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FIXING FOSTER CARE OR REDUCING CHILD POVERTY: THE PEW COMMISSION RECOMMENDATIONS AND THE TRANSRACIAL ADOPTION DEBATE

Sarah Ramsey*

I. INTRODUCTION

The recent recommendations of the Pew Commission on Children in Foster Care provide a new platform for child welfare advocates to address many of the problems that plague the foster care system.1 Unfortunately, in spite of major efforts at reform, the foster care system and the child welfare system generally are systems in crisis that fail to adequately provide for vulnerable children in need of assistance. Hence, the Commission's work is important, commendable, and necessary.

This article focuses on one aspect of the Commission's recommendations, namely how critically important it is to improve the information gathering and analysis systems used in court cases involving foster children and in assessing the overall success of the child welfare system. The article supports these recommendations, but also examines them critically by addressing controversies related to what constitutes "success" in foster care. One concern about foster care is that too many children enter the system and that more effort and money should be put into reducing child poverty and supporting low-

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*I: Laura J. and L. Douglas Meredith Professor of Teaching Excellence and Director, Family Law and Social Policy Center, Syracuse University College of Law. My thanks to Lisa Polk, Hillary Wandler, and the other members of the Montana Law Review who organized this excellent symposium on Children and the Law.

1. THE PEW COMMISSION ON CHILDREN IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE (May 18, 2004) [hereinafter PEW REPORT], available at http://pewfostercare.org/research/docs/FinalReport.pdf. When children cannot remain at home safely, they may be placed in government sponsored foster care. The term "foster care" includes placement in group homes or institutions, but the most common placement is in private homes licensed and supervised by the state. If the child is placed with relatives rather than strangers, the foster care may be called kinship care, or kinship foster care.
income families to reduce foster care placements. Another controversy is what constitutes an appropriate "permanent" placement for children exiting foster care, particularly with regard to transracial adoption. The article explores the strengths and limitations of improving court assessment and measures of child well-being to resolve these controversies and the policy problems inherent in assessing foster care "success."

The article begins with a brief overview of the constitutional framework for child protection (Part II) and a review of major foster care reforms (Part III) to set the stage for discussion in Part IV of the Pew Commission recommendations and the critique of the data gathering initiative. Part V analyzes the extent to which additional information and oversight will help resolve policy debates over child poverty and transracial adoption. The analysis concludes that attention to information-gathering and oversight are important steps for improvement, but they are unlikely to resolve the child poverty and transracial adoption debates, because these debates are as much about why children enter foster care as they are about how they should exit foster care.

II. OVERVIEW: CONSTITUTIONAL FRAMEWORK

The majority of children in foster care are there because the state has determined that they cannot remain at home safely due to abuse or neglect. Although parents have a constitutionally protected right to direct the upbringing of their children, this right is balanced against the state's parens patriae authority to protect children. The state has the authority to remove children from their parents if necessary to protect them.

The state's parens patriae authority is tempered, however, by the need for the state's interest to be compelling to overcome the parents' fundamental right to family integrity. Before removing a child, the state has to show that the child is likely to suffer severe harm if there is no intervention and that less intrusive means, short of removal, will not make the child safe.


In severe cases, the state may not only remove a child from the home, but it may terminate parental rights. Termination of parental rights is a drastic remedy because it cuts all ties between parent and child. Because termination is so severe, termination proceedings carry greater due process protections than the usual civil matter, including a right to counsel for indigent parents in most cases and an evidentiary standard of clear and convincing proof.

Although the state can intervene when the child is at risk, the state is not required to do so. Surprisingly and ironically, given the state’s parens patriae role, the state has no affirmative constitutional obligation to protect children from abuse by private actors, such as their parents. States have assumed affirmative obligations through legislation, however, particularly in response to federal requirements.

The practice of removing children from their parents to protect them has a long history, although the constitutional protections for parents are relatively new—a twentieth century invention. During much of the nineteenth century, child protective efforts were focused on children of parents who were living in poverty. Removing children from their parents was considered the best approach to child protection and was also a means of protecting society from children who might otherwise grow up without proper instruction. Placing the children in institutions or with other families was considered sounder policy than trying to rehabilitate the parents. The intention was that children would be permanently removed from the harmful influences of poverty, including their parents.

Around the turn of the century, however, states began providing aid to low-income families so that children could remain at home. This approach was supported by the adoption of the federal Social Security Act in 1935. This shift from removing children to supporting them at home was dramatic, but the same policy shifts, have continued, although now tempered by the Constitution and less extreme. When the Adoption Assistance and Child Welfare Act of 1980 was

adopted, for example, reducing the foster care population by keeping children at home was one of its goals. Removal from the home was considered less desirable because of concerns about family integrity and the harm caused to children by removal and extended foster care placement. A policy shift, however, was seen in a later reform, the Adoption and Safe Families Act of 1997. The Adoption and Safe Families Act was passed when there was more concern about child safety, and it expedited termination of parental rights.

The child protective system has evolved into a complex bureaucracy that is controlled by state law, but it has a heavy overlay of federal regulation imposed through federal funding of many child welfare programs. All states now have child protective service agencies that are required to work closely with state courts in investigating and resolving reports of neglect or abuse. These programs must strike a balance between protecting children and providing constitutionally required due process protections for parents.

III. FOSTER CARE REFORMS

By the mid-seventies, there was substantial controversy about overuse and misuse of foster care. The foster placements were intended to be temporary, with children soon being returned to their parents or, if return was not possible, placed for adoption or in some other permanent arrangement. There was general agreement among child welfare professionals that foster care was not an appropriate long-term placement option because of its impermanence. A major concern was that children were being removed from their homes unnecessarily when the provision of services could have allowed them to stay home. An additional concern was that many children suffered multiple placements over a lengthy period, with some being lost

sections of 42 U.S.C.).

10. See infra text accompanying notes 28-29.
in the foster care system. They were caught in what was characterized as foster care "drift" or "limbo." There was little accountability in the system and virtually no court oversight once a child was placed in foster care. Eventually, courts began to require states to use the least intrusive intervention possible, with services being made available to prevent removal when appropriate.\textsuperscript{14}

These problems at the state level were also of federal concern, because the federal government provided substantial funding for foster care. From the point of view of the federal government, state mismanagement was causing the foster care population to expand and the costs to increase. The first major federal intervention, however, focused on a narrower problem—namely, the states' removal of large numbers of Native American children from their homes and their placement with non-Indian parents.

\textbf{A. The Indian Child Welfare Act}

When the Indian Child Welfare Act (ICWA) was adopted in 1978, the concerns of the tribes were forcefully addressed in Congressional testimony.\textsuperscript{15} Mr. Calvin Isaac, Tribal Chief of the Mississippi Band of Choctaw Indians and representative of the National Tribal Chairmen's Association, testified before a House subcommittee that

\begin{quote}
[c]ulturally, the chances of Indian survival are significantly reduced if our children, the only real means for the transmission of the tribal heritage, are to be raised in non-Indian homes and denied exposure to the ways of their People. Furthermore, these practices seriously undercut the tribes' ability to continue as self-governing communities.\textsuperscript{16}
\end{quote}

The chief continued that

\begin{quote}
[o]ne of the most serious failings of the present system is that Indian children are removed from the custody of their natural parents by nontribal government authorities who have no basis for intelligently evaluating the cultural and social premises underlying Indian home life and childrearing. Many of the
\end{quote}


individuals who decide the fate of our children are at best ignorant of our cultural values, and at worst contemptful of the Indian way and convinced that removal, usually to a non-Indian household or institution, can only benefit an Indian child.\textsuperscript{17}

ICWA gives priority to tribal courts and also applies in state court “child custody proceedings” concerning an Indian child.\textsuperscript{18} These proceedings involve placements that do not allow the Indian parent to get custody returned upon demand, such as foster care placement, termination of parental rights, pre-adoptive placement, and adoptive placement. Custody disputes between parents are not included. An “Indian child” is any unmarried person under eighteen who (1) is either a member of an Indian tribe or is (2) eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe.\textsuperscript{19}

ICWA provides a series of preferences with regard to placements. The Act provides, for example, that for a state adoptive placement of an Indian child, “a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child’s extended family; (2) other members of the Indian child’s tribe; or (3) other Indian families.”\textsuperscript{20} For foster care, unless there is good cause to the contrary, a placement of an Indian child must be made with (1) a member of the Indian child’s extended family; (2) a foster home licensed, approved or specified by the Indian child’s tribe; (3) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or (4) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child’s needs.\textsuperscript{21}

Further, placement agencies must adhere to “prevailing social and cultural standards of the Indian community in which the parent or extended family resides.”\textsuperscript{22}

In addition to placement preferences aimed at keeping the child in the tribe, ICWA includes stringent standards for removing children from the home and for terminating parental rights, and it has a higher evidentiary standard than the United States Constitution or state law require. A foster care placement must be supported by clear and convincing evidence,

\textsuperscript{17} Id. at 34-35 (quoting Hearings, supra note 16, at 191-92).
\textsuperscript{18} 25 U.S.C. § 1911.
\textsuperscript{19} Id. § 1903(4).
\textsuperscript{20} Id. § 1915(a).
\textsuperscript{21} Id. § 1915(b).
\textsuperscript{22} Id. § 1915(d).
including testimony of qualified expert witnesses, "that the continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child." Termination of parental rights must be supported by evidence beyond a reasonable doubt.

One criticism of ICWA, which is echoed in the criticism of transracial adoption, is that it sidesteps the major problem—the lack of social support for families. ICWA addressed the need to keep Native American children with their families and tribe, but it did not address the underlying problems of poverty and unemployment that were causing disruption of Native American families. Chief Isaac also testified in Congress that ICWA addressed only "a small part of the problem compared to the challenge of combating poverty, substandard [and] overcrowded housing, child abuse, alcoholism, and mental illness on the reservation. These are the forces which destroy our families." Instead of focusing on these substantive problems, ICWA made low-cost, procedural changes.


The next major reform, which addressed problems of all children in foster care, was the Adoption Assistance and Child Welfare Act of 1980 (AACWA). With AACWA, the federal government intervened substantially in the state-operated child welfare systems and imposed extensive federal regulations on the states as a condition to the receipt of federal funding for

23. Id. § 1912(e).
26. Id. at 498. The interaction of poverty and abuse and neglect is not well understood, but in some instances money can make a significant, positive impact on children's well-being, as a recent study found. In the middle of an eight year longitudinal study of children's mental health, a group of Native American families had a sudden increase in wealth because of the opening of a casino. This presented the researchers with a natural experiment to measure the impact of poverty on the children's mental health. The study found a significant improvement in children's symptoms that related to behavioral disorder or oppositional defiant disorder. E. Jane Costello, et al., RELATIONSHIPS BETWEEN POVERTY AND PSYCHOPATHOLOGY, 290 JAMA 2023 (2003).
27. KENNEDY, supra note 25, at 498. The Pew Commission recommends that Indian tribes be included in federal funding programs, such as IV-E, to enable them to improve their child welfare systems. PEW REPORT, supra note 1, at 24.
28. AACWA, supra note 9.
foster care and other child welfare programs. AACWA was intended to prevent unnecessary removals of abused or neglected children from their homes when possible and require states to try to reunite the family when removal was necessary for the child's safety. If reunification was not possible within a reasonable time, the child would be placed for adoption. AACWA required states to make reasonable efforts "to prevent or eliminate the need for removing the child from the child's home, and . . . to make it possible for the child to safely return to the child's home." If reunification was not possible, the state should generally move to find a new permanent placement for the child. Usually this would mean the state should decide to terminate parental rights and place the child for adoption, because long-term foster care and guardianship were considered less desirable placements. AACWA also put new extensive responsibility on courts to oversee the foster care system. Courts were required to hold planning and review hearings and be instrumental in developing and enforcing permanency plans for children.

Unfortunately, AACWA did not have the desired effect of reducing the foster care population and accompanying cost of that system. Instead, the population increased and costs continued to rise from under half a million dollars in 1984, to 3.1 billion in 1996. AACWA was deemed a failure and new reforms were recommended. The decision that AACWA was a failure was unfair in many respects, because AACWA was never fully implemented. States did not fulfill their commitments and reasonable efforts became whatever was available. Services were not tailored for individual needs, but rather were "one size fits all." The federal government did not actively enforce compliance, and even if it had chosen to do so, the enforcement mechanism was cumbersome. As of 1996, twenty-one states had been sued for inadequate child welfare programs.

Lack of funding was a major problem with implementation.

30. Id. § 671.
An additional funding problem was that federal money for foster care placements was far more plentiful than money for services that might allow the child to stay home or to reunify the family. This uncapped federal funding stream acted as an incentive for states to continue to place children in foster care. This and other funding problems are key issues that the Pew Report addresses.

C. The Adoption and Safe Families Act

In 1997 Congress adopted another major reform, the Adoption and Safe Families Act (ASFA). ASFA did not repeal AACWA, but it amended it. ASFA focused less on keeping the child at home and more on child safety and finding a permanent placement through adoption. The ASFA focus was seen as a shift from the AACWA emphasis on parents’ rights to a new emphasis on children’s best interests. ASFA contained deadlines to push states toward a goal of finding permanent homes quickly. For example, a permanency hearing had to be held within twelve months. Further, states had to meet stringent time requirements for terminating parental rights when children could not be returned home. In addition, ASFA specified circumstances where states were not required to make reasonable efforts to reunite families before moving to terminate parental rights. ASFA also permitted states to use “concurrent planning,” which allowed the state agencies to work toward family reunification while simultaneously planning for adoption if reunification failed. Concurrent planning was intended to reduce the delay that would be caused by a failed family reunification effort.

In spite of these reforms, there are still many problems with the foster care system. Most states are not in compliance with

33. ASFA, supra note 11.
35. Id. § 675(5)(B)-(C), (E).
36. Reasonable efforts are not required when the parent has subjected the child to aggravated circumstances such as abandonment, torture, chronic abuse, or sexual abuse; when parental rights of the parent to a sibling have been terminated; or when the parent has: "(I) committed murder . . . of another child of the parent; (II) committed voluntary manslaughter . . . of another child of the parent; (III) aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter; or (IV) committed a felony assault that results in serious bodily injury to the child or another child of the parent." Id. § 671(a)(15)(D).
37. Id. § 671(a)(15)(F).
federal or state laws. In 2000, thirty-two states were being sued for child welfare system failures and at least 10 were operating under court directives or consent decrees. All states now have gone through the federally mandated Child and Family Services Reviews, which assess whether states are meeting the goals of safety, permanence, and well-being; none have passed. Cost and the large number of children in foster care are still a problem. In 2004, the federal foster care expenditure was budgeted at 4.8 billion dollars.

In September 2001, an estimated 542,000 children were in foster care nationwide. Although we hear more about horrific cases of parents physically abusing their children, a majority of children are in foster care because of neglect, not abuse. Twenty-five percent of foster children were in kinship care and 47% were in foster care with non-relatives. Eighteen percent were in institutions or group homes. Only 4% were in pre-adoptive homes. Two percent were runaways. The remaining children were in a variety of other placements. The largest percent of children were ages eleven to fifteen (29%).

A striking and disturbing characteristic of the foster care population is that it has a much larger percentage of African-American and Native American children than would be expected based on the general population. White children are 61% of the U.S. child population, but make up only 40% of the foster care population. African-American children, in contrast, make up only 15% of the general child population but 41% of the foster care population. Native American/Alaskan Native children are

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39. See infra text accompanying notes 73-84.
42. Chipungu & Bent-Goodley, supra note 13 at 79.
44. Id.
45. Id.
46. Id.
47. Id. at 1.
48. Id. at 2.
overrepresented as well, constituting 1% of the general population, but 2% of the foster care population.

IV. NEW REFORM PROPOSALS: THE PEW COMMISSION ON CHILDREN IN FOSTER CARE

The Pew Commission on Children in Foster Care released its recommendations on foster care reform in May 2004. The Commission was a national, nonpartisan panel funded by The Pew Charitable Trusts. Members were leading experts in child welfare, including judges, social workers, a state legislator, a child psychologist, foster and adoptive parents, a former foster youth, and others.

A. Overview

To guide its policy development, the Commission first identified five child-centered principles:

1. Children must be physically and emotionally safe and must be protected wherever they live. When children are removed from their homes, public authorities have an obligation to ensure that they are safer in out-of-home care than they would have been at home.

2. Children must have their needs met in a timely manner at every stage of their development and every stage of public decision making about their futures.

3. Children must have continuity and consistency in care-giving and relationships, including healthy ties to siblings and extended family.

4. Children must have equal protection and care, including attention to meeting children’s needs in the context of their community and culture.

5. Children and their families must have an informed voice in decisions that are made about their lives.

The Commission focused on “children who are served by the child welfare system” and its recommendations focused on improving that system rather than the broader social ills and

50. Id.
51. PEW REPORT, supra note 1.
52. Id.
53. Id. at 12.
54. Id.
poverty that cause children to enter that system. The Commission concluded that it would concentrate its work on two targeted areas:

- Improving existing federal financing mechanisms to facilitate faster movement of children from foster care into safe, permanent families and to reduce the need to place children in foster care in the first place; and
- Improving court oversight of child welfare cases to facilitate better and more timely decisions related to children’s safety, permanence, and well-being.\(^{55}\)

Reform in these two areas, the Commission believed, was a first step in solving the multiple problems affecting the child welfare system. The Commission presented its recommendations as a package, which, taken as a whole, the Commission believed fulfill the principles.\(^{56}\) Further, the Commission believed that this package of specific recommendations in the two target areas would result in substantial improvements to the child welfare system, rather than minor repairs.\(^{57}\)

The Commission is clearly right that substantial improvements are sorely needed in both the court system and the child welfare system. Courts have a major responsibility for enforcing compliance with a plethora of child welfare regulations and laws, but too often they do not even have the ability to track their cases or assess their own performance. The child welfare system suffers from chronic under-funding, unintended funding incentives that encourage foster care over in-home placement, caseworker burnout, case overloads, inadequate services, and other ills resulting in a system that “exacts a toll on everyone it touches,” including children, parents, foster parents, relatives, and caseworkers.\(^{58}\) Many of the Pew Commission recommendations are not new, but they are logically developed in relation to the ASFA goals of safety, permanence, and well-being. Their strength is that they provide a new, coherent, and well-founded platform for child welfare advocates to once again attempt to bring some order into the child welfare system chaos.

\(^{55}\) Id. at 10.

\(^{56}\) Id. at 20.

\(^{57}\) Pew Report, supra note 1, at 19.

\(^{58}\) Bass, supra note 38, at 6.
B. Information Needs

A unique aspect of the Pew Commission reform proposals, however, is the emphasis on the need for more sophisticated information-gathering and attention to performance and outcome measures. The Pew Commission noted that

[s]ocieties measure what they value. Reliable data that measure progress over time are essential to designing and operating a child welfare system that fulfills its obligations to the children in its care. Without this information, states are unable to identify and respond to those children who enter foster care most frequently, leave at the slowest rate, and get lost or forgotten in the system.59

This article focuses on this aspect of the Commission’s recommendations, specifically the identified need for more information, especially in the courts and the Child and Family Service Reviews.

1. Court Casetracking and Performance Measures.

The Commission recommends that dependency courts adopt performance measures “to ensure that they can track and analyze their caseloads, increase accountability for improved outcomes for children, and inform decisions about the allocation of court resources.”60 In particular, the Commission recommends adoption of the performance measures developed by the American Bar Association Center on Children and the Law, the National Center for State Courts, and the National Council of Juvenile and Family Court Judges, which are presented in Building a Better Court: Measuring and Improving Court Performance and Judicial Workload in Child Abuse and Neglect Cases.61

According to the Commission, courts need the ability to track and analyze their caseloads because otherwise it is “difficult for them to spot emerging trends in the cases that come before them, eliminate the major causes of delays in court proceedings, and identify groups of children who may be entering or reentering foster care at very high rates, or staying

59. PEW REPORT, supra note 1, at 28.
60. Id. at 35. The Pew Report uses the term "dependency courts" for courts that have jurisdiction over abused or neglected children.
in care the longest." These problems contribute to large caseloads, which in turn decrease the amount of time a judge has per case, and increase the length of stay in foster care.  

The recommendation for reducing caseloads is supported by a recent survey of judges who hear dependency cases. This survey identified overcrowded dockets as the major cause of delay in placing children in permanent homes. In addition, better information and analysis of case progress through the foster care system could identify areas where more cooperation is needed between a court and a child welfare agency. It also could identify procedural problems, such as inadequate legal representation of children and parents, which result in frequent continuances that prolong children's time in foster care. Finally, additional information could improve the courts' management of their own resources and help justify requests for increased funding.

Building a Better Court lists court performance measures for five areas. The first four areas are safety, permanency, due process, and timeliness, and the fifth is child well-being. For the first four performance areas, outcomes and measures are identified. For safety, for example, outcomes are:

- Children are, first and foremost, protected from abuse and neglect.
- No child should be subject to maltreatment while in placement.
- Children are safely maintained in their homes whenever possible and appropriate.

Measures for these safety outcomes are:

- Percentage of children who do NOT have a subsequent petition of maltreatment filed in court after the initial petition is filed.
- Percentage of children who are the subject of additional allegations of maltreatment within twelve months after the original petition was closed.

62. PEW REPORT, supra note 1, at 14.
63. Id.
64. FOSTERING RESULTS, VIEW FROM THE BENCH: OBSTACLES TO SAFETY AND PERMANENCY FOR CHILDREN IN FOSTER CARE (July 2004), available at www.fosteringresults.org.
65. PEW REPORT, supra note 1, at 59-62.
66. Id. at 59.
67. Id.
For the fifth performance area, child well-being, neither goals nor measures are provided, because "it is premature at this time to have courts adopt measures of well-being when consensus does not exist on measures for which courts have direct responsibility, such as safety of children, appropriate removal of children from their homes, successful achievement of permanency, and length of time in foster care." In particular, measures of children’s educational achievement and mental and physical health are omitted because:

- First, neither the federal government nor the social science research community have identified, or achieved consensus on, helpful statistical measures that are specifically related to child welfare cases. By contrast, we were able to adapt measures of safety, permanency, and procedural fairness related to court performance in child welfare cases.
- Second, even if there were clear well-being measures, the judicial branch is not likely to have child well-being statistics readily available. Getting this information requires data exchanges with external entities, which will only become possible after the court has developed its own system to measure performance.
- Third, although courts influence children’s educational attainment and health only indirectly, they clearly do impact children’s safety and permanency.

Building a Better Court suggests that in the future, when more progress has been made resolving these problems, courts should consider using child well-being as a performance measure in analyzing their own performance.


In addition to the need for court performance measures, it is necessary to consider how the foster care system is functioning overall. Ultimately, what is needed is a clear statement of goals with measures designed to determine whether the goals are being met. Safety, permanence, and child well-being are the primary goals of the child welfare system. Safety and permanence have been addressed more consistently than child

68. Id. at 63.
69. Id.
70. Id.
71. See, e.g., Bass, supra note 38, at 10-11.
well-being, however.

One explanation for the lack of attention to child well-being is the difficulty in measuring it, which is reflected in the lack of consensus about child well-being indicators for this population. An additional problem is that child welfare agencies and the courts may be reticent to employ child well-being measures to assess their own performance, because well-being is influenced by factors outside the agency and court control, such as school quality.

The Pew Commission recommends improvements in the federally required Child and Family Service Reviews (CFSRs), which potentially could be used to assess children's actual well-being. The CFSRs, which were required by the Social Security Amendment of 1994, are a mechanism for assessing whether states are meeting goals of safety, permanence, and well-being for children receiving in-home services and in foster care, using systemic, family, and child outcome measures.

The CFSR process has three phases. In phase one, the state conducts a self-assessment of its child welfare system, including an analysis of defined categories of statewide data, and it submits a Statewide Assessment Report to the federal government. Phase two is an onsite assessment of three sites in the state and the state's child welfare agency, conducted by the federal Department of Health and Human Services. In this onsite assessment, foster care and in-home service cases are reviewed. In addition, the Department conducts interviews with children, parents, foster parents, adoptive parents, private service providers, and state agency caseworkers, supervisors, and administrators, as well as other state and local persons related to the child welfare system. If the findings from the state's self assessment and the onsite review indicate that a state does not meet federal standards, the state moves to phase three. In phase three, the state is required to submit a program

72. PEW REPORT, supra note 1, at 29.
75. Id.
76. Id.
improvement plan that indicates how the state will correct deficiencies.77 Reviews have now been competed for all fifty states, the District of Columbia, and Puerto Rico, and all failed to meet the federal performance standards.78

In phase one, states are required to provide data on seven outcome measures, three of which are related to children's well-being; the remaining four are related to permanency and safety.79 The current well-being measures, however, are related to process rather than actual measures of well-being. For education, physical health, and mental health, for example, the assessment is based on whether services are provided rather than an evaluation of how well the children are doing with regard to education and health.80

Even looking at service provision alone, the phase one assessment indicated that most states did not meet the federal standards, although states fared better in the phase two assessment.81 Common problems states had in meeting the standards for education needs were: "[m]any children in foster care experienced multiple school changes as a result of placement changes" and "[t]he agency is not consistent in providing services to meet children's needs with respect to identified education-related problems."82 Common problems in meeting the needs for physical health were: "[t]he number of dentists/doctor[s] in the State willing to accept Medicaid is not sufficient to meet the need;" "[t]he agency is not consistent in providing children with preventive health and/or dental services;" and "[t]he agency is not consistent in conducting adequate, timely health assessments."83 For mental health, common problems were: "[t]here is a lack of mental health services for children"; "[t]he agency is not consistent in conducting mental health assessments."84

The Pew Commission recommends using more comprehensive measures of well-being, including, for example,

77. Id.
78. PEW REPORT, supra note 1, at 29.
79. CFSR REPORT, supra note 74.
80. Id.
82. Id.
83. Id.
84. Id.
health status and educational attainment.\footnote{PEW REPORT, \textit{supra} note 1, at 29. See also Fred Wulczyn, \textit{Family Reunification}, 14 FUTURE CHILDREN 95, 107 (2004), for a criticism of the CFSR REPORT'S measures of reunification and reentry.} Deciding on measures of well-being for this troubled and intermittent population is complex and politically sensitive, because agencies are concerned about being evaluated on measures that are not within their control.\footnote{PEW REPORT, \textit{supra} note 1, at 30. There are several compilations of measures of child well-being for the nation as a whole and by state. \textit{See, e.g.}, ANNIE E. CASEY FOUNDATION, \textit{KIDS COUNT DATA BOOK} (2004); FEDERAL INTERAGENCY FORUM ON CHILD AND FAMILY STATISTICS, \textit{AMERICA'S CHILDREN: KEY NATIONAL INDICATORS OF WELL-BEING} 2003 (2003), available at http://childstats.gov/ac2003/index.asp. \textit{See also} \textit{THE WELL-BEING OF CHILDREN AND FAMILIES} (Arland Thornton, ed., 2001).} The disproportionate representation of children of color also adds a layer of complexity and potential for disagreement.\footnote{\textit{See infra}, Part IV.} To deal with these problems, the Commission recommends establishing an expert panel to suggest appropriate outcomes and measures with the National Academy of Sciences as the convener.\footnote{PEW REPORT, \textit{supra} note 1, at 30.}

The Commission also recommends use of longitudinal, rather than point-in-time or snapshot, data.\footnote{\textit{Id.} at 29.} A point-in-time measure provides information on how many children are in foster care on a given day, their type of placement, how long they have been in care, and similar information. Longitudinal data, however, would give states a better idea of the overall strengths and weaknesses of their child welfare systems and information on how certain categories of children, such as children of color or older children, are moving through the system. Of course, collecting this kind of information requires resources and political will, because the information could identify problem areas and be a basis for holding courts and agencies accountable.

Too often our policy debates about foster care and the child welfare system are informed more by opinion than by fact. Better case management and analysis and improved CFSR well-being measures will help fill this need for more information, and the Pew Commission's explicit recommendations and justifications for improvement in these areas are compelling. It is important to note, however, that improved information will
not tell us what the right policy is.\textsuperscript{90} The debate over transracial adoption illustrates this point and demonstrates the difficulty in separating policy development for improvement of the system, the Pew Commission approach, from the larger issue of why so many children enter the system at all.

V. THE TRANSRACIAL ADOPTION DEBATE

The Pew Commission focuses on children who are involved in the child welfare system because of abuse and neglect, particularly those who are in foster care, and it recommends steps that should be taken to improve that system. A competing approach is to focus on children in low-income families generally and identify the services those families need to help them care for children adequately. Proponents of this approach argue that it would substantially reduce the need for foster care.\textsuperscript{91}

The transracial adoption controversy is a narrower version of the debate over whether a policy should be focused on fixing foster care or on reducing the need for foster care by providing more support for families. The debate currently is centered on whether African-American children should be adopted by whites.\textsuperscript{92} Although the debate has been going on for years,


\textsuperscript{91} See, e.g., \textit{JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION} 128-29 (1998).

ASFA's emphasis on terminating parental rights and expediting adoptions intensified debate. At its extremes, opponents have taken the position that transracial adoption is a form of cultural genocide, and proponents argue that race matching is a destructive practice and transracial adoption is necessary to rescue children from foster care.

As noted earlier, one of the primary purposes of ASFA was to reduce the foster care population by moving children who could not safely return home from foster care into adoptive homes. A key ASFA provision focused on one part of this process—namely the perceived barrier of parents' rights not being terminated speedily when appropriate so that children who could not return home safely could be adopted. To reduce the length of stay in foster care, strict time limits were imposed within which children were to be returned home or freed for adoption through termination of their parents' rights. Under ASFA, a petition to terminate parental rights must be filed when a child has been in foster care for fifteen of the most recent twenty-two months, with some exceptions. ASFA also allowed concurrent planning, so that agencies may plan for adoption or other out-of-home permanent placement while trying to reunify the family. There were other pro-adoption provisions as well, including incentives for states to improve adoption rates and subsidies for adoptive families.

The pro-adoption policy embodied in ASFA relied on a number of assumptions. One assumption was that the states' failure to terminate parental rights expeditiously was a major barrier to moving children out of foster care and into adoptive homes. Additional assumptions were that adoption was a good outcome for foster children and the adoptions would be successful in the short and long term. Proponents of transracial adoption agree with these assumptions, and add an additional assumption that transracial adoption is necessary to rescue children from foster care.


93. Howe, supra note 92, at 471.
94. See, e.g., Kennedy, supra note 25, at 402-03.
95. ASFA, supra note 11.
96. 42 U.S.C. § 675(5)(E). There are some exceptions to the requirement. For example, the state agency is not required to file for termination of parental rights when the child is in a relative's care. Id. § 675(5)(E)(i).
97. Id. § 671(a)(15)(F).
98. Id. § 673.
one, namely that antagonism to transracial adoption, particularly the adoption of African-American children by whites, is preventing the adoption of these foster children. Research can help us examine the assumptions underlying ASFA, relating to, for example, barriers to adoption, adoption outcomes, and the effect of termination of parental rights. As in many other areas of family research, however, there are many limitations in the studies that are currently available to address these issues.99 Consideration of the different perspectives on transracial adoption illustrates both the utility and limits of research for policy development.

The transracial adoption proponents assume that if racial barriers were removed, children of color would be adopted, and if they were not removed, the children would remain in foster care.100 Currently, federal law substantially limits consideration of race,101 but proponents believe that agency practices still substantially impede transracial adoption.102 In support of this position, they point to the fact that racial matching in adoptions was the preferred practice for decades.103

They also believe that transracial adoption should be considered a successful outcome that benefits society and children. They argue that transracial adoption serves a higher social good of reducing racism in society.104 Further, proponents of transracial adoption argue that it does not harm children, and point to studies, primarily of African-American children in white homes, that have not found harmful effects.105 In addition,
proponents assert that these children are far better off than they would be if left in foster care. For example, compared to the foster care population, adopted children are more likely to finish high school and go on to higher education. They are better adjusted emotionally and receive valuable assistance as young adults in finding employment, housing, child care assistance, and other resources. Proponents can point to research that shows that overall, “adoption is generally preferred to foster care as a lasting and developmentally superior choice of home for all children and youths.”

Opponents of transracial adoption are unconvinced by studies that have not found that the African-American children were harmed by transracial adoption. They argue that placement of African-American children in white homes will be detrimental to the children, harming their self-esteem, their racial/ethnic identity, and their ability to cope in a racist society. They suggest that studies of effects have not been sufficiently nuanced to pick up important, but subtle, differences. Further often the studies have a number of methodological problems. Most of the research, for example, has used small convenience samples.

In addition, opponents can point to the lack of information available about adoption success for the foster child population. ASFA assumes that adoption is a good outcome for hard-to-place foster children, but there is little research on this population. There is some research on special needs adoption, which may be relevant since virtually all of the children adopted from the foster care population are classified as “special needs.”


107. See, e.g., Howe, supra note 92. For an interesting report on interviews with children and parents in transracial families, see generally María Vidal de Haymes and Shirley Simon, Transracial Adoption: Families Identify Issues and Needed Support Services, 82 CHILD WELFARE 251 (2003).


109. Definitions of what constitutes “special needs” differ. Under AACWA, for example, “special needs” included factors such as ethnic background, age, and membership in a minority or sibling group, as well as physical, emotional, or mental handicaps and other factors. Mark F. Testa, When Children Cannot Return Home:
are many heartwarming stories of success with adoption of special needs children, not necessarily from foster care, that describe children faring much better than was expected, and the adoptive family reporting that the adoption experience had positive effects. Adoptive parents, for example, have reported that they were “better people,” more tolerant, less selfish, and so forth.\textsuperscript{110}

It is hard to get a clear picture, however, about the success of special needs children being adopted from foster care. For example, one study found that a majority of children were attending school and were doing reasonably well, but also that 41\% of the children had significant behavior problems, scoring in the abnormal range on a standardized measure of child behavior.\textsuperscript{111} Although these problems might be attributed to the children’s early negative experiences, a distressing factor is that these problems may not go away. Instead, the children’s problems are likely to continue, perhaps even worsening with age, and they require continued assistance.\textsuperscript{112} Adoptive families of special needs children have identified behavioral problems as their greatest source of adoption-related stress.\textsuperscript{113}

Adoption disruption (termination prior to final legalization) is another source of concern about whether adoption placement can be viewed as “success,” with little good research to provide information about disruption rates in relation to the characteristics of the children and families. One estimate, based on data from several states, is that the overall adoption disruption rate for special needs children ranges from 6\% to 20\%.\textsuperscript{114} Several small studies reporting on disruption rates by age indicate that disruption rates increase as age increases. One study, for example, reported disruption rates of 25\% for children age nine to eleven, and 47\% for children age twelve to
At the other extreme, a private agency with extensive support for adoptive parents reported a disruption rate of less than 1%. Another source of concern is "legal orphans"—foster children whose parents' rights have been terminated, but the children have not been adopted. In 2003, 126,000 children were waiting to be adopted, a majority of whom (64%) had been in foster care for more than two years. The termination of their parents' rights can also result in loss of contact with siblings and extended kin. If the children are not adopted, the termination may actually be detrimental rather than beneficial.

In addition, transracial adoption opponents identify broader issues of concern. They identify the damage that transracial adoption causes to the African-American community, arguing that "the greatest harm one can inflict on any group is the oblivion that awaits a people denied the opportunity to raise their own children." They argue that greater effort should be made to find more African-American adoptive parents. Further, they question why so many children of color are in the foster care system and maintain that the real need is for more support for families so that the children could have remained at home. Some argue that the child welfare system contains racist programs and policies and that transracial adoption is a form of cultural genocide. From this perspective, even if a number of high quality studies showed that African-American children were doing well in white homes, this research is irrelevant—they should not be there.

To put this point in a different context, consider the children of the “disappeared” (desaparecidos) in Argentina. The parents of these children were kidnapped and killed during a

115. Id.
116. Id.
118. Hochman, supra note 41, at 8.
120. Howe, supra note 92, at 472.
121. Id. at 471.
military dictatorship. Many of the children, an estimated 450, were placed with families connected to the military regime. A group of grandmothers, las Abuelas de la Plaza de Mayo, have been struggling to find their grandchildren. Assume that the children were found and a study was done that showed that the children were doing very well in their adoptive families. From the grandmothers' point of view, that research would be irrelevant. The children were stolen and their placement with the adoptive families should not be supported.

A third point of view, however, is that the transracial adoption debate is really somewhat beside the point, because in fact same-race placement policies may not have caused delay or prevented adoptions of African-American children in foster care. With regard to barriers to adoption, research has shown that other barriers, particularly age and race, may be far more significant in preventing adoption than resistance to transracial adoption or states' failure to terminate parental rights quickly.

With this in mind, consider the age and race of the over half million children in foster care. The largest percent of foster children were between ages eleven to fifteen and the majority were children of color, particularly African-American. As noted above, African-American children are 41% of the foster care population, although African-American children make up only 15% of the United States child population. From the third point of view, limitations on transracial adoption are not the problem. Instead, the problem is that there are too few families who would want to adopt these foster children; their chance for adoption, "transracial or otherwise," is very low. Unfortunately for these children, prospective adoptive parents prefer children who are of their own race, under age two, not disabled, and they prefer one child rather than a sibling group. They are willing to adopt children with other

123. Id. at 127. The period was 1976-81 while Jorge Rafael Videla was in power.
126. See supra text accompanying notes 48-50.
128. Devon Brooks et al., Preferred Characteristics of Children in Need of Adoption: Is there a Demand for Available Foster Children, 76 SOC. SERV. REV. 575, 578 (2002). The article notes that "the best empirical evidence about the preferences of prospective
characteristics, but the pool of potential adoptive parents decreases as adoption preference attributes decrease. It follows from this argument, for example, that an African-American child who is over age twelve and has substantial disabilities is unlikely to be adopted.

This third point of view suggests that more needs to be done to address issues other than transracial adoption. Proponents of this third view argue that an unfortunate effect of the debate is that it takes attention away from the problems of the child welfare system and the lack of social and economic support for families. Improvements in the court processing of cases, which the Pew Commission recommends, may move children out of foster care more quickly, for example, than trying to increase transracial adoptions. Another approach would be making more efforts to actively recruit adoptive families, although the effectiveness of this approach is uncertain because these efforts have been under funded and have not been evaluated. In addition, more generous adoption subsidies might make it possible for more families to adopt.

Another possibility is the increased use of kinship care, which might be of particular help in moving African-American children out of foster care. A large number of African-American children who are in foster care are living with kin, and these placements may be very stable. In a study using data from the National Longitudinal Study of Adolescent Health, Professors Brinig and Nock found that over half of African-American children who were in foster care were living with kin and that these children did no better nor worse than African-American children who were adopted.

Providing subsidized guardianships, which the Pew Commission recommends, may also provide an option that would be best for a particular child and family. For some children, adoption is unlikely because of their special needs. For some it is not desirable because they want to continue contact

adopters comes from a national probability sample of never-married women (ages eighteen to forty-four)."

130. Barth, supra note 99, at 300-01.
131. Adoption subsidies are 27% less than Department of Agriculture estimates of the cost of raising a child and are 5% less than the rate paid to foster parents. Id. at 297.
133. Id. at 467.
with a biological parent. For children in kinship foster care, the foster parents may not want to adopt because they do not want to terminate the parental rights of the biological parent, their relative. A grandmother, for example, might be prepared to make a permanent commitment, but she would still want her role to be that of grandmother rather than mother. Subsidized guardianship might be appropriate also when an older child does not wish to be adopted but wants a permanent connection with a relative or foster family.

Further, guardianships may meet children’s needs in a way that has not been understood. A study in Illinois found that children who were in a guardianship felt as secure as adopted children and reported similar “levels of safety, attachment, and well-being.” An analysis of the patterns of guardianship in three states that have been experimenting with subsidized guardianships determined that

[t]he data show that private wards tend to be older and more often members of a minority race than children adopted from foster care. The age difference is consistent with the sentiment that guardianship better accommodates the preferences of older children, who may wish to maintain ties with their biological parents. The racial difference may reflect longstanding Native American, African American, and Hispanic traditions of extended family care that share important similarities with legal guardianship.

This third approach relies primarily on a careful assessment of social science research and encourages further work on process and outcomes, much like the Pew Commission approach. This approach will not resolve the debate between the opponents and proponents of transracial adoption, however, because much of the transracial adoption debate deals with normative questions that empirical research cannot answer. Opponents believe that children of color should be kept out of a racist foster care system by directing more assistance to low-income families. Proponents want to fix foster care by rescuing foster children.
who have been abused and neglected by their parents and placing them in homes that are separated from their troubled kin and communities.138

The transracial adoption debate also illustrates the normative issues that can arise in family research, such as the choice of a comparison group when assessing family policies. Most transracial adoption studies, for example, compare children in a transracial adoption to racially matched adopted children. If these studies showed that the transracially adopted children were not doing as well as the racially matched adopted children, then proponents of transracial adoption could say that the tranracially adopted children were being compared to the wrong group of children. Instead, the transracially adopted children should be compared to children in foster care, which would be more likely to show that the transracially adopted children were doing substantially better than the children in foster care. Opponents of transracial adoption, however, could argue that the transracially adopted children should be compared to children reared by their biological parents, because the real issue is the lack of family support that results in too many children being placed in foster care.

Similar normative issues could arise in the identification of a comparison group for child well-being measures, recommended by the Pew Commission, for children in foster care. If composite measures of children's mental health, for example, showed that children in foster care scored significantly lower than children nationally, this would not be surprising. Foster care children often have more mental health problems than the general population. But to ascertain whether a state foster care system was performing well with regard to foster children's mental health, there would need to be some framework for comparative measurement. For example, perhaps children in foster care should be compared to children from similar backgrounds who were allowed to remain at home with in-home services.139 If this is the comparison, should children in foster care score higher on the mental health measures in a "successful" foster care program? Would comparing foster children's mental health

138. See, e.g., BARTHOLET, supra note 92, at 91; KENNEDY, supra note 25, at 405-07.
139. This was the approach used by Michael Wald and his colleagues in their study of foster care. MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 21-25 (1988).
when they entered foster care to their health when they exited be a better comparison? Ultimately these research questions are answered by making normative decisions about program goals.

VI. CONCLUSION

Overall, the Pew Commission on Children in Foster Care recommendations are a valuable contribution to the improvement of the child welfare system and to the foster care system in particular. Improved information and accountability, however, will not satisfy critics of foster care who believe that the way to fix foster care is to reduce its demand. The transracial adoption debate illustrates the normative issues inherent in foster care reform and the difficulties involved in defining what constitutes a successful foster care system. The funding reforms and improvements in the courts that the Pew Commission recommends should result in substantial improvements in foster care. Even if the Pew Commission reforms are implemented, however, foster care will continue to be controversial until the need for foster care is reduced and the child poverty rate has markedly declined.