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NOTE

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Allison Hilmer*

INTRODUCTION

The American legislative and judicial systems have consistently weighed the rights and interests of parents over the rights and interests of their children. Since as early as 1923, the Supreme Court of the United States has interpreted the Bill of Rights and the Fourteenth Amendment to guarantee to parents and guardians the liberty to bring up children under their care and control.¹ The Court has expanded this idea of liberty to include the liberties to direct the educational upbringing of their children,² direct the religious upbringing of their children,³ consent to their children obtaining an abortion,⁴ and even have their children institutionalized.⁵ In cases concerning these liberties, the Court has either weighed the interests of parents above the interests of their children or altogether ignored the interests of children.⁶ In doing so, the Court has relied on the presumption that “natural bonds of affection lead parents to act in the best interests of their children.”⁷

One might think that in the context of the child welfare system, which was designed with the intention of protecting and promoting the best interests of children, the rights and interests of children would be weighed more heavily. After all, there is a presumption that families only become involved in the child welfare system after it has been proven that, at some level, the parents have failed to act in the child’s best interests.⁸ Decades of Supreme Court precedent, however, have demonstrated that such is not the case. In *DeShaney v. Winnebago County*

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¹ See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (prioritizing parents’ right to control the education of their children over children’s rights to receive certain education).

² See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 213–15 (1972); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534 (1925); *Meyer*, 262 U.S. at 401.

³ See *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944).

⁴ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 899 (1992); *Bellotti v. Baird*, 443 U.S. 622, 634–35 (1979).

⁵ See *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that Georgia’s procedures granting parents the authority to have their children committed to a state mental hospital are not constitutionally deficient because parents are presumed to act in the best interest of their children).

⁶ See, e.g., *Yoder*, 406 U.S. at 213–15 (focusing not on the best interest of children but instead on the rights of parents to direct the upbringing of their children). See generally *Prince*, 321 U.S. 158 (ignoring the interests of the child involved).

⁷ *Parham*, 442 U.S. at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES 447; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 190).

⁸ See Jessica A. Graf, *Can Courts and Welfare Agencies Save the Family? An Examination of Permanency Planning, Family Preservation, and the Reasonable Efforts Requirement*, 30 SUFFOLK U. L. REV. 81, 82–84 (1996).

Department of Social Services, for example, the Court held that a child who had been beaten so severely by his father that he fell into a life-threatening coma and suffered severe, permanent brain damage was not entitled to state protection against his father.⁹ Further, in *Santosky v. Kramer*, the Court explicitly recognized that in termination of parental rights proceedings, the child's best interests may only be considered after a court determines parental unfitness.¹⁰ Moreover, such a determination of parental unfitness is reviewed from the parents' perspective, not from the perspective of the child's best interests.¹¹

This Note discusses whether the child welfare system actually lives up to its name by protecting the best interests of children and argues for a reform in the process by which the state may terminate parental rights. Part I of this Note provides a general overview of the child welfare system. Part II of this Note provides a general overview of the Indiana child welfare system. Part III analyzes the Indiana Department of Child Service's compliance with federal child welfare objectives. Part IV analyzes the child welfare system's impact on children. Part V proposes a reform to address the challenges existing in the child welfare system. Specifically, this Note argues that courts should be required to consider the best interests of children apart from the interests of their parents, and a "reasonable efforts" standard should be enforced against parents.

I. OVERVIEW OF THE CHILD WELFARE SYSTEM

Historically, matters of child welfare have been entirely state concerns.¹² Although child welfare remains primarily a matter of state concern, the federal government has become increasingly more involved. The child welfare system is now broadly regulated by federal legislation, and the receipt of federal funding depends on compliance with such legislature.¹³ In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), which was the first major piece of federal legislation to address child abuse and neglect.¹⁴ Under CAPTA, states were required to establish procedures for reporting child abuse and systems to

⁹ 489 U.S. 189 (1989).

¹⁰ *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

¹¹ *See id.*

¹² Kasia O'Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, THE PEW CHARITABLE TRUSTS 1 (2004), https://www.pewtrusts.org//media/legacy/uploadedfiles/wwwpewtrustsorg/reports/foster_care_reform/legislativehistory2004pdf.pdf.

¹³ *See* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 11 Stat. 2115 (1997); Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980); Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974); Social Security Act of 1935, 42 U.S.C. §§ 601-609 (1935).

¹⁴ Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974); *see also* Will L. Crossley, *Defining Reasonable Efforts: Demystifying the State's Burden Under Federal Child Protection Legislation*, 12 B.U. PUB. INT. L.J. 259, 269-70 (2003).

investigate those reports.¹⁵ This led to an increase in the number of children who were removed from their homes and placed into the foster care system, as well as an increase in the length of placement.¹⁶ Critics of the system therefore became increasingly concerned with the number of children being removed, the ease with which the children seemed to be removed, and the length of time for which they were removed.¹⁷ In 1977, the Supreme Court of the United States chimed in and noted that “the median time spent in foster care in New York was over four years. Indeed, many children apparently remain in this ‘limbo’ indefinitely.”¹⁸ Children were therefore not being accorded any semblance of permanency; their homes were temporary rather than permanent, and there was no discernible plan to provide them a permanent home.

To combat some of these concerns, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (AACWA).¹⁹ The AACWA “sought ‘to lessen the emphasis on foster care placement and to encourage greater efforts to find permanent homes for children either by making it possible for them to return to their own families or by placing them in adoptive homes.’”²⁰ The Act:

- Established the first federal procedural rules governing child welfare management, permanency planning, and foster care placement reviews;
- Required states to develop a state plan detailing how child welfare services will be delivered;
- Required states to make “reasonable efforts” to keep families together by providing both prevention and family reunification services;
- Created an adoption assistance program (Title IV-E Adoption Assistance); and
- Created the first significant role for the court system, by requiring courts to review child welfare cases on a regular basis.²¹

Specifically, the AACWA requires courts to conduct a progress review hearing every six months and a dispositional hearing no later than eighteen months after the commencement of the case.²² The goal of the progress review hearing is to monitor the progress of families and determine whether further action needs to be

¹⁵ Murray & Gesiriech, *supra* note 12, at 3.

¹⁶ *Id.*

¹⁷ *Smith v. Org. of Foster Families*, 431 U.S. 816, 835–36 (1977) (“[Critics] note that children often stay in ‘temporary’ foster care for much longer than contemplated by the theory of the system.”).

¹⁸ *Id.* at 836 (internal citations omitted).

¹⁹ Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980).

²⁰ Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 123 (1995) (quoting Rep. No. 336, 96th Cong., 2d Sess., reprinted in 3 U.S. CODE CONG. & AD. NEWS 1450 (1980)).

²¹ Murray & Gesiriech, *supra* note 12, at 3–4.

²² Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980); see also Guggenheim, *supra* note 20, at 123.

taken.²³ The goal of this eighteen-month dispositional hearing is to either reunify the family or move to terminate the parental rights so that the child may be freed for adoption.²⁴

Despite initial improvements in the child welfare system following the enactment of the AACWA, the number of children involved in the child welfare system had begun to rise dramatically again by the mid-1980s. Over the course of nine years, the number of children in foster care increased by seventy-six percent.²⁵ In response to these growing numbers, Congress enacted the Adoption and Safe Families Act of 1997 (ASFA).²⁶ The ASFA has many of the same objectives as the AACWA, but it places greater emphasis on child safety, permanency, and well-being.²⁷ The ASFA, like the AACWA, encourages the expedition of permanency, whether by reunifying the family or freeing the child for adoption.²⁸ Unlike the AACWA, though, the ASFA “[e]stablish[ed] performance standards and a state accountability system, whereby states face financial penalties for failure to demonstrate improvements in child outcomes.”²⁹ Compliance with these federal child welfare requirements is monitored by the Children’s Bureau, an agency organized under the United States Department of Health & Human Services.³⁰

II. OVERVIEW OF THE INDIANA DEPARTMENT OF CHILD SERVICES

In Indiana, matters of child welfare are governed by Title 31 of the Indiana Code, and they are handled by the Indiana Department of Child Services (DCS).³¹ DCS involvement begins when a person makes a report of suspected child abuse and/or neglect to the DCS’s hotline.³² The hotline may then choose to recommend the report for “screen-in” or “screen-out.”³³ If a report is screened in, an assessment worker with the DCS must initiate their investigation of the report within two hours, twenty-four hours, or five days, depending on the type of report.³⁴ The assessment worker must then continue to investigate the report with the primary

²³ Adoption Assistance and Child Welfare Act of 1980.

²⁴ Guggenheim, *supra* note 20, at 123.

²⁵ Murray & Gesiriech, *supra* note 12, at 4.

²⁶ *Id.* at 5; Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

²⁷ See Adoption and Safe Families Act of 1997.

²⁸ See *id.*

²⁹ Murray & Gesiriech, *supra* note 12, at 5.

³⁰ See generally CHILDREN’S BUREAU: AN OFFICE OF THE ADMINISTRATION FOR CHILDREN & FAMILIES, <https://www.acf.hhs.gov/cb> (last visited Jan. 4, 2019) (describing the role and purpose of the Children’s Bureau); see also U.S. Dep’t of Health & Human Servs., FINAL REPORT: INDIANA CHILD AND FAMILY SERVICES REVIEW 1 (2016) (providing an example of the Children’s Bureau’s oversight of child welfare in Indiana).

³¹ See generally IND. CODE ANN. §§ 31-34-1 to 31-35-2 (West 2019).

³² See IND. CODE ANN. § 31-33-5-1 (West 2019); INDIANA DEP’T OF CHILD SERVS., INDIANA CHILD ABUSE AND NEGLECT HOTLINE, [in.gov/dcs/2971.htm](http://www.in.gov/dcs/2971.htm) (last visited Dec. 25, 2019).

³³ See IND. CODE ANN. § 31-33-8-1 (West 2019); *The Child Abuse and Neglect Hotline Process*, INDIANA DEP’T OF CHILD SERVS., https://www.in.gov/dcs/files/Hotline_Process.pdf (last visited Dec. 25, 2019).

³⁴ § 31-33-8-1 (e)–(f).

purpose of protecting the child.³⁵ The investigation involves speaking with various involved individuals: the report source, the child, the parents, the child's siblings, any other members of the household, any professionals involved in the report, and the alleged perpetrator.³⁶ The investigation also includes visiting the child's home and assessing the safety conditions of the home.³⁷

Following the assessment, the DCS may either substantiate or un-substantiate the report.³⁸ If the DCS chooses to un-substantiate the report, they may offer the family information about community services.³⁹ The case is otherwise closed, however, and there is no further investigation.⁴⁰ Conversely, if the DCS chooses to substantiate the report, then the case is transferred to a second case manager, called a permanency case manager, and it may take on one of three general forms: an informal adjustment, an in-home Child in Need of Services (CHINS), or an out-of-home CHINS.⁴¹

The primary difference between an informal adjustment and a CHINS case is that an informal adjustment does not involve the coercive intervention of the courts.⁴² Rather, an informal adjustment depends on the parents' voluntary participation in services and should remain open for only six months.⁴³ CHINS cases, conversely, do require the coercive intervention of the courts, and they may remain open for as long as is necessary to achieve a permanency goal for the child.⁴⁴ Because this Note addresses the involuntary termination of parental rights, the primary focus for the remainder of the Note will be on out-of-home CHINS cases.

Over the last ten years, involvement by the DCS has increased dramatically. In 2011, there were 16,116 children in Indiana with an open DCS case.⁴⁵ By 2016, the most recent year for which the DCS has released information, that number had grown to 26,862 children.⁴⁶ Of those 26,862 children with open cases, 16, 213 resided in out-of-home care. There are six different forms of out-of-home placement

³⁵ IND. CODE ANN. § 31-33-8-6 (West 2019).

³⁶ IND. DEP'T OF CHILD SERVS., CHILD WELFARE POLICY ch. 4, § 4 (2016), <https://www.in.gov/dcs/files/4.04%20Required%20Interviews.pdf>.

³⁷ *Id.* at § 8.

³⁸ *See* IND. CODE ANN. § 31-33-8-15 (West 2019).

³⁹ IND. DEP'T OF CHILD SERVS., *supra* note 36, at § 19.

⁴⁰ *See* § 31-33-8-15(b).

⁴¹ *Id.*; IND. CODE ANN. §§ 31-34-1-0.1 to 31-34-1-16 (West 2019); IND. CODE ANN. § 31-34-8-1 (explaining implementation of informal adjustment program).

⁴² *See* IND. CODE ANN. § 31-34-8-1(b).

⁴³ IND. CODE ANN. §§ 31-34-8-1 to 31-34-8-3 (West 2019); IND. CODE ANN. § 31-34-8-6 (West 2019) ("A program of informal adjustment may not exceed six (6) months, except by approval of the juvenile court.").

⁴⁴ IND. CODE ANN. §§ 31-34-1-1 to 31-35-6-4 (West 2019) (providing no termination date for CHINS cases).

⁴⁵ IND. UNIV. EVALUATION TEAM & DEP'T OF CHILD SERVS., INDIANA DEPARTMENT OF CHILD SERVICES CHILD WELFARE TITLE IV-E WAIVER DEMONSTRATIONS PROJECT FINAL REPORT 18 (2018) [hereinafter FINAL REPORT].

⁴⁶ *Id.*

that are utilized by the DCS: relative care, kinship care,⁴⁷ licensed foster care, residential care,⁴⁸ collaborative care,⁴⁹ and emergency placement.⁵⁰ When DCS must remove a child from their home, they consider placement options in that order: first, the DCS will search for a relative placement for the child; if the DCS is unable to find an appropriate relative placement, the DCS will search for a kinship placement for the child; etc.⁵¹

The primary goal of DCS is to reunify families and return children to their natural parents.⁵² If, however, reasonable efforts by the DCS to reunify the family are unsuccessful, parental rights of the parents may be terminated.⁵³ By statute, the DCS must file a petition to terminate parental rights if a child has been out of the care of their parents for fifteen of the most recent twenty-two months.⁵⁴ While this statute seems to be in compliance with ASFA's goal of expediting permanency, there are a number of circumstances under which the DCS may move to dismiss the petition.⁵⁵ As such, the DCS is granted broad discretion in choosing whether or not to expedite permanency for the children in its care.

III. STATUS OF THE DCS: INDIANA'S COMPLIANCE WITH FEDERAL CHILD WELFARE OBJECTIVES

At the tender age of two-years-old, Jane⁵⁶ entered the child welfare system for the fifth time in her short life. Her mother had left her at a friend's house for the night, but a week later, Jane's mother still had not come to get her. Jane's mother suffered from several mental health disorders, severe substance abuse, frequent homelessness, and frequent incarceration. Jane was her mother's fourth child, and her mother's parental rights had been involuntarily terminated as to the older children before Jane was born. Jane's father was unknown. After one week of waiting for Jane's mother to return, the friend called the DCS hotline for help.

⁴⁷ Ind. Dep't of Child Servs., *Kinship/Relative Caregivers*, IN.GOV, <https://www.in.gov/dcs/3007.htm> (Kinship care is similar to relative placement; however, the caregiver is not related to the child. The caregiver is often a friend of the family.).

⁴⁸ See IND. DEP'T OF CHILD SERVS., CHILD WELFARE POLICY ch. 8, § 4 (2013), <https://www.in.gov/dcs/files/8.04%20Emergency%20Shelter%20Care%20and%20Residential%20Placement%20Review.pdf>.

⁴⁹ Ind. Dep't of Child Servs., *Indiana's Extended Foster Care Program Collaborative Care Fact Sheet*, IN.GOV, https://www.in.gov/dcs/files/Collaborative_Care_Fact_Sheet.pdf ("Collaborative Care is Indiana's Extended Foster Care Program that allows: 1. Current youth to remain in foster care with services[; and] 2. Former foster youth or probation youth to re-enter foster care with services[.]").

⁵⁰ See FINAL REPORT, *supra* note 45, at 18.

⁵¹ IND. CODE ANN. § 31-34-6-2 (West 2014).

⁵² Ind. Dep't of Child Servs., *About DCS*, IN.GOV, <https://www.in.gov/dcs/2370.htm>.

⁵³ IND. CODE ANN. § 31-35-2-4 (West 2014).

⁵⁴ *Id.* § 31-35-2-4.

⁵⁵ *Id.* § 31-35-2-4.

⁵⁶ All identifying characteristics of this story, including the child's name, have been changed so as to protect the child's privacy.

The family case manager assigned to Jane's case unsuccessfully spent the next several months trying to contact Jane's mother. Nearly every week, the family case manager called every number she had for the mother, visited the mother's every known address, frequently checked MyCase for any information, and reached out to Jane's maternal grandmother. Despite this effort, the family case manager was only able to contact Jane's mother twice, and each time, she disappeared the next day and was unable to be contacted for more than one month afterwards.

Thankfully, Jane was able to stay with the family friend during this process. Once it became apparent to the family friend that Jane's mother may never come back, the family friend expressed concern that she would never be in the position to adopt Jane. The family friend had another friend, though, who had babysat Jane and would be interested in adopting her if the time came. Jane's family case manager brought this concern to her supervisor and the attorney assigned to the case, and the family case manager offered a placement change to this potential foster-adopt family. In response, Jane's family case manager was scolded and told to not even consider adoption as an outcome until Jane had been out of her mother's care for at least fifteen months.

Although Jane's is but one story, it is not dissimilar from the stories of the thousands of children who have become involved with the Indiana DCS. In 2016, the Children's Bureau conducted their third and final Child and Family Services Review of Indiana "to: (1) ensure conformity with certain federal child welfare requirements; (2) determine what is actually happening to children and families as they are engaged in child welfare services; and (3) assist states in enhancing their capacity to help children and families achieve positive outcomes."⁵⁷ In conducting their study, the Children's Bureau reviewed sixty-five DCS cases from throughout the state of Indiana and conducted interviews with various individuals involved with the child welfare system.⁵⁸

The Child and Family Services Review assessed whether Indiana was in substantial conformity with seven child and family outcomes, all of which fall into the three categories: safety, permanency, and well-being. The outcomes include:

- (1) Children are, first and foremost, protected from abuse and neglect;
- (2) Children are safely maintained in their homes whenever possible and appropriate;
- (3) Children have permanency and stability in their living situations;
- (4) The continuity of family relationships and connections is preserved for children;
- (5) Families have enhanced capacity to provide for their children's needs;
- (6) Children receive appropriate services to meet their educational needs; and

⁵⁷ FINAL REPORT, *supra* note 45 at 1.

⁵⁸ *Id.* at 1–2.

(7) Children receive adequate services to meet their physical and mental health needs.⁵⁹

The Children’s Bureau found that Indiana’s performance was not in substantial conformity with any one of the seven outcomes.⁶⁰ Specifically, the Children’s Bureau found that Indiana struggled to establish permanency goals for the children in their care in a timely fashion.⁶¹ Of the forty applicable cases reviewed by the Children’s Bureau, “[c]hildren ha[d] permanency and stability in their living situations” in only twelve cases.⁶² In other words, the children from the remaining twenty-eight cases experienced instability in their living situations. Instability in terms of living situations refers to numerous placement changes throughout the life of the case.⁶³ According to data released by the DCS, in September 2018, the average number of placements per removal episode was 2.1 statewide.⁶⁴ This means that the average child in the care of the DCS was placed in 2.1 different homes other than their own before they were returned home.⁶⁵

The range was between 1.1 placements per removal episode in Warren County and 3.0 placements per removal episode in Steuben County.⁶⁶ Although there is no accessible data to show the average length of time a child remains in each placement, it follows from logic that the longer a case remains open, the more likely a child is to face multiple placements.

IV. WHY THE CHILD WELFARE SYSTEM NEEDS REFORM: PSYCHOLOGICAL IMPACT OF PLACEMENT IN THE CHILD WELFARE SYSTEM

Family stability is profoundly important to the healthy development of children.⁶⁷ Numerous studies have shown that children who have faced maltreatment and are involved in the child welfare system “face multiple threats to their healthy development, including poor physical health, attachment disorders, compromised brain functioning, inadequate social skills, and mental health difficulties.”⁶⁸ Moreover, these threats are compounded with each subsequent

⁵⁹ *Id.* at 5–13.

⁶⁰ *Id.* at 3.

⁶¹ *Id.* at 4.

⁶² *Id.* at 6–7.

⁶³ *Id.* at 7.

⁶⁴ IND. DEP’T OF CHILD SERVS., PRACTICE INDICATOR REPORT AVERAGE NUMBER OF PLACEMENTS 2 (2018).

⁶⁵ *See id.*

⁶⁶ *Id.* at 5–6, 15.

⁶⁷ Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 PROQUEST PSYCHOL. J. 30, 33 (2004).

⁶⁸ *Id.* at 31. *See also* Elizabeth Bartholet, *Creating a Child-Friendly Child Welfare System: Effective Early Intervention to Prevent Maltreatment and Protect Victimized Children*, 60 BUFF. L. REV. 1323 (2012); Anna T. Smyke, Charles H. Zeanah, Nathan A. Fox, Charles A. Nelson & Donald Guthrie, *Placement in Foster Care Enhances Quality of Attachment Among Young Institutionalized Children*, 81 CHILD DEV. 212 (2010).

change in placement.⁶⁹ Children who have experienced multiple placement disruptions are therefore at a much greater risk of experiencing adverse developmental effects. This is significant because many placements are disrupted within the first two years.⁷⁰

A. Attachment Theory

One factor vital to the healthy development of children, particularly infants, is attachment.⁷¹ “Attachment occurs when a child has a secure, consistent, reciprocal relationship with a preferred person—typically the child’s primary caregiver.”⁷² Attachment does not depend on the child’s primary caregiver being their biological parent.⁷³ Rather, attachment depends on the consistent, reliable availability of a primary caregiver.⁷⁴ This is important for children who are involved in the child welfare system, as a child may form secure attachment with a caregiver regardless of biological relation.⁷⁵ A child forms secure attachment with their caregiver when the caregiver consistently responds to the child’s needs in a positive, nurturing manner.⁷⁶ This secure attachment allows children to explore their environments because they can rely on their caregiver for comfort and safety.⁷⁷

Conversely, a child whose caregiver is inconsistent or is generally unresponsive to the child’s needs may not form secure attachment.⁷⁸ Their attachment may instead be insecure, disordered, or disorganized.⁷⁹ Children with some form of attachment disorder may have difficulty forming relationships, trusting others, and managing their emotions.⁸⁰ They may be unable to self-soothe, and they may not reach out to their caregiver or another adult for help.⁸¹ Alternatively, children with some form of attachment disorder may be overly

⁶⁹ Katherine C. Pears, Philip A. Fisher, Jacqueline Bruce, Hyoun K. Kim & Karen Yoerger, *Early Elementary School Adjustment of Maltreated Children in Foster Care: The Roles of Inhibitory Control and Caregiver Involvement*, 81 CHILD DEV. 1550, 1552 (2010).

⁷⁰ Harden, *supra* note 67, at 38 (citing JILL DUERR BERRICK, BARBARA NEEDELL, MELISSA JONSON-REID & RICHARD P. BARTH, TENDER YEARS: TOWARD DEVELOPMENTALLY SENSITIVE CHILD WELFARE SERVICES FOR VERY YOUNG CHILDREN (Oxford Univ. Press 1998)).

⁷¹ See *Why Attachment Matters*, 19 N.C. CHILD. SERVS. PRACTICE NOTES, July 2014, at 1, http://www.practicenotes.org/v19n3/CSPN_v19n3.pdf.

⁷² *Id.*

⁷³ Harden, *supra* note 67, at 34.

⁷⁴ *Id.* at 35.

⁷⁵ *Id.* at 34–35.

⁷⁶ *Why Attachment Matters*, *supra* note 71, at 1.

⁷⁷ Harden, *supra* note 67, at 34.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Attachment Disorders*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Jan. 2014), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Attachment-Disorders-085.aspx [hereinafter *Attachment Disorders*].

⁸¹ *Id.*

trusting or friendly with strangers and “allow strangers to pick them up, feed them, or give them toys to play with.”⁸² These children often show indiscriminate connection to any adult, whether the adult is their family member or a complete stranger.⁸³

Children who are involved in the child welfare system often experience challenges such as these. Research suggests that children who have faced maltreatment and are involved in the child welfare system are more likely than children who have not faced such maltreatment to form insecure, disordered, or disorganized attachment.⁸⁴ In fact, some data suggest that more than seventy-five percent of children who have faced maltreatment have some form of disordered attachment.⁸⁵ This is especially problematic because research has shown that these disordered attachments “have many other adverse outcomes that persist throughout childhood, such as poor peer relationships, behavioral problems, or other mental health difficulties.”⁸⁶ These outcomes are largely a consequence of the fact that attachment affects children’s brain development, social and emotional development, and self-regulation.⁸⁷

B. Brain Development

Another factor, and perhaps the most intuitive factor, vital to the healthy development of children is the physical development of their brains.⁸⁸ Put succinctly, “[b]rain development in infancy and early childhood lays the foundation for all future development.”⁸⁹ Although brain development continues throughout childhood and early adolescence, the brain is most plastic during infancy and early childhood.⁹⁰ As such, adverse experiences affect brain development more significantly during this time.⁹¹

⁸² *Id.*

⁸³ Harden, *supra* note 67, at 34, 36.

⁸⁴ *Id.* at 35.

⁸⁵ *Id.* at 34 (citing VICKI CARLSON, DANTE CICHETTI, DOUGLAS BARNETT & KAREN G. BRAUNWALD, FINDING ORDER IN DISORGANIZATION: LESSONS FROM RESEARCH ON MALTREATED INFANTS’ ATTACHMENTS TO THEIR CAREGIVERS (1989). See Dante Cicchetti & Douglas Barnett, *Attachment Organization in Maltreated Preschoolers*, 3 DEV. & PSYCHOPATHOLOGY 397, 405 (1991)).

⁸⁶ *Id.* at 409.

⁸⁷ *Why Attachment Matters*, *supra* note 71, at 1–2.

⁸⁸ Mariam Arain, Maliha Haque, Lina Johal, Puja Mathur, Wynand Nel, Afsha Rais, Ranbir Sandhu & Sushil Sharma, *Maturation of the Adolescent Brain*, 9 NEUROPSYCHIATRIC DISEASE & TREATMENT 449, 450 (2013). See Harden, *supra* note 67, at 36.

⁸⁹ *Trauma-Informed Child Welfare Practice*, 17 N.C. CHILD. SERVS. PRACTICE NOTES, May 2012, at 1, 2, <http://www.practicenotes.org/v17n2/cspnv17n2.pdf>.

⁹⁰ *Id.* See Harden, *supra* note 67, at 36.

⁹¹ *Why Attachment Matters*, *supra* note 71, at 2.

Exposure to traumatic experiences triggers the body's biological stress system, which is made up of several interacting systems.⁹² Included in these systems is the thalamus, amygdala, prefrontal cortex, hypothalamus, and hippocampus.⁹³ When triggered, these systems in turn trigger what is colloquially known as the "fight or flight" response: the body transfers resources from nonvital organs to the brain, heart, and skeletal muscles; increases alertness; and enters a sort of survival mode.⁹⁴

When a child is exposed to trauma, and especially recurring trauma, these biological stress systems receive more exercise than they would otherwise, causing them to become over developed.⁹⁵ This in turn may have the effect of rendering children "susceptible to heightened arousal and an incapacity to adapt emotions to an appropriate level" because that is what their body has become accustomed to.⁹⁶ As such, children may become stressed more easily, and they may have a more difficult time calming themselves down.⁹⁷

C. Mental Health Challenges

Children who have survived abuse and/or neglect may be more likely to face various mental health challenges later in life. For example, research has shown that children who have experienced trauma, such as maltreatment, are at an increased risk of experiencing mental health disorders such as post-traumatic stress disorder, depression, anxiety, and substance use disorders.⁹⁸ One reason for this is that exposure to trauma early in life disrupts the human brain's production of serotonin.⁹⁹ Serotonin is a hormone that is critical to the body's biological stress system, and "decreased levels of serotonin activity have been associated with mental health problems such as depression and anxiety as well as aggressive behaviors in individuals with personality disorders such as borderline personality disorder."¹⁰⁰ Similarly, childhood exposure to trauma is associated with irregular production of the stress hormone cortisol.¹⁰¹

⁹² Michael D. De Bellis & Abigail Zisk, *The Biological Effects of Childhood Trauma*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS N. AM. 185, 187 (2014).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ Harden, *supra* note 67, at 36.

⁹⁶ *Id.* at 35 (quoting Michael D. De Bellis, *Developmental Traumatology: The Psychobiological Development of Maltreated Children and Its Implications for Research, Treatment and Policy*, 13 DEV. & PSYCHOPATHOLOGY 539, 539–64 (2001)).

⁹⁷ *See id.*; *see also* Attachment Disorders, *supra* note 80.

⁹⁸ Michael D. De Bellis & Abigail Zisk A.B., *supra* note 92, at 185–86.

⁹⁹ *Id.* at 198–99.

¹⁰⁰ *Id.* (citing Kerry J. Ressler & Charles B. Nemeroff, *Role of Serotonergic and Noradrenergic Systems in the Pathophysiology of Depression and Anxiety Disorders*, 12 DEPRESSION & ANXIETY 2, 2–19 (2000); Marianne Goodman, Antonia New & Larry Siever, *Trauma, Genes, and the Neurobiology of Personality Disorders*, 1032 ANNALS N.Y. ACAD. SCI. 104, 108–11 (2009)).

¹⁰¹ Harden, *supra* note 67, at 36.

V. PROPOSED REFORM

Although research on the psychological impact of involvement with the child welfare system may seem incredibly discouraging, all hope is not lost. Additional research has demonstrated that even in the face of such extreme adversity, early intervention to protect the welfare of children can be effective.¹⁰² In recent years, the child welfare system has seemed to make a push toward focusing on the best interests of children by providing trauma-informed care and by promoting the expedition of permanency goals for children.¹⁰³ These efforts, no matter how well-intended they may have been, have simply not been enough. The child welfare system is still broken, and children are still facing the brunt of that dysfunction.¹⁰⁴ As a result, the child welfare system should adopt a three-part reform: (1) the United States should ratify the Convention on the Rights of the Child; (2) the legislature should place and enforce a formal emphasis on protecting the best interests of children; and (3) the legislature should impose a “reasonable efforts” standard on parents involved in the child welfare system to prove that they are pursuing the best interests of their children.

A. *Ratification of the Convention on the Rights of the Child*

In 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC).¹⁰⁵ The CRC asserts that children are entitled to certain affirmative rights, including the right to protection against maltreatment and the right to nurturing parental care.¹⁰⁶ Ratification of the CRC therefore “impose[s] on states a constitutional *duty* to protect children.”¹⁰⁷

Shortly after its adoption by the United Nations, the CRC “became the most widely accepted human rights treaty in history.”¹⁰⁸ To date, all but two nations have ratified the CRC.¹⁰⁹ Disappointingly, and despite playing a pivotal role in drafting the CRC,¹¹⁰ the United States is one of those two nations.¹¹¹ Although the CRC had

¹⁰² See Barholet, *supra* note 68, at 1325–26. Harden, *supra* note 67, at 43.

¹⁰³ See, e.g., Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

¹⁰⁴ See U.S. DEP’T HEALTH & HUMAN SERVS., INDIANA 2016 CHILD AND FAMILY SERVICES REVIEWS FINAL REPORT (2016) (finding that none of the seven outcomes and only one of seven systemic factors was found to be in substantial conformity with federal child welfare requirements).

¹⁰⁵ G.A. Res. 44/25, Convention on the Rights of the Child (Nov. 20, 1989).

¹⁰⁶ See Mark Engman, *And Then There Were Two: Why is the United States One of Only Two Countries in the World That Has Not Ratified the Convention on the Rights of the Child?*, 1 DEPAUL INT’L HUM. RTS. L.J. 1, 4 (2015).

¹⁰⁷ Elizabeth Barholet, *Ratification by the United States of the Convention on the Rights of the Child: Pros and Cons from a Child’s Rights Perspective*, 633 ANNALS AM. ACAD. POL. SCI. 80, 86 (2011) (emphasis in original).

¹⁰⁸ Engman, *supra* note 106, at 1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 6.

¹¹¹ *Id.* at 1; see generally Barholet, *supra* note 107. The second nation is Somalia. Somalia did announce in 2015 that it would ratify the CRC, but the nation has not yet completed the ratification. Engman, *supra* note 106, at 1 n.2.

great support throughout the United States, President George H. W. Bush declined to sign the treaty in 1989.¹¹² In the following years, various conservative groups strongly advocated against ratification of the CRC, and their protestations greatly impacted political support for the CRC.¹¹³ Despite various promises to do so, no president has since chosen to sign and ratify the CRC.¹¹⁴ By failing to ratify the CRC, the United States demonstrated its unwillingness to recognize the best interests of children as comparable to those of parents.¹¹⁵

B. Emphasis on the Protection of Children's Best Interests

At present, the child welfare system does not place great emphasis on protecting the best interests of children.¹¹⁶ For example, in the same year that the United States failed to ratify the CRC, the Supreme Court held that children do not have a constitutional right to state protection against abusive or neglectful parents.¹¹⁷ Moreover, as previously mentioned in the introduction to this note, the Supreme Court has explicitly recognized that in involuntary termination of parental rights proceedings, the child's best interests may only be considered *after* a court determines parental unfitness.¹¹⁸ And again, such determinations of parental unfitness are reviewed only from the parents' perspective; they are not reviewed from the perspective of the child's best interests.¹¹⁹

It is difficult, if not impossible, to justify these stances against the purported intent of the child welfare system. How can a system protect the best interests of children and ensure their well-being without first evaluating and emphasizing those best interests? If the United States were to ratify the CRC, one natural consequence would be that the best interests of children would be moved to the forefront of child welfare matters.¹²⁰ Even without ratification of the CRC, though, the United States could adopt legislation or implement policies that would prioritize the best interests of children.

C. Imposition of a "Reasonable Efforts" Standard on Parents to Uphold the Best Interests of Their Children

Federal and state legislation currently require that the state demonstrate that it made reasonable efforts to reunify the family before the state may move to

¹¹² Engman, *supra* note 106, at 6–7.

¹¹³ *Id.* at 9–10.

¹¹⁴ *Id.* at 7–8.

¹¹⁵ *See id.* at 9.

¹¹⁶ *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 760 (1982) (basing decision on procedural grounds rather than on best interests of child).

¹¹⁷ *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 193–94 (1989).

¹¹⁸ *Santosky*, 455 U.S. at 760.

¹¹⁹ *Id.* at 760–61.

¹²⁰ *See generally* Bartholet, *supra* note 107.

terminate parental rights in involuntary termination of parental rights proceedings.¹²¹ Although there is great debate over what “reasonable efforts” require, the term has broadly been used to include reunification services such as therapy, parenting education, and treatment for substance abuse.¹²²

This Note does not argue that legislatures should abandon this “reasonable efforts” standard, whatever its definition may be. It is beyond question that the United States Constitution affords parents the liberty to bring up children under their care and control, and that liberty is paramount.¹²³ Rather, this Note argues that legislatures should impose a similar reasonable efforts standard against parents who have maltreated their children. For example, legislatures could adopt a standard that if, at the end of fifteen months, parents cannot demonstrate that they have made reasonable efforts to protect the best interests of their child, then the state must move to involuntarily terminate parental rights and, thereby, free the child for adoption. This would eliminate some of the discretion that courts currently have to prolong involuntary termination of parental rights proceedings, but such an outcome would be consistent with the purported goal of the Adoption and Safe Families Act to expedite permanency for children.¹²⁴ By demanding either reunification or the freedom of a child for adoption, this standard would prevent children from being caught in the proverbial limbo of foster care and, instead, expedite permanency efforts.

Moreover, research supports the presumption that such an outcome would be consistent with children’s best interests.¹²⁵ In situations where children have faced maltreatment and there is no reasonable probability that the parents will be able to remedy the situation, research has demonstrated that “children placed earliest in adoption will have the best chance for healthy development.”¹²⁶ In these situations, children who have been previously maltreated and returned home face a high risk of revictimization: “roughly one-third to one-half or even more will be revictimized.”¹²⁷ Conversely, children placed earliest in adoption face lower rates of revictimization, and they often receive superior parenting.¹²⁸ Similarly, returning to the theory of attachment, research has shown that young children with attachment

¹²¹ Murray & Gesiriech, *supra* note 12, at 3–4 (federal law); *e.g.*, IND. CODE § 31-35-2-4.5(a)(1), (d)(2)(B) (2019).

¹²² See Graf, *supra* note 8, at 83–84, 100–101 n.128.

¹²³ See, *e.g.*, Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (“Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and early all the States, including Nebraska, enforce this obligation by compulsory laws.”).

¹²⁴ See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, § 671(a)(15)(C), § 201, § 673b(i)(2)(A),(C), §305, § 629a(8), 111 Stat. 2115, 2116, 2124, 2131.

¹²⁵ Bartholet, *supra* note 68, at 1326 (citing ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 178–79 (1999); Elizabeth Bartholet, *International Adoption: Thoughts on Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 179 n.73 (2007)).

¹²⁶ Bartholet, *supra* note 68, at 1326.

¹²⁷ *Id.* at 1325.

¹²⁸ *Id.* at 1326.

disorders or with insecure attachment who are removed from detrimental situations and placed with reliable, supportive caregivers can achieve secure attachment.¹²⁹

These findings mean that for children like Jane,¹³⁰ legislation expediting permanency efforts by requiring parents to demonstrate that they have made reasonable efforts to achieve reunification would protect those children from potentially facing some of the life-altering negative effects associated with maltreatment, trauma, and multiple placements. Such a standard would provide children the best opportunity to overcome the inherent hardships in the child welfare system. These results would undeniably be in the best interests of children, and such a standard would establish a child welfare system that could actually live up to its name.

CONCLUSION

Despite its name and its purported goals, the child welfare system is not currently functioning as though it were designed to promote and protect child welfare. Rather, it is currently functioning as if it were designed to promote and protect the rights of parents, even to the detriment of their children. Some critics have even gone so far as to argue that the child welfare system exists to promote and protect a parent's right to maim their own children.¹³¹

The child welfare system should be reformed to place a greater emphasis on the best interests of children, and, in doing so, it should adopt the three-part reform outlined above. The United States should ratify the CRC and, thereby, explicitly recognize that children have a right to protection against maltreatment and the right to nurturing parental care. Both federal and state legislatures should place and enforce a formal emphasis on protecting the best interests of children. This emphasis should apply not only to matters of child welfare but also to all matters involving children. Finally, both federal and state legislatures should impose a reasonable efforts standard on parents involved in the child welfare system to demonstrate that they are making reasonable efforts toward reunification. Some may criticize these goals as being too lofty and requiring too much change, but the United States owes it to the children of this nation. After all, children represent the future of the nation, and protecting and promoting their best interests can only ensure that the future of the nation is even brighter.

¹²⁹ See generally Smyke et al., *supra* note 68 (describing relevant research).

¹³⁰ See *supra* pp. 8–9.

¹³¹ Elizabeth Bartholet, *Creating a Child-Friendly Welfare System: The Use and Misuse of Research*, 13 WHITTIER J. CHILD. & FAM. ADVOC. 1, 18 (2014) (quoting C. Henry Kempe, *Approaches to Preventing Child Abuse: The Health Visitors Concept*, 130 AM. J. DISEASES & CHILD. 941, 946 (1976)).