

From Removal to Incarceration: How the Modern Child Welfare System and Its Unintended Consequences Catalyzed the Foster Care-to-Prison Pipeline

Sydney L. Goetz

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/rrgc>

Recommended Citation

Sydney L. Goetz, *From Removal to Incarceration: How the Modern Child Welfare System and Its Unintended Consequences Catalyzed the Foster Care-to-Prison Pipeline*, 20 U. Md. L.J. Race Relig. Gender & Class 289 (2020).

Available at: <https://digitalcommons.law.umaryland.edu/rrgc/vol20/iss2/6>

This Notes & Comments is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in University of Maryland Law Journal of Race, Religion, Gender and Class by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

**FROM REMOVAL TO INCARCERATION: HOW THE
MODERN CHILD WELFARE SYSTEM AND ITS
UNINTENDED CONSEQUENCES CATALYZED THE FOSTER
CARE-TO-PRISON PIPELINE**

SYDNEY L. GOETZ*

I. INTRODUCTION

The Adoption and Safe Families Act (ASFA) was enacted in 1997 in response to bipartisan concern for the present and future state of the American child welfare system.¹ The number of children being placed in foster care² in the 1980s³ was jarring to President Bill Clinton and members of Congress. The resulting consternation inspired President Clinton and members of Congress to construct a system that would depress that ever-rising statistic, as well as expedite the process of reunification or permanent removal through adoption.⁴ While the goals of the ASFA were honorable, the reality sustained by this legislation is fraught with instability and has resulted in trauma experienced by families nationwide.⁵ The ASFA and its implementation in the states has

©2020 Sydney L. Goetz

* JD Candidate 2021, University of Maryland Francis King Carey School of Law. The author would like to thank Professor Leigh Goodmark for her guidance, support, and wisdom over the past two years. The author would also like to thank the editors of the *Journal of Race, Religion, Gender and Class* for their hard work, diligence, and commitment. Last but not least, the author would like to thank her mother, Amy Goetz, for her encouragement, listening ear, reminders to celebrate victories big and small, and for being an exceptional model for abiding bravery, unapologetic ambition, and radical empathy.

¹ KAREN SPAR & MATTHEW SHUMAN, CONG. RSCH. SERV., RL30759, CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT 1 (2004) [hereinafter CRS REPORT].

² Foster care is a temporary alternative living environment for children who are removed from their caregivers' homes because their caregivers have been deemed unable to "provide them with a safe and nurturing environment." Christopher A. Swann & Michelle Sheran Sylvester, *The Foster Care Crisis: What Caused Caseloads to Grow?*, 43 DEMOGRAPHY 309, 311 (2006). This removal and placement is the result of reports of neglect or abuse, "parental physical or mental incapacity, criminality, or homelessness, or the child's own personal or emotional problems." *Id.*

³ KARL ENSIGN, U.S. DEP'T. HEALTH & HUM. SERV. ASSISTANT SECRETARY PLAN. & EVALUATION, FOSTER CARE SUMMARY: 1991 1 (1991). By the end of 1986, there were 273,500 children in foster care in the United States. *Id.* This number increased by just under 40,000 children by the close of 1988. *Id.*

⁴ CRS REPORT, *supra* note 1. President Clinton instructed the Department of Health and Human Services to develop a set of recommendations for doubling the amount of adoptions of children in foster care by 2002. CRS REPORT, *supra* note 1.

⁵ *See infra* Part III.

catalyzed an epidemic of complex trauma among children in the child welfare system, leading to the materialization of a pipeline from forced removal and the foster care system to the criminal justice system.

This comment seeks to shed light on the existence of the foster care-to-prison pipeline, explain how the ASFA and its implementation in the states is responsible for its creation, and outline the trauma and consequences of the ASFA and the foster care-to-prison pipeline. Part II delves into the history of the ASFA, including its formation, goals, and implementation in the states as well as the most notable sections of the text: the reasonable efforts requirements and the termination of parental rights provision.⁶ Part III explains what the foster care-to-prison pipeline is,⁷ illustrates the intersection between race and class and the child welfare and juvenile justice systems,⁸ and explores the resulting complex trauma in children involved in the child welfare system and how future criminal activity is born out of that trauma.⁹

II. ADOPTION AND SAFE FAMILIES ACT OF 1997: HISTORY, GOALS, FORMATION, AND IMPLEMENTATION

The ASFA of 1997 was passed by the 105th United States Congress as a response to ongoing bipartisan concerns regarding child welfare and the foster care system.¹⁰ The ASFA is considered by many to be the most comprehensive modification to child welfare law in decades.¹¹ Since its passing, all 50 states have implemented versions of the ASFA.¹²

A. *The Conception of the ASFA and its Legislative History*

In April 1997, the first of four attempts to create the eventual ASFA was passed in the United States House of Representatives and was called the Adoption Promotion Act.¹³ In March 1997, the United

⁶ See *infra* Part II.

⁷ See *infra* Part III.A.

⁸ See *infra* Part III.B.

⁹ See *infra* Part III.C.

¹⁰ CRS REPORT, *supra* note 1, at 1–2.

¹¹ CRS REPORT, *supra* note 1.

¹² CRS REPORT, *supra* note 1. “By July 1999, all states had laws that mirrored the federal legislation or were more stringent than federal law[.]” U.S. GEN. ACCT. OFF., GAO/HEHS-00-1, FOSTER CARE: STATES’ EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT 2 (1999).

¹³ CRS REPORT, *supra* note 1, at 1–2. The APA would have amended the Social Security Act to provide that “if a court of competent jurisdiction has determined that the child has been

States Senate introduced to the floor the Safe Adoptions and Family Environments Act, which was soon after superseded by the Promotion of Adoption, Safety, and Support for Abused and Neglected Children Act.¹⁴ In November 1997, the Senate and House settled the differences between the versions of child welfare legislation existing in each chamber of Congress and the ASFA was passed.¹⁵ In the same month, President Clinton formally signed the bill into law.¹⁶

The ASFA had two main goals: “(1) to ensure that consideration of children’s safety is paramount in child welfare decisions, so that children are not returned to unsafe homes; and (2) to ensure that necessary legal procedures occur expeditiously, so that children who cannot return home may be placed for adoption or another permanent arrangement quickly.”¹⁷ In the years preceding the creation and implementation of the ASFA, it appeared to legislators that judges and magistrates were interpreting current child welfare laws as mandating family preservation above all other options, regardless of whether the child was in danger.¹⁸ Thus, a third motivation behind the Act was to “clarify federal policy to ensure safety for children who come into contact with the child welfare system.”¹⁹

B. The Reasonable Efforts and Termination of Parental Rights Provisions and Their Significance

In my view, the ASFA contains three noteworthy provisions: the two “reasonable efforts” requirements and the termination of parental rights provision.²⁰

subjected to aggravated circumstances . . . reasonable efforts . . . shall not be required to be made with respect to any parent of the child who has been involved in subjecting the child to such circumstances[.]” Adoption Promotion Act of 1997, S. 827, 105th Cong. § 2(a) (1997).

¹⁴ CRS REPORT, *supra* note 1, at 1–2.

¹⁵ CRS REPORT, *supra* note 1, at 2.

¹⁶ CRS REPORT, *supra* note 1, at 2.

¹⁷ CRS REPORT, *supra* note 1, at 2.

¹⁸ CRS REPORT, *supra* note 1, at 2; *see also* Dale Russakoff, *1997 Law Redefines Child-Protection Policies in Place Since 1980*, WASH. POST, Jan. 18, 1998, at A23 (stating “[d]uring the lengthy, contentious 1997 debate, lawmakers declared that local officials and judges had widely misinterpreted the 1980 law and were making unreasonable efforts to keep children with unfit parents. A consensus formed that children were wasting formative years in foster care; the median length of stay grew from 15 months in 1987 to more than two years in 1994.”).

¹⁹ CRS REPORT, *supra* note 1, at 2.

²⁰ CRS REPORT, *supra* note 1, at 3–4, 6.

i. *“Reasonable Efforts” to Preserve Families and to Promote Adoption*

Title I Section 101 of the ASFA serves to clarify the reasonable efforts requirements.²¹ The statute states that “in determining reasonable efforts to be made with respect to a child, . . . and in making such reasonable efforts, the child’s health and safety shall be the paramount concern” and, with exceptions, “reasonable efforts shall be made to preserve and reunify families.”²² Within the lengthy list of exceptions enumerated in the statute,²³ is the parent in question “subjecting the child to aggravated circumstances.”²⁴ The exact meaning of “aggravated circumstances” was left up to the states to determine when the ASFA was enacted.²⁵ However, regardless of how each individual state decided to define “aggravated circumstances,” the explicit definition would not “preclude judges from using their discretion to protect a child’s health and safety . . . regardless of whether the specific circumstances are cited in federal law.”²⁶

The reasonable efforts provision also mandates that states make reasonable efforts to promote adoption, which can be effectuated concurrently with reasonable efforts to preserve families.²⁷ This “concurrent planning” is meant to expedite the permanency planning process if reunification is ultimately unfeasible.²⁸ Reasonable efforts to promote adoption include placing the child based on their predetermined permanency plan, “which may include placement for adoption, with a guardian, or in another planned, permanent arrangement.”²⁹ The states are required to “obtain a judicial determination that such reasonable efforts were made within 12 months of the date the child entered foster care

²¹ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 11 Stat. 2115, 2116 (1997) [hereinafter ASFA].

²² *Id.* § 101(a)(A), (B).

²³ *Id.* § 101(a)(D) (having murdered another of their children, committed voluntary manslaughter against another of their children, “aided and abetted, attempted, conspired, or solicited to commit” a murder or voluntary manslaughter against another of their children, committed a felony assault against the child or another of their children that resulted in serious bodily injury, or parental rights to another of their children have been involuntarily terminated).

²⁴ *Id.* § 101(a)(D)(i).

²⁵ CRS REPORT, *supra* note 1, at 3.

²⁶ CRS REPORT, *supra* note 1, at 3. The Department of Health and Human Services issued final regulations in January of 2000 that required judges to explicitly document their findings of reasonable efforts and “findings that reasonable efforts to prevent removal or reunification are not required” within 60 days of the child’s removal). CRS REPORT, *supra* note 1, at 3.

²⁷ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101, 111 Stat. 2115, 2117 (1997).

²⁸ CRS REPORT, *supra* note 1, at 5.

²⁹ CRS REPORT, *supra* note 1, at 4.

and at least once every subsequent 12 months that the child remains in care,” as well as document the efforts made apropos of adoption.³⁰ This regulation was intended to minimize the amount of time children are in foster care after the court has found family reunification unlikely.³¹

ii. Termination of Parental Rights

The most drastic change that was ushered in by the implementation of the ASFA was the introduction of termination of parental rights (TPR) proceedings.³² TPR proceedings are initiated when a court has found that the parent has either committed one or more enumerated acts³³ or through what is known as the “15 of 22” rule.³⁴ The “15 of 22” rule mandates that, if a child has been in foster care for 15 out of the most recent 22 months, a state must initiate TPR proceedings.³⁵ However, there are three noncompulsory exceptions to both of these courses: if a child is under the care of a relative, the State has failed to provide necessary services to the parent(s), or there is documentation of a “compelling reason to determine that TPR would not be in the child’s best interest” in the child’s case file.³⁶ In any of those instances, a State may opt not to pursue a TPR proceeding.

III. THE UNINTENDED CONSEQUENCES OF ASFA

Over the two decades since the implementation of the ASFA, studies have delineated that the Act ultimately “exacerbated the difficulty of successfully reunifying families, both by providing little

³⁰ CRS REPORT, *supra* note 1, at 4–5.

³¹ CRS REPORT, *supra* note 1, at 5.

³² See CRS REPORT, *supra* note 1, at 6 (noting that “[p]rior to 1997, there was no comparable provision in federal law”).

³³ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a)(E), 111 Stat. 2115, 2117 (1997). “[I]f a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child’s parents.” *Id.*

³⁴ CRS REPORT, *supra* note 1, at 6.

³⁵ ASFA § 101(a)(E).

³⁶ ASFA § 103(a)(E)(i)–(iii). The 2000 HHS regulations provide four examples of “compelling reasons” under the statute: adoption is not the appropriate permanency goal for the child; there are no grounds for TPR; the child is an unaccompanied refugee minor; there are international legal obligations or compelling foreign policy reasons that preclude TPR. 45 C.F.R. § 1356.21 (2000).

guidance and little time to realistically address family problems” and “signal[ing] to states that whatever minimal efforts they chose to make to reunify families were fine with Congress, so long as they ended on time, either through family reunification or, more likely, family severance.”³⁷ As a consequence, although grossly underdiscussed and overlooked, children who experienced foster care as a result of modern child welfare policies are “more likely than any others to experience incarceration and that incarcerated adults are disproportionately likely to have been in foster care, suggesting a foster care-to-prison pipeline.”³⁸

Additionally, of the almost 500,000 children in the American foster care system, “children of color represent the greatest percentages of children in foster care when compared to their respective numbers in the general population.”³⁹ This phenomenon is known as racial disproportionality and it is pervasive within the child welfare system.⁴⁰ Socio-economic status of the families is also a major indicator of involvement in the modern child welfare system.⁴¹ In the post-ASFA era, research has further revealed that “family income, not severity of maltreatment was the most predictive factor in child placement in foster care.”⁴²

A. *The Foster Care-to-Prison Pipeline*

i. *What is the Foster Care-to-Prison Pipeline?*

In 2011, the Midwest Evaluation of the Adult Functioning of Former Foster Youth, also known as the “Midwest Study,” observed a large group of children aging out of the foster care system in Illinois, Iowa, and Wisconsin.⁴³ At the completion of the study, it was ascertained that more than half of those children were incarcerated by the

³⁷ Patricia E. Allard & Lynn D. Lu, *Rebuilding Families, Reclaiming Lives: State Obligations to Children in Foster Care and Their Incarcerated Parents*, BRENNAN CENTER FOR JUSTICE (2006), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_37203.pdf.

³⁸ Youngmin Yi & Christopher Wildeman, *Can Foster Care Interventions Diminish Justice System Inequality?*, 28 THE FUTURE OF CHILDREN 37, 39 (2018).

³⁹ Tanya A. Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 216, 223 (2013). This is especially true for Black and Native American children. *Id.* at 223–24.

⁴⁰ *Id.* at 223.

⁴¹ *Id.* at 231.

⁴² Andrea Charlow, *Race, Poverty, and Neglect*, 28 WM. MITCHELL L. REV. 763, 784 (2001).

⁴³ Mark E. Courtney et al., *Midwest Evaluation of the Adult Functioning of Former Foster Youth: Outcomes at Age 26*, CHAPIN HALL CTR. FOR CHILD. U. CHI 3–4 (2011).

time they were in their mid-twenties.⁴⁴ These children were also “more likely to offend at an earlier age, spend more time incarcerated, and commit offenses at a frequency that is far greater than offenders who had not experienced foster care.”⁴⁵

During sentencing, a child who has experienced foster care is far more likely to be convicted of an offense, required to serve more time incarcerated, and have a longer list of probation conditions, which makes them “more likely to be convicted of administrative offenses” after their sentence has been served.⁴⁶ Additionally, researchers discovered that 27 percent of “adolescents leaving foster care were associated with a chronic offending trajectory[,]” which is a significantly higher percentage compared to the general population of adolescents.⁴⁷ Specifically, children who experience foster care are 244 percent more likely to “demonstrat[e] a pattern of continued chronic offending between adolescence and adulthood.”⁴⁸ This harm is exacerbated by the greater number of placements a child has had in the foster care system.⁴⁹

ii. *Factors that Have Contributed to the Creation and Continuity of the Foster Care-to-Prison Pipeline*

A multitude of factors have contributed to the creation and continuity of the foster care-to-prison pipeline. One theory, known as the Labeling Theory,⁵⁰ can offer some explanation. This theory is based on the idea that people start to associate themselves with and employ behaviors of whatever label society has bestowed upon them because of their circumstances.⁵¹ In the context of the foster care-to-prison pipeline, children in foster care are traditionally labeled by society as “broken, deviant, and high risk.”⁵² Applying the Labeling Theory, these children

⁴⁴ Yi & Wildeman, *supra* note 38, at 39. Studies that have used data from other regions have also found “dramatically high rates of criminal justice contact among current or former foster youth.” *Id.*

⁴⁵ Jennifer Yang et al., *Foster Care Beyond Placement: Offending Outcomes in Emerging Adulthood*, 53 J. CRIM. JUST. 46, 52 (2017).

⁴⁶ *Id.* Foster care youth are more likely to receive “more punitive sentences, which are typically less effective in reducing the likelihood of continued offending.” *Id.*

⁴⁷ *Id.* at 47.

⁴⁸ *Id.* at 52.

⁴⁹ Kayla McLaughlin et al., *A Fractured System: Is it Time for New Programming Within the Child Protection Services?*, 4 J. ADVANCES SOC. SCI. & HUMANITIES. 487, 488 (2018). One study found ninety percent of children who have had five or more placements during their time in foster care will commit a criminal offense. *Id.*

⁵⁰ *Id.* at 491–92.

⁵¹ *Id.* at 491.

⁵² *Id.*

eventually begin to exhibit the behaviors that correlate with this societal label, including criminal behaviors.⁵³

Another explanation emanates from the intersection of juvenile criminality and the achievement gap.⁵⁴ Children with foster care involvement tend to “score significantly lower on standardized tests, are more likely to be enrolled in special education classrooms, to change schools, and to repeat at least one grade.”⁵⁵ A correlation exists between a deprivation of education and delinquency, revealing an association of adolescent criminality “with low levels of academic achievement, lack of participation in school activities, low aspirations for continued education, unpleasant relationships with teachers, rejection of administrative authority, disregard for school policies and rules, and dropping out.”⁵⁶ Further, children that are removed from their families and placed in foster care will ultimately “experience greater residential mobility that may also involve changing schools and losing connection to peers[,]” which increases the likelihood of future criminal offending.⁵⁷

A third concept explaining the contributing factors of the foster care-to-prison pipeline is known as “child welfare bias” in juvenile courts.⁵⁸ Child welfare bias is the phenomenon that crossover youth are more likely to experience bad outcomes in their delinquency cases.⁵⁹ Crossover youth are more likely to be detained than other children

⁵³ *Id.*

⁵⁴ Joseph P. Ryan et al., *Developmental Trajectories of Offending for Male Adolescents Leaving Foster Care*, 31 SOC. WORK RSCH. 83, 84 (2007).

⁵⁵ *Id.*

⁵⁶ *Id.* This correlation also extends to recidivism of juvenile offenders. One study “reported that deficits in basic [academic] skills and a history of receiving special education services were among the factors that discriminated recidivists from non-recidivists in a midwestern male juvenile correctional facility.” Antonis Katsiyannis et al., *Juvenile Delinquency and Recidivism: The Impact of Academic Achievement*, 24 READING & WRITING Q. 177, 188 (2008).

⁵⁷ Yang, *supra* note 45, at 47. The residential mobility of foster children can be credited to the multiple placement changes they experience. Children are moved around from placement to placement for a variety of reasons “ranging from a change in visitation orders, a child becoming too old for a current placement, the opportunity to be placed with a sibling, or a foster parent ceasing to be a foster care provider.” Michelle Lisa Lustig, *A Silent and Significant Subgroup: Closing the Achievement Gap for Students in Foster Care* (2008) (Ph.D. dissertation, University of California, San Diego). The result of this much mobility is these children losing between 4-6 months of academic training, losing friendships, having to be reintroduced into a new community, and a “constant struggle to understand new expectations.” *Id.*

⁵⁸ Joseph P. Ryan et al., *Maltreatment and Delinquency: Investigating Child Welfare Bias in Juvenile Justice Processing*, 29 CHILD. & YOUTH SERVS. REV. 1035, 1046 (2007).

⁵⁹ *Id.* at 1036. The phrase crossover youth is “an umbrella term used to describe youth who are involved with both the child welfare and juvenile justice systems either concurrently or non-concurrently.” Rebecca Hirsch et al., *Educational Risk, Recidivism, and Service Access Among Youth Involved in Both the Child Welfare and Juvenile Justice Systems*, 85 CHILD. & YOUTH SERVS. REV. 72 (2018).

deemed delinquent, even with no prior arrests.⁶⁰ Furthermore, crossover youth tend to be younger when entering the juvenile justice system and “[y]oung offenders are approximately three times more likely to become serious violent offenders.”⁶¹ Existing evidence suggests that this risk could be ameliorated to an extent through the use of probation rather than detainment in juvenile justice cases.⁶² However, crossover youth are less likely to receive probation, even as first-time offenders, and are more likely to receive a correctional placement instead.⁶³ This leaves crossover youth vulnerable to environments that “reinforce[e] antisocial attitudes, values, and beliefs[,]” which increases the risk of recidivism and, eventually, entering the adult correctional system.⁶⁴

*B. Exploring the Intersection Between Race and Class in the
Child Welfare and Juvenile Justice Systems*

At the core of the ASFA and the institution of child welfare is a system “designed primarily to monitor, regulate, and punish poor [B]lack families.”⁶⁵ Cumulated statistical data shows that the modern child welfare system has a disproportionate negative effect on Black and indigent families.⁶⁶ The overlap between the two groups—Black and indigent families—is so pronounced that it is impossible to tell where one intersection begins and the other ends regarding the oppression caused by the ASFA and its implementation.⁶⁷ This noteworthy overlap can be explained in part by the overrepresentation of Black families living in poverty.⁶⁸ Thus, because of their interconnected nature, race and poverty cannot be effectively discussed independently from one another as they relate to child welfare.⁶⁹

⁶⁰ Ryan, *supra* note 58, at 1038.

⁶¹ Ryan, *supra* note 58, at 1038.

⁶² Ryan, *supra* note 58, at 1046–47.

⁶³ Ryan, *supra* note 58, at 1046.

⁶⁴ Ryan, *supra* note 58, at 1047.

⁶⁵ Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172.

⁶⁶ See generally *Id.* at 172 (discussing the racial disparity in the child welfare system and the consequences of that disparity); see also Charlow, *supra* note 42, at 763 (explaining the effects of neglect, poverty, and removal).

⁶⁷ Charlow, *supra* note 42, at 764–65.

⁶⁸ N.S. Chiteji & Darrick Hamilton, *Family Connections and the Black-White Wealth Gap Among Middle-Class Families*, 30 REV. BLACK POL. ECON. 9, 10–11 (2002) (explaining that the “[e]xamination of data on the amount of wealth held by American families consistently reveals that wealth is unevenly distributed by race in the United States. Evidence indicating that black families possess less wealth than white families—as little as one-sixth the wealth of whites—has been found using such wide-ranging data sets”).

⁶⁹ Brett Drake et al., *Race and Child Maltreatment Reporting: Are Blacks Overrepresented?*, 31 CHILD. YOUTH SERVS. REV. 309, 310 (2009) (stating that “[s]tudies have found a high

i. Disproportionality in the Child Welfare System

In the American foster care system, “children of color represent the greatest percentage . . . when compared with their respective numbers in the general population.”⁷⁰ This is known as racial disproportionality.⁷¹ In 2013, Black children represented twenty-six percent of children in foster care while only making up approximately fourteen percent of the general population of children.⁷² Further, the number of Black families that are investigated for child abuse and neglect is far higher than that of white families.⁷³ Black children are also far more commonly removed from their homes and placed in foster care when their families are investigated.⁷⁴ This rings true even when a Black family “ha[s] the same problems and characteristics as” a white family.⁷⁵ White families are twice as likely to be offered in-home services rather than removal after the investigation period than similarly situated Black families.⁷⁶ Once Black children are in the foster care system, they remain “longer, are moved more often, receive fewer services, and are less likely to be either returned home or adopted” than their white counterparts.⁷⁷

Dating back to English law, the child welfare and foster care system has primarily removed children from indigent families because “poverty was often believed to coincide with faulty parenthood and unworthy character.”⁷⁸ Under the English system, the government was permitted to remove children from their poor families’ care whenever they deemed necessary; however, only in “extreme cases” were children of wealthy families removed from the home.⁷⁹ Similarly, in the post-ASFA

concordance between individual and homogeneous neighborhood indicators of poverty, meaning that most low-income families also reside in similarly low-income areas. Thus Black families may be more likely to experience other ecological risk factors that are associated with both low-income neighborhoods and maltreatment”) (citations omitted).

⁷⁰ Cooper, *supra* note 39, at 223.

⁷¹ Cooper, *supra* note 39, at 223.

⁷² Cooper, *supra* note 39, at 224.

⁷³ John D. Fluke et al., *Disproportionate Representation of Race and Ethnicity in Child Maltreatment: Investigation and Victimization*, 25 CHILD. YOUTH SERVS. REV. 359 (2003) (explaining the results of their study that showed, in five states, that Black children were overrepresented and white children were consistently underrepresented at the investigation stage of the child welfare system).

⁷⁴ Roberts, *supra* note 65, at 172 (noting that “[fifty-six] percent of black children in the child welfare system have been placed in foster care, twice the percentage for white children”).

⁷⁵ Roberts, *supra* note 65, at 173.

⁷⁶ Roberts, *supra* note 65, at 173.

⁷⁷ Roberts, *supra* note 65, at 173.

⁷⁸ Cooper, *supra* note 39, at 227 (referencing the research and critical analysis of Leroy Pelton, who was a professor from the School of Social Work at the University of Nevada, Las Vegas).

⁷⁹ Charlow, *supra* note 42, at 763.

era, “family income, not severity of maltreatment, was the most predictive factor of child placement in foster care.”⁸⁰ Thus, it does not appear to be a coincidence that the majority of maltreatment cases concerning poor families involve neglect rather than abuse and that children from indigent families make up the majority of the foster care system.⁸¹

ii. *Racism and Crossover Youth*

At the time of their first arrest, crossover youth tend to be younger than non-crossover youth, and these younger offenders tend to be Black youth in disproportionate numbers compared to the general population of juvenile offenders.⁸² This can be attributed largely to racial discrimination as well as child welfare bias by the courts and law enforcement.⁸³ In particular, personal experience of racial discrimination is a potent factor in parsing the disproportionality issue in juvenile delinquency.⁸⁴

Researchers have found that “perceived and experienced discrimination by African American youth was correlated with numerous negative consequences including . . . anger, aggression, and violence.”⁸⁵ The emotional consequences of these adverse experiences have been proven to be “significantly correlated” with delinquent behavior.⁸⁶ In a study conducted by Hye-Kyung Kang and David Burton, one-third of Black incarcerated youth who participated were subjected to some form of race-based violence in their lives.⁸⁷ As briefly mentioned, racial

⁸⁰ Charlow, *supra* note 42, at 784.

⁸¹ Sandra Bass et al., *Children, Families, and Foster Care: Analysis and Recommendations*, 14 *FUTURE OF CHILD*. 5, 14 (2011) (stating that “[a]lthough most poor families do not abuse their children, poor children are more likely to enter the foster care system, in part because poverty is associated with a number of life challenges, such as economic instability and high-stress living environments, which increases the likelihood of involvement with the child welfare system.”).

⁸² Ryan, *supra* note 58, at 1045.

⁸³ Hye-Kyung Kang & David L. Burton, *Effects of Racial Discrimination, Childhood Trauma, and Trauma Symptoms on Juvenile Delinquency in African American Incarcerated Youth*, 23 *J. AGGRESSION, MALTREATMENT & TRAUMA* 1109, 1111 (2014) (citing that “police tend to patrol poor neighborhoods, where many minority youth reside, more often”).

⁸⁴ *Id.* (discussing previous research that has shown “race-based stressful incidents produce psychological and emotional injury similar to other events that could result in posttraumatic stress disorder (PTSD), such as rape or combat[,]” which contributes to delinquent behaviors).

⁸⁵ *Id.* at 1112.

⁸⁶ *Id.* (explaining that “not only were the effects of perceived personal discrimination a direct contributor to general and violent delinquency, . . . but they also exceeded the effects of neighborhood conditions, which reflect structural factors,” such as socioeconomic status).

⁸⁷ *Id.* at 1118 (offering that these children experienced race-based violence, such as “home or property destruction, physical attacks and threat, and murder of family members, as well as anticipation that they might be killed due to their race”).

discrimination is very much present in the courts and within law enforcement.⁸⁸ Offenses committed by Black youth are often portrayed to the courts as “emerging from negative attitudinal and personality traits” while those same offenses committed by white youth are portrayed as the “result of environmental factors.”⁸⁹ Thus, Black youthful offenders are more often viewed as dangerous—even when they are not—and are the recipients of increasingly harsh sentences and punishments.⁹⁰

C. The Interconnectedness of Complex Trauma as a Consequence of the Modern Child Welfare System and Criminal Activity of Crossover Youth

In the world of child welfare trauma research, the focus is overwhelmingly on the trauma a child endures before and after foster care rather than during their time in the foster care system.⁹¹ However, in order to fully understand the long-term effects that involvement in the child welfare and foster care system precipitates, it is critical to discern the trauma distinctly associated with a child being “forced to live apart from their parents . . . [and] form new relationships with unfamiliar people” and the consequences of said trauma.⁹² The inducement of complex trauma and the ways it interferes with the regulation of the body’s stress-response system is integral in understanding the irreversible harm done to children removed from their families.⁹³

⁸⁸ See *id.* at 1111–12; see also Ryan *supra* notes 58–64 and accompanying text.

⁸⁹ Ryan, *supra* note 58, at 1046; see also JOAN MCCORD ET AL., JUVENILE CRIME, JUVENILE JUSTICE. PANEL ON JUVENILE CRIME: PREVENTION, TREATMENT, AND CONTROL 251 (Nat’l. Acad. Press 2001) (explaining findings from a study of juvenile courts showing that “minorities are more likely than whites to be seen as disrespectful of authority and, in particular, disrespectful of court officials”).

⁹⁰ Ryan, *supra* note 58, at 1046. See generally, DEVON JOHNSON ET AL., DEADLY INJUSTICE: TRAYVON MARTIN, RACE, AND THE CRIMINAL JUSTICE SYSTEM (2015) (discusses racial profiling in the criminal justice system and how young Black men are often viewed as dangerous and threatening even when they are taking part in innocent activities).

⁹¹ Vivek Sankaran et al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1163, 1166 (2019).

⁹² *Id.*

⁹³ *Id.* at 1167; see also Matthew Kliethermes et al., *Complex Trauma*, 23 CHILD & ADOLESCENT PSYCHIATRIC CLINICS 339, 341 (2014) (referencing the fact that “prevalence of complex trauma exposure is even higher among at-risk populations such as youth in foster care and those who are justice-involved”).

i. *Complex Trauma, the Body's Neurobiological Response to Stress, and How Complex Trauma Intervenes in that Process*

Complex trauma is a gradually developing concept in the world of traumatic stress research that psychiatrists and researchers have been attempting to elucidate as early as the 1990s.⁹⁴ Complex trauma is a term with a dual definition: the cause and the effect.⁹⁵ The first part of the definition, or the cause, defines complex trauma as “a traumatic event that is repetitive and occurs over an extended period of time, undermines primary caregiving relationships, and occurs at sensitive times with regard to brain development.”⁹⁶ The second part of what defines complex trauma, or the effect, is “the resulting dysregulation that occurs across a range of areas including emotional, behavioral, interpersonal, psychological, and cognitive functioning.”⁹⁷

The body responds to stressful stimuli through a self-regulation process within the hypothalamic-pituitary-adrenal (HPA) axis, the central stress-response system of the human body.⁹⁸ The HPA axis is made up of the hypothalamus, pituitary gland, and adrenal glands.⁹⁹ In moments of stress, the hypothalamus dispenses corticotropin-releasing factor¹⁰⁰ (CRF) from the paraventricular nucleus¹⁰¹ (PVN) into the blood vessels traveling to the pituitary gland.¹⁰² The release of CRF prompts

⁹⁴ Kliethermes, *supra* note 93, at 339.

⁹⁵ See Kliethermes, *supra* note 93, at 340 (stating that there are two entities complex trauma is used to reference: the traumatic event and the “unique pattern of symptoms associated with this type of experience”); see also Johanna K.P. Greeson et al., *Complex Trauma and Mental Health in Children and Adolescents Placed in Foster Care: Findings From the National Child Traumatic Stress Network*, 90 CHILD WELFARE, 2011, at 93 (describing complex trauma as a term that encompasses both “a constellation of causal risk factors involving repeated interpersonal trauma by caregivers early in life[.]” and the dysregulation that follows said trauma).

⁹⁶ Kliethermes, *supra* note 93, at 340 (explaining that complex trauma events can include “physical abuse, sexual abuse, emotional abuse, neglect, witnessing domestic violence, exposure to community violence, and medical trauma”).

⁹⁷ Greeson, *supra* note 95, at 93.

⁹⁸ Mary C. Stephens & Gary Wand, *Stress and the HPA Axis: Role of Glucocorticoids in Alcohol Dependence*, 34 ALCOHOL RSCH.: CURRENT REV. 468, 469 (2012).

⁹⁹ *Id.* at 469–70.

¹⁰⁰ Michael J. Owens & Charles B. Nemeroff, *Physiology and Pharmacology of Corticotropin-releasing Factor*, 43 PHARMACOLOGICAL REV. 425, 426 (1991) (explaining that “CRF is the predominant chemical messenger by which the CNS controls the activity of the pituitary-adrenal axis and is, therefore, ultimately responsible for orchestrating the endocrine response to stress”).

¹⁰¹ Eduardo E. Benarroch, *Paraventricular Nucleus, Stress Response, & Cardiovascular Disease*, 15 CLINICAL AUTONOMIC RSCH. 254 (2005) (stating that the PVC of the hypothalamus is “a complex effector structure that is critical for initiation of endocrine and autonomic responses required for maintenance of homeostasis and adaptation to challenges from the internal or external stressors”).

¹⁰² Stephens & Wand, *supra* note 98, at 469.

the anterior pituitary gland to create adrenocorticotrophic hormone (ACTH) and release it into general circulation.¹⁰³ Next, the ACTH stimulates the adrenal glands to “induce[] glucocorticoid synthesis and release from the adrenal glands[.]”¹⁰⁴ Every morning, humans release glucocorticoids in order to maintain “normal homeostasis[.]”¹⁰⁵ In stressful situations, human bodies release additional pulses of glucocorticoids in order to “increase vascular tone and alertness, mobilize energy (prepare you to run) and prime the immune system (prepare you for injury).”¹⁰⁶ This is commonly known as the “fight or flight” response.¹⁰⁷

The optimal functioning of the HPA axis hinges on one’s own ability to self-regulate their stress response.¹⁰⁸ Ideally, as infants, the “parent provides scaffolding as the child gradually develops the capacity to regulate behavior and physiology.”¹⁰⁹ Over time, the child will grow to be able to self-soothe, successfully taking over that function autonomously.¹¹⁰ However, for foster children, developing this skill becomes more difficult as a result of their removal from their caretaker(s).¹¹¹ Young children in foster care, especially those who entered during infancy, exhibit atypical regulation of glucocorticoid production as a result of the separation from their parents or caretakers.¹¹² Furthermore, “trauma exposure can result in structural and functional changes in brain development” and the areas most vulnerable to such exposure coincide with the glands that make up the stress-response system.¹¹³

¹⁰³ Yolanda P. Graham et al., *The Effects of Neonatal Stress on Brain Development: Implications for Psychopathology*, 11 DEV. & PSYCHOPATHOLOGY 545, 546 (1999).

¹⁰⁴ Stephens & Wand, *supra* note 98, at 469.

¹⁰⁵ Giorgio Caratti et al., *Glucocorticoids: Restoring Balance During Stress*, ENDOCRINOLOGIST, no. 130 (Winter 2018), <https://www.endocrinology.org/endocrinologist/130-winter18/features/glucocorticoids-restoring-balance-during-stress/>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Mary Dozier et al., *Foster Children’s Diurnal Production of Cortisol: An Exploratory Study*, 11 CHILD MALTREATMENT, no. 2, 2006, at 194.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* (stating that “[i]n the case of young foster children, this process is likely perturbed and disrupted”).

¹¹² *Id.* (explaining that, based on their study, “the instability of foster children’s caregiving situation was of particular importance to the development of atypical patterns of cortisol production”).

¹¹³ Kliethermes, *supra* note 93, at 342.

ii. *The Far-Reaching Consequences of Complex Trauma and Dysregulation of the Hypothalamic-Pituitary-Adrenal Axis*

The impact of complex trauma and dysregulation of the HPA axis cannot be overstated.¹¹⁴ When children are removed from their homes and families, the inevitable complex trauma experienced catalyzes the construction of an “alternate developmental pathway” in the brain regarding stress response, “shift[ing] from a focus on learning to a focus on survival.”¹¹⁵ The longer a child is exposed to such trauma and the earlier in life it starts, the more severe the alternate developmental shift.¹¹⁶

The nature of complex trauma in the specific context of foster care children, i.e., removal from parent(s), impedes development of “secure attachments.”¹¹⁷ The development of secure attachments is responsible for the promotion of “development of brain structures critical for the regulation of stress[.]”¹¹⁸ Therefore, the impediment to the development of secure attachments, created by removal and placement into foster care, prevents the maturation of the HPA axis.¹¹⁹ Dysregulation of

¹¹⁴ See Kliethermes, *supra* note 93, at 340 (discussing the various developmental, physical, and neurological consequences of complex trauma).

¹¹⁵ Kliethermes, *supra* note 93, at 342 (explaining that a concentration on developing and accessing the parts of the brain responsible for “rapid, autonomic responses to avoid harm” dominates in place of a focus on those that control “complex learning and long-term adaptation”).

¹¹⁶ Kliethermes, *supra* note 93, at 342; see also Maggi Price et al., *Psychological Assessment & Treatment of Emerging Adults Exposed to Complex Trauma*, 4 EVIDENCE-BASED PRAC. CHILD & ADOLESCENT MENTAL HEALTH 273, 277 (2019) (stating that “[e]arly exposure to complex trauma can be conceptualized as the initiating event in a cumulative developmental process where development builds on itself in ways that are likely to lead to developmental psychopathology if the pathway to pathology continues to be supported, particularly by continued exposure to psychological trauma”) (emphasis omitted).

¹¹⁷ Kliethermes, *supra* note 93, at 343; see also Julian D. Ford et al., *Complex Trauma and Aggression in Secure Juvenile Justice Settings*, 39 CRIM. JUST. AND BEHAV., 694, 698 (2012) (explaining that “[d]isruption of primary attachment relationships—a key component in complex trauma—often occurs when children are repeatedly placed outside the home by child protective services”).

¹¹⁸ Kliethermes, *supra* note 93, at 343; see also Allan N. Schore, *Effects of Secure Attachment Relationship on Right Brain Development, Affect Regulation, and Infant Mental Health*, 22 INFANT MENTAL HEALTH J. 7, 14 (2001) (contending, in regards to forming secure attachments, that “[a]s a result of being exposed to the primary caregiver’s regulatory capacities, the infant’s expanding adaptive ability to evaluate on a moment-to-moment basis stressful changes in the external environment, especially the social environment, allows him or her to begin to form coherent responses to cope with stressors”).

¹¹⁹ See Schore, *supra* note 118, at 14 (explaining that “because the maturation of the brain systems that mediate this coping capacity occurs in human infancy, the development of the ability to adaptively cope with stress is directly and significantly influenced by the infant’s early interaction with the primary caregiver”).

the HPA axis has been shown to cause “deficits in relationships and attachment, emotional and behavior[al] dysregulation, cognitive/attention deficits, [] biological changes that may affect physical health[,] . . . dissociation, changes to self-perception, and overall shifts in beliefs about the world.”¹²⁰

All of these negative effects of complex trauma endured by children experiencing foster care lead to an increased chance of involvement in the criminal justice system.¹²¹ Approximately ninety percent of juvenile offenders report experiencing at least one childhood trauma and thirty percent “actually meet the criteria for post-traumatic stress disorder due to trauma experienced during childhood.”¹²² Additionally, about sixty-two percent of children in juvenile detention have “experienced trauma in the first five years of life.”¹²³ As a result of the dysregulation of these children’s stress response systems, these children “experience difficulties recognizing, expressing, and understanding their emotions[]” and are more prone to “extreme, and potentially violent, reactions to even trivial stimuli.”¹²⁴

This apparent connection between experienced complex trauma and delinquent behavior is reconciled by “PTSD symptomology.”¹²⁵ For example, children with PTSD may manifest avoidance symptoms, such as numbness, “as impaired empathy toward others, a desire for instant gratification, impulsive and risky behavior, and a lack of concern for consequences, all of which map onto the conduct disorder diagnostic criterion of ‘a persistent disregard of rules or rights of others.’”¹²⁶ One study found that “[i]ncarcerated youth with more serious delinquent histories displayed higher levels of PTSD symptomology[.]”¹²⁷ Meaning,

¹²⁰ Kliethermes, *supra* note 93, at 340.

¹²¹ See Kliethermes, *supra* note 93, at 348 (stating that “[t]he correlation between trauma exposure and involvement in the juvenile justice system has been well documented”); see also Bryanna Hahn Fox et al., *Trauma Changes Everything: Examining the Relationship Between Adverse Childhood Experiences and Serious, Violent and Chronic Juvenile Offenders*, 46 CHILD ABUSE & NEGLECT 163, 164 (2015) (referencing the results of a study finding that trauma “increased the odds of juvenile violent behavior by more than 200 [percent]”).

¹²² Fox, *supra* note 121, at 164.

¹²³ Kliethermes, *supra* note 93 at 348–49.

¹²⁴ Fox, *supra* note 121, at 164.

¹²⁵ Patricia K. Kerig & Stephen P. Becker, *From Internalizing to Externalizing: Theoretical Models of the Processes Linking PTSD to Juvenile Delinquency*, in POSTTRAUMATIC STRESS DISORDER (PTSD): CAUSES, SYMPTOMS AND TREATMENT 33, 36 (2010).

¹²⁶ *Id.*

¹²⁷ David W. Foy et al., *Exposure to Violence, Post-Traumatic Symptomology, & Criminal Behaviors*, in POST-TRAUMATIC SYNDROMES CHILDHOOD & ADOLESCENCE: A HANDBOOK RSCH. & PRACTICE 199, 201 (Vittoria Ardino ed., 2011).

the more serious the crime committed, the higher the levels of PTSD symptomology and the lengthier a child's complex trauma history.¹²⁸

IV. CONCLUSION

The ASFA of 1997 was implemented by Congress “(1) to ensure that consideration of children’s safety is paramount in child welfare decisions, so that children are not returned to unsafe homes; and (2) to ensure that necessary legal procedures occur expeditiously, so that children who cannot return home may be placed for adoption or another permanent arrangement quickly.”¹²⁹ However, rather than accomplishing its intended goals, the fallout from the ASFA’s implementation has effectuated an epidemic in the criminal justice system: the foster care-to-prison pipeline.¹³⁰

The victims of the foster care-to-prison pipeline are predominantly Black children and those from indigent families who enter the child welfare system at a rate exceptionally higher than children in other demographic groups.¹³¹ Children in foster care experience complex trauma when removed from their homes and families, which causes dysregulation of the HPA axis and the construction of an atypical developmental pathway in the brain regarding stress response.¹³² This, in turn, creates an increased chance of involvement in the criminal justice system.¹³³ These neurobiological consequences partnered with Black and indigent children’s predisposition to juvenile justice as a result of systemic racism and classism are the building blocks with which the foster care-to-prison pipeline was constructed, and the blueprint for how it is perpetuated over two decades later.¹³⁴

¹²⁸ *Id.*

¹²⁹ CRS REPORT, *supra* note 1.

¹³⁰ *See* Part III.A.

¹³¹ *See* Part III.B.

¹³² *See* Part III.C.1.

¹³³ *See* Part III.C.2.

¹³⁴ *See* Part III.