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THE CASE FOR ADOPTION ALTERNATIVES

Susan L. Brooks

In this article, the author takes a unique approach to adoption, criticizing the law's heavy emphasis on adoption while not promoting other permanency alternatives. The author advocates the use and promulgation of subsidized guardianship and cooperative adoption as positive alternatives to traditional adoption. First, the author considers the Adoption and Safe Families Act (ASFA). Discussions of therapeutic jurisprudence and preventive law follow. Then, she talks about family systems theory and cultural competence, leading to discussion of her two favorite alternatives. After examining these theories and approaches, she concludes that these options do a better job of maintaining family relations and correspond more closely with psychological theory.

Mr. and Mrs. Hill were happily married with two children whom they loved very much.¹ Yet, they experienced the stresses and strains shared by many low-income families, as well as the constant lure of the drug culture. Sadly, Mr. Hill became involved with drugs. He ended up being prosecuted for a drug-related offense and was sentenced to 1 year in prison. With Mr. Hill in prison, Mrs. Hill struggled even more to continue to care for the children. She, too, eventually succumbed to drugs to escape her painful reality. Neighbors reported that the Hill children were not being properly supervised, and the state child welfare agency came out to the home to investigate the situation. The agency removed the children from the Hill's home and placed them in two different foster homes.

Meanwhile, in prison Mr. Hill successfully completed a drug treatment program and became committed to fully rehabilitating himself and regaining custody of the children. But time was quickly running out for these parents. Under the most recent federal child welfare law, the Adoption and Safe Families Act (ASFA), states must adhere to rigid time frames for initiating petitions to terminate parental rights. As soon as 15 months had passed, the state filed a petition to terminate Mr. and Mrs. Hill's parental rights, which the court granted.

More than a year later, the Hills' children have not been adopted. Mr. and Mrs. Hill both have been through every available form of rehabilitation—in-patient treatment, after care, parenting classes, anger-management classes, and even preadoptive classes. They desperately want to be able to be a part of their children's lives. However, under current law, there are few, if any, options available to them.

Ms. Underwood is a maternal aunt who agreed to accept her two nephews into her home after her sister became addicted to drugs. She has been willing to provide a home for them for as long as is necessary, including raising her nephews into adulthood. But she is not interested in adopting them because she does not want to cut off her sister's parental rights, which would have to occur before an adoption could take place. Moreover, her nephews have clearly expressed their reluctance to being adopted by their aunt, despite their love and appreciation for her. Joseph, who is 16 years of age, has articulated that he continues to love his mother and that he, too, does not want her parental rights to be terminated.

Ms. Underwood has become a kinship foster parent, meaning that she receives monthly assistance from the state. It also means that her nephews are in the state's legal custody and

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that their case must still be reviewed every 6 months until they achieve “permanency.” Each time the case returns to court, state or court personnel press Ms. Underwood either to apply for legal custody or to adopt the children. Like adoption, legal custody would remove the children from the state’s wardship. However, it would not create permanency, in part because Ms. Underwood would lose the financial assistance she desperately needs to maintain her nephews in her home.

Under the reigning federal law, both of these true accounts may unfortunately end in the children’s being adopted by strangers, despite the presence of capable family members who are willing to care for them on a permanent basis. These stories illustrate that the current child welfare law lacks sufficient alternatives to traditional adoption² to meet the needs of the families affected by this system. This is especially the case with respect to African American families, who represent a disproportionately large percentage of the families in the system. Both the Hills’ and Ms. Underwood’s families are African American.

The purpose of this article is not to deride adoption but simply to suggest that the law places undue emphasis on adoption and does not do enough to promote other permanency alternatives. The article will make the case for emphasizing adoption alternatives and will highlight two alternatives: subsidized guardianship³ and cooperative adoption.⁴ It will use several theories and approaches, including therapeutic jurisprudence (TJ), preventive law, family systems theory, and cultural competency, to demonstrate that these alternatives are more responsive to today’s child welfare system. Both subsidized guardianship and cooperative adoption share a strengths-based orientation toward families and allow children to maintain attachments with important family members to the extent it is safe and appropriate. Accordingly, these alternatives fit better with therapeutic and preventive approaches and contemporary psychological theory. They also correspond to the cooperative values and extended family structure prevalent among African American families. Taken together, these considerations compel a redirection of attitudes, as well as resources, toward promoting permanency alternatives other than traditional adoption.

For years, numerous well-respected scholars and advocates have written convincingly in support of alternatives to traditional adoption. Much of this formidable scholarship was published long before ASFA became a reality. It is therefore all the more perplexing that, despite this great wealth of knowledge, ASFA takes significant steps in the opposite direction by staunchly reinforcing the primacy of traditional adoption and failing to promote any other permanency option, including family preservation or reunification. In light of ASFA, it seems all the more urgent at this time to present the many arguments favoring adoption alternatives.

BACKGROUND: ASFA

In November 1997, President Clinton signed ASFA into law.⁵ With its heavy emphasis on safety and on promoting permanency for vulnerable children through adoption, ASFA sailed through Congress after several high-profile incidents occurred in which children who had been inappropriately returned to birth parents were killed or severely injured by their parents.⁶

Prior to ASFA, the governing federal law was the Adoption Assistance and Child Welfare Act of 1980 (Child Welfare Act).⁷ Although the 1980 act, too, was designed to promote safety and permanency for vulnerable children,⁸ the crafters of ASFA asserted that the earlier act was not succeeding in achieving permanency for sufficient numbers of children in state

care.⁹ Furthermore, because of its purportedly vague and overly liberal “reasonable-efforts” requirement, the Child Welfare Act was allegedly encouraging state child welfare personnel to sacrifice the safety of children in the name of preserving families.¹⁰ In contrast, ASFA severely curtails the reasonable-efforts requirement and, along with it, rejects the general policy focus on preserving families that has been featured in our federal policy since the early 1900s.¹¹ Instead, it places great emphasis and financial incentives on adoption as the primary avenue to permanency.

Under ASFA, the reasonable-efforts requirement is diminished in large part through a list of enumerated exceptions—circumstances under which states are not required to make those efforts.¹² ASFA also imposes a new requirement that states show reasonable efforts toward permanency,¹³ which is clearly intended to correct the Child Welfare Act’s perceived over-emphasis on family preservation. Moreover, ASFA allows states to implement “concurrent planning,”¹⁴ meaning that states are permitted to develop alternative goals for a child from the outset of the proceedings, that is, return to parent and adoption. Given the well-documented criticism of most states’ family preservation services,¹⁵ there is cause for concern that concurrent planning may simply become a fast track to adoption. Additionally, ASFA creates new, independent grounds for termination including termination of parental rights of a sibling and imprisonment for a certain number of years.¹⁶

These considerations must be understood in the context of ASFA’s rigid time frames. Many families, like the Hills, will fall victim to the mandate that, after 15 months in care, states must initiate termination proceedings absent limited exceptions.

Perhaps even more significant, ASFA offers specific financial incentives for adoption in the form of reimbursement for each adoption achieved.¹⁷ No financial incentives are attached to achievement of permanency through any other means, including successful reunification.¹⁸

I have written elsewhere that these provisions, which purport to serve children’s interests, actually punish children by making it easier to sever their important attachments to family members.¹⁹ The true motivation behind these provisions is the interest of adults in meeting their own needs, including the need to feel that a child is exclusively theirs and to punish parents they believe have demonstrated their unworthiness.²⁰

Even if one accepts all of the provisions of ASFA, the case for promoting alternatives to adoption is equally viable. The alternatives suggested here are permissible under ASFA’s current framework, although ASFA itself does not promote or attach financial incentives to them. Indeed, ASFA specifically includes placement with a relative as a permanency option and permits states to exempt children who are placed with relatives from the 15-month time limit for filing petitions to terminate parental rights.²¹ Furthermore, nothing in ASFA prohibits cooperative adoption, and some of its supporters have specifically touted its virtues in certain cases.²²

TJ

The case for promoting adoption alternatives begins with the growing movement known as therapeutic jurisprudence—the study of the role of law as a therapeutic agent.²³ This movement, cofounded about 10 years ago by two legal scholars, Professors David Wexler and Bruce Winick,²⁴ now has an international following among judges, lawyers, and mental health professionals.²⁵ TJ, simply put, promotes exploration of the effects of laws and the legal system on the well-being of the persons they are supposed to serve.²⁶ A TJ inquiry asks, Is this particular law or aspect of the legal system “therapeutic” or “antitherapeutic” for the

persons affected by it?²⁷ Identifying and understanding what is antitherapeutic ideally will lead to positive law reform.²⁸

In the area of child welfare, TJ provides a lens through which to critique the rules, policies, and practices around adoption of children in foster care to see whether they are truly therapeutic.²⁹ This is an important avenue of exploration, particularly in light of the child welfare field's professed reliance on expertise about the best interests of children. Specifically, TJ would inquire whether the current system, which only offers financial incentives to move vulnerable children toward traditional adoption, serves a therapeutic purpose for those children and their families. Even without further analysis, it is readily apparent that this one-size-fits-all approach is likely not to be therapeutic for all children.³⁰

Beyond what common sense dictates, the assessment of whether adoption law and practice is therapeutic also requires reference to current mental health knowledge about child and family functioning, as well as important social and cultural realities about the children and families affected by the child welfare system. As will be discussed in depth, once current mental health knowledge and social and cultural realities are considered fully, it will become even more evident that traditional adoption often does not serve a therapeutic purpose for children in the foster care system. In any case, a broader menu of permanency options, including subsidized guardianship and cooperative adoption, must be fully supported to be responsive to the needs of the children awaiting permanency.

PREVENTIVE LAW

If TJ provides a part of the foundation for the argument favoring adoption alternatives, preventive law fills in the rest of that foundation. The preventive law movement has developed parallel to the TJ movement and shares a somewhat similar approach to the law.³¹ The proponents of preventive law believe that legal practitioners need to be proactive in their efforts and to work with clients toward the avoidance of adversarial litigation.³² The preventive law approach is very much modeled after preventive medicine, including the idea of "legal checkups."³³ Preventive lawyering requires practitioners to view their clients in a more holistic manner and try to anticipate the kinds of legal issues they might face. By having legal checkups, the lawyer can better assess the client's situation and help the client take steps to resolve impending legal issues in a peaceful manner conducive to the client's well-being. This process has also been referred to as identifying "legal soft spots."³⁴

The preventive law focus on promoting the client's well-being fits well with TJ. In synthesizing the two movements, TJ and preventive law scholars have described their work as that of identifying "psycho-legal soft spots."³⁵ Accordingly, in the process of regularly checking in with clients, lawyers can be sensitive not only to the potential legal pitfalls of the client's situation but also to the client's vulnerabilities from a mental health perspective.

The child welfare system does not truly adhere to a preventive law approach, particularly with reference to the emphasis on traditional adoption within the system.³⁶ Adoption is often the result of inadequate or nonexistent preventive efforts. Very little support of any kind, let alone legal support, is available to vulnerable families to help them to prevent their involvement with the legal system or remedy the concerns once they are so involved. These lapses in support lead to termination of parental rights and adoption.³⁷ Furthermore, when compared with the Child Welfare Act, under ASFA much more limited efforts, in scope as well as time, are mandated to prevent children from being removed from their birth parents' care or to

reunify children with their birth parents if removal is necessary.³⁸ This fact must be considered along with the other provisions of ASFA discussed earlier, including the rigid time frames, concurrent planning, and financial incentives around adoption,³⁹ all of which are inconsistent with preventive law principles.

The lack of preventive services is exacerbated by the adversarial court processes that prevail around traditional adoption. For an adoption to take place, it is necessary first to sever parental rights. The court proceedings through which this severance occurs tend to be highly adversarial because to terminate parental rights, the opposing party, usually the state, must present evidence of parental unfitness.⁴⁰ The present system therefore does not comport with notions of preventive law.

In contrast, adoption alternatives such as subsidized guardianship and cooperative adoption fully embrace TJ and preventive law principles. These alternatives share the key element of preserving a child's important attachments, including the child's relationship with his or her birth parents. A considerable body of theoretical and empirical literature indicates that children benefit from maintaining important family attachments in their lives, even if those attachments are faulty or if the family members have significant deficits.⁴¹ Focusing on maintaining the continuity of those attachments will naturally lead to more therapeutic and preventive efforts aimed at family preservation or, at a minimum, at avoidance of adversarial litigation. TJ and preventive law approaches, including these adoption alternatives, may be pursued using nonadversarial dispute resolution and planning processes, such as family group conferencing and mediation.⁴² These alternative processes are being successfully implemented in many jurisdictions around the country and, increasingly, are being used at all stages of child welfare proceedings.⁴³ The use of these alternative processes offers great promise for the encouragement of adoption alternatives.

Few would argue that the child welfare system should serve a therapeutic purpose for children and families. It would also seem that most would agree that optimally the system should minimize children's and families' exposure to adversarial litigation. I have argued above that what is antitherapeutic about traditional adoption, when contrasted with its alternatives, is the child's ability to maintain the continuity of important attachments in the child's life. At this point, I will turn to an explanation of the importance of those attachments and present the theoretical framework supporting the importance of the availability of alternatives such as subsidized guardianship and cooperative adoption.

FAMILY SYSTEMS THEORY

The reigning approach within the mental health fields focused on the importance of family attachments is known as family systems theory.⁴⁴ The unifying principle of family systems approaches is the idea that the family is a dynamic system with interacting parts.⁴⁵ One statement that captures this way of thinking is that the whole is greater than the sum of the parts—a family is not simply a collection of individuals but has qualities that belong to the whole family as an entity.⁴⁶ For this purpose, family must be defined in a broad manner, using bonds of intimacy rather than blood ties.⁴⁷ Members of a family system may include relatives as well as friends and neighbors and foster parents.⁴⁸

Family systems have two other unique overlapping principles: mutual interaction and shared responsibility.⁴⁹ Mutual interaction means that any conduct by one family member will affect the other members of the family and the family as a whole. Shared responsibility

means that every family member plays a role in what occurs within a family. It is critical to understand these two important principles in the context of two other aspects of family systems theory. First, family systems approaches are descriptive and not evaluative and focus more on present situations than past conduct.⁵⁰ Second, family systems approaches focus on family strengths rather than pathology.⁵¹ These last two characteristics mean that family systems theory approaches families from a nonjudgmental posture.⁵²

As may be apparent at this juncture, family systems thinking is very foreign to our current ways of thinking and operating in our legal system, including the child welfare system.⁵³ The U.S. legal system is not set up to take account of family systems but rather focuses on individuals' rights and responsibilities.⁵⁴ It is also not set up to accept mutual interaction or shared responsibility. Fundamental to this system is the fact that in every legal proceeding, it attaches responsibility or liability to one individual.

Understanding family systems approaches helps to explain why the current legal system is antitherapeutic, particularly in the area of child welfare, which purports to promote children's best interests.⁵⁵ The child welfare system fails to recognize the importance of the child's attachments to members of his or her family system.⁵⁶ The prime example of this lapse is the priority given to traditional adoption in the current system, in which a child's family ties must be severed prior to the adoption. This means that not only is the child cut off from the birth parents but also from siblings, grandparents, and other extended family members.⁵⁷ The child will likely also be cut off from other important parts of the family system, such as friends or neighbors, as well as larger intersecting systems, like the child's school, religious institution, and neighborhood. In sum, traditional adoption practices are thoroughly inconsistent with family systems approaches and, accordingly, are antitherapeutic for children.

In contrast, as will be described further below, adoption alternatives such as subsidized guardianship and cooperative adoption also fully embrace family systems principles. When combined with the alternative dispute resolution processes mentioned above, the full implementation of these alternatives would transform the child welfare system into a system consistent with TJ and preventive law principles.

CULTURAL COMPETENCE

The final and, perhaps, most crucial argument for adoption alternatives at this time is that of cultural competence. Culturally competent services have been defined as "systems, agencies, and practitioners that have the capacity, skills, and knowledge to respond to the unique needs of populations whose cultures are different than that which might be called dominant or mainstream American."⁵⁸ Cultural competence requires not simply an awareness of the need for cultural sensitivity but the ability to implement and fully integrate that knowledge through specific policies, practices, and attitudes responsive to the strengths and interests of a minority culture.⁵⁹ This article will focus specifically on cultural competence with respect to the African American community in the United States.⁶⁰

The dire need for cultural competence right now in the area of adoption corresponds to the disproportionate representation of African American children and families in the child welfare system. In a recent article, Professor Dorothy Roberts, a renowned legal scholar who has focused much of her recent work on child welfare, describes the extent of the racial disparities in state child welfare systems:

In 1998, black children made up 45% of the foster care population while comprising only 15% of the general population under 18. In the nation's urban centers, the racial disparity is even greater. Chicago's foster care population, for example is almost 90% black. Of 42,000 children in foster care in New York City in 1997, only 1300 were white. Moreover, once black children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children.⁶¹

The effect of the child welfare system on African American children has been likened to a funnel—"easy to get in and stay in, but very difficult to get out."⁶²

Given the disproportionate impact of the child welfare system on African American families, the child welfare system should embody the cultural values and strengths of African American family and community life. A key characteristic of African American families is the informal, communal nature of the extended family and its cooperative, child-centered focus on child rearing. Recent statistics indicate that 44% of African American families live in an extended family structure, compared with 11% of White families.⁶³ Additionally, one third of African American families with a female head of household older than 65 include children who have not been formally adopted.⁶⁴

Carol Stack, author of the seminal book, *All Our Kin*, advocated more than 15 years ago that preference should not be given to placement in stranger's homes over placement with members of the kin group and that informal adoptive parents should not be forced to pursue legal adoption and terminate the legal rights of biological parents in violation of cultural traditions.⁶⁵ She pointed out that termination of a biological parent's rights may also violate the rights of his or her kin group. The focus on protecting individual legal rights may thus be in direct conflict with the cooperative and communal values of the African American community.⁶⁶

More recently, Professor Gilbert Holmes has described how throughout history African American children have benefited from the love, training, and child rearing given by fictive and real kin in their extended families, as well as ongoing contact with and knowledge about their birth kin provided to those children.⁶⁷ These informal cooperative parenting and child-rearing arrangements became solidified during the era of slavery, when innumerable children were separated from their birth families.⁶⁸ Holmes harshly criticizes current adoption policy—that is, the promotion of traditional adoption—likening it to the treatment of African American children and families under slavery.⁶⁹ Instead, he advocates an adoption policy that "seeks to promote the interest of the whole child by including children's birth heritage without threatening the child's adoptive relationships" as "child-centered and in the best interest of adopted children."⁷⁰

A key component of moving our adoption policy toward cultural competence would therefore be to promote permanency alternatives to traditional adoption that allow children to maintain relationships with their birth families and their extended family systems. Unfortunately, rather than adapting the system to be more responsive to the longstanding practices within African American families, current adoption policy "rob[s] African Americans of the privilege and responsibility of caring for their own children"⁷¹ by promoting transracial adoption. The transracial adoption movement is premised on the idea that no child should have to wait for families of their same race to be placed.⁷² In reality, however, this recruitment effort is a one-way street, which only serves the interests of White families interested in adopting African American children.⁷³ Arguably, the African American extended family is undergoing a form of cultural genocide not unlike that experienced by the Native American

tribal community in the 1970s.⁷⁴ Figures for “displaced or outplaced” African American children are almost as high as those reported for Native American children in the 1970s, the phenomenon that led to the special protections for those children and families contained in the Indian Child Welfare Act.⁷⁵

Yet, the most invidious aspect of this effort may be that it reinforces a “deficit view” of the African American family and the African American community rather than addressing the systemic barriers that inhibit African American families willing to care for children within their own communities. Professor Ruth-Arlene Howe, among other critics, strongly rejects the assertion that not enough African American homes exist to care for those children in need of substitute care. Instead, she indicts the child welfare community for not delivering culturally competent services in ways that provide African American children with needed homes.⁷⁶ Howe, like many other critics of current adoption policy, concludes that research is needed that will focus greater attention on ensuring that both kinship care and family preservation become viable alternatives to both foster care and adoptive placements with strangers.⁷⁷

Cultural competence includes the intersection of class issues and race issues. Not only are a disproportionate number of foster care children African American, they are also overwhelmingly poor.⁷⁸ As a society, we respect the privacy and autonomy of middle-class families, but we accept coercive intervention and intrusion in low-income families. Meanwhile, we discount and devalue the cultural backgrounds and the solid parenting skills of many low-income parents. In trying to protect children, we disregard their parents’ rights and their communities’ cooperative values.⁷⁹

Professor Leroy Pelton has castigated the child welfare system as a coercive system that thrives on punishment and blame of the poor.⁸⁰ This phenomenon has been referred to as the “othering” of poor families, particularly when they are of color, which makes it easy for the dominant culture to devalue them: to view them as dysfunctional and not families at all.⁸¹ Professor Annette Appell, a proponent of cooperative adoption, criticizes the “growth industry” that has arisen from the state’s “protective” involvement with poor families and families of color and the state’s punitive treatment particularly of the mothers of these families.⁸² Appell describes these mothers as evading White, middle-class mother norms or myths in a number of ways, including the simple fact that they are poor but also because they depend on informal kinship and community networks for child care.⁸³

These deeply entrenched biases may have contributed to welfare reform, which has compounded the negative effects of ASFA and transracial adoption policies on poor, African American families. Many child and family law scholars and advocates have predicted that the Temporary Assistance to Needy Families Program (TANF), implemented in 1996, means that more children will ultimately enter the foster care system. One scholar estimates that 3.8 million children will be affected simply by the 60-month limit on welfare receipt.⁸⁴ Several critics have predicted that, in conjunction with ASFA, TANF is likely to further accelerate the separation of children from poor parents.⁸⁵ The effect will be increased numbers of children in poverty experiencing increased material hardship and being reported to state agencies as abused or neglected.

In sum, to transform our system from one of cultural destructiveness to cultural competence—or better yet, proficiency—an important step would be to promote adoption alternatives of subsidized guardianship and cooperative adoption. These alternatives support the strengths, values, and interests of capable African American families that could provide substitute care for vulnerable children.

THE ALTERNATIVES

SUBSIDIZED GUARDIANSHIP

Guardianship creates a permanent relationship between guardian and ward, but appointment of a guardian over a child does not require the formal termination of parental rights, so a relationship between child and parent can continue.⁸⁶ The guardian can be a relative or other suitable individual, including a foster parent, who is charged with protecting the child's health and welfare.⁸⁷ Once appointed by the court, the guardian has legal authority to make virtually all decisions on behalf of a child.⁸⁸ Under a guardianship, parents retain the right to visit the child and the right to consent to an adoption. They may also retain some obligation to support the child.⁸⁹ Once a guardianship is established, the agency is no longer the child's custodian, and the court no longer has jurisdiction, even if the guardian has, until then, been the foster parent. In sum, "guardianship cements the bond between the child and the caregiver, localizes authority over the child, and endows the relationship with an expectation of continuity."⁹⁰

The subsidy in a subsidized guardianship allows potential guardians to give a child a permanent home who could not afford to do so otherwise. Accordingly, it operates similarly to a foster care or adoption subsidy. The availability of the subsidy eliminates the disincentive for foster parents' becoming legal guardians because otherwise they would lose the maintenance stipend provided for the child's support while in foster care. Removing this disincentive is especially important for kinship foster parents, many of whom would be unable to assume guardianship without the provision of the subsidy.

Subsidized guardianship gives legal recognition to family patterns common within African American culture, which, as indicated earlier, is heavily represented in the foster care system.⁹¹ Within African American culture, as has been discussed, extended family members often make informal arrangements among themselves for the care of children during difficult times. "By recognizing these relationships and endowing them with legal authority, subsidized guardianship legitimizes and reinforces methods of protecting and caring for children already familiar to, and culturally valued by, substantial numbers of families already involved in foster care systems nationwide."⁹²

Subsidized guardianship is a particularly appealing option for jurisdictions that have large numbers of children in kinship foster care. It offers an attractive permanency option for relative caregivers because it allows them to provide permanency and stability without displacing the child's birth parents. It should also be noted that subsidized guardianship might facilitate permanency for children who would otherwise be difficult to place, including multiple sibling groups and children with special needs. It has been noted that kinship placements have accepted these children more readily than strangers, but moving these children to permanency may not effectively occur without support for subsidized guardianship.⁹³

COOPERATIVE ADOPTION

Cooperative adoption refers to an adoption in which the parties agree to allow some element of continuity between the birth family and the adoptive family. The continuity may range from exchanging information and photographs to ongoing contact. Adoption with contact is a form of cooperative adoption that includes an enforceable cooperative adoption

agreement specifying the parameters for ongoing contact between a child and his or her birth family. Birth relatives and adoptive parents together decide on the comfortable level of openness and involvement of a child's birth family while protecting the integrity of the adoptive family.

Proponents of cooperative adoption are convinced that it meets the needs of all members of the "adoption triangle": the adopted child, the adoptive family, and the birth family.⁹⁴ First, it meets the adopted child's needs for a sense of identity and continuity as well as information about the child's birth family.⁹⁵ It may also decrease potential conflict or acting out that may arise in adolescence. Contact with birth parents also has been shown to contribute to a higher level of self-esteem in foster children.⁹⁶ Cooperative adoption may lead to greater stability, not only because of the advantages from the perspective of the child's adjustment but also because of the birth family's participation and, therefore, greater acceptance of the arrangement.⁹⁷ For adoptive parents, it allows them ongoing access to important information about the child's background, heritage, and medical history. Research also suggests that cooperative adoption decreases the adoptive parents' anxiety about the birth parents' potential disruption of the adoption.⁹⁸

According to a recent article by Professor Annette Appell, 25% of the states have enacted adoption legislation that contemplates some form of ongoing contact between birth and adoptive families.⁹⁹ The stated purposes behind these statutes include promoting the adoption of foster children, encouraging single parents to surrender their birth children, and preserving family relationships.¹⁰⁰ Yet, according to Appell, most adoption statutes, like ASFA itself, continue to project a traditional image of adoption.¹⁰¹

CONCLUSION

At its core, this article argues that, by giving primacy to traditional adoption and by either rejecting, ignoring, or undervaluing other options, the current child welfare system discriminates against poor African American families that are overrepresented in the system. Thus, today's child welfare system operates as a classist, racist system. This argument is based on an understanding of current law and policy as much as on an understanding of African American culture and history with respect to the African American communities' indigenous ways of addressing concerns of child protection or child welfare. This is not to suggest that African American families will never want to pursue traditional adoption, even if they are offered other options. It does suggest, however, that we need to reexamine our law and policies that dictate that African American families that want to provide permanency for vulnerable children must do it "our way."

Instead, this article demonstrates, we should promote alternatives that embrace the African American community's own responses to children in need of substitute care. Thus, we should promote these alternatives not merely as a concession to the African American community; rather, we should celebrate these alternatives as reflecting an important cultural contribution. Appreciation of alternatives such as subsidized guardianship and cooperative adoption benefits us all because they help the larger culture appreciate the importance of the family system and of how concerns for child safety can be addressed while allowing a child to maintain family ties.

EPILOGUE

Today's all-or-nothing child welfare system leaves families like the Hills completely out in the cold. They dearly love their children and are painfully aware of their mistakes. Now, they have turned their lives around and desperately want to be a part of their children's lives but have nowhere to turn. It seems that it could only help their children to know that their parents are healthy and stable. Unfortunately, the Hills live in a state that does not legally support cooperative adoption. If cooperative adoption were available to them, their story could perhaps have a happy ending.

As for Ms. Underwood, she continues to return to court every 6 months for a review of her nephew's court cases. Otherwise, she manages just fine on her own. Ms. Underwood's situation would be an ideal candidate for subsidized guardianship. With the availability of a subsidized guardianship, her nephews could finally achieve permanency, and the court and state could have two less children in their care. Ms. Underwood's story, too, could have a happier ending if adoption alternatives were more widely available.

Families that experience the child welfare system must face many difficulties. By suggesting that adoption alternatives might offer happier endings, I do not mean to minimize the complexities of these situations or suggest that the availability of alternatives, by itself, would resolve every difficult case. On the other hand, the child welfare system currently operates in a manner that ignores our collective wealth of knowledge and experience about how to help vulnerable children and families. Given ASFA, we must not delay to reform child welfare policy and practice to offer a greater menu of permanency options.

NOTES

1. The following stories are taken from actual situations in which I represent the persons involved. I have refrained from using their names to protect their privacy.

2. Throughout this article, I will use the term *traditional adoption* or simply *adoption* to refer to adoptions that occur as a single event in which parental rights are severed by law prior to the adoption, along with all contact with the child's birth family.

3. A guardian is a person who can meet a child's need for parenting in a family-like setting on a permanent basis without having to sever the parents' rights. Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care and Child Welfare*, 2 N.Y.U. REV. L. & SOC. CHANGE 441, 457 (1996). Once a guardianship is awarded, the child is no longer a ward of the state and is deemed to have achieved permanency.

4. Cooperative adoption refers to a mutually agreeable adoption arrangement that permits some level of ongoing involvement between the birth family and the adoptive family. Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption With Contact Statute* [hereinafter *Adoption With Contact*], 18 CHILDREN'S LEGAL RTS. J. 24, 24 (1998).

5. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

6. Dorothy E. Roberts, *Is There Justice in Children's Rights? The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 113 (1999).

7. Pub. L. No. 96-272, 94 Stat. 500 (1980).

8. Kathleen A. Bailie, *The Other Neglected Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 FORDHAM L. REV. 2285, 2288-89 (1998).

9. See Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO STATE L.J. 1189, 1191 (1999) ("The ASFA represents a shift toward child rescue, and is an overreaction to a perceived bias toward family preservation.").

10. *Id.*, at 1196; Roberts, *supra* note 6, at 115-16 (citing Richard J Gelles, *The Book of David: How Preserving Families Can Cost Children's Lives* (1996)).

11. See generally, Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO STATE L.J. 1479, 1487 (1999). Professor Pelton points out that we are closing this century with the highest number and rate of children entering foster care than at any previous time in this century. Although Pelton was among the earliest scholars to point out the connection between poverty and neglect, he attributes these dramatic foster care figures to our coercive and punitive system rather than to trends in poverty rates. *Id.*, at 1486. Pelton states that the public child welfare system is obsessed with concepts of child abuse and neglect rather than functioning to provide a safety net for vulnerable families. He goes on to argue that our child welfare policies are "so perverse" that the coercive system overpowers any positive effect that might come from more effective prevention and family support programs. *Id.*, at 1487.

12. 42 U.S.C. § 671(a)(15)(B) (1997).

13. 42 U.S.C. § 671(a)(15)(C)-(E) (1997).

14. 42 U.S.C. § 671(a)(15)(F) (1997).

15. See, e.g., Roberts, *supra* note 6, at 126 ("state agencies continue to make anemic efforts to prevent out-of-home placements and reunify families. Family preservation programs often fail because they do not address the needs of families, are inadequately funded, and do not last long enough."); Cahn, *supra* note 9, at 1203 ("families are simply not receiving the services they need, rather than refusing to comply with the services that are offered."). See also Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE (offering detailed critique of the implementation of family preservation services).

16. 42 U.S.C. § 671(a)(15)(D) (1998).

17. Cahn, *supra* note 9, at 1205.

18. *Id.*

19. See Susan L. Brooks, *Permanency Through the Eyes of a Child: A Critique of the Adoption and Safe Families Act*, 19 CHILDREN'S LEGAL RTS. J. 2 (1999). Other scholars have articulated similar criticisms. Roberts, *supra* note 6, at 113.

20. *Id.*

21. 42 U.S.C. § 675(5)(E) (1998).

22. Even supporters of concurrent planning have written in support of openness in adoption as "facilitat[ing] the permanency planning and achievement of permanence for the child." Anita Weinberg and Linda Katz, *Law and Social Work in Partnership for Permanency: The Adoption and Safe Families Act and the Role of Concurrent Planning*, 18 CHIL. LEGAL RTS. J. 2, 14 (1998).

23. David B. Wexler, *Therapeutic Jurisprudence in a Comparative Law Context* [hereinafter *Comparative Law*], 15 BEHAV. SCI. & L. 233, 233 (1997).

24. See David B. Wexler, *Therapeutic Jurisprudence: Law as a Therapeutic Agent* (1990); LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE (David B. Wexler & Bruce J. Winick, eds.) (1996).

25. See David B. Wexler, *Therapeutic Jurisprudence and the Culture of Critique*, 10 J. CONTEMP. LEGAL ISSUES 263, 267 (1999).

26. *Id.*

27. See Wexler, *Comparative Law*, *supra* note 23, at 233.

28. *Id.*

29. For a detailed analysis of the child welfare system using a therapeutic jurisprudence perspective, see Susan L. Brooks, *Therapeutic Jurisprudence and Preventive Law in Child Welfare Proceedings: A Family Systems Approach* [hereinafter Brooks, *Therapeutic Jurisprudence*], J. PSYCHOLOGY, PUB. POL. & L. ____ (1999) (forthcoming).

30. Donald N. Duquette et al., *We Know Better Than We Do: A Policy Framework for Child Welfare*, 31 U. MICH. J. L. REFORM 93, 136-38. ("Unfortunately, our legal system recognizes only two permanent statuses for children: traditional adoption and return to the custody of their biological parents. State laws should provide for other legally secure permanent placements for children in addition to this stark dichotomy. Kinship placements, as well as nonrelative foster placements, could mature into long-term stable placements while still maintaining a connection between the child and her biological family.")

31. See Dennis P. Stolle & David B. Wexler, *Preventive Law and Therapeutic Jurisprudence: A Symbiotic Relationship*, 16 PREV. L. REV. 4 (1997); Dennis P. Stolle & David B. Wexler, *Therapeutic Jurisprudence and Preventive Law: A Combined Concentration to Invigorate the Everyday Practice of Law*, 39 ARIZ. L. REV. 25 (1997).

32. See generally, ROBERT M. HARDAWAY, PREVENTIVE LAW: MATERIALS ON NONADVERSARIAL LEGAL PROCESS (1997).

33. See Dennis B. Stolle et al., *Integrating Preventive Law and Therapeutic Jurisprudence: A Law and Psychology Based Approach to Lawyering* [hereinafter *Integration*], 34 CAL. W. L. REV. 15 (1997). A legal checkup has been analogized to a medical checkup. *Id.*, at 17.

34. Hardaway, *supra* note 32, at 189-92.

35. Stolle, *Integration*, note 3, *supra*. Psycho-legal soft spots have been described as ways in which certain legal procedures or legal interventions may be expected to precipitate or reduce anger, hurt feelings, anxiety, and other dimensions of law-related psychological well-being. David B. Wexler, *Practicing Therapeutic Jurisprudence: Psycholegal Soft Spots and Strategies*, 67 REV. JUR. U.P.R. 317 (1998).

36. For a detailed analysis of the preventive law aspects of the child welfare systems, see Brooks, *Therapeutic Jurisprudence*, note 29 *supra*.

37. See Lori Klein, *Doing What's Right: Providing Culturally Competent Reunification Services*, 12 BERKELEY WOMEN'S L.J. 20 (1997) (addressing the inadequacy of culturally competent services for birth parents in dependency cases).

38. See text accompanying notes 12-18, *supra*.

39. See text accompanying notes 12-18, *supra*.

40. See Margaret Beyer and Wallace J. Mlyniec, *Lifelines to Biological Parents: The Effect on Termination of Parental Rights and Performance*, 20 FAM. L.Q. 233, 254 (1986) ("lawyers for parents are left the unpleasant task of participating in the charade and explaining to bewildered parents why they will never see their child again.").

41. See, e.g., Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996) (describing psychological theory on attachment); Marsha Garrison, *Parent's Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371 (1996) (comparing literature on effects of divorce with effects of foster care); Susan L. Brooks, *A Family Systems Paradigm for Legal Custody Decision Making Affecting Child Custody*, 6 CORNELL J. L. & PUB. POL. 1 (1997) [hereinafter Brooks, *Family Systems*] (describing and applying family systems theory).

42. See Maria Wilhelmus, *Mediation in Kinship Care: Another Step in the Provision of Culturally Relevant Child Welfare Services*, 43 SOCIAL WORK 117 (March 1998) (advocating the usefulness of mediation, particularly in working with kinship families); Jolene M. Lowry, *Family Group Conferences as a Form of Court-Approved Alternative Dispute Resolution in Child Abuse and Neglect Cases*, 31 U. MICH. J. L. REFORM 57 (1997) (proposing broad implementation of family group conferencing in child welfare cases).

43. See "A Family-Centered Neighborhood-Based Approach to Child Protection: The Family Case Conference" (unpublished document, on file with author) (outlining implementation of family case conference, used throughout child welfare proceedings in Ohio).

44. Family systems theory is often referred to as an "ecological" approach to families. It reflects a body of literature that shares a common set of principles. For a detailed description, see Brooks, *Family Systems*, note 41 *supra*. See also Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. (1997) (discussing and advocating for implementation of this case approach).

45. Brooks, *Family Systems*, *supra* note 41, at 5.

46. *Id.*

47. *Id.*, at 4.

48. *Id.*

49. *Id.*, at 5.

50. *Id.*, at 7-8.

51. *Id.*, at 8.

52. *Id.*

53. *Id.*, at 3.

54. *Id.*, at 10 (citing Mary Ann Glendon, RIGHTS TALK 75, 109 [1991]).

55. Brooks, *Therapeutic Jurisprudence*, *supra* note 29, at 10-11.

56. *Id.*

57. Cahn, *supra* note 9, at 1220.

58. Klein, *supra* note 37, at 21 (quoting Terry Cross, *Developing a Knowledge Base to Support Cultural Competence*, 14 FAM. RESOURCE COALITION REP. 2, 3-4 [1995-96]).

59. http://www.air.org/cccp/cultural/Q_integrated.htm (visited July 28, 2000). Five elements contribute to a system's ability to be culturally competent. The system should (a) value diversity, (b) have the capacity for cultural

self-assessment, (c) be conscious of the dynamic inherent when cultures interact, (d) institutionalize cultural knowledge, and (e) develop adaptations to service delivery that reflect an understanding of diversity between and within cultures. Cultural competence may be seen as part of continuum, spanning from cultural destructiveness to cultural proficiency. Child welfare field law and practice, particularly with respect to adoption, would arguably fall within the realm of cultural destructiveness, or at best, cultural blindness.

60. At least one critic agrees that the child welfare system is failing to deliver culturally relevant child welfare services and attributes this failure to the "ethnocentric design and implementation of the system, and its symbiotic relationship with the American legal system." Maria Wilhemus, *supra* note 42, at 119 (quoting J. P. Gleeson, *Kinship Care and Public Child Welfare: Challenges and Opportunities for Social Work Education*, 31 J. SOCIAL WORK EDUCATION 182, 186 (1995)).

61. Dorothy Roberts, *supra* note 6, at 125 (citing *Administration on Children, Youth and Families, Children's Bureau, Current Estimates as of January 1999* (1) (visited Sept. 23, 1999). <http://www.acf.dhhs.gov/programs/sc/stats/ar0199a.htm>).

62. Carol C. Williams, EXPANDING THE OPTIONS IN THE QUEST FOR PERMANENCE IN CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE, IN CHILDREN IN CRISIS, IN CHILD WELFARE: AN AFRICENTRIC PERSPECTIVE 276 (Joyce E. Everett et al., eds. 1991).

63. Cynthia G. Hawkins-Leon, *The Indian Child Welfare Act and the African-American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 210-11 (1997-98).

64. *Id.*

65. Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 540, 546 (1983-84).

66. *Id.*

67. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1665 (1995).

68. Hawkins-Leon, *supra* note 63, at 210.

69. Holmes, *supra* note 67, at 1668.

70. *Id.*

71. Howe, at 417.

72. The Adoption Promotion and Stability Act of 1996, H.R. 3286, 104th Cong., 2d Sess. (1996), incorporated into Small Business and Minimum Wage Bill, as reported in Conference Report No. 3448 (signed by President Clinton on August 26, 1996). Section 1808, Removal of Barriers to Interethnic Adoption amends 471(a) and 474 of the Social Security Act, (42 U.S.C. 671(a) and 674) and repeals § 553 of the Howard Metzenbaum Multiethnic Placement Act of 1994 (42 U.S.C. § 5115a), Small Business Job Protection Act of 1996, Pub. L. No. 104-88, § 1808, 110 Stat. 1755, 1903.

73. See Angela Mae Kupenda et al., *Law, Life and Literature: Using Literature and Life to Expose Transracial Adoption Law as Adoption on a One-Way Street*, 17 BUFF. PUB. INT. L.J. 43 (1998-99). Even with these misguided recruitment efforts, a significant percentage of the children whose parental rights have been terminated have not achieved permanency through traditional adoption. In an article published in 1995, Professor Martin Guggenheim described the results of a comparative study of children in Michigan and New York whose parental rights had been terminated. Between 1987 and 1993, Guggenheim found a dramatic increase in the number of children "freed for adoption" but not adopted. He raised the specter of a growing population of legal orphans, even prior to ASFA, with its more aggressive approach to termination of parental rights. 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 (1998).

74. See Kupenda et al., *supra* note 73, at 43. This viewpoint is shared by NABSW. Since 1972, NABSW has taken a firm stance opposing transracial adoption as a form of "cultural genocide." See Note, Amanda T. Perez, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE L. & POL'Y REV. 201, 205 (1998).

75. Hawkins-Leon, *supra* note 63, at 213.

76. Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 440 (1997).

77. *Id.*, at 467. Similarly, Roberts argues that viable alternatives to adoption that could ensure family stability while preserving the parent-child relationship. "Programs intended to encourage long-term care of foster children by relatives could promote family preservation and stability while preventing the unnecessary tension within the child's biological support group that would result from termination of parental rights and adoption." Roberts, *supra* note 6, at 122. Carol Williams states further, "the issue of permanency has been addressed as if it were exclusively an adoption problem and not the outcome of weaknesses in other parts of the service delivery system. Instead, the disproportionate number of African American children needing adoption is a symptom of failed policy implementa-

tion: failure to prevent unnecessary placement; failure to reunite families in a timely fashion; and failure to stabilize the lives of children lacking the protection of families." Williams, *supra* note 62, at 270, 273.

78. Roberts, *supra* note 6, at 125; Cahn, *supra* note 9, at 1198.

79. Stack, *supra* note 65, at 547.

80. Pelton, *supra* note 11, at 1489. Pelton summarizes his position as follows: "Our child welfare and welfare programs constitute mutually reinforcing approaches to social problems that are coercive, paternalistic, and discriminatory. If a society is to be judged by the way it treats its poor, our current child welfare and welfare policies are a disgrace, and should be an embarrassment to us all." *Id.*, at 1491.

81. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System* [An Essay], S.C. L. REV. 577, 579 (1997).

82. *Id.*, at 580.

83. *Id.*, at 585-86.

84. Cahn, *supra* note 9, at 1199 (citing Greg Duncan et al., *Time Limits and Welfare Reform: New Estimates of the Number and Characteristics of Affected Families* 7 (1997)).

85. Pelton, *supra* note 11, at 1490.

86. Schwartz, *supra* note 3, at 441, 443.

87. *Id.*, at 457.

88. *Id.*

89. *Id.*, at 458.

90. *Id.*

91. *Id.*, at 459.

92. *Id.*, at 460.

93. At present, most states operating subsidized guardianship programs do so as the result of the "waiver authority" of the federal government. See *Spotlight on Illinois' New Plan for Permanency: Subsidized Guardianship*, 19 CHILDREN'S LEGAL RTS. J. 45 (1999). For the past several years, the federal government has granted a limited number of these waivers, which allow states, such as Illinois, to operate subsidized guardianship programs using federal foster care funds. Other states, like Massachusetts, operate similar programs without using federal funds. The federal government would have to make federal funding for subsidized guardianships more widely available for this option to become truly viable.

94. Annette R. Appell, *Adoption With Contact*, *supra* note 4, at 24. See generally, Annette Baran and Rueben Pannor, PERSPECTIVE ON OPEN ADOPTION: THE FUTURE OF CHILDREN (Spring 1993) (reviewing literature on openness in adoptions); Carol Amadio and Stuart L. Deutsch, OPEN ADOPTION: ALLOWING ADOPTED CHILDREN TO "STAY IN TOUCH" WITH BLOOD RELATIVES (presenting case law as well as psychological literature supporting open adoptions).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*, at 24.

100. *Id.*, at 26-27.

101. *Id.*, at 26.

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