999, and 41% indicated that they did not have enough money to cover basic living expenses.” Reilly, *supra* note 27, at 735.

<sup>41</sup> COURTNEY ET AL., *supra* note 10, at 39. Material hardship is defined as insufficient income to pay for rent or utilities or circumstances which led to a utility cut-off, phone service disconnection, or eviction. See *id.* Additionally, many former foster youth reported that they were receiving governmental financial assistance, specifically, 76% of the females and 47% of the males. See *id.* at 43–44.

## IV. FEDERAL LAW AND OLDER FOSTER YOUTH

Some efforts are being made at the federal, state, and local levels to improve these outcomes, but clearly more needs to be done as many vexing challenges persist. Two federal statutes are relevant to child welfare policies and programs for older foster youth. The first statute, targeted exclusively at this population, is known as the Foster Care Independence Act of 1999 (FCIA).<sup>42</sup> The FCIA along with its 2001 amendments, the Educational and Training Vouchers Program for Youths Aging Out of Foster Care (ETV), created a federal program aimed at providing federal funds for independent living housing programs, transitional services, and financial assistance for college or vocational programs for youth likely to remain in foster care until the age of eighteen.<sup>43</sup> The overarching goal of the FCIA and the ETV program is to help youth transition into adulthood and self-sufficiency.<sup>44</sup>

The second relevant federal statute is the Adoption and Safe Families Act (ASFA) of 1997<sup>45</sup> including its amendments contained in the Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections) and the Preventing Sex Trafficking and Strengthening Families Act, which was signed into law by President Obama on September 29, 2014.<sup>46</sup> These statutes are not aimed exclusively at older foster youth,

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<sup>42</sup> 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.).

<sup>43</sup> *See id.* Specifically, FCIA authorizes \$140 million per year in funding and up to \$60 million is made available each year for the Educational and Training Voucher Program. *Id.* § 677(h).

<sup>44</sup> *See id.* § 101(a)(1); *John H. Chafee Foster Care Independence Program*, U.S. DEP'T OF HEALTH & HUM SERVICES, CHILD. BUREAU (June 28, 2012), <http://www.acf.hhs.gov/programs/cb/resource/chafee-foster-care-program>.

<sup>45</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.). In actuality, the Adoption and Safe Families Act is an extension of the Adoption Assistance and Child Welfare Act of 1980.

<sup>46</sup> Foster Connection to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified in scattered sections of 42 U.S.C.). At the federal level, Fostering Connections, which went into effect in 2010, has increased federal funds for older youth, making it more enticing for states to maintain youth as part of their foster care systems until the age of twenty-one. *Id.* § 201. Fostering Connections also amended FCIA to allow services and the Education and Training Voucher program for youth who leave foster care for kinship guardianship or adoption after the age of sixteen. *Id.* For a succinct, but comprehensive, listing of the major provisions of Foster Connections, *see Fostering Connections to Success and Increasing Adoptions Act of 2008*, Pub.L. 110-351, CHILD WELFARE INFO. GATEWAY, [https://www.childwelfare.gov/systemwide/laws\\_policies/federal/](https://www.childwelfare.gov/systemwide/laws_policies/federal/)

but rather set forth comprehensive statutory schemes concerning child welfare policy and practice.<sup>47</sup> One of the defining accomplishments of ASFA was developing the notion of “permanency” for all children in the foster care system.<sup>48</sup> ASFA created legislative mandates requiring timely efforts to be made to identify and secure permanent families for all children.<sup>49</sup> Specifically, ASFA requires that courts hold permanency

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index.cfm?event=federalLegislation.viewLegis&id=121 (last visited July 8, 2014). More recently, states are also required to participate in the National Youth in Transition Database—a program aimed at acquiring data at the federal level on how emancipating foster youth are faring, what services they are accessing, and which programs and supports are most worthwhile, in addition to demographic information. See *NYTD*, U.S. DEP’T OF HEALTH & HUM. SERVICES, CHILD. BUREAU, <http://www.acf.hhs.gov/programs/cb/research-data-technology/reporting-systems/nytd> (last visited July 8, 2014) (“States began collecting data in 2010, and the first data set was submitted in May 2011.”). See also Trafficking and Strengthening Families Act, Pub. L. No. 113–183, 128 Stat. 1919 (2014); *Preventing Sex Trafficking and Strengthening Families Act (H.R. 4980)*, CHILD. DEFENSE FUND, (Oct. 2014), <http://www.childrensdefense.org/library/data/fact-sheet-on-hr-4980.pdf>. In addition to requiring states and state agencies to develop policies and procedures for identifying, documenting, and determining appropriate services for children who are victims, or at risk of becoming victims of sex trafficking, this new law expands on existing federal laws which strongly encourage permanency through adoption and guardianship. § 102–105, 128 Stat. 1919. The new law also mandates states to implement a “reasonable and prudent parent standard” for decisions made by foster parents or staff at congregate care facilities. § 111, 128 Stat. 1919. Such a standard would permit foster parent to make routine parental decisions that maintain the health and safety of a given child, but also permit the child to participate in age-appropriate extracurricular, enrichment, and other social activities.

<sup>47</sup> See Foster Connection to Success and Increasing Adoptions Act § 201, 42 U.S.C. § 675(8) (2012); Foster Care Independence Act § 101, 42 U.S.C. § 677 (2012); Adoption and Safe Families Act § 101, 42 U.S.C. § 671(a)(15) (2012). States must follow these statutes and their implementing regulations in order to receive necessary federal funding. See, e.g., Adoption and Safe Families Act § 203(a)(4), 42 U.S.C. § 670 (2012) (directing the Secretary of Health and Human Services to “prescribe such regulations as may be necessary to ensure that States provide to the Secretary the data necessary to determine State performance with respect to each outcome measure, as a condition of the State receiving funds under this part”).

<sup>48</sup> See Penelope L. Maza, *A New Look at the Role of ASFA and Children’s Ages in Adoption*, 23 THE ROUNDTABLE 1 (2009) (“The major outcomes expected from [ASFA] were an increase in the number of adoptions, a decrease in the time to adoption for those being adopted, and the consideration for adoption and adoptions of children for whom this permanency outcome may not have been considered feasible in the past.”).

<sup>49</sup> See Foster Care Independence Act § 101, 42 U.S.C. § 677. At the time of the enactment of ASFA, there were concerns that children were lingering too long in foster care. Sallyanne Floria, *More Good Than Harm: Legal Orphans and the New Jersey Post-Termination*

hearings after a child has been in care for twelve months to determine if the plan should be changed to something other than reunification.<sup>50</sup> It also requires pursuing the termination of parental rights for children in foster care for fifteen of the last twenty-two months, unless placement with a relative is being pursued or there are other compelling reasons.<sup>51</sup>

Specifically with regard to permanency planning, the federal statute requires that all children in care have case plans that include:

[D]ocumentation of the steps the agency is taking to find an adoptive family or other permanent living arrangement for the child, to place the child with an adoptive family, a fit and willing relative, a legal guardian, or in another planned permanent living arrangement, and to finalize the adoption or legal guardianship.<sup>52</sup>

Further, federal law requires that if a child will not be returned home, adopted, or placed with a relative through guardianship, the child welfare agency “must document to the court the compelling reason for the alternate plan.”<sup>53</sup> The 2014 amendments go even further in mandating policies that

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*Project*, 59 JUV. & FAM. CT. J. 1, 6 (2008) (describing ASFA as “landmark” legislation that “transformed federal foster care rules, adoption policies, and child welfare practices”). See also Leathers et al., *supra* note 17, at 422 (discussing why ASFA was enacted).

<sup>50</sup> Adoption and Safe Families Act § 103(c)(2)(B), 42 U.S.C. § 675 (2012).

<sup>51</sup> *Id.* § 103(a).

<sup>52</sup> *Id.* § 107.

<sup>53</sup> 45 C.F.R. § 1356.21(h)(3) (2011).

Examples of a compelling reason for establishing such a permanency plan may include:

- (i) The case of an older teen who specifically requests that emancipation be established as his/her permanency plan;
- (ii) The case of a parent and child who have a significant bond but the parent is unable to care for the child because of an emotional or physical disability and the child's foster parents have committed to raising him/her to the age of majority and to facilitate visitation with the disabled parent; or,
- (iii) the Tribe has identified another planned permanent living arrangement for the child.

require state agencies to focus on and achieve permanency for children and youth through adoption or guardianship.<sup>54</sup> Effective September 2015, it will not be permissible for a youth under the age of sixteen to have “Another Planned Permanent Living Arrangement” (APPLA) as a permanency goal.<sup>55</sup> Moreover, at each permanency hearing, the state agency must ask the child about the child’s desired permanency outcome if the goal is AAPLA, make a judicial determination explaining why AAPLA is still the best permanency plan, and explain why it is not in the best interest of the child to be returned home, adopted, or placed with a guardian or relative.<sup>56</sup>

Significantly, ASFA appears to prioritize adoption over all other permanency options.<sup>57</sup> The preamble of ASFA states the act is “[t]o promote the adoption of children in foster care.”<sup>58</sup> ASFA and subsequent amendments also created financial incentives for states that increase the number of children adopted out of the state’s foster care system.<sup>59</sup> These incentives recently increased for the adoption of older children—defined as

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*Id.* See also Sara B. Block, *Not “Out of Sight, Out of Mind”: Defining Permanency as the “Continuity of Relationships” When Ending Legal Relationships Does Not Sever Ties*, 26 *CHILDS. LEGAL RTS. J.* 25, 26 (2006).

<sup>54</sup> Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, §§ 112–114, 128 Stat. 1919, 1926 (2014).

<sup>55</sup> *Id.* § 112.

<sup>56</sup> *Id.* § 113.

<sup>57</sup> Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for “Impermanence,”* 34 *CAP. U. L. REV.* 405, 405–06 (2005).

<sup>58</sup> Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>59</sup> *Id.* §§ 201–203; Fostering Connections to Success and Increasing Adoptions Act §§ 101–105, 401–403.

children over the age of fourteen.<sup>60</sup> These increases are on top of incentives that were included in the 2008 amendments.<sup>61</sup>

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<sup>60</sup> Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113–183, §§ 202(c)(1)(A)–202(c)(1)(C), 128 Stat. 1919, 1935–36 (2014). The Act amended the U.S. Code to provide for adoption incentive payments in the following amounts:

(A) \$5,000, multiplied by the amount (if any) by which (i) the number of foster child adoptions in the State during the fiscal year; exceeds (ii) the product (rounded to the nearest whole number) of (I) the base rate of foster child adoptions for the State for the fiscal year; and (II) the number of children in foster care under the supervision of the State on the last day of the preceding fiscal year;

(B) \$7,500, multiplied by the amount (if any) by which (i) the number of pre-adolescent child adoptions and pre-adolescent foster child guardianships in the State during the fiscal year; exceeds (ii) the product (rounded to the nearest whole number) of (I) the base rate of pre-adolescent child adoptions and pre-adolescent foster child guardianships for the State for the fiscal year; and (II) the number of children in foster care under the supervision of the State on the last day of the preceding fiscal year who have attained 9 years of age but not 14 years of age; and

(C) \$10,000, multiplied by the amount (if any) by which (i) the number of older child adoptions and older foster child guardianships in the State during the fiscal year; exceeds (ii) the product (rounded to the nearest whole number) of (I) the base rate of older child adoptions and older foster child guardianships for the State for the fiscal year; and (II) the number of children in foster care under the supervision of the State on the last day of the preceding fiscal year who have attained 14 years of age.

*Id.*

<sup>61</sup> Fostering Connections to Success and Increasing Adoptions Act § 401, 42 U.S.C. § 673b (d)(1) (2012).

(d) Adoption incentive payment

(1) In general

Except as provided in paragraphs (2) and (3), the adoption incentive payment payable to a State for a fiscal year under this section shall be equal to the sum of—

(A) \$4,000, multiplied by the amount (if any) by which the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year;

Both ASFA and FCIA include the best interest of children and youth as a central focus.<sup>62</sup> When it comes to the needs of older foster youth, however, the statutes come up short.<sup>63</sup> The troubling outcomes previously described are a testament to this,<sup>64</sup> as are the poor rates of older youth finding permanent homes through adoption and guardianship.<sup>65</sup> There are no easy solutions for improving the lives of older foster youth. Part of the problem, however, lies in the fact that neither statute appears to fully address the needs of older foster youth; and neither statute is sufficiently comprehensive, flexible, nor grounded in the realities facing older foster youth.<sup>66</sup>

Although recent amendments have begun to focus on the needs of children aging out of foster care,<sup>67</sup> ASFA is heavily focused on achieving permanency which is not easily—if ever—achieved for a majority of older foster youth.<sup>68</sup> FCIA, on the other hand, is primarily concerned with services to older foster youth to help them achieve independence and self-

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(B) \$4,000, multiplied by the amount (if any) by which the number of special needs adoptions that are not older child adoptions in the State during the fiscal year exceeds the base number of special needs adoptions that are not older child adoptions for the State for the fiscal year; and

(C) \$8,000, multiplied by the amount (if any) by which the number of older child adoptions in the State during the fiscal year exceeds the base number of older child adoptions for the State for the fiscal year.

*Id.* § 101.

<sup>62</sup> See Adoption and Safe Families Act § 103. See also Foster Care Independence Act § 101.

<sup>63</sup> See Margolin, *supra* note 22, at 424 (maintaining that federal legislation is an obstacle to achieving permanency for adolescents); HOWARD & BERZIN, *supra* note 2, at 28 (discussing how ASFA has not affected the adoption of older children); Leathers et al., *supra* note 17, at 422 (“ASFA has been less successful in influencing permanency outcomes for adolescents than for younger children.”).

<sup>64</sup> See discussion *supra* Part III.

<sup>65</sup> See HOWARD & BERZIN, *supra* note 2, at 28.

<sup>66</sup> See Bussiere, *supra* note 26, at 232 (explaining the need for a shift to an approach integrating independent living programs and services with permanency planning).

<sup>67</sup> Preventing Sex Trafficking and Strengthening Families Act, § 114, 1930 (2014). Effective September 2015, no child shall be discharged from a state child welfare agency unless they have been provided with an official or certified copy of their birth certificate, a social security card, health insurance information, their medical record, and a driver’s license or an equivalent state issued identification card. *Id.*

<sup>68</sup> See Block, *supra* note 53, at 26 (maintaining that the current focus of permanency under ASFA does not ensure that children are safe, healthy, happy, and stable).



sufficiency.<sup>69</sup> It never even mentions the need for permanence, although one of its six stated purposes is “to provide personal and emotional support to children aging out of foster care, through mentors and the promotion of interactions with dedicated adults.”<sup>70</sup> It is as if ASFA and FCIA are working on separate, albeit parallel, tracks.<sup>71</sup> Permanence and services to help youth transition into adulthood must be complementary, not distinct.<sup>72</sup> In other words, all efforts must be made to ensure that all youth who leave foster care do so with some stable and committed emotional connections, while also making certain that they have the tools and supportive services in place to live independently once the state has terminated its assistance.<sup>73</sup> As will be further discussed below, stability and emotional connections need to be the central focus—not legally binding permanency.<sup>74</sup>

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<sup>69</sup> See Bussiere, *supra* note 26, at 232.

<sup>70</sup> Foster Care Independence Act § 101, 42 U.S.C. § 677(a)(4) (2012); Avery, *supra* note 2, at 402 (concluding that FCIA and its program interventions “do not specifically address assisting youth with reconnection to birth family, kin, and other significant other adults,” and that “[r]esearch suggests that many youth exiting care have a need unforeseen [in the FCIA], i.e., enduring, supportive relationships”); Madelyn Freundlich, *Permanence for Older Children and Youth*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* 127, 138 (Benjamin Kerman et al. eds., 2009) [hereinafter *PERMANENCE FOR OLDER CHILDREN*] (noting that FCIA, which is designed specifically to support aging out youth, does not reference family permanency for youth).

<sup>71</sup> KRISTI CHARLES & JENNIFER NELSON, *PERMANENCY PLANNING: CREATING LIFE LONG. WHAT DOES IT MEAN FOR ADOLESCENTS?* 13 (2000), available at <http://www.nrcyd.ou.edu/publication-db/documents/permanency-planning.pdf> (describing the options presented by the two statutes as “an either/or decision”).

<sup>72</sup> Some have even suggested that there is a disconnect between the objectives of each of these statutes. Bussiere, *supra* note 26, at 232–33.

<sup>73</sup> See Avery, *supra* note 2, at 401 (“The pursuit of enduring relationships, alongside the delivery of support services, is essential” for permanency); *Making Families Permanent and Cases Closed—Concluding Thoughts and Recommendations*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* 357, 360–61 (Benjamin Kerman et al. eds., 2009) [hereinafter *Making Families Permanent*] (recommending that family permanency and preparation for adulthood be fully integrated). One of the six federal policy recommendations that was developed at the 2005 Permanency Symposium was to “[f]ully integrate permanence and preparation for adulthood in family policy.” CASEY FAMILY SERVICES & CHILDREN’S DEFENSE FUND, *MAKING PERMANENCY A REALITY FOR CHILDREN AND YOUTH IN FOSTER CARE: STRENGTHENING POLICY AT THE FEDERAL LEVEL* 14 (2006), available at <http://www.childrensdefense.org/child-research-data-publications/data/making-permanence-reality-for-children-in-foster-care.pdf>.

<sup>74</sup> See discussion *infra* Part VI.A.

## V. DEFINITIONS OF “PERMANENCY”

A. *Social Scientists’ Understanding of “Permanency”*

Despite the definitions of permanency in federal law,<sup>75</sup> a growing number of scholars have begun to focus on what permanency means to our older foster youth and, in turn, question whether our definitions need to be more expansive and integrated.<sup>76</sup> Consistent with ASFA, some scholars have focused on the security and commitment that comes with a lasting and binding parent relationship.<sup>77</sup> Others have emphasized the importance of physical and psychological stability, specifically the need to have a stable place to live and an emotional connection with at least one caring adult.<sup>78</sup> While it is difficult to synthesize the varying definitions, an evolving consensus is emerging that permanency for older youth must be viewed broadly and flexibly and needs to encompass three or four, different—but intersecting—components, consisting of: physical, relational, legal, and

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<sup>75</sup> See 45 C.F.R. § 1355.20 (2012) (listing permanency options as “when the child will be: (i) Returned to the parent; (ii) Placed for adoption with the State filing a petition for termination of parental rights; (iii) Referred for legal guardianship; (iv) Placed permanently with a fit and willing relative; or (v) Placed in another planned permanent living arrangement”).

<sup>76</sup> See, e.g., LAUREN L. FREY ET AL., *A CALL TO ACTION: AN INTEGRATED APPROACH TO YOUTH PERMANENCY AND PREPARATION FOR ADULTHOOD 3* (2005). From 2001 to 2005, the California Permanency for Youth Project, sponsored by Casey Family Services, hosted national youth permanency conferences where participants (including child welfare professionals, advocates, and current and former foster youth and young adults) reached a consensus about the specific elements of permanency that are important to foster youth. *Id.* They are as follows: “[1] a permanent connection with at least one committed adult who provides a safe, stable and secure parenting relationship, love, unconditional commitment, lifelong support, and legal relationship if possible; . . . [2] the opportunity to maintain contacts with important persons, including siblings,” and “[3] The involvement of the youth as a participant or leader in the process.” *Id.*

<sup>77</sup> See Margolin, *supra* note 22, at 417 (distinguishing parent figures from mentors, friends, and other committed adults); Richard P. Barth & Laura K. Chintapalli, *Permanence and Impermanence for Youth in Out-of-Home Care*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 88, 88 (Benjamin Kerman et al. eds., 2009).

<sup>78</sup> See Barbara A. Pine & Robin Spath, *Applying Lessons Learned from a Family Reunification Demonstration Program*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 223, 223 (Benjamin Kerman et al. eds., 2009); Avery, *supra* note 2, at 400 (discussing a “reframing” of the concept of permanency “in terms of lifelong connections to kin and fictive kin”).

cultural.<sup>79</sup> The first dimension, “physical” permanency, concerns the need to have a home or a safe and stable living environment,<sup>80</sup> while “relational” permanency refers to the youth’s emotional connections and the need for there to be a “caring adult” in the life of the youth.<sup>81</sup> “Legal permanency” refers to the guarantee of a legally binding family, through reunification, and if that is not possible, then through adoption or guardianship.<sup>82</sup> The fourth component, “cultural” permanency, which at times is subsumed within relational permanency, emphasizes the importance of a youth’s “continuous connections [with his or her] family, tradition, race, ethnicity, culture, language and religion.”<sup>83</sup>

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<sup>79</sup> See Sarah Geenen & Laurie E. Powers, “*Tomorrow is Another Problem*”: *The Experiences of Youth in Foster Care During Their Transition into Adulthood*, 29 CHILD. & YOUTH SERVICES REV. 1085, 1098 (2007) (calling for a “flexible, individualized and creative approach”); Freundlich et al., *supra* note 27, at 743–44, 756 (citing and summarizing recent studies that suggest the benefits of permanency extend beyond legal relationships and that permanency has at least three dimensions—relational, physical and legal); Madelyn Freundlich & Rosemary J. Avery, *Planning for Permanency for Youth in Congregate Care*, 27 CHILD. & YOUTH SERVICES REV. 115, 132 (2005) (“Permanency for youth must be viewed broadly, to include reunification, guardianship, permanency placement with relatives, adoption, and long-term connections with committed, caring adults.”); Miriam J. Landsman et al., *Achieving Permanency for Teens: Lessons Learned from a Demonstration Project*, 2 THE PREVENTION REPORT, 1999, at 14 (“Permanency, especially for older children nearing adulthood, needs to be reconceptualized to include a broader range of options—including connections with family and important adults in their lives, and long-term foster care—that meet the child’s needs for life-long, meaningful connections to significant others.”). Casey Family Services, a leader in promoting better outcomes for foster youth, put forward a definition of permanency in *A Call to Action: An Integrated Approach to Youth Permanency and Preparation for Adulthood*. FREY ET AL., *supra* note 76, at 3. It is as follows:

“[P]ermanency” means having an enduring family relationship that is safe and meant to last a lifetime; offers the legal rights and social status of full family membership; provides for physical, emotional, social, cognitive, and spiritual well-being; and assures lifelong connections to extended family, siblings, other significant adults, family history and traditions, race and ethnic heritage, culture, religion and language.

*Id.*

<sup>80</sup> *Enhancing Permanency*, *supra* note 4, at 1.

<sup>81</sup> *Id.*

<sup>82</sup> *See id.* at 1.

<sup>83</sup> *Id.*

When looked at through this lens, only legal permanency is what is defined and discussed in federal and state statutes,<sup>84</sup> and therefore, what most child welfare agencies seek to achieve.<sup>85</sup> Absent from the discussion are efforts targeted at achieving physical and relational permanence.<sup>86</sup> Physical permanence only becomes a focus once efforts at adoption and guardianship fail and relational permanency is seldom targeted.<sup>87</sup> Consequently, too many youth leave foster care unconnected to committed adults who could help them with some of the challenges they will inevitably face as they enter into adulthood.<sup>88</sup>

### *B. Youths' Perspectives on "Permanency"*

When one actually focuses on the perceptions and views of system-involved youth, as well as those who care for or work with the youth, it becomes clear that youth truly value stability and connections.<sup>89</sup> Stated

<sup>84</sup> See *id.* ("Permanency for youth in foster care should include a permanent *legal* connection to a family.") (emphasis added).

<sup>85</sup> See *id.*

<sup>86</sup> Landsman et al., *supra* note 79, at 21 (explaining that "the very notion of permanency, particularly when applied to older children, needs to be expanded beyond the definition as a legal status . . . or a placement category" and finding that "[p]ermanency is better understood as a multifaceted construct which includes several key dimensions").

<sup>87</sup> See *Enhancing Permanency*, *supra* note 4, at 1 (noting that when a permanent legal connection is "less likely, workers can help youth pursue physical or relational permanency").

<sup>88</sup> See Avery, *supra* note 2, at 399 ("Too many youth leave care unconnected to committed adults in their lives who could buffer the challenges they face and serve as safe havens in times of need.").

<sup>89</sup> For example, in one study, conducted by Gina Miranda Samuels, relational permanence is explored. See SAMUELS, *supra* note 5, at 76. Youth in this study were asked to name important persons in their lives and designate whether these persons should be placed in their inner, middle, or outer circle. *Id.* at 17. Through their participation in this exercise and in an extensive interview, certain conclusions were drawn about what youth feel is important in terms of permanency, the importance of emotional connections, and who these people were. See *id.* at 19. Emotional support was named as the most important and absent category of support. *Id.* at 76. The study by Samuels also reflects on whether the framework known as "ambiguous loss" is helpful in understanding what so many foster children and youth experience when they enter, and are forced to spend extensive time in, our foster care system, and whether the lens of "ambiguous loss" can help explain why foster youth have such a difficult time achieving "permanency" as it is typically defined. *Id.* at 4-5. "Ambiguous losses are defined as those without clear boundaries, endings, or societally recognized rituals for grieving the loss . . ." Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience*

differently, youth are much more focused on physical and especially relational permanency than securing legally binding outcomes.<sup>90</sup> In one study on permanency goal-setting and permanency outcomes for children in the New York City foster care system, interviews were conducted of (1) young adults formerly in foster care, (2) birth parents of children formerly and currently in foster care, (3) adoptive parents, and (4) child welfare professionals.<sup>91</sup> One theme that permeated throughout all of the interviews is that permanency, as a concept, is not well understood among young adults, parents, and adoptive parents.<sup>92</sup> The interviewees were “not clear about ‘permanency goal’ options, how the goal is set, or the extent to which they have input into setting that goal.”<sup>93</sup>

For the youth, legal permanency took a backseat to relational and physical permanency. Youth voiced concerns about the need for emotional and relational connections to be included in permanency planning, and particularly noted the importance of their relationships with siblings.<sup>94</sup> Their comments also focused on having a place to live and stability.<sup>95</sup> One youth described permanency as “my own place”; while another defined it as “somewhere that you can just say is yours.”<sup>96</sup> Even more significant, the youth, prospective caregivers, and professional stakeholders expressed in various ways that “permanency options need to be defined more broadly, not to be confined to legal options, and to be individualized.”<sup>97</sup>

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*of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD. & YOUTH SERVICES REV. 1229, 1230 (2009) [hereinafter *The Experience of Familial (Im)permanence*].

<sup>90</sup> See Freundlich et al., *supra* note 27, at 744 (explaining that for youth “the most salient aspects of permanency were relational and emotional”).

<sup>91</sup> Madelyn Freundlich et al., *Permanency Options and Goals: Considering Multifaceted Definitions*, 35 CHILD YOUTH CARE FORUM 355, 360 (2006) [hereinafter *Permanency Options*].

<sup>92</sup> *Id.* at 363. *But see* KATE CHAMBERS ET AL., FOSTER YOUTHS’ VIEWS OF ADOPTION AND PERMANENCY 1 (2008) (finding that youth “were aware of the different options, which they noted included adoption, guardianship, reunification, independent living, and ‘aging out’ of the system”).

<sup>93</sup> *Permanency Options*, *supra* note 91, at 363.

<sup>94</sup> *Id.* at 363.

<sup>95</sup> Freundlich et al., *supra* note 27, at 752.

<sup>96</sup> *Id.* See CHAMBERS ET AL., *supra* note 92, at 1 (explaining how youth described permanency as a “physical or concrete entity, such as ‘staying on one place’ or ‘a place to stay until you age out’”).

<sup>97</sup> *Permanency Options*, *supra* note 91, at 367. The child welfare professionals specifically blamed the ASFA rigid timelines for the lack of individualized plans. *Id.* at 369.

In another study, California youth were interviewed as to their views on permanency.<sup>98</sup> This study was conducted by California Youth Connection's California Permanency for Youth Project.<sup>99</sup> First, the youth in this survey recommended that to promote permanency, youth should be listened to and included in the process.<sup>100</sup> They also identified the following as the three major barriers to legal permanency: inappropriate foster care placements, poorly selected and improperly trained foster parents, and an overzealous focus on adoption.<sup>101</sup>

In the California study, permanency was broken down into relational, physical, and legal as defined above.<sup>102</sup> A majority of foster youth agreed that relational permanency was the most important type of permanency one can achieve.<sup>103</sup> One youth was quoted as saying, "Legal permanence could be taken off the list and I wouldn't miss it. You can have legal permanency—but without relational or physical permanency, what's the point? . . . Without the last two, the first is not important."<sup>104</sup> Another youth described how important even one "caring adult" is:

It's really important to make sure before emancipating a youth that they have one person. If I have somebody that I know I can depend on, that loves me and cares that I wake up tomorrow and am still breathing, I can get through it. I can walk through it.<sup>105</sup>

Still another youth noted that "[w]hat is most important is for someone to make a commitment to you, someone who you could trust and feel comfortable with,"<sup>106</sup> and "[d]epending on your age, you really aren't too

<sup>98</sup> REINA M. SANCHEZ, YOUTH PERSPECTIVES ON PERMANENCY 10–11 (2004). This survey involved twenty-five youth (seventeen women and eight men) ranging in age from sixteen to twenty-four with an average age of 19.4. *Id.* at 21.

<sup>99</sup> *Id.* at 1–2.

<sup>100</sup> *Id.* at 19–20.

<sup>101</sup> *Id.* at 16–18.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.* Interestingly, the majority of the youth interviewed did describe at least one permanent adult connection. *Id.* at 13. Persons filling this role were foster parents, neighbors, extended family of foster parents, former foster parents, peer mentors, staff at congregate care facilities, high school counselors, CASA volunteers, siblings, grandparents, friends, teachers, and social workers. *Id.*

<sup>104</sup> *Id.* at 10 (quoting a youth study participant).

<sup>105</sup> *Id.* at 11.

<sup>106</sup> *Id.*

much in tune with legal permanency. I think, above all, it's the emotional, having someone there."<sup>107</sup>

While one person's viewpoint cannot be attributed to others, the words of Crys, a former foster youth quoted in another report, encapsulates a great many of the youths' sentiments:

The search for permanence is long and complicated for most foster youth. Learning how to cultivate a healthy relationship as an adult is difficult if it wasn't modeled for you. However, the growth opportunity provided by adult supporters, who can later become permanent connections, can make the difference. Some days it may mean that an older youth may have someone to call and check in with or to help with taxes. Or it may mean having someone who can attend your graduation or a major surgery. Creating permanent connections means maintaining those meaningful and supportive relationships into adulthood, despite being in foster care and lacking a permanent legal guardian.<sup>108</sup>

### C. *Youths' Views on Adoption*

Although most youth view relational permanency as the most important aspect of permanency, youth also have strong and conflicting views on adoption in general and on whether legal permanency should be the paramount focus that it is.<sup>109</sup> Some, even beyond the age of eighteen, want to be adopted and value the legally binding aspect and legal commitment that adoption, or even guardianship, symbolizes.<sup>110</sup> Other youth, however, strongly advocate against legal permanency.<sup>111</sup>

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<sup>107</sup> *Id.* at 13.

<sup>108</sup> *Enhancing Permanency*, *supra* note 4, at 12 (quoting a youth named Crys who is described as a former foster youth).

<sup>109</sup> *See id.* at 11; CHAMBERS ET AL., *supra* note 92, at 2 (finding that "youth ha[ve] very strong opinions about older child adoption").

<sup>110</sup> *See* CHAMBERS ET AL., *supra* note 92, at 1.

<sup>111</sup> *See id.* at 2.

The anti-adoption sentiments are based on a variety of factors,<sup>112</sup> many of which were evident in a study conducted by the Urban Institute<sup>113</sup> of thirty-four youth aged eleven through nineteen from Washington, D.C. and New York.<sup>114</sup> First, due to the youths' experiences in foster care, and their continuous moving around from one foster care placement to another, the youth are unable to trust the legal system or the commitment that adoption or guardianship represents.<sup>115</sup> Related to this concern is the belief shared by many older foster youth that no one wants them.<sup>116</sup> Thus, many foster youth do not want to pursue adoption only to have this objective fail and experience rejection yet again.<sup>117</sup> Second, many youth expressed tremendous loyalties to their birth families; they were not willing to do anything which put them in a position of acting against these allegiances.<sup>118</sup> These connections to their biological families do not just include parents, but extend to siblings, friends, and important people in their communities.<sup>119</sup> Third, many youth spoke of the need for autonomy and control.<sup>120</sup> There was a deep-seeded fear of being "stuck" if things did not work out in an adoptive home.<sup>121</sup> Accordingly, youth would rather maintain their control and the status quo rather than risk the unknown.<sup>122</sup> Finally, many youth understood that moving toward adoption had "resource implications."<sup>123</sup> In other words, many youth were unwilling to forego financial aid for college and ongoing independent living support just to be adopted or placed in

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<sup>112</sup> For a comprehensive summary of youths' ambivalence about adoption, see HOWARD & BERZIN, *supra* note 2, at 30–33. See also Lauren Frey et al., *Achieving Permanency for Youth in Foster Care: Assessing and Strengthening Emotional Security*, 13 CHILD. & FAM. SOC. WORK 218, 221 (2008).

<sup>113</sup> See CHAMBERS ET AL., *supra* note 92, at 1.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 2, 4; SANCHEZ, *supra* note 98, at 12.

<sup>116</sup> CHAMBERS ET AL., *supra* note 92, at 2.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1; SANCHEZ, *supra* note 98, at 7–8.

<sup>119</sup> SANCHEZ, *supra* note 98, at 7–8. See also CHAMBERS ET AL., *supra* note 92, at 2.

<sup>120</sup> CHAMBERS ET AL., *supra* note 92, at 4. See Gerald P. Mallon et al., *Adolescents' Conflicting Feelings About Permanency*, in *ACHIEVING PERMANENCY FOR ADOLESCENTS IN FOSTER CARE* 45, 49–50 (Claire Sandt Chiamulera & Markin Hardin eds., 2006) (explaining how many "adolescents, as they approach adulthood, seek a sense of control over their lives," and how foster youth feel this even more acutely).

<sup>121</sup> CHAMBERS ET AL., *supra* note 92, at 3; Mallon, *supra* note 120, at 50.

<sup>122</sup> See Mallon et al., *supra* note 120, at 49–50.

<sup>123</sup> CHAMBERS ET AL., *supra* note 92, at 3; SANCHEZ, *supra* note 98, at 12.



someone's guardianship.<sup>124</sup> These sentiments are especially strong when combined with the youths' generalized mistrust and the force of their loyalties.<sup>125</sup>

Similar views were expressed in another study conducted by social work scholar, Gina Miranda Samuels.<sup>126</sup> The twenty-nine youth in this study ranged in age from seventeen years old to twenty-six and were from four different locations within the United States.<sup>127</sup> All of the youth were discharged from foster care or were planning to age out of the foster care system.<sup>128</sup> Part of the study sought the views of the youth on adoption and the system's more traditional view of permanency through reunification, adoption, or guardianship.<sup>129</sup> Many of the sentiments echoed above were repeated by these youth.<sup>130</sup> First, most youth understood the difficulty of being adopted after the age of twelve, either because they have been told this by caseworkers or seen for themselves the number of foster youth in congregate care facilities who have not been adopted.<sup>131</sup> Thus, their rejection of adoption is a "coping mechanism"; they reject adoption before efforts at adoption can fail.<sup>132</sup> Second, many youth expressed a strong desire to return to their biological family and an equally strong sense of loyalty to their biological families—especially to their birth mothers.<sup>133</sup> Finally, most youth "did not trust adoption as a reliable path to ensure access to familial support."<sup>134</sup> Rather, they felt that adoption "did not guarantee permanence

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<sup>124</sup> See SANCHEZ, *supra* note 98, at 12–13 ("When youth get adopted, the funds get cut off, and I really want to go to college and I don't think my mother could afford to pay for me to go to college. Being in the system, going to college would be easy for me because I could get a lot more opportunities.").

<sup>125</sup> *See id.*

<sup>126</sup> See *The Experience of Familial (Im)permanence*, *supra* note 89, at 1233–34.

<sup>127</sup> *Id.* at 1232 (Most of the youth "were between the 19 and 23 years of age. Eleven participants were the custodial parents of young children under age 6; two of these parents were married. During foster care most, experienced a combination of placement settings; however, a large sub-group had only experienced non-relative foster homes."); SAMUELS, *supra* note 5, at 4, 22–23. Furthermore, five of the twenty-nine were adopted, although two of these adoptions disrupted prior to the youth turning seventeen. *The Experience of Familial (Im)permanence*, *supra* note 89, at 1232; SAMUELS, *supra* note 5, at 23.

<sup>128</sup> See *The Experience of Familial (Im)permanence*, *supra* note 89, at 1232.

<sup>129</sup> *Id.* at 1236.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 1234–35; SAMUELS, *supra* note 5, at 50–51.

<sup>132</sup> See SAMUELS, *supra* note 5, at 55–57.

<sup>133</sup> *Id.* at 47; *The Experience of Familial (Im)permanence*, *supra* note 89, at 1234.

<sup>134</sup> SAMUELS, *supra* note 5, at 78.

or that one would feel a sense of belonging.”<sup>135</sup> Put simply, they “doubt[ed] . . . the ability of a piece of paper to mandate any parent (biological or adoptive) to provide the level of caring and parental bond for which many were still searching.”<sup>136</sup>

## VI. WHAT CAN BE DONE TO IMPROVE OUTCOMES FOR OLDER FOSTER YOUTH

### A. *Achieving Stability and Connections: A Refocused Approach*

The needs and perceptions of youth are distinct and individual, and the views of youth cannot—and should not—be generalized. Yet the findings of the studies summarized above help to illustrate that the current system is not working for a significant majority of youth. Given the feelings and perceptions of current and former foster youth, along with the data illustrating the significantly low number of older foster youth being adopted, and the extremely concerning outcomes for youth emancipating from foster care, the system’s current and primary focus on permanency—especially legal permanency—must be critically evaluated.<sup>137</sup> Taking it one step further, leads to the question that is seldom—if ever—outright posited: should the term “permanency” even be used?<sup>138</sup> It is impossible to be against permanency for any child or youth; it is, however, incumbent to begin to examine whether the predominant focus on permanency is harming older youth and whether a different terminology and approach would help improve their outcomes.

In other words, rather than focusing on an approach which is not able to be achieved for the majority of youth over twelve,<sup>139</sup> would it not be wiser

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<sup>135</sup> *Id.*

<sup>136</sup> *The Experience of Familial (Im)permanence*, *supra* note 89, at 1234. See Mallon et al., *supra* note 120, at 50 (citing the lack of control over their lives and their lack of permanency as reasons why youth are “reluctant to believe that much will be different just because someone is promising a permanent situation”).

<sup>137</sup> See PERMANENCY FOR OLDER CHILDREN, *supra* note 70, at 136–37 (asking whether different practice approaches are called for when considering the needs of this age group).

<sup>138</sup> See Coupet, *supra* note 57, at 405 (promoting kinship caregiving arrangements over adoption and questioning, although not with regard to older foster youth, whether “there is a case to be made, especially for a certain segment of the population, for opposing adoption in favor of a more ‘impermanent’ alternative”); BUSS ET AL., *supra* note 2, at 68 (calling for a change in ASFA that would replace Another Planned Permanent Living Arrangement (APPLA) with the term “reasonable efforts to finalize a plan for successful transition to independence”).

<sup>139</sup> See PERFORMANCE FOR OLDER CHILDREN, *supra* note 70, at 136–37, 139.

to focus on achieving stability and emotional connections separate from legally binding parental relationships. Certainly, the hope is that by focusing on stability and connections, many children will also be able to secure legal permanence. However, by focusing on other aspects of permanency— aspects that youth have stated are critical<sup>140</sup> and which may be more attainable—youth will feel less failure and rejection, and their overall outcomes hopefully will be improved.<sup>141</sup> Thus, this paper calls for a change in approach and terminology from one that focuses on legal permanency to one that emphasizes stability and connections. Obviously, such a significant shift in policy will require statutory changes. Rather than discussing these changes in isolation, the need for statutory reform will be discussed as part of an examination of what is necessary in order to best achieve this newly proposed mandate of stability and emotional connections.

## *B. Stability as a Focus and Mandate*

### *1. Policy Changes*

To ensure youth have the best chance of transitioning successfully into adulthood, all youth must be able to stay involved with the state or local foster care agency until the age of twenty-one.<sup>142</sup> Moreover, jurisdiction by

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<sup>140</sup> See SAMUELS, *supra* note 5, at 53, 55, 58 (discussing what participants viewed as important criteria to gaining permanence).

<sup>141</sup> *Making Families Permanent*, *supra* note 73, at 358 (stressing how “greater attention must also be given to issues of emotional security and the social aspect of permanency” due to developmental status of older foster youth and the needs of older foster youth being different than younger children in care). See also Avery, *supra* note 2, at 401 (“The pursuit of enduring relationships, alongside the delivery of support services, is essential in ‘permanency oriented’ child welfare services.”).

<sup>142</sup> *Fostering Connections* allows states to extend foster care until age twenty-one and provides federal reimbursement for at least half of the cost, but states must avail themselves of this option. *Foster Connection to Success and Increasing Adoptions Act of 2008* § 201, 42 U.S.C. § 675(8) (2012). See also Rosemary J. Avery, *Federal Law and Child Welfare Reform: The Research-Policy Interface in Promoting Permanence for Older Children and Youth*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN & YOUTH IN FOSTER CARE* 147, 149 (Benjamin Kerman et al. eds., 2009) (maintaining that “[f]ailure to make these [caring adult] connections for youth should be grounds for an extension of foster care past the age of majority” and arguing that both the court case and agency case should not be closed unless there is a “caring adult”). A related issue is the development of policy and protocols that permit youth to return to care if they close their child welfare cases and then are in need of assistance and services. Allowing youth to return to care has been found to serve a protective function. HOWARD & BERZIN, *supra* note 2, at 62. Approximately 30% of states allow re-

state juvenile and family courts must be maintained until that time as well.<sup>143</sup> Studies show that youth who remained in care “were more likely to pursue higher education, had higher earnings and were more likely to delay pregnancy.”<sup>144</sup>

Moreover, any policies that cause youth and family members to choose between adoption and guardianship, on the one hand, and necessary financial assistance for college, housing, and other essential services, on the other hand, must be repealed.<sup>145</sup> Currently, most financial assistance obtained through adoption or guardianship subsidies end when the child turns eighteen or graduates high school.<sup>146</sup> Thus, it often becomes a choice—especially for older foster youth—between legal security and financial security. Such disincentives must be eliminated.

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entry to care and another 16% permit it in certain circumstances. *Id.* A full analysis of policies and statutes permitting re-entry into care is beyond the scope of this Article. However, consistent with the state’s obligation to ensure that youth achieve stability, states must develop and make certain that this critical safety net exists. Any young adult leaving home for college or elsewhere often needs to return home for support and nurturance. The only difference with regard to foster youth is that their parent is the State. But like any responsible parent, the State must remain available for youth who may make a hasty decision to terminate his/her involvement with the State, and then find himself or herself in need of assistance and support.

<sup>143</sup> BUSS, ET AL., *supra* note 2, at 66 (noting how court monitoring helps to ensure effective service delivery). Emily Buss, *Juvenile Court for Young Adults? How Ongoing Court Involvement Can Enhance Foster Youths’ Chances for Success*, 48 FAM. CT. REV. 262, 265 (2010) [hereinafter *Chances for Success*]; CLARK PETERS ET AL., CONTINUING IN FOSTER CARE BEYOND AGE 18: HOW COURTS CAN HELP 2 (2008).

<sup>144</sup> HOWARD & BERZIN, *supra* note 2, at 61. It also must be mentioned that the quality of the independent living programs and transitional services is an issue; many have been found to be seriously inadequate. Geenen & Powers, *supra* note 79, at 1098; BUSS ET AL., *supra* note 2, at 35–36. While a discussion of what factors contribute to successful transitional programs and services is beyond the scope of this Article, it must be stressed that in order for youth to achieve stability, they must be provided with meaningful and effective programs, services, and assistance.

<sup>145</sup> See Bussiere, *supra* note 26, at 240 (discussing disincentives to permanency and calling for their removal).

<sup>146</sup> Mary Eschelback Hansen & Josh Gupta-Kagan, *Raising the Cut-Off: The Empirical Case for Extending Adoption and Guardianship Subsidies from Age 18 to 21*, 13 U.C. DAVIS J. JUV. L. & POL’Y 1, 7, 9 (2009).

## 2. *Statutory Reform*

Not only are these policy changes necessary, but in order for stability to be a prominent focus, it needs to be weighted equally with other permanency options, as per the federal statute. This could occur in one of two ways. First, the definition of permanency in federal law could be amended by removing the mandate of permanency for older foster youth, as it currently is defined,<sup>147</sup> and instead mandating stability and at least one connection to a committed and caring adult. Yet, given the renewed commitment to permanency for older children in the most recent amendments to ASFA, such a change is doubtful.<sup>148</sup>

As is explained above, the new amendments prohibit any youth younger than sixteen from having “Another Planned Permanent Living Arrangement” (APPLA) as his or her permanency goal.<sup>149</sup> However, what is still possible, and what is recommended is, an increased and more systematized use of the process of “concurrent planning.”<sup>150</sup> The National Resource Center for Permanency and Family Connections defines concurrent planning as:

A process of working towards one legal permanency goal (typically reunification) while at the same time establishing and implementing an alternative permanency goal and plan that are worked on concurrently to move children/youth more quickly to a safe and stable permanent family (Permanency Round Table Project, 2010). This is a process which involves concurrent rather than sequential permanency planning efforts. It involves a mix of meaningful family engagement, targeted case practice, and legal strategies aimed at achieving timely permanency, while at the same time establishing and actively working a

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<sup>147</sup> See Bussiere, *supra* note 26, at 237 (noting federal law “applies regardless of the age of the foster child”).

<sup>148</sup> See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, §§ 112–113, 128 Stat. 1919, 1926–29 (2014).

<sup>149</sup> *Id.* § 112.

<sup>150</sup> Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323, 1361 (2012).

concurrent permanency plan in case the primary goal cannot be accomplished in a timely manner.<sup>151</sup>

As ASFA currently reads, there are five permissible permanency options.<sup>152</sup> Yet, the fifth permanency option of “another planned permanent living arrangement” (APPLA) is not even considered until the youth’s 16th birthday and unless there is a compelling reason to do so, which often is interpreted as all of the other permanency options have failed or been ruled out.<sup>153</sup> As a result, time is lost, and a focus on developing alternate committed adults and a plan for stability does not occur until much too late in the process—often after many failed attempts at one or more of the other permanency options—which leads to additional trauma and emotional scarring for the youth.<sup>154</sup>

While ASFA is explicit in requiring child welfare agencies to begin identifying, recruiting, and approving prospective adoptive families concurrently with the filing of the petition for TPR,<sup>155</sup> many states begin concurrent planning much earlier in the process and “have identified concurrent planning as a recognized or required practice for achieving permanency.”<sup>156</sup> Many statutes or policies instruct that concurrent planning

<sup>151</sup> *An Overview of Concurrent Planning*, NAT’L RES. CTR. FOR PERMANENCY AND FAM. CONNECTIONS, <http://www.nrcpfc.org/cpt/overview.htm> (last visited November 2, 2014).

<sup>152</sup> 42 U.S.C. § 675(5)(C) (2012).

<sup>153</sup> Landsman et al., *supra* note 79, at 15, 20 (arguing that “sequential case management continues to be the dominant method of practice” and noting that federal law needs to expand options for older youth).

<sup>154</sup> BUSS ET AL., *supra* note 2, at 36–37.

<sup>155</sup> Adoption and Safe Families Act of 1997 § 101, 42 U.S.C. § 675(5)(E) (2012); 45 C.F.R. § 1356.21(i)(3) (2013). Work to finalize an adoptive placement must be “child-specific,” which, at a minimum, includes using state, regional, and national electronic exchange systems or adoption registries. 45 C.F.R. § 1356.21(g)(5) (2013). Mandating that child welfare agencies concurrently work toward the adoption goal for children when a TPR is filed was “developed to ensure that a child does not wait unnecessarily between the time a TPR is granted and the child’s permanent placement in a home.” Title IV-E Foster Care Eligibility Reviews, 65 Fed. Reg. 4020, 4062 (Jan. 25, 2000) (to be codified at 45 C.F.R. pt. 1356).

<sup>156</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CHILDS. BUREAU, CONCURRENT PLANNING FOR PERMANENCY FOR CHILDREN 2 (2012) [hereinafter CONCURRENT PLANNING], available at [https://www.childwelfare.gov/systemwide/laws\\_policies/statutes/concurrent.pdf](https://www.childwelfare.gov/systemwide/laws_policies/statutes/concurrent.pdf).

Approximately 38 States and the District of Columbia have statutes that address the issue of concurrent planning. Seven States address

occur through the development of case plans, discussed further below, which must be developed for each child.<sup>157</sup> Whatever the approach, the requirement that concurrent planning takes place at an early point in a

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concurrent planning in regulation. The language in these statutes and regulations ranges from general statements that simply authorize concurrent planning activity to statutes that provide, in some detail, the elements that must be included when making a concurrent permanency plan.

*Id.* In other words, some statutes permit concurrent planning while others mandate it at least when certain circumstances exist. *See id.* Illinois has an example of a statute that would aid older foster youth through concurrent planning:

The legislature recognizes that the best interests of the child require that the child be placed in the most permanent living arrangement as soon as is practically possible. To achieve this goal, the legislature directs the Department of Children and Family Services to conduct concurrent planning so that permanency may occur at the earliest opportunity.

20 ILL. COMP. STAT. Ann. § 505/5(l-1) (West 2008). Mississippi provides another example:

At the time of placement, the [D]epartment [of Human Services] shall implement concurrent planning . . . so that permanency may occur at the earliest opportunity. Consideration of possible failure or delay of reunification should be given, to the end that the placement made is the best available placement to provide permanency for the child . . . .

MISS. CODE ANN. § 43-15-13(2)(f) (2008). Also:

The legislature recognizes that the best interests of the child require that the child be placed in the most permanent living arrangement as soon as is practicably possible. To achieve this goal, the Department of Human Services is directed to conduct concurrent planning so that a permanent living arrangement may occur at the earliest opportunity.

*Id.* § 43-15-13(8).

<sup>157</sup> A Kentucky regulation exemplifies this model:

“Concurrent planning” means the cabinet simultaneously plans for: (a) [t]he return of a child in the custody of the cabinet to the child’s parent; and (b) [a]nother permanency goal for the child if return to parent is not achieved within fifteen (15) of the last twenty-two (22) months, in accordance with 42 U.S.C. 675(5)(E). . . . Concurrent planning shall be considered: (a) [d]uring development of the case permanency plan; and (b) [a]t the 6-month case review.

922 Ky. Admin. Regs. 1:140 (2014).

youth's tenure in foster care must be adopted for all of foster youth, ideally through federal legislative mandate, but if not, through state legislative action or the enactment of strong state policy. In short, APPLA must not be viewed as a last resort, and the policy of concurrent planning must be adopted and implemented more systematically to ensure that child welfare agencies are held to the obligation of establishing multiple permanency or stability options for each and every youth.

A few state statutes provide additional ideas for how child welfare agencies can be held more accountable for ensuring stability for our older foster youth. These statutes and regulations are in line with the new federal requirement that every youth aging out of care be provided with critical documents, such as a birth certificate, social security card, and medical records.<sup>158</sup> Yet, these state statutes are more encompassing than the new federal requirements, in that they seek to ensure that when youth leave foster care they are well positioned to be able to live on their own. In addition, these statutes and regulations create enforcement provisions, which permit courts to order the youth's discharge date be extended should the youth not be able to safely transition to adulthood with the necessary indicia of stability in place.<sup>159</sup> The best examples of such statutes and regulations are found in New York<sup>160</sup> and California.<sup>161</sup>

In New York, the child welfare agency is required to make "diligent efforts" to help a foster youth "achieve permanent discharge."<sup>162</sup> The regulation then lists activities that constitute such efforts. Most significant is that fact that the New York regulation does not permit a youth to be discharged from foster care unless "there is a reasonable expectation that the residence will remain available to the child for at least the first 12 months after discharge," and the place to live cannot be a homeless shelter, a single-room occupancy hotel, or "other congregate living arrangement which houses more than 10 unrelated persons."<sup>163</sup> While the regulation itself does

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<sup>158</sup> Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 114, 128 Stat. 1919, 1930 (2014).

<sup>159</sup> See BUSS ET AL., *supra* note 2, at 5.

<sup>160</sup> See N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12 (2014).

<sup>161</sup> See CAL. WELF. & INST. CODE § 391 (West 2008).

<sup>162</sup> BUSS ET AL., *supra* note 2, at 47 (citing N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(a)).

<sup>163</sup> N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(f)(3)(i)(c). Oregon has a similar statute, mandating that all foster youth "must have safe and stable housing when they leave foster care." BUSS ET AL., *supra* note 2, at 48 (citing OR. REV. STAT. § 419B.337(7)(B)(iv) (2013)). However, Oregon's statute does not provide for continuing jurisdiction or time in



not specifically state that the youth's child welfare case can remain open if the youth does not have stable housing, case law interpreting the regulation has provided such a remedy.<sup>164</sup>

California's statutes establish that court jurisdiction must not be terminated unless a hearing is conducted, the youth is present in court, and certain other requirements are met.<sup>165</sup> Specifically, California's statutory provisions, like those of New York,<sup>166</sup> require that the agency provide a report that verifies that a list of information, documents, and services have been provided to the foster youth prior to discharge.<sup>167</sup> Significantly, among the services required is "[a]ssistance in maintaining relationships with individuals who are important to a [youth] who has been in out-of-home placement for six months or longer."<sup>168</sup> If the agency has not achieved all of the statutory requirements by the expected date of discharge and it can be shown that closing the youth's court and child welfare agency case will be harmful to the youth, the youth will not be discharged from care—at least for the period of time necessary for the agency to come into compliance with its obligations under the statute.<sup>169</sup>

Additionally, California requires that specific and extensive services be included in the case plan for each and every child. These services are described as "the foundation and central unifying tool in child welfare services."<sup>170</sup> Among the items required to be in case plans (for children ten years of age and older who have been in foster care for at least six months) is the "identification of individuals, other than the child's siblings, who are important to the child and actions necessary to maintain the child's relationship with those individuals, provided that those relationships are in the best interest of the child."<sup>171</sup> Moreover, the social worker must "ask

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foster care if the agency fails to comply. *Id.* Thus, it is lacking in its enforcement capability and the ability to truly hold the agency accountable.

<sup>164</sup> BUSS ET AL., *supra* note 2, at 47 (discussing *Palmer v. Cuomo*, 503 N.Y.S.2d 20, 21 (1986)).

<sup>165</sup> CAL. WELF. & INST. CODE § 391(a).

<sup>166</sup> See N.Y. COMP. CODES R. & REGS. tit. 18, § 430.12(b).

<sup>167</sup> CAL. WELF. & INST. CODE § 391(e). See also BUSS ET AL., *supra* note 2, at 48 ("The required discharge report covers five broad sections: case history, documentation, case worker assistance, training, and relationship assistance.").

<sup>168</sup> CAL. WELF. & INST. CODE § 391(e)(7).

<sup>169</sup> *Id.* § 391(c).

<sup>170</sup> CAL. WELF. & INST. CODE § 16501.1(a) (West 2013). See also Bussiere, *supra* note 26, at 234.

<sup>171</sup> CAL. WELF. & INST. CODE § 16501.1(i). See also Bussiere, *supra* note 26, at 234.

every child who is ten years of age or older, who has been in out-of-home placement for six months or longer, to identify individuals other than the child's siblings who are important to the child and may ask other children to provide that information, as appropriate."<sup>172</sup> California also requires that transitional living plans include individuals who are important to the youth.<sup>173</sup>

### 3. Court Oversight

The regulations and legislation in place in New York and California provide examples of statutory reform that could be enacted at either the federal or state level. This statutory reform would help ensure that youth are not leaving care without housing, a caring adult, or other necessary services. Such legislation also would enhance the role of state courts in holding child welfare agencies accountable when certain necessary services are not being provided to a particular youth. Professor Emily Buss, a noted child welfare scholar, explains that courts are effective monitors for four reasons: (1) judges are objective; (2) judges can order people to act; (3) courts have authority to compel people to appear before them; and (4) "courts have an established process of fact finding and record keeping that helps to hold people . . . accountable and ensures a more coherent planning process over time."<sup>174</sup>

Even without additional legislation, courts have an obligation to ensure that necessary services are being provided to aging out youth, as such services are mandated by federal law.<sup>175</sup> A condition of federal funding requires the state child welfare agency to develop a written case plan for every child in foster care.<sup>176</sup> For foster youth, aged sixteen and older, the case plan must include "a written description of the programs and services which will help such child prepare for the transition from foster care to

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<sup>172</sup> See sources cited *supra* note 163.

<sup>173</sup> CAL. WELF. & INST. CODE § 10609.4(b)(1)(E) (West 2013). See also Bussiere, *supra* note 26, at 234.

<sup>174</sup> See *Chances for Success*, *supra* note 143, at 265–66. See also BUSS ET AL., *supra* note 2, at 38, 47, 66 (noting that checklists can help with the monitoring and oversight function and providing examples).

<sup>175</sup> See 42 U.S.C. § 675(1)(A)–(1)(C) (2012).

<sup>176</sup> See *id.* (explaining that case plans cover a multitude of issues concerning the child's welfare, including, but not limited to, the child's educational, medical, and mental health needs, living situation, family circumstances, and long term goals for the child and his/her family).

independent living.”<sup>177</sup> Thus, courts can and should request information on a particular youth’s case plan; thereby ensuring that case plans are developed and that the services included in such plans are provided. More generally, courts have an obligation to ensure that the best interests of the youth appearing before it are being met. Accordingly, family court judges should routinely be soliciting information as to the welfare of the youth, the youth’s plans for the future, the provision of necessary services, and the existence of caring and committed adults, among other needs of the youth. At times, this information should be sought from the youth himself.<sup>178</sup>

### C. *The Need for Emotional Connections*

#### 1. *Committed Caring Adults*

The other aspect to this re-defined approach for older youth encompasses the identification and securing of at least one caring and committed adult, in addition to the shoring up of existing important emotional connections. In psychological and social work literature, there has been increased attention to a youth’s need for caring committed adults in their lives.<sup>179</sup> While some speak of these adults as substitute parental figures,<sup>180</sup> others clearly define them as playing a significant, but non-parental, role.<sup>181</sup> The former is certainly preferable, but what is most important is that efforts are made to connect youth with caring and committed adults, who they can turn to in times of need. Hopefully, some may turn out to play a more significant parental function, but even if they do not, their presence and assistance is beneficial.

For example, in the study by Samuels, connections with such non-parental adults were viewed as essential, both while in care and into early

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<sup>177</sup> *Id.* § 675(1)(D).

<sup>178</sup> See discussion *infra* Part VI.D. See also SOPHIA I. GATOWSKI ET AL., ASKING THE RIGHT QUESTIONS II: JUDICIAL CHECKLISTS TO MEET THE EDUCATIONAL NEEDS OF CHILDREN AND YOUTH IN FOSTER CARE 21–23 (2008), available at <http://www.ncjfcj.org/sites/default/files/education%20checklist%202009.pdf> (providing a sample checklist concerning older youth and education); Andrea Khoury, *Permanency Planning Options for Adolescents*, in *ACHIEVING PERMANENCY FOR ADOLESCENTS IN FOSTER CARE* (Claire Sandt Chiamulera & Sally Small Hardin eds., 2006).

<sup>179</sup> See, e.g., HOWARD & BERZIN, *supra* note 2, at 58–59.

<sup>180</sup> See SAMUELS, *supra* note 5, at 5.

<sup>181</sup> See Rosemary Avery, *The Potential Contribution of Mentor Programs to Relational Permanency for Youth Aging Out of Foster Care*, 90 CHILD WELFARE 9, 19 (2011) (distinguishing between “parental adults” and “adult mentors” and stressing that both are needed, but that mentors are not a substitute for parental figures).

adulthood.<sup>182</sup> Some even found this to be the most important factor in terms of improving outcomes for youth, more important even than accessing formal services.<sup>183</sup> Two other researchers, Michelle R. Munson and J. Curtis McMillen, tested and studied whether the presence of naturally occurring relationships with “non kin mentors” is associated with positive psychosocial outcomes for foster youth.<sup>184</sup> The results of their study illustrate that these connections relate to important psychological and behavioral outcomes among foster youth ages eighteen and nineteen; specifically, the youth exhibited less perceived stress and a lower likelihood of being arrested by age nineteen.<sup>185</sup> If the relationship lasted more than a year, it also was found to help with reduced depression symptoms.<sup>186</sup> Other scholars found that outside of the foster care context connections with supportive adults have had positive effects on self-esteem, psychological health, educational achievement, and social skill development.<sup>187</sup>

Despite this research, documenting the importance of caring and committed adults to older foster youth, child welfare practice does not focus on cultivating these relationships in any formal or systematized way.<sup>188</sup> In

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<sup>182</sup> See SAMUELS, *supra* note 5, at 9.

Scholarship on youth aging out of care, as well as research focusing on other “at risk” populations, has consistently recognized the importance of non-parental adults in the lives of young people and their positive development. Feeling connected to an adult has been found to have positive effects not only on general well-being and socio-emotional health, but also can buffer some of the negative outcomes this population is reported to face.

*Id.* (citations omitted). See also FREY ET AL., *supra* note 76, at 3 (“The involvement of caring adults in permanency planning and decision-making is also essential.”).

<sup>183</sup> See Geenen & Powers, *supra* note 79, at 1091–92.

<sup>184</sup> See Michelle R. Munson & J. Curtis McMillen, *Natural Mentoring and Psychosocial Outcomes Among Older Youth Transitioning from Foster Care*, 31 CHILD. & YOUTH SERVICES REV. 104, 110 (2009).

<sup>185</sup> *Id.* at 108.

<sup>186</sup> *Id.*

<sup>187</sup> BUSS ET AL., *supra* note 2, at 8; *The Experience of Familial (Im)permanence*, *supra* note 89, at 1230.

<sup>188</sup> Avery, *supra* note 142, at 147 (noting the lack of regulatory or statutory authority concerning the need for every child to have a committed adult in their lives); Freundlich & Avery, *supra* note 79, at 119 (“The poor outcomes for youth who leave care without committed adults in their lives raise significant questions about the quality of efforts to plan for and achieve permanency for youth in foster care.”).

fact, it has been noted that: “The child welfare system pays a great deal of attention to the relationships foster children have with individuals who may become their ‘permanent’ families through return home, guardianship, and adoption. But the importance of building and sustaining relationships for healthy development without regard to placement, is largely ignored.”<sup>189</sup>

Given the importance of cultivating these adult relationships and connections, several recommendations are proposed. Admittedly, it is not the first time that many of these policy and practice suggestions are being made.<sup>190</sup> However, if there is to be a shift in approaching what is needed for older foster youth from legal permanency to stability and connections, then these efforts become even more critical.

*a. Ensure that Important Persons are Involved in the Permanency Planning Process*

First, it is essential that there be a process in place to identify those persons who are important to the youth.<sup>191</sup> The recent amendments to ASFA require a child, who has attained fourteen years of age, to add up to two persons of his or her choice to the case planning team.<sup>192</sup> It is encouraging to see federal law recognizing that the youth themselves are the best resource for identifying these special persons.<sup>193</sup> Recalling the youth quoted in the beginning of this Article, “Mama,” whoever she may be, should be included in any and all meetings (as well as less formal conversations) about this youth’s future, and must be encouraged to assist this youth in whatever manner she is able.

This new requirement is a good beginning, but the child welfare system in the past has done a really poor job of identifying and nurturing such persons.<sup>194</sup> Accordingly, the youth must be encouraged to invite these persons, and once their involvement is initiated, these persons must be welcomed as equal and respected members of the team. This may be difficult at times. For example, as will be further explained below, the youth

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<sup>189</sup> BUSS ET AL., *supra* note 2, at 7.

<sup>190</sup> Comm. on Early Childhood, Adoption & Dependent Care, *Developmental Issues for Young Children in Foster Care*, 106 PEDIATRICS 1145, 1146 (2000).

<sup>191</sup> See Bussiere, *supra* note 26, at 233.

<sup>192</sup> Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113, 128 Stat. 1919, 1928 (2014). “A State may reject an individual selected by a child to be a member of the case planning team at any time if the State has good cause to believe that the individual would not act in the best interests of the child.” *Id.*

<sup>193</sup> Pine & Spath, *supra* note 78, at 238.

<sup>194</sup> *Id.*

may wish to invite one or more biological family members, who have not been formally involved in the youth's life for some time. The agency may initially have concerns about including these family members in the planning process. Yet, unless it is certain that these family members would "not act in the best interest of the youth,"<sup>195</sup> it is critical that they be fully included in the permanency planning process and supported in whatever way is consistent with the youth's wishes and the adult's intentions with regard to the youth.<sup>196</sup> In addition, it also can be fruitful to examine the youth's child welfare file (often referred to as "mining") to identify people (former foster parents, relatives, former teachers or coaches, etc.) who have had a relationship with the youth and ask the youth for their thoughts about these people.<sup>197</sup>

*b. Mentoring*

Mentoring is another method that can help youth become more connected with adults.<sup>198</sup> Such relationships can be quite significant, even life changing.<sup>199</sup> Not only do they provide opportunities for emotional connections, but mentors can "improve[e] . . . cognitive skills through instruction and conversation" and can "promot[e] positive identity development by serving as role models and advocates."<sup>200</sup> Creative methods need to be explored to help recruit mentors who wish to establish a genuine relationship with a foster youth and to sustain these relationships once they are established.<sup>201</sup> It is also critical to look to the youth's existing contacts and relationships to be best able to foster on-going connections.<sup>202</sup> Mentoring relationships that are encouraged with adults who already are part

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<sup>195</sup> Preventing Sex Trafficking and Strengthening Families Act § 113.

<sup>196</sup> See Bussiere, *supra* note 26, at 233.

<sup>197</sup> Pine & Spath, *supra* note 78, at 238.

<sup>198</sup> HOWARD & BERZIN, *supra* note 2, at 57 (finding that "[m]entoring also has been shown to support positive youth development"). For a review of the efficacy and benefits of mentor programs, see generally Avery, *supra* note 181.

<sup>199</sup> Munson & McMillen, *supra* note 184, at 105.

<sup>200</sup> Avery, *supra* note 181, at 10–11.

<sup>201</sup> See BUSS ET AL., *supra* note 2, at 39 (citing to a program in New York City that established a set of "best practices" for starting a mentoring program). See also Avery, *supra* note 181, at 19 (cautioning that "not all mentoring relationships lead to positive outcomes" and stressing that mentoring programs of short duration or with high turnover rates for mentors are less successful).

<sup>202</sup> CHARLES & NELSON, *supra* note 71, at 24.

of the youth's life tend to last longer, be more meaningful, and have greater potential for a more positive impact.<sup>203</sup>

*c. Permanency Pacts*

Another method to foster lasting connections with adults is the development of a permanency pact. Permanency pacts were developed by Foster Club, a national organization of current and former foster youth.<sup>204</sup> These templates “provide[] a formalized, facilitated process for adults to pledge and specify the support they can provide to [the] youth in foster care.”<sup>205</sup> Permanency pacts call for there to be one or more planning meetings where everyone connected to and involved with a youth come together to discuss the youth's future.<sup>206</sup> As part of this meeting, all adults in attendance are asked to commit to certain activities or responsibilities with which they can assist.<sup>207</sup> For example, one adult may agree to assist a youth with developing her resume, another may commit to taking the youth on college tours, and another may welcome the youth into her home on Thanksgiving and other major holidays. In short, permanency pacts help to establish a network of people for a given youth who may not be able to care for the youth full-time, but would be willing to step in and help with a particular task or activity.<sup>208</sup>

*d. Teach and Nurture Relational Skills*

Finally, it is important to remember that cultivating these adult relationships may not be easy for many foster youth. In fact, it may be quite difficult. The experience of being in foster care and living through many failed relationships causes foster youth to lack trust and to shy away from attachments.<sup>209</sup> Accordingly, building these connections is something that needs to be taught and developed through formal therapeutic supports, as

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<sup>203</sup> Avery, *supra* note 181, at 20.

<sup>204</sup> *Enhancing Permanency*, *supra* note 4, at 11–12. For additional information on Foster Club, see FOSTER CLUB, <https://www.fosterclub.com> (last visited November 2, 2014).

<sup>205</sup> *Enhancing Permanency*, *supra* note 4, at 12.

<sup>206</sup> FOSTERCLUB, PERMANENCY PACT: LIFE-LONG, KIN-LIKE CONNECTIONS BETWEEN A YOUTH AND A SUPPORTIVE ADULT (2006), available at <https://www.fosterclub.com/files/PermPact.pdf>.

<sup>207</sup> *See id.*

<sup>208</sup> *See* BUSS ET AL., *supra* note 2, at 39 (suggesting these networks have been found to be critical). *See also* FOSTERCLUB, *supra* note 206, at 2.

<sup>209</sup> *See* Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 495 (2012).

well as informal communications.<sup>210</sup> Samuels stated it best when she wrote, “Efforts to build skills among young adults aging out of foster care must attend not only to their economic and physical well-being, but to developing their relational skills to ensure their socio-emotional well-being.”<sup>211</sup>

## 2. *The Importance of the Biological Family*

The other emotional connections that must be remembered and nurtured are ties that the youth may have to his or her biological family. As is apparent from youths’ responses and from numerous psycho-social studies, the biological family remains psychologically important to youth—even in cases of previous abuse and neglect or years of physical separation.<sup>212</sup> As is stated above, for many youth, “Mama” in the opening quotation is in fact the youth’s birth mother. Social scientists explain that many youth have a deep-seeded need to continue their relationships with biological parents and siblings.<sup>213</sup> It is essential to their emotional, psychological, cognitive, and social development.<sup>214</sup> Rosemary Avery, author of numerous articles and

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<sup>210</sup> SAMUELS, *supra* note 5, at 5; CHARLES & NELSON, *supra* note 71, at 24 (describing strategies to help develop foster youth relational skills); Robert B. Hill, *Guardianship and Youth Permanence*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* 169 (Benjamin Kerman et al. eds., 2009) (emphasizing the importance of youth being assisted in developing family connections with nonrelated significant adults); Gretta Cushing & Benjamin Kerman, *Permanence Is a State of Security and Attachment*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* 109, 112 (Benjamin Kerman et al. eds., 2009) (concluding that older youth “need to be afforded opportunities and assistance in forming and maintaining continuous relationships . . . that can become significant attachments”).

<sup>211</sup> SAMUELS, *supra* note 5, at 83.

<sup>212</sup> Hill, *supra* note 210, at 169 (recommending that youth be encouraged to maintain frequent contact with birth parents); Geenen & Powers, *supra* note 79, at 1094 (remarking on how “birth families could be an important source of support . . . but also express[ing] concern that their influence could be a negative one”); Block, *supra* note 53, at 27–30 (commenting on children’s attachments with their parents despite parental dysfunction); CASEY FAMILY SERVICES & THE CHILDREN’S DEFENSE FUND, *supra* note 73, at 14 (recommending that “[s]ibling relationships should be maintained”); Landsman et al., *supra* note 79, at 19 (stressing how “[f]amily connections endure regardless of legal actions”).

<sup>213</sup> See Block, *supra* note 53, at 27–28.

<sup>214</sup> HOWARD & BERZIN, *supra* note 2, at 56–57 (discussing how and why “[i]t is important to maintain, strengthen or develop healthy relationships for older youth with their families of origin”); CHARLES & NELSON, *supra* note 71, at 11 (indicating that several studies found “foster youth who have contact with their birth parents while in care have better outcomes than youth who do not maintain these contacts”).



reports on permanency, stated that “[r]eestablishing these family connection for teens before they exit out of foster care . . . is the . . . most positive youth development program the child welfare system can offer.”<sup>215</sup>

Anecdotal reports, along with numerous studies, document how youth seek out and return to the biological families from whom they were removed, despite the fact that these families were deemed unsafe for reunification at one point in time.<sup>216</sup> For example, in the Chapin Hall tri-state study, 81% of the young adults reported having contact with a biological family member at least once per week.<sup>217</sup> “Contact was most frequent with siblings and least frequent with fathers.”<sup>218</sup>

Another study of youth from eight counties in Missouri further illustrates the pull to reconnect with biological family members.<sup>219</sup> Four hundred and four youth were interviewed near their seventeenth birthday and then every three months until the age of nineteen.<sup>220</sup> At the final interview, 80% of the youth (325 of the 404) were still participating.<sup>221</sup> By the month of their nineteenth birthday, over half of the youth (234 of the 404) exited foster care, despite the fact that Missouri permits youth to stay involved with the child welfare agency until the age of twenty-one.<sup>222</sup> Significantly, many youth began leaving the system soon after their seventeenth birthday.<sup>223</sup> Of even greater significance, the majority of youth explained they left to live with family.<sup>224</sup> In fact, the study showed that youth who left the system were often living with family; those who stayed

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<sup>215</sup> Avery, *supra* note 2, at 400.

<sup>216</sup> BUSS ET AL., *supra* note 2, at 40. *See also* SAMUELS, *supra* note 5, at 83 (“Biological family remains psychologically present for participants despite their physical separation.”); CHARLES & NELSON, *supra* note 71, at 11 (describing how foster youth “return to the very homes from which they were removed”).

<sup>217</sup> COURTNEY ET AL., *supra* note 10, at 14.

<sup>218</sup> *Id.* Not surprisingly, these were “the same family members to whom they reported feeling the most and least close.” *Id.*

<sup>219</sup> McCoy et al., *supra* note 13, at 735.

<sup>220</sup> *Id.* at 737.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.* at 738–39. Stated differently, 168 of the 325 youth remaining in the study had left foster care by their nineteenth birthday. *Id.*

<sup>223</sup> McCoy et al., *supra* note 13, at 739.

<sup>224</sup> *Id.* A smaller proportion (29%) stated that they wanted “independence.” *Id.* at 742. Furthermore, youth with behavioral concerns were more likely to leave foster care before the age of twenty-one. *Id.* at 743.

were often living on their own in the community.<sup>225</sup> These findings are corroborated by other studies and research.<sup>226</sup>

Despite this strong evidence, for many older foster youth, the responsible child welfare agencies had long since discontinued their efforts to sustain the youth's relationship with family members.<sup>227</sup> Such policies and practices need to change. Not only is statutory reform necessary, but child welfare policy and practice must be refocused.

First, we must cease creating situations where connections with the biological family are completely lost and must reconsider whether the requirement that the state must file for termination of parental rights when a child has been in care for fifteen of the last twenty months makes sense for our older youth.<sup>228</sup> This mandate coupled with the high financial incentives for the adoption of older youth creates too many legal orphans.<sup>229</sup> At the very least, there should be a rebuttable presumption against adoption for older youth when no foreseeable adoptive families have been identified, the youth does not want to be adopted, or the youth has strong ties to biological family members. Moreover, it is worth considering whether there should be financial incentives for the achievement of long term plans that do not require the termination of parental rights—most notably guardianship. Additionally, financial incentives might be warranted for youth achieving other significant and sustained emotional connections or who succeed in completing a four-year college.

In addition to these statutory reforms, current policies with regard to how biological families are viewed and treated must be examined anew. Once parental rights are terminated, all efforts to work with the biological

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<sup>225</sup> *Id.* This study also revealed that 39% of the youth left foster care frustrated and in unplanned ways. *Id.* at 742.

<sup>226</sup> See, e.g., 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) (noting how older youth are "firmly opposed to the termination of parental rights and hope to preserve a role for their parents"); Cushing & Kerman, *supra* note 210, at 112 (finding that youth who entered care between the ages of seven and twelve are most likely to run away and maintaining that "running away as an attempt to 'make connections with family, friends and a community where they sensed (or hoped) they belonged . . . .'").

<sup>227</sup> Avery, *supra* note 2, at 401 ("[M]any child welfare agencies have long since discontinued their efforts to sustain the youth's relationships with family [or] reconnect youth with family members with whom contact has been lost over time.").

<sup>228</sup> Barth & Chintapalli, *supra* note 77, at 105 (calling for older youth to be exempt from TPR requirements).

<sup>229</sup> See Schalick, *supra* note 17, at 470.

family are halted, often abruptly.<sup>230</sup> This practice needs to change. If a youth wishes to continue his or her connections to parents, siblings, grandparents or other important biological family members, this should be encouraged to the fullest extent permissible under state law.

Second, once it becomes clear that a youth is not likely to be adopted or the plan formally changes to an alternate permanent living arrangement, connections with biological family members ought to be re-established—especially if the youth has maintained contact or wishes to have contact.<sup>231</sup> At times, such actions may need to encompass actually finding parents and biological family members including siblings, grandparents, aunts, uncles, and cousins.<sup>232</sup> At other times, the youth are in contact with various family members, but the connections are not supported and valued by the child welfare system.<sup>233</sup>

This approach needs to be reversed. If a youth is in touch with biological family members, child welfare agency representatives should be in communication with these relatives as well. If several years pass, family members should be re-investigated and their current situations re-assessed, particularly if plans toward adoption or guardianship are not proving fruitful. Obviously some situations will remain unsafe and inappropriate. It is possible, however, that the situation with one or more of the biological family members changed during the passage of time and the relative is now viable in terms of reunification (if a parent), placement (if a relative), or at the very least as an adult connection for the youth.<sup>234</sup> Recognizing this

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<sup>230</sup> See Dorothy Roberts, *ASFA: An Assault on Family Preservation*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/roberts.html> (last visited Nov. 3, 2014) (even parents lose all visitation rights).

<sup>231</sup> Landsman et al., *supra* note 79, at 19 (“Building on family strengths and making optimal use of positive connections is an important part of permanency planning.”).

<sup>232</sup> For example, the Family Finding Program is a model program, which uses internet search engines and other investigative strategies to identify and locate lost family members. See NAT’L INST. FOR PERMANENT FAM. CONNECTEDNESS, *What is Family Finding and Permanency*, <http://www.familyfinding.org/> (last visited Nov. 2, 2014). The Family Finding program is a model program developed by Kevin A. Campbell. *Id.* It “offers methods and strategies to locate and engage relatives of children currently living in out-of-home care. The goal of Family Finding is to connect each child with a family, so that every child may benefit from the lifelong connections that only a family provides.” *Id.*

<sup>233</sup> Roberts, *supra* note 230 (emphasis is now placed on adoption with new families).

<sup>234</sup> See David Crampton & Joan Pennell, *Family-Involvement Meetings with Older Children in Foster Care: Promising Practices and the Challenge of Child Welfare Reform*, in *ACHIEVING PERMANENCE FOR OLDER CHILDREN AND YOUTH IN FOSTER CARE* 266, 280

reality, some recommend that statutes be enacted to permit the reinstatement of parental rights.<sup>235</sup>

Even if none of these scenarios are feasible, if the youth wishes or consents, biological family members should be included in planning meetings where the youth's future and long term goals are discussed. For example, it may be that a biological family member is one of the two persons that the youth wishes to join the case planning team, as per the recent amendments to ASFA.<sup>236</sup> While child welfare agency representatives may be reluctant to permit these family members to participate, it might well be that these family members have information and ideas to contribute, and their presence maintains a connection for the youth and helps the him or her to have a more realistic sense of what an individual family member can offer.<sup>237</sup>

#### *D. Youth Involvement*

Finally, all of the above objectives are best supported by ensuring that youth are involved in their own permanency planning.<sup>238</sup> This involvement

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(Benjamin et al. eds., 2009) (“The establishment or reestablishment of family connections . . . may be beneficial for youth long after they leave foster care.”).

<sup>235</sup> See, e.g., Schalick, *supra* note 17, at 471–72. Schalick acknowledges that while reinstatement of parental rights is not appropriate for all children, for some children, it may be in their best interest. *Id.* Reinstatement is most often appropriate when both the child and parent wish for it to happen, the parent has remediated whatever was the concern that initiated the child's placement into foster care, and a court has determined that it is in the child's best interest. See *id.* at 471. See also HOWARD & BERZIN, *supra* note 2, at 50–51, 55 (discussing under what circumstances the reinstatement of parental rights may be appropriate and concluding it is in the best interest of youth when there is statutory authority enabling and guiding courts when and how to consider placement back with the birth parents); Taylor, *supra* note 21, at 329–34 (surveying current state efforts to reinstate parental rights and proposing a method of temporarily terminating parental rights); Barth & Chintapalli, *supra* note 77, at 105 (calling for TPR reversals to be permitted when parents regain their parental capacity and youth have not been adopted).

<sup>236</sup> See Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, § 113, 128 Stat. 1919, 1928 (2014).

<sup>237</sup> This last point highlights another issue, the need to equip youth with the tools to deal with ongoing difficulties with their birth families. BUSS ET AL., *supra* note 2, at 40. Often youth may idealize what reconnecting or returning home will be like, only to be sorely disappointed and rejected once again. See SAMUELS, *supra* note 5, at 84. More needs to be done to prepare youth for this reality and what they may find once they return home. *Id.*

<sup>238</sup> *Chances for Success*, *supra* note 143, at 268 (“No effective plan for independence can be developed or implemented for a youth without the youth's extensive involvement.”);

can take many different forms including, but not limited to, the youth's presence at court hearings<sup>239</sup> and case planning and family team meetings, in addition to encouraging the youth's active participation in regularly scheduled transition planning meetings, where the sole or primary purpose of the meeting is to discuss the youth's plans for the future and necessary services and assistance to accomplish these objectives. The recent amendments are another step in the right direction. Pursuant to these new requirements, "[i]n the case of any child for whom another planned permanent living arrangement is the [proposed] permanency plan, . . . the court must ask the child about [his or her] desired permanency outcome."<sup>240</sup> Yet, the new amendments do not go far enough. Regardless of a youth's permanency goal, all youth should be invited and welcomed to participate in court hearings, especially annual permanency hearings.<sup>241</sup> A youth's presence at court and important meetings not only helps to ensure that those persons most important to the youth are present, involved, and connected with the youth, but it also helps to make certain that whatever is being

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Mallon et al., *supra* note 120, at 50–51; Bussiere, *supra* note 26, at 233; CHARLES & NELSON, *supra* note 71, at 25 (maintaining that there is a "need for meaningful youth involvement").

<sup>239</sup> *Chances for Success*, *supra* note 143, at 264 ("In 2006, Congress added to the permanency review provisions a requirement that foster youth be 'consulted' in an 'age-appropriate manner' during the review process."). The recent amendments to ASFA also add the requirement that youth be consulted on their permanency plans. Preventing Sex Trafficking and Strengthening Families Act § 113. Yet, in both instances "consultation" is not defined.

<sup>240</sup> Preventing Sex Trafficking and Strengthening Families Act § 112(a)(s)(A).

<sup>241</sup> New Jersey provides statutory authority for such a mandate. Section 30:4C-61.2 of the New Jersey Statutes Annotated states:

Written notice of the date, time and place of the permanency hearing shall be provided at least 15 days in advance to the following, each of whom shall be entitled to attend the hearing and to submit written information to the court: (1) the division or agency; (2) the child . . .

N.J. STAT. ANN. § 30:4C-61.2 (West 2011).

planned is most in line with the individual needs of the youth.<sup>242</sup> Some also have noted the value of including youth in terms of their development.<sup>243</sup>

The importance of including youth in the permanency planning process cannot be overstated.<sup>244</sup> Yet, despite strong support for this to occur, in practice youth continue to be shut out of permanency planning meetings and the decision-making process.<sup>245</sup> Foster youth repeatedly report that they are rarely involved in the decisions made about their lives, whether these are short term decisions or decisions concerning longer-term issues—including

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<sup>242</sup> For example, in one study by Geenen and Powers in 2007, current and former foster youth (the majority of whom had disabilities) stressed the importance of “young people taking part and having a say in the important decision that impact their lives while in care,” which certainly would include having a say in their permanency plans. Geenen & Powers, *supra* note 79, at 1090. See also Avery, *supra* note 2, at 402 (commenting on the importance of the involvement of youth in decision-making regarding their own care); BUSS ET AL., *supra* note 2, at 73 (“No effective plan for independence can be developed or implemented for a youth without the youth’s extensive involvement.”).

<sup>243</sup> Their involvement can enhance their decision-making skills and their ability to advocate for themselves, among other things. *Chances for Success*, *supra* note 143, at 268; BUSS ET AL., *supra* note 2, at 73.

<sup>244</sup> Margolin, *supra* note 22, at 425, 431; Hill, *supra* note 210, at 169 (calling for youth to be fully involved in futures planning and decision-making); Crampton & Pennell, *supra* note 234, at 278 (“A key element of the process is the attendance of the youth themselves in [planning] meetings.”); FREY ET AL., *supra* note 76, at 3 (“Youth involvement in permanency planning and decision-making is absolutely essential.”); Freundlich & Avery, *supra* note 79, at 132; Landsman et al., *supra* note 79, at 19.

<sup>245</sup> Crampton & Pennell, *supra* note 234, at 278 (remarking how youth are not included in planning and decision-making processes); CHARLES & NELSON, *supra* note 71, at 25 (“In most child welfare systems, youth are not included in the discussion of how the system evolves and functions.”); Madelyn Freundlich et al., *Preparation of Youth in Congregate Care for Independent Living*, 12 CHILD & FAM. SOC. WORK 64, 65 (2007) (describing research which indicates “that youth are not involved significantly in making decisions that affect them while they are in foster care nor in planning for themselves after discharge”); BUSS ET AL., *supra* note 2, at 73 (describing youth participation in transition planning as “minimal” and noting that even if they are invited to participate, “they are clearly not in control of the planning process and their experience is largely passive”).

permanency.<sup>246</sup> Even child welfare caseworkers acknowledge that youth typically are not included in futures planning.<sup>247</sup>

Clearly, protocols and policies must be put into place to ensure that youth have the opportunity to fully and meaningfully participate in the permanency planning process.<sup>248</sup> “Planning must genuinely be guided by each youth’s wishes, hopes, and dreams and must respectfully honor their feelings about past and current relationships.”<sup>249</sup> In other words, each and every youth must be asked and encouraged to explain and define what permanency means to them, to identify who are the important people in their lives, and to articulate what they need to ensure a safe and stable future.<sup>250</sup> No one knows this better than the youth himself or herself. This may seem obvious, however, it is often overlooked if not ignored.

## VII. CONCLUSION

We must do more and something different to improve the outcomes of older foster youth. Recent studies demonstrate how poorly this population

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<sup>246</sup> MADELYN FREUNDLICH & JANA BOCKSTEIN, CHILDREN’S RIGHTS 75 (2008), available at [http://www.childrensrights.org/wp-content/uploads/2008/06/permanent\\_solutions\\_seeking\\_family\\_stability\\_for\\_youth\\_in\\_foster\\_care.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/permanent_solutions_seeking_family_stability_for_youth_in_foster_care.pdf) (reporting on a study conducted in New York City in 2005); Avery, *supra* note 2, at 402 (citations omitted) (“Foster youth report rarely being involved in the decisions made about their short- or long-term care plans made for them, and report having minimal, if any, control over maintaining core relationships with those to whom they are attached, most notably siblings.”). *But see* CHAMBERS ET AL., *supra* note 92, at 2 (noting a consistent theme among youth that they felt they had influence over their permanency goals).

<sup>247</sup> Geenen & Powers, *supra* note 79, at 1090 (interviewing child welfare caseworkers who agree that “giving youth more opportunities to take responsibility and ownership for their lives is key to successful transition”). One caseworker is quoted as stating the following: “We [caseworkers] are making plans for them. And nobody is saying ‘what do you want?’” *Id.*

<sup>248</sup> Crampton & Pennell, *supra* note 234, at 279 (cautioning that “simply inviting the youth to the meeting is not sufficient,” and reminding that youth must be listened to and given the opportunity to be actively engaged in the process); *Making Families Permanent*, *supra* note 73, at 360 (highlighting “[t]he importance of actively involving youth in permanency planning and preparation for adulthood”); BUSS ET AL., *supra* note 2, at 40 (recommending and describing a particular program utilized in California and Hawaii—“Youth Circles”—aimed at facilitating meetings where youth choose who to invite, what issues to discuss, and ultimately what plans to make for the future).

<sup>249</sup> FREY ET AL., *supra* note 76, at 3.

<sup>250</sup> *See* Crampton & Pennell, *supra* note 234, at 280.

is faring and vividly describe the realities of their situations.<sup>251</sup> We also now have access to numerous reports documenting both what youth think they need as well as practice and policy changes recommended by social workers and psychologists.<sup>252</sup> Yet, most of these recommendations are limited and too narrow, in large part because they are unwilling to forego the mandate of permanency, and instead, try to fit their proposed changes into the existing framework.<sup>253</sup>

Until child welfare stakeholders recognize that an approach primarily focused on legal permanency and security is not a reality for the majority of our older foster youth, the system will continue to fail these youth, causing their transitions into adulthood to be extremely difficult and wrought with heartache. The existing definitions of permanency, as they are outlined in federal and state laws, must be thrown out or at the very least re-defined. While it is optimal to strive for the ideal situation of permanency, through adoption or guardianship, when a youth desires it (and at times even when they do not), all efforts also must be made to establish committed, emotional connections for our youth and ensure stability through quality supportive services and assistance. These objectives must never be sequential and the former must never overshadow the latter. When asked, this is what the youth are saying; their voices must be heard and acted upon accordingly.

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<sup>251</sup> See, e.g., SHARON VANDIVERE ET AL., CHILDREN IN FOSTER CARE: HOW ARE THEY FARING? 1 (2003), available at <http://www.childtrends.org/wp-content/uploads/2013/03/FosterHomesRB.pdf>.

<sup>252</sup> See sources cited *supra* note 235.

<sup>253</sup> See, e.g., Deborah Cromer, *Through No Fault of Their Own: Reasserting a Child's Right to Family Connectedness in the Child Welfare System*, 41 FAM. L. Q. 181, 182–84 (2007).