

# A MOTHER'S RIGHT TO CHOOSE: VOLUNTARY PLACEMENT

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## ABSTRACT

Voluntary foster care placement is an option in the majority of states in the United States, yet there is a paucity of legal research dedicated to studying and improving the mechanism. This Article will provide legal analysis of voluntary foster care placement options across the country with qualitative data over twenty-five years. The

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Article offers both a descriptive and normative analysis of the voluntary placement process. In doing so, it distinguishes true voluntary placements from (in)voluntary placements into foster care, which mask themselves as uncoerced.

By proposing due process guardrails, such as access to attorneys at the outset, limiting scope and time periods for contractual placement, and decoupling voluntary placement agreements from child welfare investigations, this Article re-imagines a model voluntary placement option. Ultimately, it proposes a feminist, pro-choice, pro-parent, pro-child, and truly voluntary placement that can empower mothers who face limited reproductive choices to retain autonomy and select the choices that are safest for their own families.

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## INTRODUCTION

Family law scholars perpetually grapple with legal issues at the crossroads of parental and children's interests, particularly in cases when the government is involved in the family. The diagram of a triangle representing the triad of rights is a cornerstone of family law jurisprudence.<sup>1</sup> Parents' interests and rights are one corner of the triangle, children's rights are on another corner, and governmental powers bestride the third corner. Invariably, there are tensions between this tripartite. Public sphere cases include those cases where the government surveils or intervenes in a family to challenge the parenting of children. Such cases often test the boundaries for the family law triad,<sup>2</sup> in that the government questions the decisions and the abilities of the parents in the home. Too often these governmental challenges place children outside of the family home.

Every state in the United States maintains a system of foster care as part of the larger child welfare system within that state. Foster care services include homes and placements outside of the

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1. See, e.g., Mary Ziegler et al., *Retrenchment by Diversion: The New Politics of Parental Rights*, 123 MICH. L. REV. 669, 677 (2025) (describing the traditional family law framework as a triangle including the state, parents, and children); Jennifer Johnson & Brenda A. Baietto, *Diverse Family Structure: Reevaluating the Best Interests of the Child Standard*, 15 MINORITY TRIAL L. 5, 5 (2017) (describing and diagrammatically representing family structure as an "inverted triangle"); Margareth Etienne, *Managing Parents: Navigating Parental Rights in Juvenile Cases*, 50 CONN. L. REV. 61, 72–74 (2018) (explaining that family law scholars commonly describe parent, child, and state relationships as "triadic," with each competing for authority to make important decisions on behalf of the child).

2. All levels of government play a role in promoting general child welfare pursuant to the U.S. Constitution. At the federal level, "[t]he Children's Bureau, under the Administration for Children and Families (ACF) within the U.S. Department of Health and Human Services (HHS), administers federal child welfare policy and seeks to achieve these goals by providing family services that allow children to reunite safely with their families, or by finding new, permanent families for children." At the state level, "every state's Department of Social Services (or likeness) investigates reports of child maltreatment. In the most serious cases, the agency devises and administers a plan to help reduce the problems that led to the investigation and improve the situation for all family members." In addition, states provide at least half of the overall funding whereas the federal government provides for larger portions of foster care costs. *Foster Care: Understanding the Basics*, THE POL'Y CIRCLE (Feb. 1, 2024), <https://www.thepolicycircle.org/brief/the-failures-and-future-of-the-u-s-foster-care-system/> [https://perma.cc/FX89-9XEG].

family home, often when the government and/or the courts determine that the children are not safe to remain in their home of origin.<sup>3</sup> Conceptually, the foster system is a necessary state creation because it protects vulnerable children. Yet, in modern practice, the child welfare system, also known as the child protection system, has been renamed the “family policing system,”<sup>4</sup> the “family regulation system,”<sup>5</sup> and the “family destruction system”<sup>6</sup> to demonstrate its long and controversial history in the United States. Professor Dorothy Roberts has described it as a system of “benevolent terror” that especially punishes low-income families and families of color in the name of protecting children.<sup>7</sup>

In the United States, foster placement too often morphs into an overly punitive endeavor. While the tripartite of rights is intended to serve as a checks and balances system, the balancing is often insufficient to overcome a multitude of biases, including what I have earlier termed “motherhood bias.”<sup>8</sup>

This Article is centered specifically on motherhood for three reasons: (1) statistically speaking, mothers are most often the

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3. Some states might term the “child welfare system” the “child protection system.” I utilize the term “child welfare system” interchangeably to refer to the “foster care system” and related legal proceedings in each state.

4. DOROTHY ROBERTS, *TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES AND HOW ABOLITION CAN BUILD A SAFER WORLD* 18–19 (2022) [hereinafter ROBERTS, *TORN APART*]. See also DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002) [hereinafter ROBERTS, *SHATTERED BONDS*]; Dorothy Roberts, *The Reproductive Violence of Family Policing & Separation*, PETRIE FLOM CTR. AT HARV. L. SCH. (May 9, 2022), <https://petrieflom.law.harvard.edu/2022/05/09/dorothy-roberts-torn-apart-family-separation/> [<https://perma.cc/8VFG-V63A>]; Amy Sinden, “Why Won’t Mom Cooperate?” *A Critique of Informality in Child Welfare Proceedings*, 11 *YALE J. L. & FEMINISM* 339 (1999); Josh Gupta-Kagan, *America’s Hidden Foster Care System*, 72 *STAN. L. REV.* 841 (2020); Melissa L. Breger, *The (In)Visibility of Motherhood in Family Court Proceedings*, 36 *N.Y.U. REV. L. & SOC. CHANGE* 555 (2012).

5. Jane M. Spinak, *The Road to a Federal Family Court*, 58 *CT. REV.* 8, 13 (2022); see also JANE M. SPINAK, *THE END OF FAMILY COURT: HOW ABOLISHING THE COURT BRINGS JUSTICE TO CHILDREN AND FAMILIES* (2023) [hereinafter SPINAK, *THE END OF FAMILY COURT*].

6. ALBANY LAW SCHOOL, *10th Annual Katheryn D. Katz ’70 Memorial Lecture* (2024), at 38:50–39:20 (Vimeo, Oct. 30, 2024), <https://vimeo.com/1025530950> (on file with the *Columbia Human Rights Law Review*) (Professor Guggenheim coining the phrase “family destruction system”).

7. ROBERTS, *TORN APART*, *supra* note 4, 297, 304.

8. See generally Breger, *supra* note 4.

primary caretakers of children in the United States;<sup>9</sup> (2) mothers are more easily located as compared to fathers, and thus, more often the subject of child welfare cases;<sup>10</sup> and (3) reproductive choices are now limited to mothers due to the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*.<sup>11</sup> At this particular juncture in time, with continued attacks upon reproductive choices and the resultant blame placed upon mothers, we need to be vigilant about women's rights. Certainly, fathers and all parents should have the option of voluntary placement into foster care, and nothing about situating these issues through a feminist lens takes away from the fact that many parents are not women or do not identify as female. Womanhood and motherhood are not equivalent and synonymous.<sup>12</sup> Many women are not mothers, and many parents are not women. We need to allow all parents to care best for their children in the space and in the reality in which they live.

Like the criminal justice and carceral systems, many scholars have called for a complete abolition of the child welfare system.<sup>13</sup> A rich body of scholarship examines the shortcomings of the child

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9. See Breger, *supra* note 4, at 556; Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 614–15 (2005); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORN. L. REV. 688, 708 (1998) ("[M]others overwhelmingly are the custodians and caretakers of children."); Matthew R. Hall, *Book Note: Redefining Fatherhood*, 4 J. L. & FAM. STUD. 209, 209 (2002) (reviewing NANCY E. DOWD, *REDEFINING FATHERHOOD* (2000)) ("Mothers are still overwhelmingly the primary care-taker of children. Fathers are at most secondary parents, and have often abandoned children altogether—physically, economically, and otherwise."); Catherine J. Ross, *The Tyranny of Time: Vulnerable Children, "Bad" Mothers, and Statutory Deadlines in Parental Termination Proceedings*, 11 VA. J. SOC. POL'Y & L. 176, 180 (2003); Annette Appell, *Accommodating Childhood*, 19 CARDOZO J. EQUAL RTS. & SOC. JUST. 715, 728 (2013) ("[The current] scheme disproportionately places these often-uncompensated burdens on women and especially on poor women and women of color.").

10. Breger, *supra* note 4, at 556.

11. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 229–33 (2022) (holding that abortion is not a constitutional right and overturning *Roe v. Wade*).

12. Breger, *supra* note 4, at 566–67; see also LAURY OAKS, *GIVING UP BABY: SAFE HAVEN LAWS, MOTHERHOOD, AND REPRODUCTIVE JUSTICE* 203 (2015).

13. See, e.g., SPINAK, *THE END OF FAMILY COURT*, *supra* note 5, at 5; ROBERTS, *TORN APART*, *supra* note 4, at 27.

welfare system as it currently exists.<sup>14</sup> Scholars argue that the systems are used as weapons to divide families, particularly impoverished families and families of color.<sup>15</sup> While fully acknowledging the inherent issues of bias baked into the child welfare system and the potential for governmental coercion and undue influence upon parents,<sup>16</sup> this Article focuses upon a very narrow piece of the foster care system called voluntary placement.<sup>17</sup>

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14. See, e.g., Gupta-Kagan, *supra* note 4; SPINAK, THE END OF FAMILY COURT, *supra* note 5; ROBERTS, SHATTERED BONDS, *supra* note 4.

15. See, e.g., Nicole E. Imperatore, *Parents Under Pressure: Why CPS needs to Tell Parents Their Rights Before Walking in the Door*, 51 HOFSTRA L. REV. 541, 545 (2023) (“In general, CPS has immense powers in comparison to the families that they work with. These powers, left unchecked, allow CPS agents to take advantage of the families that they work with, especially if these families are not aware of the rights they have at their disposal.”); A.J. Dettlaff, et al., *It Is Not A Broken System, It Is A System That Needs To Be Broken: The Upend Movement To Abolish The Child Welfare System*, 14 J. PUB. CHILD WELFARE 500, 500 (2020) (“An entire body of research has demonstrated the adverse outcomes associated with child welfare intervention. . . . Black children are at greater risk of experiencing these outcomes due to the added impact of the ongoing legacy of structural and institutional racism in America.”); ROBERTS, TORN APART, *supra* note 4, at 38 (“Far from functioning as a helpful service provider, the child welfare system operates as a destructive behemoth. Child protection authorities wield . . . the power to forcibly remove children from their homes and permanently separate them from their families. The state deploys this disruptive force disproportionately on Black families.”).

16. See, e.g., Gupta-Kagan, *supra* note 4, at 841 (arguing that “[s]tate agencies infringe on parents’ and children’s fundamental right to family integrity with few meaningful due process checks” by circumventing legal requirements to reunify families, ensure safe kinship placements, and provide foster care maintenance payments to kinship caregivers).

17. This Article represents several full-circle moments for me. I started this research over twenty-five years ago while teaching at the University of Michigan Law School. I was fascinated about the distinctions between New York City and Michigan family law practices regarding the topic of voluntary foster care. I had amazing Michigan Law research assistants who helped research voluntary foster care in every state, which I then printed and compiled into an old-school 3-ring binder. I presented this research and the nascent drafts for all my job talks, including at Albany Law School, once I went onto the teaching market. Then I immersed myself into the clinical work at Albany and put the research on hold. My interest in the topic was renewed in 2023, partially due to Justice Amy Coney Barrett’s “solution” of using safe havens to justify axing reproductive rights, and I started my research anew with terrific Albany Law research assistants who then helped me research the states again to create a new binder which I compared to my old binder. That is the first full circle moment. When I presented my new paper in Denver at the Law & Society Association Annual Conference, I chatted with my mentor, Jane Spinak, who informed me that these were the first type of

This Article advocates that, in limited and particular circumstances, a truly voluntary placement option should be provided to parents to facilitate a mother's right to choose and her right to the well-being and safety of her children. This aspect of the foster care system, the voluntary placement of children into current foster care by parents, has received very little academic attention in legal literature<sup>18</sup> and needs re-evaluation.

Although most parents do not aspire to nor seek to place their children into state foster systems,<sup>19</sup> there are rare and particular times when it is the only option for a parent. This Article will examine United States voluntary placement laws in tandem with safe haven laws in all U.S. states<sup>20</sup> and will briefly explore voluntary placement through a comparative lens by addressing similar practices outside of the United States.<sup>21</sup>

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cases her child advocacy clinic addressed and that early representation was a model for the later creation of Lawyers for Children in Manhattan, my first legal job, and that she has also studied this topic. How fortunate was I for this second full circle moment. I am now doubly motivated to get this piece out into the public and shine a light on an area of the law that has been largely overlooked in academic legal literature.

18. See, e.g., Lois Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Troublesome Youth*, 33 HOFSTRA L. REV. 1305, 1325 (2005) ("While significant attention has been paid to the coercive intervention of the state . . . there has been little emphasis on those families who avail themselves of the services of their states' dependency systems 'voluntarily'").

19. See Annette Semanchin Jones et al., *Voluntary Placements in Child Welfare: A Comparative Analysis of State Statutes*, 88 CHILD. & YOUTH SERVS. REV. 485, 486 (2018) ("A smaller proportion of children and youth enter foster care placement through a voluntary placement."); see also Katharine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. & YOUTH SERVS. REV. 62, 62 (2017) ("While generally children enter child welfare through a court order, some children are voluntarily placed in the child welfare system by their family, using a mechanism known as a voluntary placement agreement.").

20. Telephone Interviews with Caseworkers in all 50 U.S. States (Jan. 2000–Aug. 2001) [hereinafter *Caseworker Interviews 2000–01*] (on file with author); Melissa L. Breger, *State Statutory Charts Compilation May 2024–Sept. 26* [hereinafter *State Statutory Charts Compilation 2024–26*] (unpublished chart) (on file with author).

21. In Finland, Sweden, and Denmark, most foster care placements are voluntary (70–90%). Jones et al., *supra* note 19, at 486; MARK HENAGHAN & BILL ATKIN, *FAMILY LAW POLICY IN NEW ZEALAND* (5th ed. 2020) (examining family law in Māori communities).

From a purely theoretical perspective, the concept of a voluntary foster care placement system is wise. There are times when parents know they need assistance, and the government should provide this route when there are no other feasible options. With proper guidelines in place, I posit that voluntary placement should be one viable avenue for parents in all states. The voluntary placement mechanism—if created with effective due process guardrails—can empower a parent whose children need temporary shelter outside of the family home of origin. Taking away the voluntary placement option entirely from a parent—with no other parallel option for placing a child out of the home—is arguably paternalistic, anti-feminist, and anti-children.

Twenty-five years ago, I studied and amassed data from all fifty states about the laws that allowed birth parents to voluntarily place their children into foster care in a truly voluntary capacity. I also explored the burgeoning “safe haven” laws, proliferated throughout the 2000s, where mothers of newborns could anonymously relinquish their babies without fear of criminal prosecution. I spoke with caseworkers and lawyers across the country about what voluntary placement agreements (“VPA”) looked like in their states. Now, twenty-five years and many interviews later, I examine where the United States currently stands with respect to safe haven and voluntary foster care placement laws and how these mechanisms impact and affect families.<sup>22</sup>

While this Article does not ignore the problems within the current United States child welfare system, it attempts to shift the narrative to address how we can offer the option of voluntary foster care in a very narrow set of circumstances. Rather than coercive and draconian intervention separating children involuntarily from their parents, there needs to exist an option in each state that is truly consensual and voluntary with added guardrails to ensure due process for parents and children.

This Article will examine the idea of voluntary placements within the larger societal system, and as Professor Laury Oaks notes: “[w]e must consider carefully the social, legal, financial, and medical barriers rooted in racism, classism, ageism, ableism, heterosexism,

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22. Caseworker Interviews 2000–01, *supra* note 20; State Statutory Charts Compilation 2024–26, *supra* note 20.

and citizenship inequalities that limit some girls' and women's opportunities to raise their children."<sup>23</sup>

This Article will not propose that we adopt voluntary placement mechanisms wholesale as they currently exist. Many states have flawed systems in practice, particularly when they are used as a false avenue to coerce a child into involuntary foster care. Instead, it provides recommendations for how to reimagine a voluntary system that is robust, equitable, and non-coercive. The Article provides ideas designed to empower parents when considering whether they need temporary assistance in caring for children who they cannot care for at that time.

In essence, this Article proposes these concepts concurrently—the system is flawed as it currently stands, yet it has endured and the system can improve by reimagining a better voluntary option with due process safeguards and access to counsel. Rather than government money being utilized to forcefully separate families who do not wish to be separated, let us instead focus governmental resources on those families who truly need to place their children in foster care temporarily.

Many mothers who seek voluntary respite care are in the predicament because they had limited reproductive choices at the outset and now find themselves overwhelmed by parenting. As more states and the U.S. Supreme Court remove the rights of women to choose through *Dobbs*, the need for alternative options such as voluntary placements becomes increasingly vital. No one should force a woman to be a mother if that is not her choice. Situating this piece within the reproductive rights discourse is entirely intentional for this reason.

This Article begins with an explanation of the advent and practical implementation of the voluntary foster care system in the United States in Part I. Part I will also address the history, origins, and current workings of the system, including the system's shortcomings, as situated in the United States. It then explains safe haven laws, which I term "voluntary-placement-adjacent" and consider whether any valuable lessons can be drawn when fashioning voluntary placement laws. Part II utilizes case examples from states as varied as New York, Hawai'i, Washington, and New Mexico to highlight strong components of a viable voluntary placement

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23. OAKS, *supra* note 12, at 203.

mechanism. Part III re-imagines and crafts an ideal voluntary process absent duress and coercion. It suggests guardrails including access to attorneys for the parents and attorneys for the children and advocates for actual written contracts, initiated by parents, coupled with time and scope limitations and clear details about how to reunite with children when ready. Most importantly, this part advocates for decoupling these contracts from child welfare investigations and, when possible, having distinct state agencies or units within state agencies conduct voluntary placement agreements (“VPAs”).

There is a benefit to parents having a voluntary placement mechanism as one option in the toolbox. If such placements include clear guardrails, they can empower disenfranchised families in need of assistance. If we limit or take away this option, we essentially deprive mothers of their options above and beyond those reproductive choices robbed post-*Dobbs*. The option of some kind of voluntary foster care in each state would ensure a pro-parent, pro-child, pro-choice feminist alternative to keeping families safe and ultimately intact.

## I. THE VOLUNTARY PLACEMENT MECHANISM INTO THE FOSTER SYSTEM

### A. Utilizing the Option of Voluntary Placement

Parents rarely enter the venture of parenting with the idea that they will surrender or abdicate their parental rights at a later time, either temporarily or permanently. Yet, with the often-crushing demands of parenthood, parenting can be an overwhelming endeavor. There are situations when the temporary relinquishment of parenting is the only, or the safest, route for a family.

In the rare situation where a parent is in such need, there should be a safety net available through the government. In the majority of states, a mechanism called voluntary foster care placement is available, whereby the parent agrees to place their children in foster care while the parent stabilizes their own situation. Voluntary foster care placement is conceptualized as temporary in most instances with parental rights intact; other options for more long-term, permanent care are outside the scope of this Article.<sup>24</sup> For

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24. Gupta-Kagan, *supra* note 4, at 847.

example, if a parent has a terminal illness, there are options to permanently transfer guardianship to another person. Similarly, if children need the supervision of an institution or medical facility to safely lead their lives, there are long-term options.<sup>25</sup> This Article focuses not on these permanent options but rather on the temporary options within states where the parents retain their parental rights but need temporary respite care for their children. The Article also does not focus on older or teenaged children, where a voluntary placement may be sought for mental health or behavioral reasons of the child, which could be a workaround to a status offense or juvenile delinquency case.<sup>26</sup> Instead, this Article focuses upon situations where the parent is seeking some scaffolding from others for child care, separate and apart from the particular child's special needs or troubling behavior.

Social scientists and legal advocates note that foster care should be seen as a last resort rather than a knee-jerk response, and the government should not remove a child from home if there is a way to remove the danger from the home instead.<sup>27</sup> From the child's

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25. This Article intentionally does not focus on children over eighteen years old or children who have special needs to the point of needing a higher form or longer-term care through a hospital or institutional setting. *See, e.g.*, Young Adult Voluntary Foster Care Act, MICH. COMP. LAWS pmb. (2011). [https://www.legislature.mi.gov/\(S\(3jatcyx3zutglc4xf1wks0vq\)\)/documents/mcl/pdf/mcl-Act-225-of-2011.pdf](https://www.legislature.mi.gov/(S(3jatcyx3zutglc4xf1wks0vq))/documents/mcl/pdf/mcl-Act-225-of-2011.pdf) [<https://perma.cc/FBZ5-547D>]. (“AN ACT to establish a program for youths at least 18 years of age who choose to remain under certain state care up to 21 years of age; and to prescribe the powers and duties of certain state departments and agencies.”). This Article also does not refer to medical, psychiatric, or institutional foster care placements for children, which many states allow. *See, e.g.*, Voluntary Placement for Children with Serious Mental Illnesses or Developmental Disabilities Act., H.B. 4739, 98th Gen. Assemb., Reg. Sess. (Ill. 2013) (the act was tabled in 2014). Voluntary placement of children with serious mental illness, emotional disturbance, or developmental disabilities is a distinct topic worthy of its own investigation.

26. This Article does not focus on teenagers who do not behave as a parent wishes and where the parents could file a status offense case, such as a Persons in Need of Supervision (P.I.N.S.) petition. In fact, some states, such as Nebraska, specifically disallow voluntary placement agreements in these kinds of cases.

27. Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 118–19 (2002) (“Even under the best of circumstances removal of a child to foster care can be a traumatic experience”); Amanda J. Jackson, *Nicholson v. Scopetta: Providing a Conceptual Framework for Non-Criminalization of Battered Mothers and Alternatives to Removal of Their Children from the Home*, 33 CAP. U. L. REV. 821, 854–55, 864 (2005) (“Other evidence has shown, however, that children are

perspective, being placed into foster care is often psychologically damaging, as it is naturally disruptive to be placed outside of the family home of origin.<sup>28</sup> The harms of disruption from the home were brought to the forefront with cases such as *Nicholson v. Scopetta*,<sup>29</sup> educating us that the harms of removal from the home often outweigh the harms of staying in the home.<sup>30</sup>

Yet not every parent has a real alternative to care or access to safe family or friends who can care for their children, so the parent may need to place their child with the government temporarily. Governments need to provide parents the option to place a child in foster care, while also ensuring that proper guidelines are in place to protect the rights of the parents (and the rights of the children) without undue influence or duress.

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generally more stable and less emotionally distressed following the witnessing of a domestic encounter when they are left in the care of their mother rather than removed from the home and placed in foster care.”).

28. See, e.g., Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 660–61 (2006) (noting that children in foster care typically suffer from psychological hardships later in life including post-traumatic stress disorder (PTSD), depression, social phobia, panic syndrome, and anxiety disorders); Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523, 526 (2019) (“The American Association of Pediatrics noted that family separation ‘can cause irreparable harm, disrupting a child’s brain architecture and affecting his or her short- and long-term health.’ . . . ‘Attachment theory’ suggests that emotional distress . . . can be attributed to early childhood disruption of the parent-child bonding process.”).

29. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 274–78 (2004) (rejecting the assumption that a child’s exposure to domestic violence alone necessarily warrants removal from the home and recognizing the serious harms children may suffer from unnecessary removal into foster care).

30. See generally *id.*; see also Olivia Hampton, ‘Deluged’ Child Welfare Systems Struggle To Protect Kids Amid Calls For Reform, NPR (Nov. 30, 2023), <https://www.npr.org/2023/11/30/1211781955/deluged-child-welfare-systems-struggle-to-protect-kids-amid-calls-for-reform> [https://perma.cc/MV29-XBSN]; Richard Wexler, *Mandatory Child Abuse Reporting Belongs in Dustbin, New Research Shows*, YOUTH TODAY (Feb. 28, 2020) [hereinafter *Mandatory Child Abuse Reporting*], <https://youthtoday.org/2020/02/mandatory-child-abuse-reporting-belongs-in-dustbin-new-research-makes-clear/> [https://perma.cc/T8WW-E93D]. See generally Richard Wexler, *Shrinking size of haystack key to preventing child abuse*, COMMONWEALTH BEACON (Nov. 28, 2020) [hereinafter *Shrinking size of haystack*], <https://commonwealthbeacon.org/opinion/shrinking-size-of-haystack-key-to-preventing-child-abuse/> [https://perma.cc/TEZ3-692L] (describing how the best remedies for the child welfare system may seem counterintuitive upon first glance).

What kinds of situations am I envisioning?

*Mother A is undergoing severe post-partum depression after having a baby. Her doctors are concerned that the depression is morphing into post-partum psychosis, which is a rare and temporary condition partially created by hormonal imbalances.<sup>31</sup> In Wisconsin, she might seek help with a voluntary placement agreement due to the stress and urgency of having a new baby in the home.<sup>32</sup>*

*Mother B has recently become homeless. She was living in a housing pod in Oregon, and now the U.S. Supreme Court has arguably criminalized homelessness.<sup>33</sup> In Kentucky, where homelessness is specifically contemplated in these kinds of scenarios, she might have the option of voluntary foster care.<sup>34</sup>*

*Mother C is a survivor of domestic violence and needs to relocate and escape safely without her kids being present in the initial journey. She needs to know her children are cared for temporarily while she tries to find safe housing for her family. In some states she would have options, but not in all states.*

*Mother D is travelling via train across the country with her toddler. She is seven months pregnant. She unexpectedly goes into labor prematurely on the train in the middle of her route. She does not know a single person in the state in which she goes into labor. If she landed in New York, they would house her toddler into foster care temporarily while she goes to the hospital to give birth so that the toddler can be safe in the meantime.<sup>35</sup>*

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31. Chloe W. Shakin, *She Had Thoughts of Harming Her Baby. To Treat Her, Doctors Kept Them Together*, N.Y. TIMES (Oct. 9, 2024), <https://www.nytimes.com/2024/10/09/well/postpartum-psychosis-health-pregnancy-women.html> [https://perma.cc/SZS8-69VK].

32. See Interview with Mark Mitchell, Wis. Caseworker, Wis. Dep't of Child. & Families ("DCF") (August 31, 2000) (noting that voluntary placement is used by "parents who have stresses in the home (e.g., a mother has a new baby)" and that "[f]amilies can recognize their own stress, and this option gives them control over managing those stresses") (on file with author).

33. See *City of Grants Pass v. Johnson*, 603 U.S. 520, 568 (2024) (Sotomayor, J., dissenting) ("Criminalizing homelessness can cause a destabilizing cascade of harm").

34. KY. REV. STAT. ANN. § 620.170(1) (1996) (defining a "voluntary commitment agreement"); see also Interview with Martha Vozos, Ky. Caseworker, Cabinet for Families & Child. in Ky. (August 2000) ("when parents are homeless and the agency wants [to help], parents voluntarily [place] to get back on their feet") (on file with author).

35. N.Y. SOC. SERV. LAW § 384 (McKinney 2025).

Keep in mind that in the above situations, we are dealing arguably with a fit parent, and there is no allegation of unfitness by any state agency. In some of these scenarios, the ideal situation would be for the government to provide support services, such as housing or shelter, to ensure that family separation is not needed. When such state support services are not provided or available, the next best option might be to send the child to family, neighbors, or friends. In reality, however, this is not always possible, and some mothers need to turn to an option of last resort: foster care.

The above four scenarios are all temporary, short-term crises that may require voluntary placements in cases where mothers (who are otherwise fit) do not have appropriate family or friends to care for their child. By no means is this list exhaustive, as there are dozens of reasons why children may also enter foster care voluntarily. Other examples might include medical surgery, military deployment,<sup>36</sup> drug or alcohol rehabilitation on the part of the parent, or risk of child abuse and neglect during a parental crisis.<sup>37</sup> Children may also need to remain in foster care after their parents' release from incarceration due to temporary re-entry challenges including housing, employment, and the collateral consequences of incarceration.

#### B. Recognizing the Risk of State Coercion Within the Current Foster Care System

The United States foster care system is no panacea; the system has serious shortcomings, as detailed above. I start with the premise that foster care should not be the default, but rather, a rare option. The child welfare system is not the first and ideal option to resolve complicated family issues.<sup>38</sup> As I, and many others, have

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36. The Uniform Law Commission tracks the enactment of the Deployed Families Custody and Visitation Act which allows for temporary transfer of custodial responsibility to a parent or nonparent in cases deployment. *Deployed Parents Custody and Visitation Act*, UNI. L. COMM., <https://www.uniformlaws.org/committees/community-home?CommunityKey=c6374f03-21fe-4862-a114-7498710d8e5d> [<https://perma.cc/9E2A-WNRL>] (last visited Feb. 2, 2025).

37. *In re Laws. for Child. v. N.Y. State Off. of Child. & Fam. Servs.*, 233 N.Y.S.3d 752, 756 (N.Y. App. Div. 2025) (noting that families use Safe Families programs most commonly for homelessness, hospitalizations, lack of family support, parental crisis, and respite).

38. Melissa L. Breger, *Making Waves or Keeping the Calm?: Analyzing the Institutional Culture of Family Courts Through the Lens of Social Psychology*

written in other spaces, the child welfare system as it exists is problematic—whether inside or outside of the courts—and too often limits the due process rights of those involved.<sup>39</sup> Not only do many of the underlying causes of actions for child neglect arise out of circumstances outside of a parent's control, such as parental poverty, but being poor in the United States also makes it much easier to be surveilled.<sup>40</sup> Whether the underlying alleged neglect is failure to provide proper food, clothing, shelter, or adequate supervision, such situations could often be ameliorated or eliminated with the state helping the family with support services instead of separating the families. Yet, the government overly scrutinizes poor families in the United States, who in this country tend to be families of color, poor families, single mothers, or some combination thereof.<sup>41</sup>

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*Groupthink Theory*, 34 L. & PSYCH. REV. 55, 56 (2010). See also SPINAK, THE END OF FAMILY COURT, *supra* note 5, at 8 (advocating for the abolition of Family Courts).

39. Breger, *supra* note 38, at 66; see also Breger, *supra* note 4, at 558 (arguing that Family Courts often have implicit biases against mothers).

40. ROBERTS, SHATTERED BONDS, *supra* note 4, at vii.

41. FRED WULCZYN & BRIDGETTE LERY, RACIAL DISPARITY IN FOSTER CARE ADMISSIONS 4 (2007) (“According to national data, although African American children make up only 15 percent of the children living in the United States, roughly 37 percent of the children in foster care are African American.”); see also Tanya Asim Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 225 (2013) (“African American and Native American . . . children are more likely to be removed from their parents and placed in foster care than Whites.”); see also, *How Many Kids Are in Foster Care?*, USAFACTS, <https://usafacts.org/articles/how-many-kids-are-in-foster-care/> [https://perma.cc/F3P3-ECSV] (last visited May 15, 2024) (discussing the demographics of children in the foster care system in 2023); H.R. REP. NO. 95-1386, at 9 (1978) (detailing that, before the enactment of Indian Child Welfare Act (ICWA), studies by the Association on American Indian Affairs in 1969 and 1974 revealed that nationwide “approximately 25–35 percent of all [Indigenous] children [were] separated from their families and placed in foster homes, adoptive homes, or institutions.”); NAT’L INDIAN CHILD WELFARE ASSOC., DISPROPORTIONALITY IN CHILD WELFARE FACT SHEET (2021) (finding that, even after ICWA, Indigenous children “are overrepresented in state foster care at a rate 2.66 times greater than their proportion in the general population”). Additionally, although comprising only one percent of U.S. children, Indigenous children accounted for 2.7 percent of foster placements in 2019. In contrast, White children are underrepresented at 0.93 times their population share. From 2010 to 2014, disproportionality rose sharply and has continued to increase more gradually since. *Id.* at 1–2. The current foster care system—whether kinship, non-kinship, involuntary, or hidden—is disproportionately comprised of Black and Brown children and children living in poverty. See generally Rosemary Sarri &

When the government intervenes and threatens to remove children, parents are without bargaining power. They meet with investigatory caseworkers absent any attorney or judicial oversight.<sup>42</sup> The meetings are often morphed into a tool for coercion, with a common threat that the agency can just place the children into foster care on its own.<sup>43</sup> When a placement is cloaked as voluntary but is actually a way to circumvent a parent's rights, parents may be acting in fear of criminal prosecution or child neglect or abuse proceedings.<sup>44</sup> Examples abound of when a so-called voluntary placement and a child welfare investigation are too intertwined. At times, the threats and coercion appear explicitly in plain language on state forms.<sup>45</sup> At

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Janet Finn, *Child Welfare Policy and Practice: Rethinking the History of Our Certainties*, 14 CHILD. & YOUTH SERVS. REV. 219, 222 (1992) (“Coercive state intervention under the guise of child protection imposed upon these women would not be tolerated in middle-class two-parent families. Single mothers are treated as commodities to be shaped by state intervention . . . [and] people’s functioning as parents . . . is profoundly influenced by actions of the state.”); Emily Buss, *Parents’ Rights and Parents Wronged*, 57 OHIO ST. L. J. 431, 432 (1996) (noting that poor families face disproportionate suspicion and reporting for abuse and neglect due to heightened exposure to surveillance through neighbors, welfare systems, and public health clinics, and lack of private resources to address difficulties outside the public eye).

42. Theresa A. Hughes, *Discovering the Undiscoverable in Child Protection Proceedings: Safety Planning Conferences and the Abuse of the Right to Counsel*, 10 U.C. DAVIS J. JUV. L. & POL’Y 429, 434 (2006).

43. *Id.* at 439–44.

44. Daniel Pollack et al., *The Use of Coercion in the Child Maltreatment Investigation Field: A Comparison of American and Scottish Perspectives*, 22 U. MIAMI INT’L & COMP. L. REV. 129, 142–43 (2015); see also Gupta-Kagan, *supra* note 4, at 866 (“In considering whether hidden foster care violates parents’ and children’s due process rights, the stronger view is that even legally justified threats to remove children are so coercive as to render involuntary any subsequent parental agreements to change physical custody.”).

45. For instance, in a Kentucky safety plan form, in all capital letters, the language states, “ABSENT EFFECTIVE PREVENTATIVE SERVICES . . . PLACEMENT IN FOSTER CARE IS THE PLANNED ARRANGEMENT FOR THIS CHILD.” Gupta-Kagan, *supra* note 4, at 849. Similarly, South Carolina provides that a child will be placed out of the home either through law enforcement or an ex parte order while the investigation is pending if the parent(s) refuses to sign off on a valid safety plan. See ANDREW C. BROWN & ANNA CLAIRE LONG, REFORMING THE HIDDEN FOSTER CARE SYSTEM 5 (2022), <https://www.texaspolicy.com/wp-content/uploads/2022/12/2022-12-RfF-ReformingHiddenFosterCareSystem-BrownLong.pdf> [<https://perma.cc/Z5ST-7DWF>]. A safety plan form used by the Nevada Division of Child and Family Services “clearly states in bold letters that a child may be removed into protective custody if the parents are unwilling to participate in the activities listed.” A form

other times, the duress is hidden more subtly. As one child protective agency worker told the Annie E. Casey Foundation—a major child welfare research and funding organization—“[w]e say we want a child welfare system that values family decisions . . . but once the government gets involved, relatives and parents don’t always have real choices.”<sup>46</sup> The agency worker continues to describe how “[w]omen are often coerced into signing ‘voluntary’ plans that include agreements to participate in . . . parenting classes and battered women’s support groups but are not given assistance with the [real] resources needed to separate safely.”<sup>47</sup> Again, these faux voluntary placements and service plans are anything but voluntary. A truly voluntary placement agreement should not be linked to the threat of a child’s removal.

The child welfare system in general is often over-zealous in its scope. In 2021, for example, investigations for suspected child abuse and neglect were conducted for more than three million children in the United States, but only 600,000 cases were founded and predicated upon evidence.<sup>48</sup> Thus, eighty percent of these investigations did not confirm any abuse or neglect, underscoring the child welfare system’s propensity to over-investigate, particularly in

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used by the Texas Department of Family and Protect Services “contains a clause informing the family that the safety plan will remain in effect until notified by the caseworker.” Andrew C. Brown, *Shadow Removals: How Safety Plans Allow CPS to Avoid Judicial Oversight*, TEX. PUB. POL’Y FOUND. (May 31, 2019), <https://www.texaspolicy.com/shadow-removals-how-safety-plans-allow-cps-to-avoid-judicial-oversight/> [<https://perma.cc/N8W9-HMUH>].

46. Gupta-Kagan, *supra* note 4, at 850. Agency officials may pressure parents into compliance through express or implied threats. In one case, an officer threatened to arrest a mother not based on any abuse allegation, but simply because he found her behavior during the interview disruptive. See Katherine C. Pearson, *Cooperate or We’ll Take Your Child: The Parents’ Fictional Voluntary Separation Decision and a Proposal for Change*, 65 TENN. L. REV. 835, 842–43 (1998); Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 656 (2012) (“Parents’ feelings of helplessness, vulnerability, and fear are magnified by the perception that CPS is an indomitable force that cannot be confronted or questioned.”); S. Lisa Washington, *Pathology Logics*, 117 NW. U. L. REV. 1523, 1545 (2023) (“they are not required to inform parents about their rights in most states”).

47. Donna K. Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 836 (2001). See also Sinden, *supra* note 4, at 385 (describing the “voluntary” agreements in child welfare cases as coercive).

48. Hampton, *supra* note 30.

marginalized communities.<sup>49</sup> These numbers should be alarming to anyone who understands the trauma of needlessly separating children from their families.<sup>50</sup> The funding spent on unnecessary foster care could be reallocated to robust and ethical narrowly tailored voluntary care.

In some families, there is an option of kinship foster care, where a child is placed with a relative.<sup>51</sup> Kinship foster care serves as a viable option for preserving “family, community, [and] cultural ties.”<sup>52</sup> Kinship foster care can be a loving option for parents to choose. Yet, some parents do not have access to suitable members within their family or have to be mindful of intergenerational trauma that may be present in a parent’s family of origin. Thus, not every parent has the option to place a child with a relative safely.<sup>53</sup> Scholars like Professor Dorothy Roberts note that the kinship option can also be overused by caseworkers as a quick alternative to paying for the child to be in a higher rate of non-kinship foster care.<sup>54</sup> Roberts

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49. See generally ROBERTS, SHATTERED BONDS, *supra* note 4.

50. *Nicholson v. Scopetta*, 3 N.Y.3d 357, 357 (2004) (requiring far more than a mere showing that the parent had been a victim of domestic violence and that the children had been exposed to the violence to find neglect and justify removal); Hampton, *supra* note 30 (describing how the child welfare system harms children through family separation); Wexler, *Mandatory Child Abuse Reporting*, *supra* note 30 (outlining the harms of mandatory child reporting). See generally Wexler, *Shrinking size of haystack*, *supra* note 30 (discussing the harms of foster homes).

51. Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI. KENT L. REV. 1619, 1622–23 (2001) (kinship care helps children maintain family ties and avoid formal placement, but social workers may overuse it as a convenient alternative). Additionally, kinship caregivers often lack the training, background clearances, and financial support provided to licensed foster parents. *Id.*

52. *Id.* at 1625.

53. Jennifer Ehrle & Rob Geen, *Kin and Non-Kin Foster Care—findings From A National Survey*, 24 CHILD. & YOUTH SERVS. REV. 15, 16 (2002). To compound the issue, kinship caregivers who are relatives of the child often do not receive the same level of additional support as foster parents. For example, kinship caregivers face less stringent assessment and approval processes compared to non-relative caregivers, such as those in formal foster care arrangements. The lack of training and clearance requirements for kinship caregivers is another aspect that makes this placement option alarmingly quick for social workers. As a result, many kinship caregivers have fewer economic resources and receive little financial support in comparison to non-relative caregivers. See generally Julie Murray, Jennifer Ehrle Macomber & Rob Geen, *Estimating Financial Support for Kinship Caregivers*, THE URB. INST., Dec. 2004.

54. Roberts, *supra* note 51, at 1634–35.

describes that “[k]inship care . . . also invite[s] state intrusion.”<sup>55</sup> Further, “[t]he [B]lack community’s cultural tradition of sharing parenting responsibilities among kin has been mistaken as parental neglect.”<sup>56</sup> For these reasons and others, this Article is not including kinship foster care in its scope.

When considering how some children end up in care, there are too often back-room meetings circumventing the current system and often become what has been called “hidden foster care” or a shadow system.<sup>57</sup> If the government coerces a parent to informally transfer guardianship or custody rights to another person outside of the court system, there are significant risks. States can too easily and frequently take advantage of situations<sup>58</sup> to cut expenses and coerce parents to faux “voluntarily” place their children into foster care or to place their children with relatives outside of the system.<sup>59</sup> These types of placements are inherently coercive.<sup>60</sup>

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55. *Id.* at 1623.

56. *Id.*

57. Gupta-Kagan, *supra* note 4, at 843–44; see also Lizzie Presser, “*They Took Us Away From Each Other*”: *Lost Inside America’s Shadow Foster System*, PROPUBLICA (Dec. 1, 2021), <https://www.propublica.org/article/they-took-us-away-from-each-other-lost-inside-americas-shadow-foster-system> [<https://perma.cc/AR92-V52G>] (describing how Molly and Heaven Cordell were separated and placed in informal arrangements with different caregivers upon their parents’ inability to take care of them, and how these placements lacked proper oversight and support for the two sisters, illustrating how a tragic family situation led to their entry into “hidden foster care” or “shadow foster care.”).

58. Sydnie Peterson, *Choice or Coercion? How the Push to Avoid Formal Care Has Contributed to the Creation of a Dangerous Hidden Foster Care System*, MINN. J. L. & INEQUALITY (Feb. 2, 2022), <https://lawandinequality.org/2022/02/02/choice-or-coercion-how-the-push-to-avoid-formal-foster-care-has-contributed-to-the-creation-of-a-dangerous-hidden-foster-care-system/> [<https://perma.cc/Y844-BMMQ>] (describing how Brian Hogan, a father who left his daughter with the neighbors while his wife was in the hospital, was later investigated by local child protection agencies). After his daughter was put into temporary custody of Hogan’s father, local protection agencies asked Hogan to transfer custody of his daughter to his father indefinitely; as he was unable to read, he signed the papers fearing he would not be able to see his daughter again if he did not sign.

59. DAVID TOBIAS, FROM PARIAHS TO PARTNERS: HOW PARENTS AND THEIR ALLIES CHANGED NEW YORK CITY’S WELFARE SYSTEM 1–22 (2013). By the mid-1990s, about half of the states in the United States were being sued over the child welfare system, whether it was over public funding or child abuse and neglect within the foster homes. Between 1995 and 2012, the national population of children in foster care decreased by seventeen percent. Notably, New York State’s foster child population decreased by seventy-two percent. See Sharon McDaniel,

I start with the premise that the foster system should not be the default placement for children, but rather the rare option when necessary. Absent abolition of the system, we can endeavor to improve one narrow mechanism within: a robust system which is truly voluntary and untethered to a threat of a child protection investigation.

Even though I mention these other systems above, this Article is not focused on relative care, kinship foster care placement, hidden foster care placement, shadow foster care placement, or re-homing.<sup>61</sup> Instead of using the very limited foster homes we have for children who are improperly transferred, the government can use those homes for children who are voluntarily placed.<sup>62</sup> The system should focus

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*Hidden Foster Care: The Problem with Voluntary Kinship*, A SECOND CHANCE INC. (Dec. 28, 2021), <https://asecondchance-kinship.com/hidden-foster-care-the-problem-with-voluntary-kinship/> [<https://perma.cc/L45Y-BYSG>] (noting that discussing child welfare without reference to race and poverty is “ignorant and oblivious to reality in the era of our post-George Floyd world” and that “due process is interpreted from a lens of privilege and power” in ways that disadvantage families of color and the poor).

60. Gupta-Kagan, *supra* note 4, at 861.

61. Parents who resort to re-homing legally transfer responsibility for the child to another individual without appropriate background checks or assessment of the home. This exchange can be referred to as unregulated child custody transfers, as they “are often arranged by third parties or through informal internet communications.” Re-homing is met with severe criticism due to the “increased risk for children who have been re-homed to be abused, exploited, or trafficked . . . because no one is supervising the placement[.]” *Re-Homing*, OFF. CHILD. & FAM. SERVS. (Mar. 2015), <https://ocfs.ny.gov/main/publications/Pub5167.pdf> [<https://perma.cc/4YEB-XL6W>]; see also Elizabeth A. Dahl, *Re-Homing: The Underground Market for Adopted Children and How Current Laws Fail to Protect the Innocent*, 6 WAKE FOREST J. L. & POL’Y 549, 558 (2016) (analyzing the one and only case regarding re-homing in New York where the judge “strongly opposed th[e] process, calling it ‘human trafficking in children,’ . . . [and noted] that the practice boils down to parents relieving themselves of the responsibility to care for their children by giving them to strangers whose qualifications are relatively unknown.”); Sally Terry Green, *The Law Demands Process for Rehomed Children*, 69 ARK. L. REV. 729, 731 (2016) (describing the legal process for rehomed children).

62. See generally Christopher Swann & Michelle Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 309–10, 314 (2006) (stating the foster care system has adapted to shifting caseloads influenced by societal changes). Between 1985 and 1999, the number of children in U.S. foster care surged from 276,000 to 568,000. Factors like the crack and HIV/AIDS epidemics, housing shortages, rising teenage pregnancies, and decreases in welfare benefits contributed to this growth. Amongst these cases, racial

instead on parents who really need temporary respite instead of improperly removing children when unwarranted.<sup>63</sup> An agreement unconnected to the control and coercion of child protection services is a tool to offer parents, if it is truly voluntary.<sup>64</sup>

There are parents who have no safety net whatsoever in their personal network.<sup>65</sup> Parents without monetary resources have even fewer options.<sup>66</sup> Scholars like Robert Putnam write about how America is facing an epidemic of lack of social connectedness and

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disparities persist, with children from low-income backgrounds—especially Black, Latinx, and Indigenous children—overrepresented. *Id.*

63. See Gupta-Kagan, *supra* note 4, at 901–08 (discussing various reforms to ensure CPS agencies mitigate hidden foster care concerns). Under Title IV-E, the federal government reimburses states for foster care costs tied to outdated 1996 AFDC eligibility criteria, which remain in use despite welfare reform replacing AFDC with TANF. Swann & Sylvester, *supra* note 62, at 312. Since these criteria are not inflation-adjusted, federal reimbursements to states will steadily decline over time. *Id.* Federal involvement through Title IV-E of the Social Security Act provides reimbursement to state and local governments for foster care expenses incurred for children from families receiving or eligible for AFDC payments. *Id.* Notably, there is a complex interplay between cash welfare and foster care systems, as children from families receiving public assistance are disproportionately represented in foster care placements. See *id.* at 313. (explaining reductions in state welfare benefit levels have been associated with increases in foster care placements, suggesting a link between economic hardship and child welfare interventions). Moreover, relative caregivers may opt for formal child welfare involvement to access more generous foster care maintenance payments compared to cash welfare benefits.

64. *Id.* at 849. See also Pearson, *supra* note 46, at 842–43 (“The agency may phrase the parents’ choice in express or implicit terms of ‘do it our way or else’ . . . In one instance, the officer who accompanied the social worker admitted to making a threat to arrest the mother . . . because he viewed her conduct during the interview as ‘disorderly.’”). See also, McGrath, *supra* note 46, at 656–57, 670–71 (“To many parents, CPS appears to be an ominous force with the power to take away their children and to break apart their families. Parents are wary and distrustful of a system they frequently see as powerful and unfriendly.”) See also Washington, *supra* note 46, at 1545 (prolonged family surveillance creates caseworkers who simultaneously support and coerce families while juggling investigative, enforcement, and safety roles, and in addition, most states do not require these workers to inform parents of their rights).

65. *In re Laws for Child. v. N.Y. State Off. of Child. & Fam. Servs.*, 233 N.Y.S.3d 752, 752 (N.Y. App. Div. 2025) (stating that parents without a village often need social services to help provide for their child).

66. ROBERT D. PUTNAM, OUR KIDS: THE AMERICAN DREAM IN CRISIS 218 (2015) (describing less “collective efficacy” in poorer neighborhoods).

community cohesion.<sup>67</sup> This impacts families without resources the most. Community bonds and social networks have powerful effects on “health, happiness, educational success, economic success, public safety, and child welfare.”<sup>68</sup> As noted by Professor Susan Boyd: “Parenting is very often accomplished in isolation from extended families and/or without adequate childcare and other social supports, so that maternal autonomy is correspondingly limited.”<sup>69</sup>

### C. Borrowing Lessons from Voluntary Placement-Adjacent Mechanisms: Safe Haven Laws

Although, as outlined above, voluntary placement laws have existed for decades, “safe haven laws” more recently reemerged across the United States.<sup>70</sup> For the purposes of this Article, I label safe haven laws as “voluntary-placement adjacent,” although they are distinct legal mechanisms. Safe haven laws are adjacent to voluntary placement laws in that they are a specialized mechanism focused on voluntarily allowing a parent to surrender their child into state foster care. It is logical to examine safe haven laws and its contours while re-imagining voluntary placements.

Safe haven laws typically involve a situation where a newborn can be placed anonymously in a so-called “safe space” without recourse to the mother. These situations are not without

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67. *Id.* at 207, 226 (defining “social connectedness” and showing that social networks, communities, and community institutions like churches can be powerful tools for child development and families). Thank you to my colleagues Professors Dale Margolin Cecka and Josh Gupta-Kagan for suggesting that I include Robert Putnam’s work to amplify my thesis.

68. *Id.* at 207. These resources are distributed unevenly like everything else in society. *Id.* at 205 (“[I]n villages all over America, rich and poor[] have deteriorated as we’ve shirked collective responsibility for our kids.”).

69. Susan B. Boyd, *Autonomy for Mothers? Relational Theory and Parenting Apart*, 18 FEMINIST L. STUD. 137, 141 (2010).

70. Lorana Bartels, *Safe Haven Laws, Baby Hatches and Anonymous Hospital Birth: Examining Infant Abandonment, Neonaticide and Infanticide in Australia*, 36 CRIM. L. J. 19, 23 (2012) (“Texas introduced the first safe haven laws in the United States in September 1999; 15 states followed suit in 2000, all 50 states (and the District of Columbia) had passed such laws.”); Lisa Black, *Babies Get 2nd Chance; Safe-haven Laws Make it Legal for Moms Who Aren’t Ready to Have Kids to Give Them Away*, CHI. TRIBUNE (Aug. 9, 2006), <https://www.chicagotribune.com/2006/08/09/babies-get-2nd-chance/> [<https://perma.cc/53RG-ALPJ>].

their own flaws, biases and concerns for mothers and children.<sup>71</sup> Typically, a mother, shortly after giving birth to a baby, leaves the newborn in a designated place, such as a hospital, fire station, or police station, without any criminal repercussions for abandoning her baby.<sup>72</sup> In other words, the government gives the mother immunity against criminal prosecution for placing the child safely in a designated place. Four states, Georgia, Maryland, Minnesota, and Tennessee, and also Guam and Puerto Rico, permit only the mother to surrender the child.<sup>73</sup> Eleven states permit a person with the parent's approval to surrender the child to a safe haven.<sup>74</sup> Six states have no regulations on who may give up the child to safe havens.<sup>75</sup> These laws were largely created to protect newborn babies who were at risk of being abandoned in unsafe locations.<sup>76</sup>

In part, municipalities envision safe haven laws as a harm reduction measure.<sup>77</sup> A study from the Center for Disease Control indicated that since the enactment of safe haven laws, the infant homicide rate dropped by 13% nationwide.<sup>78</sup> These types of laws originated in Texas around 1999, where they were first coined as the "Baby Moses laws."<sup>79</sup> Since 2008, safe haven laws exist in every state

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71. See OAKS, *supra* note 12, at 20–21.

72. *Id.*

73. Faith Karimi, *A Newborn was Found Wrapped in a Plastic Bag in Indiana. Here are 5 Things to Know About Safe Haven Laws*, CNN (Oct. 17, 2019), <https://www.cnn.com/2019/10/17/us/safe-haven-laws-things-to-know/index.html> [<https://perma.cc/F5LJ-FPV7>].

74. CHILD WELFARE INFO. GATEWAY, INFANT SAFE HAVEN LAWS 2 (2021), <https://www.childwelfare.gov/resources/infant-safe-haven-laws/> [<https://perma.cc/7CJV-A6QU>].

75. *Id.*

76. *Id.* at 1; see also *Safe Haven Laws by State 2024*, WORLD POP. REV., <https://worldpopulationreview.com/state-rankings/safe-haven-laws-by-state> [<https://perma.cc/76WZ-7PGG>] (last visited Feb. 2, 2025) (database comparing safe haven laws across various states); Karimi, *supra* note 73 (stating that most states require babies be left only at hospitals, and while some states may expand this to encompass police or fire stations, the statute mandates that someone be present at the time the infant is surrendered).

77. In other words, if the government believes that babies will be abandoned regardless of the laws, it tries to reduce the harm by providing a legally protected alternative for parents.

78. Astrid Galvin, *After Supreme Court Abortion Case, A New Look At Baby 'Safe Haven' Laws*, PBS NEWS (Dec. 22, 2021), <https://www.pbs.org/newshour/nation/after-supreme-court-abortion-case-a-new-look-at-baby-safe-haven-laws> [<https://perma.cc/T3U8-LPNM>].

79. CHILD WELFARE INFO. GATEWAY, *supra* note 74, at 1.

and territory in the United States.<sup>80</sup> Notably, states passed safe haven laws “more rapidly than they passed other child protection laws.”<sup>81</sup>

Although the safe haven mechanism is distinct from a voluntary placement into foster care, there are many parallels and similarities. One distinction is that parents are known to the state in voluntary placement cases, but in safe haven laws, the parents are almost always anonymous.<sup>82</sup> Another distinction is that safe haven laws are typically for infants, whereas voluntary placements have no real age limitation. There have been isolated cases of older children being left in safe haven spaces, but typically these spaces are intended for newborns.<sup>83</sup> Another distinction is that with voluntary placements, a parent has the ability to have a child returned.<sup>84</sup>

The motivation behind why parents use either mechanism might be similar. For example, the parent may place the child into foster care to avoid criminal prosecution for endangering the welfare of the child or having a civil case of removal in Family Court. Interestingly, there are also similarities in how both mothers who utilize safe haven laws and those who voluntarily place a child into care are judged or perceived by society. Motherhood biases play out in many ways and may revolve around the idea that separating themselves from their children makes them so-called “bad mothers.”<sup>85</sup>

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80. OAKS, *supra* note 12, at 13.

81. *Id.*

82. Yet, some scholars have noted that anonymity also makes it easier for society to see the mother as ancillary to the whole process, instead of seeing the complexities of motherhood, pregnancy, birth, and ultimate surrender. “The mother, who is also grieving and probably very much alone and without social support, remains invisible.” OAKS, *supra* note 12, at 180–81.

83. Prior to 2008 in Nebraska, the safe haven laws allowed children of any age to be dropped off without being prosecuted for abandonment. As a result, in the first few months of the enactment of the law, thirty-four of the thirty-five children abandoned at safe haven locations were over the age of five. Shortly after, “the Nebraska legislature had convened a special session, culminating in a 43-5 vote that set the 30-day age limit.” See Joan Martelli & Sylvia Johnson, *Parents Leave Kids With “Safe Haven” Loophole*, ABC NEWS (Nov. 19, 2008), <https://abcnews.com/TheLaw/story?id=6290489> [<https://perma.cc/P55Y-AARP>].

84. OAKS, *supra* note 12, at 178.

85. Breger, *supra* note 4, at 556; see also Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990, 2077 (1995) (explaining that the surrendering mother’s counsel worked hard to defy the stereotype of their client being a “bad mother”).

To the contrary, the strongest parent arguably often knows when she needs help in parenting.

Safe haven laws have received considerable press coverage in the wake of the *Dobbs* decision.<sup>86</sup> Remarkably, safe havens were pitched as a panacea for limiting reproductive rights. According to Justice Amy Coney Barrett, safe haven laws were cited as one “solution” to limiting abortion rights for women, in that “mothers always have the option to use safe haven laws.”<sup>87</sup> Scholars for many decades have been connecting safe haven laws’ popularity with limiting reproductive rights and even argue that the real politics

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86. See, e.g., Astrid Galvan, *After Supreme Court abortion cases, a new look at baby ‘safe have’ laws*, PBS NEWS (Dec. 22, 2021, at 12:37 PM EDT), <https://www.pbs.org/newshour/nation/after-supreme-court-abortion-case-a-new-look-at-baby-safe-haven-laws> [<https://perma.cc/RR6Y-3VSG>] (noting that safe haven laws drew renewed attention during *Dobbs* oral arguments, with Justice Barrett invoking them as a potential alternative to abortion, while advocates cautioned the laws do not address the health and economic risks of pregnancy; Dana Goldstein, *Drop Box for Babies: Conservatives Promote a Way to Give Up Newborns Anonymously*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/08/06/us/roe-safe-haven-laws-newborns.html>? [<https://perma.cc/3RU9-8JQ7>] (reporting that safe haven surrenders were expected to increase following *Dobbs*, in which Justice Alito cited safe haven laws as a development that obviated the need for abortion rights, while reproductive health experts cautioned that a safe haven surrender signals a woman “fell through the cracks of existing systems”); Debbie Elliot & Sarah McCammon, *A year after the Dobbs abortion ruling, the impact nationwide has been dramatic*, N.P.R. (June 23, 2023, at 5:12 AM EDT), <https://www.npr.org/2023/06/23/1183931379/a-year-after-the-dobbs-abortion-ruling-the-impact-nationwide-has-been-dramatic> [<https://perma.cc/834J-RT32>] (documenting the dramatic nationwide impact of *Dobbs*, including abortion bans across more than a dozen states and significantly reduced patient rights).

87. *Dobbs v. Jackson Women’s Health Organization*, 597 U.S. 215, 258–59 (2022). During Oral Arguments, Justice Amy Coney Barrett said: “I have a question about the safe haven laws. So, Petitioner points out that in all 50 states, you can terminate parental rights by relinquishing a child after abortion, and I think the shortest period might have been 48 hours if I’m remembering the data correctly. So it seems to me, seen in that light, both *Roe* and *Casey* emphasize the burdens of parenting, and insofar as you and many of your amici focus on the ways in which forced parenting, forced motherhood, would hinder women’s access to the workplace and to equal opportunities, it’s also focused on the consequences of parenting and the obligations of motherhood that flow from pregnancy. Why don’t the safe haven laws take care of that problem? It seems to me that it focuses the burden much more narrowly.” Transcript of Oral Argument at 56, *Dobbs*, 597 U.S. 215 (2022) (No. 19-1392).

behind them is an anti-abortion stance.<sup>88</sup> The more the United States Supreme Court and individual states limit a woman's right to choose, the more we actually need the option of ethical voluntary placements.

Accordingly, situating this piece within the reproductive rights discourse is entirely intentional. Justice Barrett's suggestion that a woman who does not want to be a parent can utilize safe haven laws as a viable option, and, in turn, limit reproductive rights, overlooks the economic, mental, emotional, and environmental factors that affect individuals who are making these decisions.<sup>89</sup> It ignores the risks of continuing a physical pregnancy that is unwanted and a mother undergoing physical and emotional strain due to pregnancy. A mother who is at the end of her rope and facing desperation may still make a poor choice as to where to place the newborn and/or might not even be aware that the police station is an option, without arrest.<sup>90</sup> As Professor Oaks notes, "[w]hile it is laudable to save a newborn's life, safe haven laws ignore the real problem, which is that some women lack key social and economic supports enjoyed by most people in our society."<sup>91</sup> Again, as this Article reiterates, the most marginalized mothers typically have the fewest options of how to keep their families safe.<sup>92</sup>

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88. OAKS, *supra* note 12, at 52–53; *see also* Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 756–57 (2006) (arguing that Safe Haven laws are enacted to keep women from having abortions and, instead, persuade them to keep the pregnancy and abandon the baby once born).

89. *See* Dorothy E. Roberts, *The Reproductive Violence of Family Policing & Separation*, PETRIE-FLOM CTR. AT HARV. L. SCH. (May 9, 2022), <https://petrieflom.law.harvard.edu/2022/05/09/dorothy-roberts-torn-apart-family-separation/> [<https://perma.cc/FT2V-57TX>] (arguing that framing safe haven placement as “voluntary” obscures the deep coercion embedded in the child welfare system, as pressuring women to relinquish children they were compelled to carry, only to place them in foster care due to insufficient adoptive families, is itself a form of coercion).

90. *See* Galvin, *supra* note 78 (referencing a CDC study showing “that a majority of infant homicides that take place on the day of birth are committed by young, unmarried mothers with lower education levels who had not sought prenatal care, and that they're often associated with a hidden, unplanned pregnancy and with giving birth at home”).

91. OAKS, *supra* note 12, at 3 (explaining the context for how people think about “good mothers versus potentially bad mothers”).

92. *See, e.g.*, Laury Oaks, *Safe Haven Laws and Anti-Abortion Politics*, PETRIE-FLOM CTR. AT HARV. L. SCH. (May 10, 2022) <https://petrieflom.law.harvard.edu/2022/05/10/safe-haven-laws-and-anti-abortion-politics> [<https://perma.cc/4AB4-FNW3>] (“The anonymity of safe haven

“Motherhood bias” is heightened when mothers (either through voluntary placement laws or safe haven laws) are judged as so-called “bad mothers” who would dare to leave or abandon their children.<sup>93</sup> While *Dobbs* eradicated a woman’s right to choose when she is pregnant,<sup>94</sup> it certainly does not follow that a woman’s right to choose should also be eliminated once the baby is born. Mothers must be empowered to make choices that are safest for them and their children. Parents should be able to choose to place their children into foster care, when necessary, without fear of being punished or losing their children forever. Every state has a safe haven law, but we should offer different levels of support for all “who are faced with challenging life circumstances and difficult reproductive decisions.”<sup>95</sup> Thus, I posit that every state should provide an ethical voluntary

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relinquishment constructs women as silent . . . concealing reproductive, racist, and classist injustices in our society that lead some women and girls to relinquish their newborns”); *see also* OAKS, *supra* note 12, at 203 (“[U]nwantedness’ is not the only or the main factor that leads to safe haven relinquishment. We must consider carefully the social, legal, financial, and medical barriers rooted in racism, classism, ageism, ableism, heterosexism, and citizenship inequalities that limit some girls’ and women’s opportunities to raise their children”); Professor Deseriee Kennedy writes about the societal indifference to the large numbers of Black infant child mortality. *See* Deseriee Kennedy, *No Safe Haven*, in *AVANT-GARDE LAW: NEW FRONTIERS AT THE CROSSROADS OF GLOBAL FAMILY LAW* (Melissa Breger ed., forthcoming 2027). Safe haven laws could negatively impact mortality rates by diverting resources and attention from other causes of infant mortality, such as low birth weight. Sanger, *supra* note 88, at 790. This is especially true for Black women: “In addition to having the highest [infant mortality rate], maternal morbidity during childbirth also occurs at the highest rate among Black women.” Caleb J. Jang & Henry C. Lee, *A Review of Racial Disparities in Infant Mortality in the US*, 9 *CHILD*. 257, 263 (2022). For instance, “[s]elf-reported experiences of racism are associated with increased adverse birth outcomes including low birth weight.” *Id.* at 259. “Because the prevalence of safe haven laws is based at least in part on this oppressive, limited conceptualization of motherhood, the laws cannot account for important considerations that may arise as a result of socio-economic, racial, or ethnic background.” Sarah Biehl, *Validating Oppression: Safe Haven Laws as Perpetuation of Society’s Demonization of Bad Mothers*, 22 *CHILD. LEGAL RTS. J.* 17, 22 (2002–2003). As a result, an increased focus on safe haven laws may unintentionally divert resources from maternal health and racial inequalities.

93. Breger, *supra* note 4, at 558 (coining the term “motherhood bias”); *see also* Spinak, *supra* note 85, at 2076 (explaining that stereotypes about “bad” mothers may cause lawyers to make and present an incorrect evaluation of the harm in question).

94. *See Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215, 229–33 (2022).

95. OAKS, *supra* note 12, at 221.

placement mechanism in the same way that every state has a safe haven law.

## II. EXPLORING STATE LAWS TO RE-IMAGINE A BETTER VOLUNTARY PLACEMENT MECHANISM

The child protection system and the idea of voluntary placements has been in place since before the 19th century.<sup>96</sup> Federal engagement in foster care began at the seminal White House Conference on Children as far back as 1909.<sup>97</sup> In 1958, the amendments to Title V of the Social Security Act “require[d] states to match federal child welfare funds if they choose to draw down funding.”<sup>98</sup> Congress enacted the Child Abuse and Treatment Act (“CAPTA”) in 1974, which is the “only federal legislation exclusively dedicated to the prevention, assessment, identification and treatment of child abuse and neglect.”<sup>99</sup> Congress reauthorized CAPTA in 2010 and Title IV-B of the Social Security Act in 2011.<sup>100</sup> Throughout the 1980s and 1990s, federal legislation attempted to target the pervasive

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96. DAVID TOBIS, FROM PARIAS TO PARTNERS: HOW PARENTS AND THEIR ALLIES CHANGED NEW YORK CITY’S WELFARE SYSTEM 5 (2013); Brief for Professor Merrill Sobie as Amicus Curiae Supporting Petitioners-Appellants at 2, *In re Laws. for Child. v. N.Y.S. Off. of Child. and Fam. Servs.*, 233 N.Y.S. 3d 752 (N.Y. App. Div. 2025); Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of Its History, Purposes, and Current Efficacy*, 45 CARDOZO L. REV. 1319, 1325–26 (2024) (addressing the trend that, in the earlier years, most children were placed in care voluntarily but that shifted as the “number of babies voluntarily relinquished by birth parents dropped dramatically as abortion became more accessible and single motherhood became more acceptable.”).

97. John J. Stretch, *The Rights of Children Emerge: Historical Notes on the First White House Conference on Children*, 49 CHILD WELFARE LEAGUE OF AM. 365, 365, 367–68 (1970). (“The first White House Conference on Children, convened by President Theodore Roosevelt on January 25 and 26, 1909, was a landmark in the history of social welfare in the United States.”); PROCEEDINGS OF THE CONFERENCE ON THE CARE OF DEPENDENT CHILDREN HELD AT WASHINGTON D.C., JANUARY 25, 26, 1909 (U.S. Gov’t Printing Office, 1909). <https://archive.org/details/proceedingsconf01statgoog/mode/2up?q=foster> [<https://perma.cc/6ATW-M3ZE>].

98. *Timeline of Major Child Welfare Legislation*, CHILD WELFARE LEAGUE OF AM., <https://www.cwla.org/wp-content/uploads/2014/05/TimelineOfMajorChildWelfareLegislation.pdf> [<https://perma.cc/GLE8-EBVR>] (last visited May 10, 2026).

99. *Id.*

100. *Id.*

issue of “foster care drift”<sup>101</sup> with Acts such as the Adoption Assistance and Child Welfare Act of 1980.

The current concept of voluntary foster care systems in the United States evolved in some ways from federal legislation, such as these Acts mentioned,<sup>102</sup> as well as the 1997 reauthorization of the Adoption and Safe Families Act.<sup>103</sup> Federally, voluntary foster care placement is codified within Title IV-E of the Social Security Act, Section 672.<sup>104</sup>

As of 2025, the majority of states have some kind of voluntary placement option. Yet there are some states that do not have this option in any form.<sup>105</sup> For example, according to my research in 2001, those states that had not codified voluntary placement laws included

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101. The term “foster care drift” refers to children floating through the foster care system with no permanency and, at times, a severing of parental ties with no adoptive family. *See, e.g.,* Marsha Garrison, *Why Terminate Parental Rights*, 35 STAN. L. REV. 423, 426, 473 (1983) (explaining the concept of foster care drift and arguing that while the foster care system is often criticized, it does serve an important role for children who need a safe home away from their family of origin).

102. Swann & Sylvester, *supra* note 62, at 311 (explaining that under the Adoption Assistance and Child Welfare Act of 1980, “reasonable efforts” were required prior to the child’s removal from the family; however, the Act did little to prevent the increase of children in foster care). This resulted in the Family Preservation and Family Support Program, later integrated into the ASFA, which highlighted the importance of child safety while introducing incentives for adoption and streamlining decision-making protocols regarding reunification or parental rights termination. Also, the Family First Prevention Services Act (“FFPSA”) was codified in 2018 as Public Law 115-123, which took effect in October 2021. This legislation’s goals were to expand support resources for families and provide safer options for children entering into foster care.

103. *See* Rosales v. Thompson, 321 F.3d 835, 836 (9th Cir. 2003) (holding that the Health and Human Services (HHS) had been wrongly denying federal foster care benefits to harmed children that had been placed with relatives). Most recently, the Family First Prevention Services Act (“FFPSA”) was codified in 2018 as Public Law (P.L.) 115-123 and took effect by October 2021. Cristina Cooper, *Family First Prevention Services Act: Initial Implementation & Considerations*, ABA (Jan. 25, 2022), [https://www.americanbar.org/groups/public\\_interest/child\\_law/resources/child\\_law\\_practiceonline/january-december2022/family-first-implementation/](https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january-december2022/family-first-implementation/) [https://perma.cc/YCH6-X39D]. The three federal laws that shape states’ child welfare laws in recent years are the Child Abuse Prevention and Treatment Act, the Adoption Assistance and Child Welfare Act of 1980, and the Adoption and Safe Families Act of 1997. Gottlieb, *supra* note 96 (arguing that such Acts have often created more damage to families).

104. 42 U.S.C. § 672(e).

105. Hill, *supra* note 19, at 63.

Arkansas, Delaware, Illinois, Indiana, Missouri, New Hampshire, and Texas.<sup>106</sup> These states shifted by 2018, with states like Illinois, for example, now codifying voluntary placement,<sup>107</sup> and Indiana and Missouri allowing the option in only the narrow situation where the child needs mental health placement.<sup>108</sup> Still, in 2025, there are fewer than ten states without any codification of voluntary placement.

States may have a codified voluntary placement mechanism but might be less likely to use them if they are seen as a tool of coercion and if state agency workers question whether practices are being used inappropriately.<sup>109</sup> Some agency workers see the evolution of the law over time and the benefits of non-adversarial systems in place. For example, one Georgia caseworker explains: “[I]n the [19]80s, it was misused. Workers didn’t want the hassles of involving the court, and the guidelines were not used. More kids were allowed in the voluntary system than necessary, and some cases of abuse were likely missed. Now, it is used correctly.”<sup>110</sup> In Colorado, a caseworker notes that “voluntary [placements] take out the penalty-fee” and a Connecticut caseworker notes that “this [option] keeps families together; this option doesn’t penalize the families as other courses might.”<sup>111</sup> Other caseworkers from around the nation support a voluntary placement mechanism as a “more informal,” “less

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106. Caseworker Interviews 2000–01, *supra* note 20; State Statutory Charts Compilation 2024–26, *supra* note 20.

107. ILL. ADMIN. CODE tit. 89, § 302.

108. IND. CODE ANN. § 31-34-1-16 (West 2026); MO. ANN. STAT. § 210.122 (West 2026).

109. MICH. COMP. LAWS SERV. § 400 (2011); *see also* Interview with Sandy Ranville, Mich. Caseworker, Mich. Fam. Indep. Agency (“FIA”), (July 2000) (“[abuse of the system] is rumored to be the reason for the strict current limitations”) (on file with author). Notably, when I taught with Professor Don Duquette at The University of Michigan Law School, we discussed how voluntary placements had fallen out of favor over the years in Michigan due to the concerns that they were being used inappropriately. In fact, this state contrast between Michigan and New York was one of the inspirations for writing this piece, because they were so heavily codified in New York and were still common.

110. Caseworker Interviews 2000–01, *supra* note 20; Interview with Melissa Carter, Exec. Dir., Barton Child L. & Pol’y Ctr. (Mar. 2026) (explaining that, although voluntary placements are relatively rare under Georgia’s existing foster care statutes, they do occur in certain contexts, including Extended Foster Care cases and kinship arrangements).

111. Interview with Mary Griffin, Colo. Caseworker, Colo. Div. of Child Welfare, Dep’t of Hum. Servs. (July 2000) (on file with author); Interview with Derith McGann, Unit Dir., Conn. Dep’t of Child. & Families (Aug. 2000).

punitive,” “less intrusive” and “less adversarial” option and “a way to empower the family unit.”<sup>112</sup>

Although much of the voluntary placement processes are statutory, there is a small body of pertinent case law surrounding the concept of voluntary foster care placement laws, including one just decided on May 21, 2026, by the New York State Court of Appeals discussed later in this Article.

In *Smith v. Organization of Foster Families for Equality & Reform* (“*OFFER*”), the U.S. Supreme Court, in holding that the procedure that governed a child’s removal from foster homes in New York was not constitutionally defective,<sup>113</sup> indirectly addressed the issue of the voluntariness of a parent’s action in the context of foster care placements.<sup>114</sup> As Professor Soledad McGrath notes: “[T]he Court’s recognition in *Offer* that ‘the threat of neglect proceedings’ has an inherently coercive effect on parents is significant because it reflects a genuine understanding of the realities of the complex dynamic that exists in child welfare cases.”<sup>115</sup> Moreover, McGrath highlights the *OFFER* Court’s observation that caseworkers are inclined to maintain a child’s continued placement in foster care rather than return the child to the birth family, particularly if that family is poor, “thus reflecting a bias that treats the natural parents’ poverty and lifestyle as prejudicial to the best interests of the child.”<sup>116</sup> The *OFFER* Court acknowledged in part that often economic and other disparities exist between the birth families and the foster families, which serve to “negate the voluntary nature of voluntary foster care placements.”<sup>117</sup> The Court wrote in dicta: “The extent to which supposedly ‘voluntary’ placements are in fact voluntary has been questioned.”<sup>118</sup>

112. Caseworker Interviews 2000–01, *supra* note 20; State Statutory Charts Compilation 2024–26, *supra* note 20.

113. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 823 (1977).

114. *See id.* at 834; Gottlieb, *supra* note 96.

115. McGrath, *supra* note 46, at 673.

116. *Id.*

117. *Id.* at 672. As noted in Part III.C, this is one reason why access to counsel is so important.

118. *Smith*, 431 U.S. at 834; *see* McGrath, *supra* note 46, at 633 n.12 (“Indeed, even caseworkers implementing differential response systems have themselves questioned whether family participation in these alternative response systems can very truly be voluntary”). As noted in part III, this is one reason why

One of the most salient points in the *OFFER* case is the Court acknowledging the disproportionate burden placed on poor families and families of color. According to the Court, “[f]rom the standpoint of natural parents, such as the appellant intervenors here, foster care has been condemned as a class-based intrusion into the family life of the poor.”<sup>119</sup> Moreover, the Court continues, “[t]his disproportionate resort to foster care by the poor and victims of discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families.”<sup>120</sup> Indeed, while middle- and upper-income families often have the resources to purchase private care, poor families “have little choice but to submit to state-supervised childcare when family crises strike.”<sup>121</sup> As mentioned later in the Article, this lack of a support system can be the very reason to allow voluntary placements in a very narrow set of circumstances.

In *Croft v. Westmoreland County Children & Youth Services*, within a middle-class family, the Third Circuit considered whether an agreement to separate a family unit was indeed genuinely voluntary at all.<sup>122</sup> After a hotline report accusing Dr. Croft of sexually abusing his daughter, a caseworker visiting the home gave Dr. Croft an ultimatum to leave the home on his own accord.<sup>123</sup> The court ultimately rejected the characterization that Dr. Croft’s decision was “voluntary,”<sup>124</sup> and held that the threat was “blatantly coercive,” and without adequate grounds.<sup>125</sup> Professor Pearson aptly notes that:

[T]he Third Circuit’s threshold rejection, apparently as a matter of law, of the government’s argument that there was no constitutional issue [was] because the parents had consented to a separation plan. However, the placement of this key point in a footnote potentially masks the significance of the Court’s clear rejection of the voluntary label.<sup>126</sup>

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having a system disconnected from child protective investigations can be a critical component.

119. *Smith*, 431 U.S. at 833.

120. *Id.* at 834.

121. *Id.* at 833–34.

122. *See Croft v. Westmoreland Cnty. Child. & Youth Servs.*, 103 F.3d 1123, 1125 n.1 (3d Cir. 1997).

123. *Id.* at 1124–25.

124. *Id.* at 1125 n.1.

125. *Id.*

126. Pearson, *supra* note 46, at 856.

In *Croft*, the court overlooked the reason that the social worker likely failed to develop additional facts—her belief, however poorly based—because there was a valid voluntary agreement in place.<sup>127</sup>

In 2000, Diane Redleaf, a family defense advocate, filed a class action suit in *Dupuy v. Samuels* to challenge the constitutionality of Illinois “safety plans” which she deemed coercive.<sup>128</sup> Redleaf argued that these so-called “voluntary safety plans” were in fact forced upon parents who had no bargaining power.<sup>129</sup> At the district court level, Redleaf presented testimony about families torn apart by safety plans that then turned into lengthy separations.<sup>130</sup> Although the district court agreed these plans were not voluntary, the Seventh Circuit disagreed, holding that the plans did not infringe upon parental constitutional rights.<sup>131</sup> The court noted the inherently unequal bargaining power between the government and a parent at risk of losing her child but did not equate the agency’s actions with coercion.<sup>132</sup> As Professor Dorothy Roberts notes in her recent book, when the Supreme Court denied certiorari, “[t]he family police could continue the farce that parents agreed to safety plans voluntarily despite being threatened with foster care.”<sup>133</sup> Some critics of the child welfare system in general have noted the irony that the only way for a parent to obtain help and have a safety valve if they cannot keep their child safe at that juncture is to call the authorities on themselves.<sup>134</sup>

These so-called “agreements” in the *Croft* and *Dupuy* cases are flawed and clearly not voluntary because the government agencies used the threat of children’s removal as a way to unduly influence and coerce the parents. These are not true voluntary

127. *Id.* at 856–57.

128. ROBERTS, TORN APART *supra* note 4, at 136–37; *Dupuy v. Samuels*, 465 F.3d 757 (7th Cir. 2006).

129. ROBERTS, TORN APART *supra* note 4, at 136–37

130. *Id.*

131. *Dupuy*, 465 F.3d at 761 (stating that “the decision to agree to a safety plan is [an] option with the parents” and “imposes no obligation on anybody”).

132. *Id.* (acknowledging that refusing the safety plan might incur negative consequences); *see also* Gupta-Kagan, *supra* note 4, at 863–65 (emphasizing the disparity between the “awesome powers” of a state agency and the relatively poor and undereducated status of the parents).

133. ROBERTS, TORN APART, *supra* note 4 at 137.

134. Panel Discussion, The Scholarship and Impact of Professor Dorothy Roberts, SEALS Conference, Amelia Island, Fla. (Aug. 1, 2025).

placements.<sup>135</sup> In these cases, the courts are channeling many of the concerns with foster care placement that are discussed above. We must consider the following: How can states have a truly ethical voluntary placement option and ensure due process? How can states avoid coercive processes when the bargaining power in these types of cases is clearly unequal?

To demonstrate the ways for states to have a voluntary placement option in a narrow set of circumstances by scaffolding the mechanism with as much protection for parents as possible, I highlight several states with progressive and sensible options. These options include assigning attorneys for the parents and limiting the time period of the placement. States have crafted laws that allow parents to retain decision-making abilities.<sup>136</sup> In states like North Carolina, the VPAs include actual contracts and time limitations for children to be in care;<sup>137</sup> family conferencing is a component of the

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135. Although these courts used that terminology, they also recognized that, in these instances, the placements were not in fact voluntary at all.

136. See, e.g., *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 826 (1977) (noting that in the New York system, “most of the functions ordinarily associated with legal custody . . . are the responsibility of the foster parent.”).

137. In North Carolina, the state manual explains: “The agreement to provide a foster care placement and services to the family or young adult is not a court order and does not legally transfer custodial rights to DSS. Although court involvement is not required at the time a voluntary agreement is executed and implemented by the participating parties to that agreement, the Juvenile Code (G.S. Chapter 7B) requires that the district court conduct a judicial review of the placement and services provided by DSS. The Juvenile Code provisions focus on the judicial review and are silent as to procedures that apply when executing and implementing a voluntary agreement prior to the judicial review.” SARA DEPASQUALE, *Voluntary Placements of Juveniles and Foster Care, in ABUSE, NEGLECT, DEPENDENCY, AND TERMINATION OF PARENTAL RIGHTS* 8-1 (2023) (citation omitted). Under N.C. Gen. Stat. § 7B-910, the court is required to review voluntary foster care placements to assess their voluntariness, appropriateness, alignment with the child’s best interests, and the necessity of services. The court has the authority to either approve or disapprove the continuation of the placement or direct the DSS to petition for custody. Review hearings must occur within ninety days of the initial placement and subsequently every ninety days. Children cannot remain in voluntary placement for more than six months without a petition alleging abuse or neglect. N.C. GEN. STAT. § 7B-910 (2025). Thus, North Carolina not only has a time limitation but also requires a neutral arbiter (the court) to review the placement to see if they are appropriate, necessary, and truly voluntary. 10A N.C. Admin. Code 70B.0102 outlines the conditions under which a county department of social services may determine a child eligible for foster care assistance payments, which includes the child in foster care who was placed

process in Hawai'i and parts of Oklahoma;<sup>138</sup> respite care options exist in New York;<sup>139</sup> in Oregon, the right to revoke the placement allows parents an exit strategy at any time;<sup>140</sup> separating out from the investigative unit is an option in Alabama;<sup>141</sup> separate rules for indigenous children exist in Nebraska;<sup>142</sup> in the states of Washington

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pursuant to a voluntary placement agreement entered by the parents or guardians of the child with the county department of social services. 10A N.C. ADMIN. CODE 70B.0102 (2026).

138. HAW. DEP'T OF HUM. SERVS., CHILD WELFARE SERVS. PROCS. MANUAL pt. III § 4.4B2 30 (2025); OKLA. ADMIN. CODE § 340:75-6-31.

139. 18 N.Y.C.R.R. §§ 435.3, 435.4, 435.2.

140. As Oregon notes "For those children who have remained in voluntary placement for 18 months, an administrative review by the Department of Human Services shall be required. The department shall review the same information required in reports on children placed pursuant to court order." OR. REV. STAT. § 418.302 (2025). Parents can terminate the agreement/Voluntary Placement Agreements and retain legal custody of the child. The Oregon Department of Human Services ("DHS") cannot compel a parent or guardian to transfer legal custody for the purpose of placing a child in care due to emotional, behavioral, or physical disabilities. A "voluntary placement agreement" is defined as a binding, written arrangement between the department and the parent or legal guardian that does not transfer legal custody but outlines the child's legal status and the rights and responsibilities of all parties involved while the child is in placement. If the child is placed in a qualified residential treatment program, the placement must receive judicial approval. For Indigenous children, the agreement must be court-approved and fully explained to the parent or custodian, who retains the right to revoke the agreement before any final termination of parental rights. If a child remains in voluntary placement for more than 180 days, the juvenile court must make a judicial determination to confirm that the placement is in the child's best interests. For placements extending beyond 12 months, the juvenile court is required to conduct a permanency hearing no later than 14 months after the original placement and at least once every 12 months thereafter to assess the future status of the child. OR. REV. STAT. § 418.312(1), (2), 3(b)-(c), 4(a)-(b), (5) (2025).

141. Alabama mandates time limits for voluntary foster care (180 days), which can be renewed with court approval, and can decouple voluntary placements from the investigation and family removal system. ALA. ADMIN. CODE r. 660-5-28-.04(2)(c) (2002). In a memo to caseworkers, though, there is a provision stating that "in protection services situations where parents recognize their inability to provide adequate nurturing to their child and are willing with the Department in improving their situation." There also is a safe haven-like option, ALA. CODE § 26-25-1.1 (2023). At the end of December 2000, there were 173 children in care in Alabama on a voluntary basis. Interview with Linda Campbell, Foster Care Specialist, Ala. Dep't of Hum. Res. ("DHR") (March 15, 2001) (on file with author).

142. In certain states, such as Nebraska, there are voluntary placement agreement laws specifically tailored to Indigenous populations that are within the

and New Mexico, parents have the right to conference with legal counsel.<sup>143</sup> Many of these ideas are discussed below in the next section and in the conclusion as potential components of an ideal voluntary placement mechanism law.

#### A. An Example of a Highly Developed Statutory Structure: New York

New York advocates, legislators and judges have been working on codifying child welfare laws since at least the 1960s to ensure fairness and due process for families and children.<sup>144</sup> Specifically, as to voluntary placements, New York State has developed a detailed, sophisticated, comprehensive voluntary placement statute which allows for separate judges, separate petition designations, and court-appointed attorneys for the children at the outset.<sup>145</sup> In 1983, the New York State Temporary Commission to Recodify the Family Court Act offered some bold and relevant proposals.<sup>146</sup> Much was codified into laws such as Social Services Law (SSL) Section 384, which includes written, printed contracts which parents would sign with a present lawyer.<sup>147</sup> The contracts ensured that counsel would represent the parents and their children in any court review of the placement, and that judges would have the authority to review any petition to continue with a child present.<sup>148</sup>

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context of their respective ICWA statutes. NEB. REV. STAT. §§ 43-1503(2)(a), (e), 43-1506, 43-1508(2) (2015).

143. WASH. REV. CODE ANN. § 13.34.067 (West 2026); N.M. STAT. ANN. § 32A-3A-6 (West 2026).

144. Merrill Sobie, *The Child Client: Representing Children in Child Protective Proceedings*, 22 *TOURO L. REV.* 745, 752 (2014); *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. 6 (N.Y. May 21, 2026) (“The Host Family Home regulatory program must be annulled because it undermines the carefully designed foster system, and contravenes various critical statutory protections the legislature saw fit to include in that system.”).

145. Sobie, *supra* note 144, at 748, 750, 752; *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. 2–3 (N.Y. May 21, 2026) (outlining various safety valves for parents and families in the voluntary foster care process, such as judicial oversight, no forfeiting of parental rights, mandating preventative services first, request for immediate return of child, and assigned counsel for both parents and children).

146. U.S. DEP’T. OF JUST., N.Y.S. TEMP. COMM’N TO RECODIFY THE FAM. CT. ACT-FOURTH ANNUAL REPORT 159 (1983); MERRIL SOBIE, *THE CREATION OF JUVENILE JUSTICE: A HISTORY OF NEW YORK’S CHILDREN’S LAWS* 88 (1987).

147. N.Y. SOC. SERV. L. §§ 384 (McKinney 2025).

148. *Id.*

Judges would review these contracts to ensure that they were truly voluntary.<sup>149</sup> Technically, in New York, there is a two-part process. First, the parent signs the VPA. Second, if the social services official believes that the child will stay in foster care beyond thirty days, the Family Court reviews the VPA.<sup>150</sup> When parents were ready to resume custody of the child and release them from state care, both parents and children would have legal representation.<sup>151</sup>

In New York, voluntary placement petitions were initially governed solely by the Social Services Law.<sup>152</sup> The Social Services Law Section 392, requiring judicial oversight over petitions, was amended in 1999 to comply with the Adoption and Safe Families Act.<sup>153</sup> Relevant New York statutes include SSL § 384-a, which provides a method for a child's parent, guardian or other specified person to voluntarily place a child in foster care by signing a placement instrument.<sup>154</sup> There are certain legal provisions that must be included in the placement instrument, while others are optional. In addition, SSL § 384-a requires that, before signing a voluntary placement agreement, parents and others be informed of certain rights, including the right to prescribe the conditions for the return of the child to them and the right to consult with attorneys.<sup>155</sup>

The New York Family Court has jurisdiction over proceedings to review voluntary foster care placements. The procedure in such cases was initially governed by SSL § 358-a.<sup>156</sup> If the voluntarily placed child remains in foster care, further proceedings are governed

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149. *Id.*

150. *Joyner by Lowry v. Dumpson*, 712 F.2d 770, 773 (2d Cir. 1983) (citing N.Y. SOC. SERV. L. §§ 384-a, 358-a (McKinney 2025)).

151. *Id.*; *see also* Sobie, *supra* note 146, at 174 (explaining that procedural protections for parents have increased with time).

152. N.Y. SOC. SERV. LAW § 358-a (McKinney 2025).

153. The Social Services Law was amended in 1999 to comply with the Adoption and Safe Families Act of 1997 (ASFA), recognizing the need for more protections to minimize the chance of children languishing in foster care. DIV. MGMT. AUDIT STATE FIN. SERVS., N.Y.S. OFF. STATE COMPTROLLER, OFFICE OF CHILDREN AND FAMILY SERVICES: COMPLIANCE WITH THE ADOPTION AND SAFE FAMILIES ACT, REPORT 2000-S-2 1 (2001); Brief for Professor Merrill Sobie, *supra* note 96, at 22.

154. N.Y. SOC. SERV. LAW § 384-a (McKinney 2025).

155. *Id.* § 384-a(2)(c).

156. *Joyner by Lowry*, 712 F.2d at 773 (explaining the application of SSL § 358-a for voluntary placement procedure).

by the provisions concerning permanency hearings. Specifically, SSL 358-a(1) provides that:

A social services official who accepts or proposes to accept the custody and guardianship of a child by means of an instrument executed pursuant to the provisions of section three hundred eighty-four of this chapter, or the care and custody of a child as a public charge by means of an instrument executed pursuant to the provisions of section three hundred eighty-four-a of this chapter, shall determine whether such child is likely to remain in the care of such official for a period in excess of thirty consecutive days. If such official determines that the child is likely to remain in care for a period in excess of thirty consecutive days, such official shall petition the family court judge of the county or city in which the social services official has his or her office, to approve such instrument upon a determination that the placement of the child is in the best interest of the child, that it would be contrary to the welfare of the child to continue in his or her own home and, that where appropriate, reasonable efforts were made prior to the placement of the child into foster care to prevent or eliminate the need for removal of the child from his or her home and that prior to the initiation of the court proceeding required to be held by this subdivision, reasonable efforts were made to make it possible for the child to return safely home.<sup>157</sup>

After a child is removed from the home and placed in foster care voluntarily pursuant to SSL §§ 358-a,<sup>158</sup> 384,<sup>159</sup> or 384-a,<sup>160</sup> the case remains on the court's calendar.<sup>161</sup> The court retains jurisdiction over the case until the child is discharged from placement and all orders regarding supervision, protection, or services have expired.<sup>162</sup> Through the Permanency Plan legislation, much of the VPAs are now governed through Family Court Act Article 10.<sup>163</sup> Voluntary foster care proceedings out of New York City are all conducted in

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157. N.Y. SOC. SERV. LAW § 358-a(1) (McKinney 2025).

158. *Id.* § 358-a.

159. *Id.* § 384.

160. *Id.* § 384-a.

161. *Id.* § 358-a.

162. *Id.*

163. *Id.* § 358-a.

Manhattan Family Court regardless of the borough where the child or parent resides.<sup>164</sup>

Statutorily, the voluntary placement mechanisms in New York are highly developed in their current form.<sup>165</sup> As noted in the recently decided case of *Lawyers for Children v. N.Y. State Office of Child and Family Services*, voluntary placements have continued for decades within the statutory system in New York and in significant numbers.<sup>166</sup>

When the New York State Office of Children and Family Services (OCFS) promulgated regulations creating the Host Family Homes program, critics argued that the Host program was a work-around system for the temporary care of children without resorting to the voluntary placement process in the Social Services Law.<sup>167</sup> Under this Host Family Homes program, the parent/legal guardian would put forth a “designation of ‘person in parental relation.’”<sup>168</sup> The Host Family Homes program did not have any judicial oversight or require lawyers for the parents and children.<sup>169</sup> For example, the program provided a weak, diluted attempt at representation by stating, “[t]he

164. DIV. MGMT. AUDIT STATE FIN. SERVS., *supra* note 153.

165. See *Joyner by Lowry v. Dumpson*, 712 F.2d 770, 783 (2d Cir. 1983) (contrasting plaintiffs’ portrayal of the foster care system as an overreaching bureaucracy against defendants’ depiction of a cooperative, rehabilitation-focused partnership between parents and the state, thereby highlighting the need for fuller factual development at trial).

166. *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. (N.Y. May 21, 2026); Oral Argument by William Silverman, Proskauer, *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. (N.Y. May 21, 2026) (stating that *Lawyers for Children* attorneys appear in over 1,000 legal proceedings per year regarding voluntarily placed children); see also Laura E. Oren, *Deshaney’s Unfinished Business: The Foster Child’s Due Process Right to Safety*, 69 N.C. L. REV. 113, 117 n.22 (1990) (citing several 1980s studies as evidence that voluntary placements were becoming “less frequent” than in the 70s, and that voluntary transfers “constituted 25% of all foster care placements” nationally, but still comprised much larger shares of placements in some high-population states, including New York).

167. At the Court of Appeals argument, Justice Caitlain Halligan asked the State if this was just “an end-run” around the legislation. See *In re Laws. for Child. v. N.Y.S. Off. of Child. & Fam. Servs.*, 193 N.Y.S.3d 378, 380 (N.Y. App. Div. 2023).

168. *Id.*

169. *In re Laws. for Child. v. N.Y.S. Off. of Child. & Fam. Servs.*, No. APL-2025-00081 (N.Y. argued Apr. 14, 2025).

Agency must provide the parent with a list of available free or low-cost legal services for the parent and child.”<sup>170</sup>

Lawyers for Children, a preeminent legal services organization in Manhattan which often specializes in voluntary foster care placement, sued the state.<sup>171</sup> The plaintiffs argued that a major flaw in these new regulations would be that the child (typically assigned an Attorney for the Child in the State of New York) being placed in the program was not entitled to assigned counsel, although they could “communicate with an attorney.”<sup>172</sup> After the implementation of the law, but before any children were placed in accordance with the Host Family Homes program, Lawyers for Children brought an action challenging the new regulations.<sup>173</sup> This case was just decided on May 21, 2026, by the New York Court of Appeals, which ruled that the N.Y. State Office of Child and Family Services (OCFS) did not have the authority to create the program outside of New York’s voluntary placement provisions.<sup>174</sup>

The creators of the Host Families policy explained that the Host Program requires that host family providers have an agreement with an agency to “cooperate with the parent/child’s plan to see and/or talk with each other,”<sup>175</sup> and “cooperate with the Agency and the child’s parent on the return of the child to the parent upon termination of the designation of ‘person in parental relation.’”<sup>176</sup> Ultimately, the Third Department denied OCFS’s motion to dismiss the petition on appeal by Lawyers for Children.<sup>177</sup> In the decision, denying the motion to dismiss, the Court<sup>178</sup> acknowledged that, based on the facts alleged, “implementation of the program would, in essence, place children outside their home without the right to legal representation.”<sup>179</sup>

The Appellate Division in a subsequent case allowed the program to stand saying it was within the agency’s broad powers and

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170. N.Y. COMP. CODES R. & REGS. tit. 18, § 444.5(f) (2021).

171. *Id.*

172. *In re Laws. for Child.*, 193 N.Y.S.3d at 380.

173. *Id.*

174. *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. at 10–11 (N.Y. May 21, 2026).

175. N.Y. COMP. CODES R. & REGS. tit. 18, § 444.13(a)(14).

176. *Id.* § 444.13(a)(15).

177. *In re Laws. for Child.*, 193 N.Y.S.3d at 382.

178. *Id.*

179. *Id.* at 381.

discretion to create this program administratively instead of legislatively.<sup>180</sup> The dissent by Judge Pritzker was skeptical of the program, in part due to the fact that New York already has a sophisticated program in place.<sup>181</sup> Subsequently, the New York Court of Appeals specifically stated that a sophisticated statutory system already exists in New York.<sup>182</sup> Because the New York statutes govern a very comprehensive system for voluntary placement, other states could replicate the statutory framework of New York State.

#### B. Family ‘Ohana Conferencing and Empowerment Philosophy: Hawai‘i

Family conferencing and empowering parents can be part of a solution for a fairer, more equitable voluntary foster care mechanism. For example, in the State of Hawai‘i Department of Human Services Manual, it reads:

The use of a voluntary consent to place a child out of the family home can be a positive tool in working with a family. Consensual, time-limited, temporary placements provide safety for the child, while allowing the family respite as well as time to reflect on the issue within the family home that led to [agency] involvement. Families who feel empowered to address their issues are more motivated to participate in services in a non-defensive manner.<sup>183</sup>

The cornerstone of Hawai‘i child welfare law is called ‘Ohana Conferencing, which is a special program that facilitates family group

180. *In re Laws. for Child. v. N.Y.S. Off. of Child. & Fam. Servs.*, 233 N.Y.S.3d 752, 761–62 (N.Y. App. Div. 2025).

181. “Despite this carefully crafted voluntary foster care system in which the Legislature granted numerous protections to children and parents, OCFS attempted to administratively create a separate voluntary foster care system that not only amends, but debrides the Social Services Law and the Family Court Act.” *Id.* at 762–63 (Pritzker, J., dissenting). While this particular proposed program has been criticized as one that is wholly untethered to any kind of oversight, parts of these types of programs with safety guidelines and due process for parents and children could be an ally to the idea of truly voluntary placements where states reconceptualize with mandatory legal representation for parents and children.

182. *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. at 3–4 (N.Y. May 21, 2026).

183. HAW. DEP’T OF HUM. SERVS., CHILD WELFARE SERVS. PROCS. MANUAL pt. III § 4.4B2 30 (2025).

conferences “that highlight family strengths and draw upon the family’s wisdom and bonds.”<sup>184</sup> Social workers outline the standard of care, and the family develops a plan to meet that standard.<sup>185</sup> Support resources are provided, and the family is given private time to take ownership and develop a plan.<sup>186</sup> Once reconvened, the family, social worker, and service providers finalize or refine the plan to ensure the child’s safety and well-being.<sup>187</sup> In 1998, EPIC, Inc., a nonprofit 501(c)(3) in Hawai’i, was established to provide ‘Ohana Conferencing statewide.<sup>188</sup>

‘Ohana Conferences (“Ohana,” meaning family in Hawaiian), focus on strengthening family and community networks to protect children.<sup>189</sup> These conferences include any family or community members who can address the child’s safety, risks, or transition planning, with all requests by active case participants honored.<sup>190</sup> This approach ensures a culturally competent, community-based response within the child welfare system.<sup>191</sup> The program is similar to structured decision-making but led by the family.<sup>192</sup> The program is built on the strong Māori tradition from New Zealand which centers family conferencing.<sup>193</sup> The program has been replicated for twenty-five years.<sup>194</sup>

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184. Wilma Friesema, *‘Ohana Conferences: A Collaborative Approach to Meeting the Needs of Abused and Neglected Children*, CASA JUDGES’ PAGE NEWSL., at 1 (2008), <https://epicohana.squarespace.com/s/Ohana-Conferencing-A-Collaborative-Approach-to-Meeting-the-Needs-of-Abused-and-Neglected-Children.pdf> [<https://perma.cc/9WPK-FAP2>] (last visited Mar. 20, 2026).

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*; HAW. REV. STAT. § 587A-4 (2025).

190. Friesema, *supra* note 184, at 1.

191. *Id.*

192. Interview with Karen Worthington, Board Chair of EPIC ‘Ohana in Haw. (Feb. 5, 2025) (on file with author) (explaining that the Annie E. Casey Foundation supports this kind of conferencing as well.).

193. See, e.g., Catherine Love, *Family Group Conferencing: Cultural Origins, Sharing, and Appropriation-A Maori Reflection*, in FAMILY GROUP CONFERENCING 15 (Gale Burford & Joe Hudson eds., 2000); Mike Doolan & Pam Phillips, *Conferencing in New Zealand*, in *Family Group Conferencing Programming: New Directions in COMMUNITY-CENTERED CHILD AND FAMILY PRACTICE* 193 (Gale Burford & Joe Hudson eds., 2000); see generally Children, Young Persons, and Their Families Act 1989, §§ 17, 18 (N.Z.).

194. Doolan & Phillips, *supra* note 193, at 194.

'Ohana conferences include a facilitator, recorder, and a coordinator who assists in bringing the parties together and addresses concerns the family might have about the meeting.<sup>195</sup> The conferencing is followed by initial greeting, convening, shared meals, private family time, recurrent meetings, youth-led circles, and peer partners for adults and youth in certain circumstances, such as mothers struggling with substance abuse.<sup>196</sup> 'Ohana conferencing is utilized both for involuntary and voluntary foster care placement.<sup>197</sup> In Hawai'i, a voluntary placement can only last ninety days, yet if the family is engaged in 'Ohana conferencing, the voluntary placement can extend to 180 days.<sup>198</sup>

The philosophy behind this approach is akin to a procedural justice argument, where the parents are involved in the process of placing their children into care during the entire process. Although this process has limitations, given that it de-emphasizes attorney involvement and may not work where social isolation contributes to challenging situations, it could work in narrow circumstances.<sup>199</sup> 'Ohana conferencing could be a complement to a strong voluntary care provision with imbued due process rights for parents and could be replicated in other states as well.

### C. Right to Conference with Counsel and Attorney Hotline: Washington and New Mexico

Access to counsel is a key due process consideration. Some states, such as Washington and New Mexico, understand that this component is necessary in voluntary placement cases. Additionally, New Mexico provides within its Administrative Code a Sample Voluntary Temporary Placement Agreement, which outlines the rights and responsibilities that parents retain during voluntary placement. New Mexico allows parents to have legal counsel before

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195. Interview with Karen Worthington, *supra* note 192; E-mail from Delia Ulima & Laurie Tochiki, Exec. Dirs. of EPIC 'Ohana, to Melissa Breger, Professor of L. at Albany L. Sch. (May 19, 2026) (on file with author).

196. See EPIC 'OHANA, MAINTAINING CONNECTIONS: A GUIDE TO THE VALUES AND ENGAGEMENT PRACTICES OF EPIC 'OHANA 13 (2023) (describing the agenda of an 'Ohana Conference).

197. *Id.*

198. Interview with Jeannie Rhinehart, Child Welfare Serv. ("CWS") Adm'r, Haw. Dep't of Hum. Serv. (Feb. 15, 2001) (on file with author).

199. Interview with Karen Worthington, *supra* note 192; For an in-depth dive into family group conferencing in general, see Huntington, *supra* note 28.

they sign any agreement. Similarly, in Washington State, House Bill 1295 was introduced in 2023, allowing for a parent or guardian who is considering a voluntary placement agreement to be assigned legal counsel prior to the signing and for the duration of the agreement.<sup>200</sup> Although that particular legislation did not pass, there is now a free service for parents in the state of Washington as of January 1, 2024.

Washington State launched a Voluntary Placement Agreement Legal Consultation Hotline that runs twenty-four hours a day, seven days a week.<sup>201</sup> The hotline is solely focused on providing legal advice to parents, guardians, and legal custodians who are facing the decision of whether to place their children voluntarily into state care.<sup>202</sup> The Voluntary Placement Agreement Legal Consultation Hotline, which offers free legal consultation to parents considering voluntary placement, is funded as part of the operating budget through the Washington Office of Public Defense, Parents Representation Program.<sup>203</sup> It is also partially funded with federal Title IV-E funding. Legal counsel then can help explain in detail the terms and consequences of the agreement.<sup>204</sup> This helps to ensure that parents have the same amount of legal knowledge and understanding of the process as the department that is presenting them with the option of voluntary placement. This is a major step towards confirming that the agreement was actually signed voluntarily.<sup>205</sup> If a parent is faced with the State trying to dictate what a voluntary placement might look like, the lawyers advise the parents to put everything in writing, including what the placement is and when they wish for such services to end.<sup>206</sup> The State provides additional training to contractors about policies and ways to answer calls, especially with regard to the three most prominent issues which involve placement of the child, services for the parents, and visitation

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200. H.B. 1295, 68th Leg., Reg. Sess. (Wash. 2023).

201. *VPA Hotline*, WASH. STATE OFF. OF PUB. DEF. <https://opd.wa.gov/vpa-hotline> [<https://perma.cc/VML2-ECB9>] (last visited Mar. 23, 2026).

202. *Id.*

203. *See Parents Representation Program*, WASH. STATE OFF. OF PUB. DEF. <https://opd.wa.gov/parents> [[perma.cc/2CA7-Z73J](https://perma.cc/2CA7-Z73J)] (last visited May. 30, 2026).

204. *VPA Hotline*, *supra* note 201.

205. *Id.*

206. Interview with Marci Comeau, Managing Att’y, Wash. State Off. of Pub. Def., Parents Representation Program (July 1, 2025) (on file with author) (explaining that some of the hotline attorneys are trained in family law, criminal law, guardianship and even some in substance abuse and all of the hotline attorneys are already trained in CPS dependency cases).

between child and parents.<sup>207</sup> Washington State is sharing this information to parents through posters and cards and collaborating with parents before anything is filed.<sup>208</sup>

Likewise, in New Mexico, when a voluntary placement agreement is considered, the Children, Youth, and Families Department (CYFD) is required to notify the Office of Family Representation and Advocacy, which will then provide the parent or guardian with legal counsel.<sup>209</sup> Counsel explains the terms of the agreement, the rights of the parent or guardian, and the potential for the department to seek custody, if the parent decides to reclaim the child.<sup>210</sup> Additionally, the CYFD must organize a collaborative meeting if requested by the parent or guardian.<sup>211</sup> Upon the signing of a voluntary placement agreement, the Office of Family Representation and Advocacy will then appoint a guardian ad litem for the child.<sup>212</sup> The law also permits any party to the action to petition the court for a review of the agreement.<sup>213</sup> The law limits the duration of a child's voluntary placement to 180 consecutive days.<sup>214</sup> If the parent or guardian agrees in writing, this period may be extended for an additional 180 days, provided the department files a petition to formalize the extension.<sup>215</sup> According to the statute, a child cannot remain in voluntary placement for more than 365 days within any two-year period.<sup>216</sup>

In New Mexico, parents have the right to demand and secure the return of their child from voluntary placement within forty-eight hours.<sup>217</sup> If the parent refuses custody, the agency must make reasonable efforts to reunify the child with the family before filing a neglect petition.<sup>218</sup> These reasonable efforts include providing

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207. *Id.*

208. *Id.*

209. N.M. STAT. ANN. § 32A-3A-6(B) (2023).

210. *Id.*

211. *Id.* § 32A-3A-6(D).

212. *Id.* § 32A-3A-6(E).

213. *Id.* § 32A-3A-6(F).

214. *Id.* § 32A-3A-7(A).

215. *Id.* § 32A-3A-7(B).

216. *Id.* § 32A-3A-7(D).

217. *Id.* § 32A-3A-8(A).

218. *Id.* § 32A-3A-8(B). If the child is Native American, the agency must notify the Tribe of the pending VPA (certified upon receipt) and utilize active efforts to prevent the break-up of the Native American Family before the parent signs any VPA agreement per the New Mexico Indian Family Protection Act

necessary services, searching for relatives who might take custody, offering family preservation strategies, and ensuring siblings remain together whenever possible.<sup>219</sup> Parents retain several rights during the voluntary placement of their child: they are entitled to visitation and must be informed of any changes in the child's school or placement.<sup>220</sup> According to the statute, parents have the authority to make decisions regarding the child's medical, dental, and behavioral health care.<sup>221</sup> Additionally, parents must consent to all non-emergency and non-routine medical care and make decisions concerning the child's participation in cultural and religious events.<sup>222</sup> The parents are responsible for decisions of substantial legal significance and serve as the child's educational decision-maker, unless the department determines this is not in the child's best interests.<sup>223</sup>

According to its statutes, the law in New Mexico prioritizes placing the child with a relative in a licensed foster home, a facility run by a licensed child welfare services agency, or a facility as provided for in the Children's Shelter Care Act. The department is also required to make reasonable efforts to keep siblings together unless doing so compromises their safety or well-being.<sup>224</sup>

We can borrow heavily from states like New Mexico and Washington, where the voluntary placement laws prioritize parents keeping decision-making and custody and parents having the right to consult with lawyers throughout the process and/or via a hotline option.

### III. HOW TO RE-IMAGINE VOLUNTARY PLACEMENT OPTIONS BOLSTERED BY DUE PROCESS GUARDRAILS

A voluntary placement mechanism that is truly voluntary and uncoerced could be a valuable mechanism for states when there is a

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(IFPA). I would like to thank Cristen Conley, Director of the Corinne Wolfe Center for Child and Family Justice, University of New Mexico School of Law, for highlighting the importance of distinctions and requirements for Native American children per IFPA.

219. *Id.*

220. *Id.* §§ 32A-3A-10(A) to (B).

221. *Id.* § 32A-3A-10(C).

222. *Id.* § 32A-28-18(M)(5)

223. *Id.* §§ 32A-3A-10(E) to (F).

224. N.M. STAT. ANN. § 32A-3A-18(D) to (H).

true need by the parents. A truly voluntary placement mechanism is categorically different than faux placement options which are coerced. The following section will outline several suggested guardrails, such as decoupling any investigation from the agreement—perhaps with a separate unit or separate agency—limiting the time the child would stay in care, and having attorneys present for children and parents. States are free to add additional options and guardrails, such as having actual written contracts that may be reviewed by judges to identify undue influence, duress, or coercion.

States can choose from a menu of options to imbue their existing voluntary placement statutes with safeguards. For example, states could decouple a child welfare investigation from a voluntary placement agreement. It should be a proactive rather than reactive program, in that the parent should initiate the contact with the caseworker agency, instead of the parent reacting to a potential child removal. Lawyers or, at the very least, access to lawyers, should be provided at all steps in the process. Time limitations should be part of a written contract. States have a plethora of options to offer within their statutes. There is no one-size-fits-all voluntary foster care placement statute.

When we examine the laws internationally, countries like Canada, Ireland, France, and Sweden all have interesting voluntary foster care and respite care models from which we can learn. Many Scandinavian countries have the majority of their foster care placements as voluntary.<sup>225</sup> As noted above, some countries, such as New Zealand, have an emphasis on holistic family conferencing instead of adversarial litigation, particularly within the Māori culture.<sup>226</sup> As part of Swedish laws, respite care can be provided by community members, for example:

Some children can't live with their legal guardians because they lack in attention and/or care, for example as a result of an addiction or mental illness. The social services can make the decision to place the child in a foster home that will provide the day-to day-care for the child. Apart from being a foster home, you can offer support by being the legal guardian, contact

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225. Jones et al., *supra* note 19.

226. See Jacinta Ruru, *Kua Tutū te puehu, kia mau: Māori Aspirations & Family Law Policy*, in *FAMILY LAW POLICY IN NEW ZEALAND* 57, 84–85 (Mark Henaghan & Bill Atkin eds., 2020) (explaining how family group conferences have been mandated in New Zealand since 1989).

person or the contact family of a child, who, for different reasons needs support or needs to be in a different environment for a period of time.<sup>227</sup>

The Swedish laws explain further: “The social welfare board may not place a child in such an individual home that repeatedly accepts children for temporary care and upbringing (emergency home) unless the conditions in the individual home and the conditions for care in it have been investigated by the social welfare board.”<sup>228</sup>

#### A. Decoupling Voluntary Placements from Child Protective Investigations

A state could mandate that there can be no voluntary placement option if there has already been a credible hotline call or threat of child abuse or neglect proceedings. Parents should not be pressured to consider a VPA because of the threat (or perceived threat) of a child welfare investigation.

Vigilance is necessary to determine whether there are any coercive influences of state actors, and this is particularly true for marginalized families.<sup>229</sup> Low-income families, for example, too often live in the shadow of state supervision as it is.<sup>230</sup> Therefore, a truly voluntary foster care placement arrangement ought to be decoupled from these so-called safety plans and child welfare investigations.

Professor Gupta-Kagan has suggested guardrails to protect those in kinship care and “hidden foster care,” foster care outside of

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227. *Foster/Emergency Foster Home*, RFSL (Apr. 12, 2022) (Swed.), <https://www.rfsl.se/en/organisation/familj/att-bli-och-vara-foralder/familjehem-jourhem/> [<https://perma.cc/76EY-TB3X>].

228. 4 ch. RÄTTEN TILL BISTÅND (Socialtjänstlag [SoL] 2001:453) (Swed.).

229. Sarah Font & Marina Haddock Potter, *Socioeconomic Resource Environments in Biological and Alternative Family Care and Children’s Cognitive Performance*, 89 SOCIO. INQUIRY 263, 276 (2019). See also Gupta-Kagan, *supra* note 4, at 865 (noting that power imbalances between the state and the disproportionately poor, immigrant, or disabled parents involved with CPS undermine any meaningful negotiation, particularly absent the procedural protections afforded to criminal defendants or civil litigants).

230. Roberts, *supra* note 51, at 1626 (“[T]he higher the payment, the greater the intensity of state supervision.”); see also Leroy Pelton, *Four Commentaries: How We Can Better Protect Children from Abuse and Neglect*, 8 FUTURE CHILD., 126, 127 (1998) (“The public child welfare agency is regarded by many parents with child-rearing problems more as an enemy than a friend, as something to be feared and avoided, and certainly not as a place to come voluntarily for help.”).

the court system or formal rules.<sup>231</sup> I would adopt some of those same guidelines for voluntary placement agreements, guidelines which states like New York already have, such as allowing for time limits, attorney appointments, written terms, and a clear exit strategy.<sup>232</sup> Yet, it is critical to add the decoupling of the voluntary agreement from the threat of an involuntary option. Ideally, the voluntary placement agreement (and the threat of any child neglect investigation) should be addressed in an entirely separate state agency, or at the very least, a distinct unit, within the overall state agency.

To keep the two parts of the process even more separate, a state could require that the parent initiates the original contact with the agency. In other words, a state could mandate (or favor) a proactive process instead of a reactive process on the part of the parent. Thus, a parent is not reacting to the threat of a child welfare investigation and possible removal, but rather the parent is proactive and truly wishes to enter into a VPA. This would truly unhook the coercion piece by having VPAs only be self-initiated.

Similarly, states could create a separate unit of their child welfare investigators to handle VPAs that is untethered from the caseworkers who investigate hotline reports. Many states already have large child welfare agencies with distinct units for preventative, investigative, and reunification services. There could be a separate unit that focuses solely on voluntary placements.

Alternatively, a state could choose to detach from a child welfare agency entirely and place voluntary foster care cases into a separate state agency. New York, for instance, offers respite care for parents and foster parents through other state agencies focused on children with developmental disabilities.<sup>233</sup> These programs are comprehensively laid out in regulations<sup>234</sup> and offer protections for

231. Gupta-Kagan, *supra* note 4, at 844.

232. Gupta-Kagan, *supra* note 4, at 905 (“Providing notice forces CPS agencies to write down their justification and enables parents (ideally with their lawyers []) to evaluate the legal strength of that insistence and determine whether to contest or agree to it.”).

233. 18 N.Y.C.R.R. §§ 435.3, 435.4, 435.2.

234. *See, e.g.*, 18 N.Y.C.R.R. § 435.3 (explaining eligibility requirements for respite care); § 435.4 (describing how respite care is provided and provisioned); § 435.2 (defining approved respite care and other relevant terms). These would be through the New York State Office for People With Developmental Disabilities (OPWDD) instead of OCFS.

children and parents that are limited in timing and scope. As Dawne Mitchell, Attorney-In-Charge of the Juvenile Rights Project at The Legal Aid Society said: “[I]nstead of creating a shadow foster care system that places children at an undue risk of harm, OCFS should provide and fund brief respite services and other primary preventive services[.]”<sup>235</sup> There are some jurisdictions that offer parents assistance by way of respite care that could be explored and borrowed in the VPA space.<sup>236</sup>

Community-based organizations can offer respite care for parents, such as Safe Families for Children, which was founded in 2009 in Chicago, and has expanded to other regions in the United States and Canada.<sup>237</sup> Although this has been successful in other

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235. *Child Advocates File Lawsuit Seeking to Terminate the New York State Office of Children and Family Services’ Host Homes Program*, LEGAL AID BUREAU OF BUFFALO, INC. (Apr. 6, 2022), <https://legalaidbuffalo.org/child-advocates-file-lawsuit-seeking-to-terminate-the-new-york-state-office-ofchildren-and-family-services-host-homes-program/> [<https://perma.cc/KZ3P-HHHR>].

236. In the United States, these programs exist in states including Minnesota, New Jersey, and Mississippi, and there is pending legislation for services such as respite care in states like Texas and Iowa. See David Dudley, *When Minnesota Parents Give Up Their Kids to Foster Care: An Imprint Look at a Nationwide Predicament*, THE IMPRINT (July 7, 2025, at 03:00 ET), <https://imprintnews.org/child-welfare-2/when-minnesota-parents-give-up-their-kids-to-foster-care-an-imprint-look-at-a-nationwide-predicament/261820> [<https://perma.cc/LH2W-WU3B>] (“[S]ometimes [parents] are just burned out and need a break. In those cases, 24-7 respite care is available. . . .”). Outside of the U.S., we see such programs in Sweden, Canada, Ireland, and the UK. See Kristina Engwall & Lill Hultman, *Constructions of Childhood: The Assessment of Respite Care for Children with Disabilities in Sweden*, 24 EUR. J. OF SOC. WORK 617, 618 (2021), <https://www.tandfonline.com/doi/full/10.1080/13691457.2020.1763260#abstract> [<https://doi.org/10.1080/13691457.2020.1763260>] (“The SDA confers ten specified interventions, some of which are aimed at children and their families. Examples include after-school supervision at youth recreation centres, residence care outside the family and respite care.”); Kristina Engwall, Lill Hultman, *‘Meet and Greet’: Children with Disabilities’ Participatory Rights in the Assessment Process of Respite Care*, 22 SCANDINAVIAN J. OF DISABILITY RSCH. 187, 188 (2022), <https://sjdr.se/articles/10.16993/sjdr.693#respite-care> [<https://perma.cc/XT87-H5BD>] (“Respite care is one of ten support interventions pursuant to the Swedish Disability Act (SDA).”); *Caregiver Respite/Relief*, B.C. (Aug. 9, 2024), <https://www2.gov.bc.ca/gov/content/health/accessing-health-care/home-community-care/care-options-and-cost/caregiver-respite-relief> [<https://perma.cc/J5MZ-PSTE>] (outlining respite care available in British Columbia).

237. Erik Eckholm, *Mothers in Crisis Turn to Temporary ‘Parents’*, N.Y. TIMES (May 6, 2009), <https://www.nytimes.com/2009/05/07/us/07safe.html>

states, the program was disallowed within the state of New York in the *Host Family Homes* case, in part because New York already has a robust and clear voluntary placement program which includes judicial oversight and access to counsel.<sup>238</sup>

States can certainly mandate that the child welfare agency have not been involved with this family, or not within the calendar year, before a parent can approach the agency to place children voluntarily.

One example that tries to decouple the various arms of the child welfare agency comes from Massachusetts, which contemplates that a family has had no child abuse or neglect involvement before they accept a VPA under Chapter 119.<sup>239</sup> Some other states, such as North Carolina and Idaho, have a similar option.<sup>240</sup> As one way to decouple the process, a state might even choose to have a separate set of caseworkers or a separate set of foster parents specifically for voluntary placements, and the birth parents could even meet the foster parents ahead of the contractual agreement.<sup>241</sup>

Some states use different nomenclature for the process itself perhaps to distance this option from the foster care system. For example, instead of using the parlance of Voluntary Placement Agreement, the process can be renamed as “*Extended Respite*” or “*Entrustment Agreement*,” as in the state of Virginia.<sup>242</sup>

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[<https://perma.cc/WED8-EZZD>]; see also MARK F. TESTA & STEPHEN BUDDÉ, LOW-COST RANDOMIZED CONTROLLED TRIAL OF SAFE FAMILIES FOR CHILDREN (2021), [https://safe-families.org/wp-content/uploads/2021/06/AppendixA-SFFCFinalReport\\_Apr\\_15\\_2021\\_updated.pdf](https://safe-families.org/wp-content/uploads/2021/06/AppendixA-SFFCFinalReport_Apr_15_2021_updated.pdf) [<https://perma.cc/5WEX-EW6S>] (studying the impact of the Safe Families for Children Program); *Everything Wrong with “Safe Families” in one “Model” Case*, NCCPR CHILD WELFARE BLOG (May 13, 2009), <https://www.nccprblog.org/2009/05/everything-wrong-with-safe-families-in.html> [<https://perma.cc/VDE2-ZQSR>] (outlining some of the shortcomings of the Safe Families program).

238. *In re Laws. for Child. v. N.Y. State Off. of Child. & Fam. Servs.*, 233 N.Y.S.3d 752, 756 (N.Y. App. Div. 2025).

239. MASS. GEN. LAWS ch. 119, § 39 (2008); see also Interview with Judy Howard, Mass. Caseworker, Mass. Dep’t of Soc. Servs. (July 17, 2001) (on file with author) (stating “if there are protective issues, workers try first to avoid voluntary placements by going through the courts”).

240. N.C. GEN. STAT. § 7B-910 (2023); IDAHO ADMIN. CODE r. 16.06.01.564 (2024).

241. Thank you for this idea from my mentor, Professor Jane M. Spinak, Edward Ross Aranow Clinical Professor Emerita of Law, Columbia Law School.

242. 22 VA. ADMIN. CODE § 40-141-85.

All these options point to the idea of decoupling a voluntary process within a child investigative agency. Housing this type of care elsewhere could separate it from the knee-jerk investigation culture that permeates the child welfare system as it currently stands.

#### B. Guardrails, such as Time and Scope Limitations and Written Contracts with Judges or Ombudspersons

Another idea for an ideal voluntary placement agreement is to require an ending date and a maximum stay for the child, in addition to other limitations. As another guardrail, states should mandate written and signed contracts with time and scope limitations. Many states currently limit VPAs to 180 days, and many states even limit the time in foster care to ninety days.<sup>243</sup> Some states restrict voluntary foster care to only thirty days.<sup>244</sup>

Instead of a minimum or maximum, some states outline the *total* days that a child can be residing in non-kinship foster care (365 days).<sup>245</sup> Many states mandate that VPAs are also explicit and clear regarding what would enable parents and children to reunify.<sup>246</sup> This is what I refer to above as an exit strategy—when the parents can end the agreement. In Georgia, the length in a specific case is subject to case-by-case negotiation and renegotiation as the case develops.<sup>247</sup> Time limitations provide transparency to parents, so they are aware of the parameters, and this, in turn, provides parents with more guidance and due process.

Another idea is to have an objective, unrelated ombudsperson. California is an example of a state having an external ombudsperson, specifically the Office of the State Foster Care Ombudsperson, as an “autonomous entity within the department for the purpose of providing children who are placed in foster care, either voluntarily or

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243. See, e.g., IOWA ADMIN. CODE § 441-202.3(234) (2009) (“All voluntary placement agreements initiated after July 1, 2003, for children under the age of 18 shall terminate after 90 days.”).

244. 55 PA. CODE § 3130.65(a)–(b); *Laws. for Child. v. N.Y. State Off. Of Child. & Fam. Servs.*, No. 37, slip op. at 2 (N.Y. May 21, 2026) (stating that OCFS must petition Family Court to approve any voluntary placement expected to last longer than thirty days).

245. Caseworker Interviews 2000–01, *supra* note 20; State Statutory Charts Compilation 2024–26, *supra* note 20.

246. *Id.*

247. IOWA ADMIN. CODE § 441-202.3(234) (2009).

pursuant to Section 300 and Sections 600 and following, with a means to resolve issues related to their care, placement, or services.”<sup>248</sup> Twenty-three states have something similar.<sup>249</sup> The ombudsman duties include, but are not limited to, informing foster children and families of their rights, providing training and technical assistance, receiving complaints made by or on behalf of children placed in foster care, and deciding to investigate or refer complaints.<sup>250</sup> California is one state operating an ombudsman within, but autonomous of, the state agency providing child welfare services.<sup>251</sup> In Maryland, for example, there is a “Citizen Review Board” after a child resides for at least five months in foster care.<sup>252</sup> Oregon has a similar set-up.<sup>253</sup> The ombudsman model or the citizens review board model could be options for states who desire that a separate entity examine voluntary placement contracts. Having a

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248. CAL. WELF. & INST. CODE § 16161 (2022).

249. See generally *Children's Ombudsman Offices: Office of the Child Advocate*, NCSL (Jan. 8, 2025), <https://www.ncsl.org/human-services/childrens-ombudsman-offices-office-of-the-child-advocate> [https://perma.cc/Z69B-CSTZ] (explaining that approximately twenty-three states have established a Children's Ombudsman specifically for children's services, and another five states have a statewide ombudsman program addressing both children's services and concerns of government).

250. See, e.g., CAL. WELF. & INST. CODE § 16164 (2022).

251. See also *About the Office of the Ombudsman for Children*, BARNOMBUDSMANNEN (Jan. 6, 2021) (Swed.), <https://www.barnombudsmannen.se/english/> [https://perma.cc/9MY9-8PJD] (demonstrating that the U.S. is not the only country to establish an Ombudsman, as Sweden is shown to also have established a government agency “tasked with promoting and advancing children's rights and interests”); see also *About the Ombudsperson for Children*, BARNEOMBUDET (Nor.), <https://www.barneombudet.no/english/> [https://perma.cc/XG5E-EL53] (informing that the Norwegian Ombudsperson for Children was the world's first Ombudsperson for Children); *Children's Ombudsman Offices: Office of the Child Advocate*, supra note 249. Texas and Utah Ombudsman offices also operate within yet autonomous of their state agencies, whereas twenty-four states operate independent and autonomous Ombudsman offices, specifically handling issues related to children (Colorado, Connecticut, Georgia, Indiana, Maine, Massachusetts, Michigan, Missouri, New Hampshire, Rhode Island, South Carolina, Tennessee, Washington and West Virginia). *Id.*

252. Interview with Debbie Rider, Md. Policy Analyst, Md. Dep't of Hum. Servs. (2001) (on file with author); *Citizens Review Board for Children*, MD. DEP'T OF HUM. SERVS., <https://dhs.maryland.gov/citizens-review-board-for-children/> (last visited May 12, 2026).

253. OR. REV. STAT. ANN. § 418.312 (1993).

citizens review board puts the power in the hands of the community instead of another state agency.

Again, as noted above, a request for children to be placed into state care should be seen as a last resort after other options or preventative services have failed. Utah, for example, only allows a voluntary placement type of agreement “when all other alternatives are exhausted first.”<sup>254</sup> Certain states, such as Maryland, routinely offer preventive services, including in-home aide services, day care crisis counseling, emergency financial assistance, respite care, self-help, special education, housing assistance, mental health, substance abuse, and domestic violence counseling.<sup>255</sup> New York has also grown its own preventative services program, which includes mental health services, aftercare programs, special medical needs services, and more.<sup>256</sup> A new campaign rolled out by OCFS called “Stronger Families NY” seeks to increase awareness of the various preventive programs in New York that provide families with resources and support when parenting is “tough” and offers services such as the HEARS Family Line for resources.<sup>257</sup> The advertisements on social media make clear that there be no Child Protective Services (CPS) involvement and state that “[t]hese types of supportive services are funded by the New York State OCFS, are not mandated, and are not part of Child Protective Services (CPS).”<sup>258</sup> Again, this seems to be aligned with the idea of separating parental resources from CPS but the programming is in nascent stages, and so it is too early to assess.

Nationwide, the goal should be to provide services and options to families in need to reduce the need to place a child into any kind of care.<sup>259</sup> While preventive services are not available in every state, voluntary placements can be an alternative remedy as a last resort during a crisis.

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254. Interview with Anonymous, Utah Caseworker, Utah Div. of Child and Fam. Servs. (“DCFS”) (2001) (on file with the author).

255. MD. CODE REGS. 07.02.11.10(B) (1983).

256. *In Your Home*, N.Y. CITY ADMIN. CHILD. SERV., <https://www.nyc.gov/site/acs/for-families/prevention-services.page> [<https://perma.cc/K8LN-477D>] (last visited May 23, 2026).

257. *Stronger Families NY*, N.Y. OFF. CHILD. & FAM. SERV., <https://strongerfamilies.ny.gov/> [<https://perma.cc/S4LX-77HA>] (last visited May 23, 2026).

258. *Id.*

259. *Id.*

### C. Access to Attorneys for Parents and for Children

Ultimately, states should seek a truly authentic mechanism for voluntary placements that is not pretextual or coerced. We can borrow from the substantial body of literature and robust body of case law about how voluntariness and consent are defined in criminal procedure law and contracts law to apply to this mechanism in family law.<sup>260</sup> Trained lawyers have a working knowledge of evaluating voluntariness in other areas of law such as constitutional law, criminal procedure, or within basic contractual law involving duress.<sup>261</sup> If we are to endorse some method of true voluntary placement into foster care, we need to ensure proper legal representation. Attorneys should be present (or at least available) at every stage of the way for voluntary placements and application of safe haven laws. Alternatively, law school clinics, trained parent advocates, or community-based organizations could be on call. There is empirical support that parents with some type of legal assistance fare better with their children without compromising safety.<sup>262</sup> Title IV-E funds can also be used to pay for attorneys if funding is an issue.<sup>263</sup> States could mandate that an agency cannot initiate a voluntary placement case without open and clear access to counsel.

Access to attorneys cannot be overlooked as a due process safeguard in any kind of child welfare case. Rarely do parents have legal counsel in any preliminary stages of child protection investigation, and understand the true nuances and guardrails of assessing consent.<sup>264</sup> If appointed attorneys are not feasible in a particular state, states could provide attorneys “on call” and then require a targeted consent agreement with clear parameters to be reviewed ahead of time by lawyers. The presence of stand-by counsel or some iteration of an attorney, or the dedicated attorney hotline in Washington, can serve to lessen coercive tactics. Even child welfare workers often do not have access to their own counsel until they file a

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260. Gupta-Kagan, *supra* note 4, at 902–04.

261. See, e.g., Robert Mnookin, *Foster Care: In Whose Best Interest?*, 42 HARV. EDUC. REV. 599, 601 (1973) (explaining that many so-called voluntary foster care arrangements would not pass muster in the criminal law realm).

262. *Id.*

263. *Id.* at 903–04.

264. See Pearson, *supra* note 46, at 839–40 (“However, when the parents later seek reunification of the family, they are often confronted with the surprisingly serious and adverse consequences of their initial separation decision.”).

petition, which is problematic on a number of levels.<sup>265</sup> There have been measures taken to expand rights and access to counsel in civil proceedings, especially those related to child welfare.<sup>266</sup>

In states like Hawai'i and New York, the availability of social workers outside of the agency roster has been helpful, as the social workers are able to provide support in tandem with the lawyers.<sup>267</sup> Lawyers and their teams can serve as a check and balance on the assertions and promises by caseworkers and the agency.<sup>268</sup> When lawyers advise the parents, it helps balance the fact that the agency has a tremendous information advantage, as “[the caseworkers] are repeat players negotiating with parents who, in the aggregate, are of a low socioeconomic status and likely do not understand the nuances of child protection law but certainly understand that the agency is threatening their relationships with their children.”<sup>269</sup> States like Pennsylvania allow for the appointment of counsel for children in voluntary placements.<sup>270</sup> In New York, this is the case as well, and

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265. Gupta-Kagan, *supra* note 4, at 877 (“[A]ll parties involved are flying blind . . .”).

266. ABA Adopts NCCRC-Authored Resolution on Right to Counsel, NAT'L COAL. FOR A CIV. RIGHT TO COUNS. (Feb. 5, 2018), [https://civilrighttocounsel.org/major\\_developments/aba-adopts-nccrc-authored-resolution-on-right-to-counsel/](https://civilrighttocounsel.org/major_developments/aba-adopts-nccrc-authored-resolution-on-right-to-counsel/) [<https://perma.cc/EXE8-JMLL>] (“In 2006, the ABA adopted what is now a well-known resolution endorsing the right to counsel ‘where basic human needs are at stake, such as those involving shelter, sustenance, safety, health or child custody . . .’”); *see also* Laura K. Abel, *Keeping Families Together, Saving Money, And Other Motivations Behind New Civil Right To Counsel Laws*, 42 LOY. L.A. L. REV. 1087, 1088–89 (2009) (after the ABA’s House of Delegates “called for states to provide the right to counsel in civil proceedings [in 2006], states including ‘Alabama, Arkansas, Connecticut, Florida, Hawaii, Louisiana, Montana, New York, and Texas . . . enacted laws expanding the right to counsel in civil cases,’ particularly in cases involving parental rights and child custody). *But see* Turner v. Rogers, 564 U.S. 431, 446–48 (2011) (holding that the Due Process Clause does not require provision of counsel at a father’s civil contempt proceeding for failing to comply with a child support order); Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 33 (1981) (holding there is no federal constitutional right to a lawyer in termination of parental rights proceedings).

267. *See* Tonya L. Brito, et al., *What We Know and Need to Know About Civil Gideon*, 67 S.C. L. REV. 223, 227–29 (2016) (agencies in New York City like the Center for Family Representation and the Legal Aid Society’s Juvenile Rights Division have such options to pair lawyers with social workers).

268. Gupta-Kagan, *supra* note 4, at 913.

269. *Id.* at 902.

270. In Pennsylvania, there is the right to counsel for any proceedings under the juvenile act, including voluntary placement agreements and children. 42 PA. CONS. STAT. § 6337 (2012).

the Attorneys for the Child are attorneys who convey the express wishes of their clients and serve as their mouthpieces, as opposed to substituting their own judgment of best interests.<sup>271</sup> Counsel all around is a first step in curtailing agency worker discretion.

#### CONCLUSION: RECLAIMING THE RIGHT TO CHOOSE VOLUNTARY PLACEMENT

The goals of this Article are multi-fold. One goal is to shine a light on an issue which has long been overlooked in legal literature. A second goal is to give a broader perspective on how states might re-imagine a shift in the dialogue to address the limited benefits of a regulated and ethical voluntary foster care option. A third goal is to provide a feminist option that will ensure parental choice.

There is real value in having respite care and temporary options for parents overwhelmed by life and overextended by parenting. Although most parents may not require or desire out of home placement for their children, voluntary foster care offers this option as needed. As noted above, other countries and states have managed to offer options while also honoring the rights of parents and children.<sup>272</sup>

Ultimately, the United States has a foster system in its infrastructure, which, despite its many flaws,<sup>273</sup> already exists. Every parent who knows they cannot care for their children and does not have neighbors, friends, relatives, clergy, or other options needs to be able to resort to the government for help with their children, who might otherwise be harmed. Challenges in life occur unexpectedly, and it is rare for a parent to believe that foster care is the ultimate goal for their child. Yet, many mothers, for instance, live in the harsh reality of a world that expects them to be perfect caretakers while simultaneously taking away their reproductive choices to become

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271. See Melissa L. Breger, *Against the Dilution of a Child's Voice in Court*, 20 IND. INT'L & COMPAR. L. REV. 175, 185–86 (2010).

272. See, e.g., Ruru, *supra* note 226, at 78–80 (discussing how New Zealand law and Māori custom approach the shared rights and responsibilities of raising a child).

273. See, e.g., Melissa L. Breger, *Healing Sex-Trafficked Children: A Domestic Family Law Approach to an International Epidemic*, 118 W. VA. L. REV. 1131, 1135 (2016).

mothers.<sup>274</sup> We must give parents the grace and space to make the decision that it is best for themselves and their children.

For a bit of a metaphorical analogy, it does not follow that we should throw the baby out with the bathwater. There is a system already in place that provides help for those parents who are too overwhelmed or unable to keep their children safe at that juncture. This system is not perfect, but it exists as an option built into the infrastructure. Ideally, a narrow part of it can be recreated with guardrails, improvements, and legal representation. If we truly wish to support parents, particularly mothers in need, then we need to revitalize feminist approaches and afford them the right to freely choose the options that they need.

We must honor women's parental autonomy and create space for the myriad decisions women make regarding family structures and their child's upbringing. A feminist approach to parental autonomy supports enabling mothers to trust their own judgment about what is best for themselves and their children.<sup>275</sup> A mother should have the right to make decisions about herself and her children with autonomy, with intentionality, and without undue interference, particularly when these decisions challenge prevailing norms or institutional power.<sup>276</sup>

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274. See Breger, *supra* note 4, at 568 (“We need to be cognizant of how society expects perfection based upon our cognitive schemas of what it means to be a mother. We expect mothers to be the ultimate nurturers and caregivers without ever erring.”); see also *id.* at 584 (exploring how compounding implicit biases against women, Black mothers, young mothers, single mothers, and low-income mothers manifest across courtrooms, government agencies, and society at large). For further discussion on intersectionality, see Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

275. See generally Susan B. Boyd, *Autonomy for Mothers? Relational Theory and Parenting Apart*, 18 FEMINIST L. STUD. 137 (2010) (explaining how the choices women must make regarding family structure and their child's upbringing may require decisions that are labelled as problematic or hostile, rather than recognizing and supporting the difficult decisions required to raise their child).

276. See Anne Donchin, *Reworking Autonomy: Toward a Feminist Perspective*, 4 CAMBRIDGE Q. HEALTHCARE ETHICS 44, 50 (1995) (discussing how autonomy, through a feminist lens, preserves one's right to make “certain personal decisions,” and provides women a defense to resist institutional pressures, especially when there are male-dominated practices).

Unless and until there is reform or abolition of the current foster system, let us create options for parents within that space. We should re-imagine a placement option with true voluntariness and due process to protect children, parents, and families. A mother, or any parent, should always have the right to choose on every level and the right to choose what is safest for her children and family.