

## CRAFTING COMPLAINTS AND SETTLEMENTS IN CHILD WELFARE LITIGATION

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*Despite widespread criticism in legal scholarship bemoaning the inadequacies of institutional reform litigation, class-action lawsuits from public interest legal organizations have been the major driver of comprehensive child welfare reform over the past forty years. These legal claims are chaotic, wide-ranging and of questionable relevance to the facts, but the tendency of jurisdictions to settle means the complaints are the only narratives that get promoted in the media. Media portrayals of these narratives and sympathetic plaintiffs leads the public to understand government responsibility to youth in the foster care system as expansive, and advocates can use this broad understanding to address harms that are even less clearly related to a potential constitutional, statutory, or tort-based claim. The paper argues that settlements are a normative good for children in foster care, and that effective media advocacy will increase equity and efficiency for different groups of foster children in this process of change creation. Lawyers can make better use of media to force institutional defendants to settle even when the legal claims are weak, and careful use of media will allow for the addition of delay in permanency to the list of harms about which class-action foster care reform lawsuits file suit.*

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## INTRODUCTION

Legal scholarship has railed against the consent decree in institutional reform litigation. This paper argues instead that consent decrees are not only an important bureaucratic tool, they are a normatively good mechanism for creating change in complex child welfare systems with weak law. While a weak lawsuit would not ordinarily create significant systems change, lawyers in child welfare institutional reform litigation have been able to use the media to convince defendants to settle despite a lack of clear legal claims. Child welfare reform litigation has been based on limited legal authority coupled with dramatic facts, turned into a drumbeat through large-scale class-action lawsuits. These class action suits concluding in complex settlements have become the preferred method for achieving reforms in the child welfare system, but legal academics have thus far paid little attention to the structure of these complaints or the rights being asserted. Examining the history of these cases and settlements reveals that while the allegations of rights violations rely upon questionable law and uncertain access to private rights of action, the settlements have led to significant improvements in the child welfare system.

This paper argues that the role of the media in achieving these settlements and compelling enforcement is under-acknowledged, and that lawyers considering class action litigation should be prepared to utilize media effectively. Further, effective use of media with consent decrees and private settlements offers an avenue for future changes to child welfare systems despite changes in the legal system that have made it difficult to pursue class action litigation. These future changes can and should involve areas like delay in permanency, which is difficult to reach with traditional legal pleadings. Delay in permanency is a harm that is well-established in the psychological literature and recognized in statutory child welfare law, but is difficult to link to concrete legal claims and has been addressed in only three of the child welfare law reform complaints. Addressing it in all of the child welfare institutional reform litigation would increase efficiency and equity, since other injuries to children in foster care are already being addressed through these complaints.

This paper first outlines what allegations these complaints are making, which laws they are saying are violated, and what happens when these cases go to trial. It details how § 1983 claims and claims under the Child Welfare and Adoption Assistance Act of 1980, the Child Abuse and Prevention Treatment Act (CAPTA), the Adoption and Safe Families Act (ASFA), and the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) have been treated by courts. The paper then describes how these settlements have been implemented and enforced. Telling the stories of these settlements from many different states shows a chaotic scene but one in which change is occurring. Looking back at the public ideas of these settlements through newspapers and other contemporaneous sources shows how participants and observers have publicly struggled with expanding ideas of what duties states owe to children in their care, and at what cost.

This paper then argues in favor of settlements in comprehensive child welfare reform litigation as a legal realist response to poor prospects in federal court, but argues that the complaints should be more comprehensive so that the settlements can be, too. Owen Fiss wrote, famously, “Like plea bargaining, settlement is a capitulation to the conditions of mass society and should be neither encouraged nor praised.”<sup>1</sup> My more optimistic view of settlement is that it gives both sides a seat at the table to develop best practices together rather than letting a judge decide independently how the system should be reorganized. Settlement recognizes a judge’s distance from day to day practice, and puts practitioners in conversation with defendants beyond briefs and conflict. Of

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<sup>1</sup> Owen Fiss, *Against Settlement*, 93 YALE L.J. 1074, 1075 (1983-1984).

course, “[a] settlement is by definition a compromise,” but positive media attention for the plaintiffs puts them in a more favorable position than they might be were the cases to be judged solely on their merits.<sup>2</sup> This paper advocates for a more nuanced approach to child welfare reform settlements, in which litigators consider the public image and understanding of these suits as important along with what specific narratives of harm they are constructing for the named plaintiffs in the suit. Winning class action lawsuits is significantly more difficult for plaintiffs than it was when the child welfare reform lawsuits began,<sup>3</sup> so jurisdictions now and in the future may be less willing to settle without more motivation from something like intense media coverage.<sup>4</sup> This paper argues that systems change requires public approval, and so litigators need to realize that their work is not limited to the courtroom but also occurs in the media.

Accordingly, advocates would do well to build on the public’s expansive understanding of governmental duty to children in foster care by including delay. The third section of this paper addresses delay in permanency, arguing that centering delay as a specific harm in the complaints would draw attention to its harms, and delay is otherwise almost unjusticiable except perhaps as a common-law tort or under narrow state laws. Over 28% of American children in the foster care system, or over 113,000 children, had been in foster care for more than two years in fiscal year 2013 without exiting to adoption, reunification, or aging out. Delay in finding permanency causes injury to these children, ranging from the risk of further harm at being left in an abusive or neglectful home environment to developmental impairments to reduced chances of ever being adopted. Yet only a few complaints discuss delay, and only one puts delay at the center. The paper argues for the recognition of child welfare law reform litigation as failing children who are currently in care, particularly those who have been in care for long periods, and argues instead for the centering of the injuries accumulated by young people who have been in foster care for more than two years. As the paper details, the lack of a clear legal hook for addressing delay-based harms should not affect it having a major role in the complaints.

## I. LEGAL CLAIMS AND RESULTS OF COMPREHENSIVE CHILD WELFARE CLASS ACTIONS

Child welfare reform began through class action lawsuits in the 1970s, and the structure of the complaints in each case appears to have been almost haphazard, of the “throw the spaghetti on the wall and see what sticks” style. These institutional reform lawsuits have alleged constitutional violations of substantive due process, procedural due process, and family integrity,<sup>5</sup>

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<sup>2</sup> SEC v. Citigroup Global Markets Inc., No. 11-5227-cv (2d Cir., Mar. 15, 2012), at 166.

<sup>3</sup> See, e.g., Arthur Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory & Practice*, 36 FORDHAM URB. L.J. 604, 607 (2009) (explaining that class action litigation is significantly more difficult for poor people thanks to the actions of a conservative federal judiciary in the 1980s and 1990s).

<sup>4</sup> See, *infra*, Connor B. v. Patrick, at text surrounding notes 114-119 and 227-229.

<sup>5</sup> Child welfare and family court litigators often refer to a “right to family integrity,” as a substantive due process right under the Fourteenth Amendment. The idea of a right to family integrity recognizes and privileges bonds between parents and children, but the Supreme Court has not recognized this right. See Cheryl M. Browning & Michael L. Weiner, *The Right to Family Integrity: A Substantive Due Process Approach to State Removal and Termination Proceedings*, 68 GEO. LJ 213 (1979); John C. Duncan, Jr., *The Ultimate Best Interests of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240 (2004); Pamela D. Sutton, *The Fundamental Right to Family Integrity and its Role in New York Foster Care Adjudication*, 44 BROOK. L. REV. 63 (1977).

as well as statutory violations of the federal Child Abuse and Prevention Treatment Act (CAPTA), the Adoption and Safe Families Act (ASFA), and the Early and Periodic Screening, Diagnostic, and Treatment (EPSDT) component of the Medicaid Act. They also made state claims based on the state equivalents of those laws. Most of these lawsuits ended in settlement agreements or consent decrees that resulted in complete restructurings of the child welfare systems of the affected jurisdictions.

Calculating the number of child welfare reform cases at issue is difficult because the groups involved count them differently. According to the Center for the Study of Social Policy (CSSP), as of 2012 there were seventy class-action lawsuits somehow related to child welfare in nearly thirty states, and twenty states then working under consent decrees.<sup>6</sup> The National Center for Youth Law identifies 51 child welfare class actions in its database, with 38 of them being multi-issue suits.<sup>7</sup> While the Center for Youth Law's database is not entirely up to date, examining the listed cases shows that some cases are still ongoing and more are still in the enforcement and monitoring stages.<sup>8</sup> In both of these lists; the vast majority of cases have ended in settlement agreement or consent decrees.

Repeat players drive much of the litigation and also maintain awareness of its history. The National Center for Youth Law filed three of the current comprehensive class action child welfare reform lawsuits,<sup>9</sup> as well as numerous related, non-comprehensive child welfare lawsuits. The nonprofit Children's Rights (formerly the ACLU's Children's Rights Project, but a separate organization since 1995) can claim involvement in 15 of those lawsuits. Of those 15, 14 were comprehensive child welfare reform lawsuits, of which ten ended in settlement agreements or consent decrees. Two remain in the court system, one was lost, and one was won. For the cases it argued, Children's Rights maintains web pages with all legal documents and many media documents related to the cases. Complaints and responses are generally difficult to track down, since older ones were not e-filed and so are unavailable on PACER or similar websites, but Children's Rights includes its complaints (but not the responses) on its website.<sup>10</sup> The decrees active between 1995 and 2005 addressed almost every imaginable aspect of the child welfare system, ranging from child safety in foster and group homes to the adequate training of foster parents and caseworkers to visitation with parents or siblings to necessary medical, dental, and mental health care for foster children.<sup>11</sup> These details are important to show the high percentage of cases that end

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<sup>6</sup> Judith Meltzer et al., *Preface*, in FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION iv (Center for the Study of Social Policy, ed., 2012), available at [http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children\\_Lessons-Learned-from-Class-Action-Litigation\\_January-2012.pdf](http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf)

<sup>7</sup> Analysis conducted from Foster Care Database at <http://youthlaw.org/foster-care-docket/> (last accessed May 2, 2018).

<sup>8</sup> *Id.*

<sup>9</sup> Henry A. v. Willden, 678 F. 3d 991(9<sup>th</sup> Circuit, 2012); Braam ex rel. Braam v. State, 81 P.3d 851, 854 (2003); Agreement to Terminate the Lawsuit, David C. v. Huntsman, Civil Action No: 2:93-CV-00206 TC (2007), [http://youthlaw.org/wp-content/uploads/2014/11/David\\_C\\_final\\_exit\\_plan.pdf](http://youthlaw.org/wp-content/uploads/2014/11/David_C_final_exit_plan.pdf).

<sup>10</sup> See CHILDREN'S RIGHTS, CLASS ACTIONS, <http://www.childrensrights.org/our-campaigns/class-actions> [<https://perma.cc/P4K7-3G4L>] (last visited Sept. 14, 2016); ROSS SANDLER & DAVID SCHOENBROD, DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT n.13 (Yale University Press, 2003) (explaining that most orders and decisions in these cases are unreported, so lists of cases from public interest organizations are particularly useful).

<sup>11</sup> AMY KOSANOVICH & RACHEL MOLLY JOSEPH, CHILD WELFARE CONSENT DECREES: ANALYSIS OF THIRTY-FIVE COURT ACTIONS FROM 1995 TO 2005 5 (Child Welfare League of America, 2005), <http://thehill.com/>

in settlement agreements and the relevance of repeat players, particularly Children's Rights, in this litigation.

Legal scholars have criticized both the settlement aspect and the institutional reform aspect of the child welfare suits and similar cases for almost fifty years. In traditional institutional reform cases, the judge is a "dominant" figure making and implementing decisions that would otherwise come from the political sphere, instead of maintaining the traditional judicial position of announcing legal principles.<sup>12</sup> Litigants approach the court for relief specifically because they are unhappy with the results provided by political remedies.<sup>13</sup> Judges can feel and act powerful, "transform[ing an] institution's collective understanding of itself."<sup>14</sup> Scholars have claimed that judges are not experts qualified to run agencies, that their announcement of legal principles is not sufficient to create change and their enforcement powers are limited, and that their rulings suffer from a "countermajoritarian difficulty," upholding rights of minorities over the decisions of an elected majority.<sup>15</sup> These critiques have not slowed the popularity of these types of suits, and federal courts have used law reform suits to dramatically restructure schools, prisons, health care facilities, and other institutions accused of violating individuals' rights.<sup>16</sup> The Prison Litigation Reform Act halted certain types of class-action suits and lessened enforcement abilities for others, but applied mostly to suits from prisoners, a far less popular set of plaintiffs than the adorable children of the foster care system.<sup>17</sup> Owen Fiss writes approvingly of these lawsuits, claiming structural reforms "acknowledge the bureaucratic character of the modern state, adapting traditional procedural forms to the new social reality."<sup>18</sup> This reality, however, included settlement, which he derides.

Owen Fiss argued in 1979 that settlements in general should be avoided since they avoid the articulation of any legal principles and fail to set any precedents.<sup>19</sup> Some people claim that many lawsuits never seek a judge's orders at all, and are instead "litigotiation," or "the strategic pursuit of a settlement through mobilizing the court process," which goes against the entire idea of the court system as a place of judicial determination of fact and rights.<sup>20</sup> Further, while "[p]laintiffs must

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sites/default/files/consentdecrees\_0.pdf.

<sup>12</sup> Chayes, *supra* note 15, at 1284; Kim, *supra* note 16, at 959-60.

<sup>13</sup> DONALD L. HOROWITZ, *THE COURTS & SOCIAL POLICY* 24 (Brookings Institution, 1977) ("[F]or some tasks legislative and bureaucratic institutions may be even less well suited than the courts are. On some matters, an imperfect judicial performance may be the best that is currently available, if there is to be any official performance at all.").

<sup>14</sup> MALCOLM FEELEY & EDWARD RUBIN, *JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS* 302 (Cambridge University Press, 1998).

<sup>15</sup> ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 17 (1986) (describing the countermajoritarian difficulty as an exercise of control to the benefit of the minority or losing party); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976).

<sup>16</sup> Catherine Y. Kim, *Changed Circumstances: The Federal Rules of Civil Procedure and the Future of Institutional Reform Litigation After Horne v. Flores*, 46 U.C. DAVIS L. REV. 1435, 1435 (2013); Mark Kelley, Note, *Saving 60(b)(5): The Future of Institutional Reform Litigation*, 125 YALE L.J. 271, 275 (2015).

<sup>17</sup> Prison Litigation Reform Act, Pub. L. No. 104-134, 110 Stat. 1321, 801-810 (Apr. 26, 1996) (codified in pertinent part at 18 U.S.C. 3626 (1997 Supp.)) ("PLRA").

<sup>18</sup> Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979).

<sup>19</sup> *Id.*

<sup>20</sup> Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1342 n. 14 (1994) (citing Marc Galanter, *Worlds of Deals: Using Negotiation to Teach About Legal Process*, 34 J. LEGAL EDUC. 268, 268 (1984)).

allege violations of rights to get in the courthouse door, . . . the decrees ultimately signed frequently have little to do with enforcing rights and much to do with the policy preferences of the controlling group.”<sup>21</sup> Class members may not be adequately represented, and judges overseeing a settlement cannot use “independent procedural and substantive standards” to correct for the class members’ absences as they would ordinarily do in writing a judgment, according to Fiss.<sup>22</sup> Further, once written, decrees expand “like accordions,” and jurisdictions struggle to extricate themselves from court oversight.<sup>23</sup> There is no experimental ability to be able to tell if a settlement has improved a situation more than the situation might have improved from events that were already in motion, as there is no way to have a control variable.<sup>24</sup>

The child welfare complaints begin in legal chaos, citing statutory law, state law, and the U.S. Constitution, and settlements continue that anarchy. Settlement allows these cases to continue amidst a chaotic legal framework, with little incentive to clarify exactly which laws provide which unfulfilled rights. Settlement requires no formal proof, expert witnesses, or argument in courts. Settlement in an institutional reform suit usually takes the form of a negotiated agreement between the lawyers and submission to the judge; judges most often rubber-stamp these agreements, which then become enforceable by and against the parties, even when they include terms the judges never would have inserted.<sup>25</sup> Settlement reduces the importance of judges and strengthens the role of lawyers as negotiators. David Ferleger writes, “Remedial activity in this variety of litigation frequently entails negotiation, informal dialogue, *ex parte* communication, broad participation by actors who are not formally liable for the legal violations, and involvement of court-appointed officials to assist in implementation.”<sup>26</sup> Implementation is slow and painful with traditional judicial decrees as well, so choosing settlement adds little additional risk for parties.<sup>27</sup> Instead, settlement allows litigants to claim moral and financial difficulty and allows defendants to address negative publicity, gain more resources, and bind future administrations.<sup>28</sup> Enforceable settlements, or consent decrees, have thus become the primary way to create change in child welfare.

Understanding why child welfare litigation is almost never actually litigated requires a closer look at what legal claims are being made and under what legal theories these claims could be granted. Such an examination reveals that there are almost no coherent theories that can explain all of these claims as justiciable under so many different laws and with few precedential decisions. The

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<sup>21</sup> SANDLER & SCHOENBROD, *supra* note 10, at 139.

<sup>22</sup> Fiss, *Against Settlement*, *supra* note 1, at 1080.

<sup>23</sup> SANDLER & SCHOENBROD, *supra* note 10, at 197.

<sup>24</sup> SANDLER & SCHOENBROD, *supra* note 10, at 94.

<sup>25</sup> David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620 (1995) (“[J]udges sometimes . . . treat the settlement process as though it were the sacrosanct private business of the settling parties, in which outsiders simply should not meddle.”); Margo Schlanger, *The Courts: Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2011 (1999); SANDLER & SCHOENBROD, *supra* note 10, at 6.

<sup>26</sup> David Ferleger, *Masters in Complex Litigation & Amended Rule 53*, 20 (2005) (unpublished manuscript), <http://www.courtappointedmasters.org/sites/default/files/Ferleger.pdf> [<https://perma.cc/Y6DB-QA8W>].

<sup>27</sup> Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 475 (1980) (“While none of us really believes that all litigants willingly comply with decrees, we often talk and think about the propriety of judicial activism as if they did.”).

<sup>28</sup> See John V. Cardone, *Substantive Standards and NEPA: Mitigating Environmental Consequences with Consent Decrees*, 18 B.C. ENVTL. AFF. L. REV. 159, 168 (1990) (discussing critique of consent decrees as binding on successive administrations and thus intruding on executive discretion).

exception is the legal realist perspective saying that defendants and judges have accepted these arguments in previous cases that ended in consent decrees. The rights asserted are fairly vague constitutional ones interpreted more generously in earlier decades of liberal courts, but the child welfare reformers persist in claiming expansive understandings of substantive due process rights and rights to family integrity. Judges have rarely ruled on child welfare reform litigation beyond certifying a class of affected children, but it is clear that states do have some obligations to children in the foster care system.

#### *A. Potential Sources of Law*

Many of the judicial rulings affecting children in the foster care system were made through cases about individual children or families, not the comprehensive child welfare litigation that is the topic of this paper. Even within those cases, plaintiffs have been limited by a lack of a private right of action, institutional defenses, and hostility to expansive constitutional interpretation. Analyzing the barriers those plaintiffs faced and the lack of legal clarity those rulings display may allow readers to better understand why the comprehensive class action child welfare reform litigation would make so many legal claims, hoping that at least one would be seen as valid if the case ever did go to trial.

As background, for an individual to sue under a statute, the statute must have a private right of action, whether from specific language in the statute creating the right, from other federal statutes that provide a path for constitutional rights enforcement, or by implication.<sup>29</sup> Federal statutes related to child abuse and neglect are all funding statutes, including the Federal Child Abuse Prevention and Treatment Act (CAPTA),<sup>30</sup> the Adoption Assistance and Child Welfare Act (AACWA)<sup>31</sup>, and the Adoptions and Safe Families Act (ASFA).<sup>32</sup> Congress uses the spending clause to dictate funding for states through funding statutes. However, the Supreme Court has held that these funding statutes do not create individual rights of action against states, because “the typical remedy for State noncompliance . . . is to terminate funds to the State.”<sup>33</sup> Courts have held that recent iterations of CAPTA do not include a private right of action with regard to investigation.<sup>34</sup> In contrast, some federal courts have held that AACWA does have enforceable rights of action with regard to case planning<sup>35</sup> and “reviews, monitoring and collaboration between State, local, and Federal

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<sup>29</sup> Cass R. Sunstein, *Section 1983 and the Private Enforcement of Federal Law*, 49 U.CHI.L.REV. 394, 411-12 (1982).

<sup>30</sup> Child Abuse Prevention and Treatment Act Amendments of 1996 (CAPTA), Pub. L. No. 104-235, 110 Stat. 3063 (codified as amended at 42 U.S.C. § 5101-5109 (Supp. V 2005)).

<sup>31</sup> Adoption Assistance and Child Welfare Act (AACWA) of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended in scattered sections of 42 U.S.C.).

<sup>32</sup> Adoption and Safe Families Act (ASFA) of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

<sup>33</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28 n.21 (1981).

<sup>34</sup> *Hilbert v. County of Tioga*, No. 3:03-CV-193, 2005 WL 1460316 at \*14 (N.D.N.Y. Jun. 21, 2005); *see also* *Charlie H. v. Whitman*, 83 F.Supp.2d 476, 496-97 (D.N.J. 2000); *A.S. v. Tellus*, 22 F. Supp. 2d 1217, 1224 (D. Kan. 1998); *Jordan v. City of Philadelphia*, 66 F. Supp. 2d 638, 648-49 (E.D. Pa. 1999); *Alger v. County of Albany, New York*, 489 F. Supp. 2d 155, 159 (N.D.N.Y. 2006).

<sup>35</sup> *Brian A. v. Sundquist*, 149 F. Supp. 2d 941, 949 (M.D. Tenn. 2000).

agencies.”<sup>36</sup> There is, however, no clear route to being able to sue in most jurisdictions.

Another potential route to a successful court action could be a traditional civil rights claim under 42 U.S.C. § 1983, which has no substantive rights of its own but authorizes a wide variety of suits against state and local governments. Children in the foster care system may sue under § 1983 to obtain compensation from agencies that have wronged them.<sup>37</sup> Establishing rights under § 1983 has become more and more difficult over the years as the Supreme Court has restricted who may benefit from the statute. The Supreme Court now requires that “an unambiguously conferred right” exists that is “‘phrased in terms of the persons benefited.’”<sup>38</sup> Further, the Court writes: “[I]t is *rights*, not the broader or vaguer ‘benefits’ or ‘interests,’ that may be enforced” under Section 1983.<sup>39</sup> Even if a petitioner is able to successfully establish that there is a right that has been violated, agencies are only responsible for their own actions and are not vicariously liable for their employees’ actions unless the employee was acting “‘pursuant to official municipal policy.’”<sup>40</sup> Further, the standard for liability is very high. Only when the foster care agencies, officials, and employees’ poor behavior exhibits “deliberate indifference” to a risk of harm to the foster children can the children recover.<sup>41</sup> The District Court of Rhode Island held that the appropriate standard for considering whether an employee’s conduct can be challenged via a substantive due process claims is somewhere between an employee’s failure to exercise “professional judgment” and an employee’s conduct that is clearly “conscience shocking.”<sup>42</sup> In either case, conduct that is merely careless or work that is of poor quality cannot be challenged.

The Federal Tort Claims Act is another potential source of private right of action for children in foster care. The Federal Tort Claims Act can overcome a jurisdiction’s sovereign immunity, subject to specific bans on punitive damages, interest prior to judgment, and the government’s performance or failure to perform a “discretionary function or duty.”<sup>43</sup> Generally speaking, the government or government employee must have been taking mandatory actions. The Federal Tort Claims Act also exempts certain intentional torts from being actionable, including those that may be relevant in the foster care context such as false imprisonment or interference with contract rights.<sup>44</sup> The “discretionary function or duty” requirement is also difficult, as much in the child welfare world is based on the discretionary acts of social workers who come into a home and make decisions based on personal observations rather than defined rubrics. A social worker may be required to investigate a relative’s home, for example, such that the child could move in with Grandma instead of staying in temporary non-relative care, but the social worker is neither required by federal law to visit Grandma’s house within a certain time frame nor to find resources to help Grandma make her house meet whatever standards the agency has.

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<sup>36</sup> *Jeanine B. v. Thompson*, 877 F. Supp. 1268, 1284 (E.D. Wis. 1995).

<sup>37</sup> *Civil Action for Deprivation of Rights*, 42 U.S.C. § 1983 (2015).

<sup>38</sup> *Gonzaga Univ. v. Doe*, 536 U.S. 273, 283-84 (2002) (quoting in part *Cannon v. Univ. of Chicago*, 441 U.S. 677, 692 n. 13 (1979)).

<sup>39</sup> *Id.*

<sup>40</sup> *Connick v. Thompson*, 563 U.S. 51, 60 (2011) (quoting *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978)).

<sup>41</sup> *Doe v. N.Y.C. Dep’t of Soc. Servs.*, 649 F.2d 134, 141-44 (1981).

<sup>42</sup> *Cassie M. v. Chafee*, 16 F. Supp. 3d 33, 47 (2014).

<sup>43</sup> 28 U.S.C. § 2674; 28 U.S.C. § 2680(a).

<sup>44</sup> 28 U.S.C. § 2680(h).

Immunity is a common defense from government entities or individual state agents in response to claims of breaches of duty. Agency employees “are entitled to qualified immunity unless their alleged conduct violated ‘clearly established statutory or constitutional rights of which a reasonable person in their positions would have known.’”<sup>45</sup> Government actors are immune from liability under sovereign immunity unless a statute explicitly confers liability on a state, such as if a statute expressly waives immunity for a state’s negligent acts.<sup>46</sup> In some jurisdictions, the public duty doctrine limits sovereign immunity (i.e., allows liability) if the statute confers upon a state a duty of care to a specific individual, rather than a generalized duty to the public.<sup>47</sup> A jurisdiction may also provide immunity from liability for a State actor who is performing discretionary acts in an official role as a government employee.<sup>48</sup> However, if the actor fails to fulfill the job duties required by statute, that immunity may be waived and the actor made liable.<sup>49</sup> The Supreme Court has gradually broadened the protections of qualified immunity so that it is now very hard to sue a public official.<sup>50</sup>

Some lower court cases have made equal protection arguments to claim that while facially neutral, policies about foster care have disproportionate effects upon black youth, as they make up a disproportionate number of youth in the foster care system.<sup>51</sup> Disproportionate effects on a suspect class can be considered as evidence that the State has racial motivations underneath a facially neutral policy. In New York City, studies showed black children were twice as likely as white children to be removed from their homes, black children made up the majority of children in foster care, and black children stayed in care longer than white children.<sup>52</sup> Yet despite these clearly disproportionate effects, no case has won through use of an equal protection claim.<sup>53</sup> *Kenny v. Deal*, a comprehensive child welfare reform suit in Georgia, did include an Equal Protection Claim from the Georgia State Constitution behalf of a class of black children in foster care, among other claims, but the case settled.<sup>54</sup>

In the constitutional law context, substantive due process suits against states’ failures in the child welfare realm are very difficult for plaintiffs to win, even if children are physically injured or dead. The Supreme Court has held that for the most part, the State has no duty to prevent a parent

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<sup>45</sup> Forrester v. Bass, 397 F.3d 1047, 1054 (8<sup>th</sup> Cir. 2005); M.D. v. State, Dep’t of Soc. Serv., 943 So.2d 471, 480 (La. Ct. App. 2006). *See also* Harlow v. Fitzgerald, 457 U.S. 800, 806 (1982) (crafting the idea of qualified immunity to protect public officials from both liability and the costs of litigation); Ashcroft v. Iqbal, 556 U.S. 662, 685 (2009) (applying the doctrine of qualified immunity).

<sup>46</sup> *See* Kane v. Lamothe, 182 Vt. 241, 244 (Vt. 2007).

<sup>47</sup> *See* Burney v. Kan. Dep’t of Social and Rehabilitation Serv., 23 Kan. App. 2d 394, 398 (1997) (stating that the Torts Claims Act waives immunity in certain instances).

<sup>48</sup> Gowens v. Tys .S. ex rel. Davis, 948 So.2d 513, 524 (Ala. 2006); Jensen v. South Carolina Dep’t of Soc. Serv., 297 S.C. 323, 332 (S.C. 1988).

<sup>49</sup> Gowens, 948 So.2d at 524.

<sup>50</sup> Kit Kinsports, *The Supreme Court’s Quiet Expansion of Qualified Immunity*, 100 MINN. L. REV. HEADNOTES 62, 67-68 (2016).

<sup>51</sup> People United for Children, Inc. v. City of New York, 108 F.Supp.2d 275, 296-297 (S.D.N.Y., 2000) (holding that evidence of statistical disparity in children’s likelihood of remaining in foster care by race is sufficient for an Equal Protection Act violation claim to survive a motion to dismiss).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Complaint at 19, 101, Kenny A. v. Roy Barnes, Civil Action No. 1: 02-CV-1686-MHS (2003).

or caregiver's act of abuse or neglect against a child.<sup>55</sup> However, if the state has developed a "special relationship" with the child, such as placing the child in foster care, the state or state actors could face liability.<sup>56</sup> Merely having an open investigation or even a voluntary placement is not enough; the state is generally required to have physical and/or legal custody of the child.<sup>57</sup> The State or state actors could also face liability if the State created or significantly added to the dangerous situation that led to the child's injury or death.<sup>58</sup>

Claims under procedural due process rights are only slightly easier for plaintiffs to win. A State denies an individual procedural due process rights when it deprives that individual of a property or liberty interest without following certain protective procedures. If a State statute grants individuals certain entitlements, those recipients are due procedural due process.<sup>59</sup> The Supreme Court has not ruled on the issue of procedural due process rights for children who are the subject of child welfare investigations, but lower courts have occasionally held that children can be entitled to investigations or other protective services, depending on the specific language of state laws and whether they grant discretion to child welfare agencies or compel certain actions.<sup>60</sup> However, all of those cases were from youth or their representatives alleging that the state had left these children out of the protection of the foster care system. Procedural due process for children already in the system is limited to the idea that children already in the system are entitled to procedures meeting the requirements of the Due Process Clause when the state attempts to terminate the rights of their parents.<sup>61</sup> Both cases addressing the issue, *Lassiter* and *Quilloin*, are over 35 years old, yet courts have found no new procedural due process rights have been found since then.

Overall, the general absence of Supreme Court input, and especially the absence of recent input, on the field of foster care litigation has made room for a variety of interpretations from different jurisdictions as to whether private rights of action exist under federal foster care statutes and just what obligations a state has to children who have been or are at risk of being abused or neglected. This lack of clarity has led litigators to list everything and anything that might be a potential source of rights for children in foster care, as described in the next section. Understanding the existing scope of the legislative and judicial landscape is important to later analysis of the costs and benefit of choosing settlement negotiations rather than the risks of proceeding to trial.

### *B. Allegations of Rights Violations*

The comprehensive child welfare reform complaints have alleged a variety of rights violations, most commonly violations of children's rights to be safe from harm and a right to family

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<sup>55</sup> *DeShaney v. Winnebago Cnty. Dep't of Soc. Serv.*, 489 U.S. 189, 1193-94 (1989).

<sup>56</sup> *Id.* at 190.

<sup>57</sup> *A.S. ex rel. Blalock v. Tellus*, 22 F.Supp.2d 1217, 1220-22 (D. Kan. 1998); *Burton v. Richmond*, 370 F.3d 723, 728 (8th Cir. 2004).

<sup>58</sup> *DeShaney*, 489 U.S. at 199-200.

<sup>59</sup> *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 476 (6th Cir. 1990); *Doe v. District of Columbia*, 93 F.3d 861, 868- 870 (D.C. 1996).

<sup>60</sup> *Pierce v. Delta County Dep't of Soc. Serv.*, 119 F.Supp.2d 1139, 1153 (D. Colo. 2000); *Tony L. ex. re. Simpson v. Childers*, 71 F.3d 1182, 1185-1186 (6th Cir. 1995); *Forrester v. Bass*, 397 F.3d 1047, 1054-58 (8th Cir. 2005); *Olivia Y. v. Barbour*, 351 F.Supp.2d 543, 550 (S.D. Miss. 2004); *Powell v. Dep't of Hum. Resources of the State of Ga.*, 918 F.Supp. 1575, 1581 (S.D. Ga., 1996).

<sup>61</sup> *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 37 (1981); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

integrity. The scope of these rights has not been made clear by higher courts, so the lawyers writing the complaints are free to draw on the rights as expansively as they wish.

Among early comprehensive class-action lawsuits against a state or local child welfare system was *Wilder v. Sugarman*, filed in the Southern District of New York in 1973.<sup>62</sup> The case alleged that defendants discriminated against non-white Protestant children in New York City in child placement due to the children's race and religious belief. The complaint stated that defendants violated the First, Eighth, and Fourteenth Amendments, and Title VI of the Civil Rights Act of 1964, as well as state law. The defendants refused to enter settlement negotiations for over a decade of litigation.<sup>63</sup> During that time, the complaint was dismissed, refiled, and additional children were added as plaintiffs several times.<sup>64</sup> The case was then dismissed in part but class certification was granted and the court found violations of the First and Fourteenth Amendments.<sup>65</sup>

The next comprehensive class action lawsuit against a child welfare system was *G.L. v. Zumwalt* in 1977, brought by Legal Aid of Western Missouri in federal court in the Western District of Missouri. The case alleged violations of the right of foster children not to be harmed while in state custody, drawing on the prohibition against cruel and unusual punishment in the Eighth and Fourteenth Amendments.<sup>66</sup> The complaint also alleged a denial of substantive due process and a right to appropriate care, both under the Fourteenth Amendment.<sup>67</sup> The complaint also lists 42 U.S.C. § 601 et seq and 42 U.S.C. § 1302 and their regulations as sources of law for the suit. The complaint attempts to claim private rights of action for the class of foster children in the suit by stating, "The Missouri Division of Family Services has consented and agreed to comply with the statutes and regulation of the United States regarding foster placements which are funded directly or indirectly by funds authorized by 42 U.S.C § 601 et. seq. [sic.]"<sup>68</sup> The merits of these claims were never addressed because the Missouri Division of Family Services agreed to settlement negotiations when the court had only certified the class of foster children involved in the case.

Later cases have alleged violations of the same laws, with no greater specificity than decades prior. In Washington, D.C., *LaShawn v. Williams* was filed in 1989, but the case is still ongoing. *LaShawn* alleged violations under CAPTA, the Adoption Assistance and Child Welfare Act of 1980, the right to due process under the Fifth Amendment, and local D.C. laws regarding child abuse and youth residential facilities.<sup>69</sup> Chief complaints in *LaShawn* included the child welfare system's leaving of children in emergency care facilities for far beyond the 90 days D.C. statutes allowed, failure to conduct adequate case planning for these children or to move them to foster homes, and failure to assist their birth families with remedying any of the situations that led

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<sup>62</sup> 385 F.Supp. 1013 (S.D.N.Y. 1974)

<sup>63</sup> CIVIL RIGHTS LITIGATION CLEARINGHOUSE, UNIVERSITY OF MICHIGAN LAW SCHOOL <http://www.clearinghouse.net/detail.php?id=12417> [<https://perma.cc/4YH2-WHDY>] (last visited Apr. 4, 2017).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> First Amended Complaint, at 19, *G.L. vs. J.Z.*, Civil Action No. 77-242-CV-W-3, [http://www.childrensrights.org/wp-content/uploads/2008/06/mo\\_gl\\_amended\\_complaint.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/mo_gl_amended_complaint.pdf) [<https://perma.cc/L9HL-JP9D>].

<sup>67</sup> *Id.* at 19-20.

<sup>68</sup> *Id.* at 8.

<sup>69</sup> "Class Actions: DC- *LaShawn A. v. Gray*," CHILDREN'S RIGHTS, [http://www.childrensrights.org/class\\_action/district-of-columbia/#](http://www.childrensrights.org/class_action/district-of-columbia/#) [<https://perma.cc/J4YV-HS2B>] (last visited Apr. 4, 2017). [hereafter "CHILDREN'S RIGHTS, *LaShawn*"].

the children to be placed into care.<sup>70</sup> The complaint also accused the D.C. child welfare system of failing to provide the necessary mental health treatment that the children needed.<sup>71</sup> The case settled, but implementation failed and the court held the child welfare agency in contempt.<sup>72</sup> The D.C. child welfare system is now operating under a 2010 Implementation and Exit Plan.<sup>73</sup>

Other cases made different claims. A 1999 New Jersey case, *Charlie & Nadine H. v. Christie*, made claims under the 14<sup>th</sup> Amendment and the Multiethnic Placement Act.<sup>74</sup> A 2008 Oklahoma case, *D.G. v. Yarbrough*, made substantive due process, procedural due process, and family integrity claims, as well as claims under ASFA.<sup>75</sup> Both cases settled.<sup>76</sup> A 2015 Arizona case, *B.K. v. Flanagan*, similarly alleges “substantive due process rights to be free from harm and an unreasonable risk of harm while in state custody,”<sup>77</sup> “rights under the EPSDT provisions of the federal Medicaid Act,”<sup>78</sup> and “rights to family integrity, guaranteed by the First, Ninth, and Fourteenth Amendments to the United States Constitution.”<sup>79</sup> That case is still ongoing.<sup>80</sup>

It can be argued that the most significant accomplishment of the child welfare reform litigation was to establish that the federal judiciary has a role in improving the lives of children in the foster care system. States, and the federal government by proxy, have obligations to care for children in foster care until such time as they can be returned to their permanent homes or new homes can be found for them. While most child welfare class actions have resulted in settlements or consent decrees, a small body of law regarding child welfare officials’ obligations to groups of children in foster care does now exist. These decisions all focus on statutory law and some reference the duties of the defendants to uphold the Constitution by keeping the plaintiff children safe from harm.<sup>81</sup> The actual children described in the complaints have arguably gained very little from the

<sup>70</sup> Complaint at 13-30, *LaShawn A. v. Barry*, Civil Action No. 89CV1754 (1989), [http://www.childrensrights.org/wp-content/uploads/2008/06/1989-6-20\\_dc\\_lashawn\\_complaint.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/1989-6-20_dc_lashawn_complaint.pdf) [<https://perma.cc/96U9-EWAV>].

<sup>71</sup> *Id.*

<sup>72</sup> CHILDREN’S RIGHTS, *LaShawn*, *supra* note 69.

<sup>73</sup> *Id.*

<sup>74</sup> Complaint at 6, *Charlie & Nadine H. v. Whitman*, Civil Action No. 99-3678 (2000), [http://www.childrensrights.org/wp-content/uploads/2008/06/1999-08-04\\_nj\\_charlieh\\_amended\\_complaint.pdf](http://www.childrensrights.org/wp-content/uploads/2008/06/1999-08-04_nj_charlieh_amended_complaint.pdf) [<https://perma.cc/8N22-EVDS>].

<sup>75</sup> Complaint at 14, *D.G. v. Henry*, Civil Action No. 08CV-074 GKFFHM (2008), [http://www.childrensrights.org/wp-content/uploads/2009/02/2008-02-13\\_dg\\_complaint\\_as\\_filed.pdf](http://www.childrensrights.org/wp-content/uploads/2009/02/2008-02-13_dg_complaint_as_filed.pdf) [<https://perma.cc/B2LM-3H94>].

<sup>76</sup> “Class Actions: NJ- *Charlie & Nadine H. v. Christie*,” CHILDREN’S RIGHTS, [http://www.childrensrights.org/class\\_action/new-jersey](http://www.childrensrights.org/class_action/new-jersey) [<https://perma.cc/65ZU-GWFG>]; “Class Actions: OK- *D.G. v. Yarbrough*,” CHILDREN’S RIGHTS, [http://www.childrensrights.org/class\\_action/oklahoma](http://www.childrensrights.org/class_action/oklahoma) [<https://perma.cc/P4DV-7EKP>].

<sup>77</sup> Complaint at 29, 42, *B.K. v. Flanagan*, Civil Action 2:15-cv-00185-ROS, <http://www.childrensrights.org/wp-content/uploads/2015/02/Arizona-2015-02-03-Complaint-.pdf> [<https://perma.cc/C3T4-7BSH>].

<sup>78</sup> *Id.* at 33.

<sup>79</sup> *Id.* at 47.

<sup>80</sup> “Class Actions: AZ: *B.K. v. McKay*,” CHILDREN’S RIGHTS, [http://www.childrensrights.org/class\\_action/beth-k-v-flanagan](http://www.childrensrights.org/class_action/beth-k-v-flanagan) [<https://perma.cc/A693-8HVX>].

<sup>81</sup> “DCS and DHS further abdicate their legal duty to provide care for members of the General Class . . . A state assumes an affirmative duty under the Fourteenth Amendment to the United States Constitution to protect a child from an unreasonable risk of harm once it takes that child into its legal foster care custody.” *Supra* note 77, at 25, 27. *See also* Complaint at 25, 65-66, *Connor B. v. Patrick*, Civil Action 3:10-cv-30073, <http://www.childrensrights.org/wp->

litigation, and I argue that the goal of this litigation was policy change rather than providing remedies to affected plaintiffs. No class-action child welfare reform litigation has sought damages for a large class of plaintiffs, in contrast to other class actions suits seeking both policy changes and damages, like those for people with disabilities,<sup>82</sup> prisoners,<sup>83</sup> women,<sup>84</sup> victims of sexual harassment,<sup>85</sup> gays and lesbians,<sup>86</sup> and more.<sup>87</sup> Whether or not damages can change the system is questionable, but it would help the children at the center of this litigation. However, it seems that for the attorneys, the goal of this litigation has been to change the system rather than to remedy the harms against individual children.

In Georgia, *Kenny A. v. Perdue* began as a complaint that asserted fifteen causes of action under federal and state law, with allegations including overworked caseworkers, an inadequate number of foster homes, separating siblings and teen mothers from their infants, and many other areas of failure. These other failures included failure to identify children's relatives, failure to provide adequate support to foster parents, failure to place children in an expedient manner, failure to do adequate permanency planning, and failure to provide adequate medical and educational services.<sup>88</sup> The case was appealed up to the U.S. Supreme Court on an issue unrelated to the merits of the case,<sup>89</sup> but the settlement created 31 outcome measures to improve performance in all of the complaint areas mentioned above and fees for attorneys and litigation expenses.<sup>90</sup>

Although comprehensive cases such as those described above brought substantial change, non-comprehensive cases also raised important issues. In *Burgos v. DCFS*, filed in Illinois in 1975,

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content/uploads/2010/04/2010-04-15\_ma\_complaint\_as\_filed.pdf [https://perma.cc/DT3H-ZD2C] (“The foregoing actions and inactions of Defendants [ . . . ] in their official capacities, constitute a failure to meet their affirmative duty to protect from harm all Named Plaintiffs and Plaintiff Children, which is a substantial factor leading to, and proximate cause of, the violation of the constitutionally-protected liberty and privacy interests of all Named Plaintiffs and Plaintiff Children.”).

<sup>82</sup> Vallabhapurapu et al. v. Burger King Corp., Civil Action 3:11-cv-00667 (N.D. Cal. 2012), settlement available at <http://law.justia.com/cases/federal/district-courts/california/candce/3:2011cv00667/237290/238/>; Burger King Discrimination Class Action Reaches Proposed \$19M settlement, <https://www.bigclassaction.com/settlement/burger-king-discrimination-class-action-lawsuit.php> (last visited Apr. 4, 2017).

<sup>83</sup> See, e.g., Sarah Vandenbraak Hart, *Evaluating Institutional Prisoners' Rights Litigation: Costs & Benefits & Federalism Considerations*, 11 U. PA. J. CONST. L. 73, 88 (2008).

<sup>84</sup> Consent Decree, *Carter v. Wells Fargo Advisors LLC*, 09-cv-01752 (D.D.C. 2010), <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1247&context=condec> (last visited Apr. 4, 2017) [https://perma.cc/6GEN-XD48]; *Wells Fargo to Pay \$32 Million to Settle Gender Discrimination Suit*, BUS. INS. (June 8, 2011), <http://www.businessinsurance.com/article/20110608/NEWS01/110609916> [https://perma.cc/Q36C-R8GD].

<sup>85</sup> EEOC v. Wells Fargo Bank, N.A., 13-CV-00528-R CJ-WGC (U.S.D. Nev.) (2013); Press Release, *Wells Fargo Settles EEOC Same-sex Sexual Harassment Lawsuit for \$290,000*, EEOC (Sept. 9, 2014), <https://www.eeoc.gov/eeoc/newsroom/release/9-15-14b.cfm> [https://perma.cc/5XPM-ZUT6].

<sup>86</sup> *Carlson v. eHarmony.com*, L.A. Super. Ct. Case No. BC371958 (November 19, 2008); *eHarmony Settles Same-Sex Class Action Lawsuit*, SOCALTECH (Jan. 27, 2010), [http://www.socaltech.com/eharmony\\_settles\\_same\\_sex\\_class\\_action\\_lawsuit/s-0026461.html](http://www.socaltech.com/eharmony_settles_same_sex_class_action_lawsuit/s-0026461.html), [https://perma.cc/JN7S-2RXQ].

<sup>87</sup> A list of some civil and human rights settlements and verdicts, many of which combine financial settlements with policy changes, is available at <https://www.lawyersandsettlements.com/settlements/civil-human-rights-settlements> [https://perma.cc/DYD9-PL3Z].

<sup>88</sup> *Kenny A. ex rel. Winn v. Perdue*, 454 F. Supp. 2d 1260, 1267 (N.D. Ga. 2006).

<sup>89</sup> The appeals addressed attorney's fees, specifically when to apply fee enhancements. *Perdue v. Kenny A.*, 130 S. Ct. 1662; *Kenny A. v. Perdue*, 532 F.3d 1209 (2008).

<sup>90</sup> *Kenny A. v. Perdue*, 532 F.3d 1209, 1216-1217 (2008).

Puerto Rican parents argued that they and their children were being discriminated against due to their race and national origin.<sup>91</sup> Their causes of action included Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and 42 U.S.C. § 1983.<sup>92</sup> Similarly, plaintiffs appealed specific complaints against a child welfare system in West Virginia's *Gibson v. Ginsberg* in 1978. In *Gibson*, the plaintiffs argued that caseworkers did not explore alternatives to removal such as providing a family with food or shelter.<sup>93</sup> Plaintiffs argued that West Virginia's Department of Welfare and Department of Child Protective Services violated federal law and the First, Fourth, Fifth, Ninth, and Fourteenth Amendments of the U.S. Constitution. Here again, the court certified the class and then the defendants settled.<sup>94</sup>

Defendants have incentives to settle. They are vulnerable to bad publicity. They face high costs of defending against litigation. Further, they may recognize that there are problems within their systems and so may want to proactively make system changes or they may just recognize that they are likely to lose due to the strength of the plaintiffs' complaint. Settlement is attractive to defendants who can "win by losing," as the results of a consent decree might be more funding in resource-strapped areas. Settlements allow defendants to make policy changes they had already wanted to make without bearing the political costs of asserting their desires for change (i.e., "The court is making me do it").<sup>95</sup> Courts traditionally have not seen raising revenue as part of their role, but defendants can see court-ordered funds as an easier political alternative than persuading a legislature to allocate funds.<sup>96</sup> Defendants may also enter restrictive settlements knowing that they will never fully comply with the terms. Failure to fully comply with settlements is common and somewhat tolerated, although judges may hold defendants in contempt.<sup>97</sup>

In the end, child welfare litigation almost always ends in settlement, but the length of time to settlement has varied. Connecticut settled in 11 months, but New York took 13 years.<sup>98</sup> In an ongoing case, New York attempted to settle within 12 days.<sup>99</sup> New Mexico settled but failed to improve its systems, was taken back to court and held in contempt, and is now in its 25<sup>th</sup> year of

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<sup>91</sup> Consent Decree, *Burgos v. Ill. Dep't of Children and Fam. Servs.* (No. 75-C-3974, N.D. Ill., Jan. 14, 1977) (available as Document No. CW-IL-0008-0001 at <http://www.clearinghouse.net/chDocs/public/CW-IL-0008-0001.pdf> [<https://perma.cc/G25N-K7XD>]).

<sup>92</sup> Case Profile: *Burgos v. Dep't of Children and Fam. Servs.*, CIVIL RIGHTS LITIG. CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=12407> [<https://perma.cc/C55N-5WWU>].

<sup>93</sup> Memorandum Opinion and Order, *Gibson v. Burdette*, (Civil Action No. 2:78-2375, S.D.W.V., June 3, 2001) (available as Document No. CW-WV-0001-0001 at CIVIL RIGHTS LITIG. CLEARINGHOUSE, <https://www.clearinghouse.net/chDocs/public/CW-WV-0001-0001.pdf>) [<https://perma.cc/E6TA-JVLB>].

<sup>94</sup> *Id.*

<sup>95</sup> Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 Mich. L. Rev. 1994, 2012 (1999); DONALD L. HOROWITZ, *THE COURTS & SOCIAL POLICY* 10 (Brookings Institution, 1977).

<sup>96</sup> See, e.g., Mark Kellar, *Responsible Jail Programming*, AM. JAILS (Jan.-Feb. 1999), at 78-79 ("To be sure, we used 'court orders' and 'consent decrees' for leverage. We ranted and raved for decades about getting federal judges 'out of our business'; but we secretly smiled as we requested greater and greater budgets to build facilities, hire staff, and upgrade equipment.").

<sup>97</sup> Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies*, 65 S. CAL. L. REV. 735, 738 (1992).

<sup>98</sup> John Kelly, *Class Action?*, YOUTH TODAY (Sept 1, 2004), <http://youthtoday.org/2004/09/class-action/> [<https://perma.cc/KF45-4VMT>].

<sup>99</sup> See *infra* text accompanying notes 240-242.

attempted compliance.<sup>100</sup> It is also much safer for plaintiffs to settle. The likelihood of success at trial is very unclear for many of these cases, with no clear private right of action for federal child welfare statutes in most circuits and many officials protected from challenges because of qualified immunity.<sup>101</sup> With so many settlements, there is a lack of actual law on what obligations a state owes to a young person in the child welfare system. The next section outlines what little clarity exists.

### *C. Rulings on Comprehensive Child Welfare Litigation*

As the majority of cases have settled before being ruled upon, there is a lack of actual case law addressing whether the various constitutional provisions and statutes apply to youth in the foster care system. One analysis of child welfare reform litigation described the lawsuits as having “proffer[ed] relatively novel legal theories with little or no controlling authority,” forcing courts to make decisions of first impression.<sup>102</sup> Judgments that exist are all from lower courts, thus not setting any larger precedents.

Some of the applicable law, then, has appeared in cases that were not class actions or were not seeking large-scale reform of child welfare systems. Children have a constitutional right to family integrity, but courts have interpreted that loosely.<sup>103</sup> Plaintiffs have successfully argued that the state had a “special relationship” with children in foster care, and so had a duty to them. The State, in contrast, argued that it had no obligations to these children. When the State has placed a child in a foster home, it is obliged to provide “constitutionally adequate” medical care, protection, and supervision.<sup>104</sup> States must provide “personal security and reasonably safe living conditions” under the Fourteenth Amendment.<sup>105</sup> One decision states, “Courts have found, with apparent unanimity, that [a special] relationship exists in the foster-care context.”<sup>106</sup> States must file to terminate parents’ rights after children have been in care for 15 of the most recent 22 months.<sup>107</sup> As the government only starts counting days 60 days after a child was removed from the home, 17 months is really the first time at which a state is required to begin termination proceedings.<sup>108</sup> Even after a petition to terminate parental rights has been filed, children can still spend months or years

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<sup>100</sup> *Id.*

<sup>101</sup> Karoline S. Homer, *Program Abuse in Foster Care: A Search for Solutions*, 1 VA. J. SOC. POL’Y & L. 177, 217-219 (1993).

<sup>102</sup> SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS 157, 66-76 (2000).

<sup>103</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>104</sup> *Griffith v. Johnston*, 899 F.2d 1427, 1439 (5th Cir. 1990); *Norfleet v. Ark. Dep’t. of Human Servs.*, 989 F.2d 289, 293 (8th Cir. 1993). *See e.g.*, *Tamas v. Dep’t of Soc. & Health Servs.*, 630 F.3d 833, 846-47 (9th Cir. 2010); *James ex rel. James v. Friend*, 458 F.3d 726, 730 (8th Cir. 2006); *Nicini v. Morra*, 212 F.3d 798, 808 (3d Cir. 2000); *Lintz v. Skipski*, 25 F.3d 304, 305 (6th Cir. 1994); *Yvonne L. ex rel. Lewis v. N.M. Dep’t of Human Servs.*, 959 F.2d 883, 892-93 (10th Cir. 1992); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846, 849 (7th Cir. 1990); *Taylor ex rel. Walker v. Ledbetter*, 818 F.2d 791, 795 (11th Cir. 1987); *Doe v. N.Y. Dep’t of Soc. Servs.*, 649 F.2d 134, 144-45 (2d Cir. 1981).

<sup>105</sup> *Hernandez v. Tex. Dep’t of Protective & Regulatory Servs.*, 380 F.3d 872, 880 (5th Cir. 2004).

<sup>106</sup> *Connor B. ex rel. Vigurs v. Patrick (Connor B. I)*, 771 F. Supp. 2d 142, 160 (D. Mass. 2011).

<sup>107</sup> 42 U.S.C. § 675(5)(E) (2012).

<sup>108</sup> *Id.* at (F)(ii).

in care; unfortunately, no federal guidelines exist for what should happen if a termination of parental rights extends over years or is actually denied.

In the Southern District of New York, *Marisol v. Giuliani* provided some of the most extensive judicially developed protections for children in the foster care system.<sup>109</sup> The judge ruled that:

- 1) Children could enforce state child welfare statutes;
- 2) Children in state foster care custody have a substantive due process right to be free from harm that extends to freedom from “unreasonable and unnecessary intrusions into their emotional well-being”;
- 3) Children in foster care have a substantive due process right to conditions of confinement which bear a reasonable relationship to the purpose of their custody, including conditions and duration of foster care reasonably related to this goal;
- 4) The substantive due process right to freedom from harm encompasses the right to reasonable services to enable children to be reunited with biological family members;
- 5) The state laws governing the investigation of child abuse and neglect create constitutionally protected entitlements sufficient to trigger procedural due process rights, a ruling of particular significance;
- 6) Children have a private right of action to sue for violations of the Adoption Assistance and Child Welfare, and the Child Abuse Prevention and Treatment Acts, the primary federal child welfare funding statutes; and
- 7) Children in foster care with disabilities have rights under the federal disability statutes, both to non-discriminatory access to government services and to affirmative steps to ensure that the access is meaningful.<sup>110</sup>

These rights have not been established in higher courts or in other jurisdictions, meaning that pursuing this case could have established important precedent for other Children’s Rights cases in other states. Yet after a long discovery period and 300 hours of planned trial time for each side, the plaintiffs eventually chose to pursue settlement negotiations. Marcia Robinson Lowry claimed she was convinced that the plaintiffs would win eventually, but “[A]s difficult as it was to give up what looked like a certain finding of liability, it was easy to recognize that the settlements moved the process forward by at least two years and offered the best, most immediate prospect of beginning to solve the problems now.”<sup>111</sup> Another source instead attributed Lowry’s new willingness to negotiate to “daunting costs,” New York City’s “impressive” new reform plan, and the City’s

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<sup>109</sup> See generally *Marisol v. Giuliani*, 929 F. Supp. 662 (S.D.N.Y. 1996).

<sup>110</sup> *Id.*; see also Marcia Robinson Lowry, *Why Settle When You Can Win: Institutional Reform and Marisol v. Giuliani*, 26 *FORDHAM URB. L.J.* 1335, 1339 (1999).

<sup>111</sup> Lowry, *supra* note 110, at 1345.

unwillingness to cede control of its system as compared to other defendants who quickly gave in to the plaintiffs' demands.<sup>112</sup> Lowry settled, that is, because she thought she was about to lose. Accordingly, the settlement gave Children's Rights significantly less power than in previous settlements; notably, court jurisdiction concluded two years after the consent decree was entered instead of the decades of monitoring seen in many other cases.<sup>113</sup>

Child welfare institutional reform lawsuits' long track record of easy settlements began to wane after *Marisol*, but was most severely compromised by the 2013 Massachusetts case *Connor B. v. Patrick*. *Connor B.* asserted foster children's substantive and procedural due process rights and children's constitutional right to family association and rights to permanency under the Adoption Assistance and Child Welfare Act of 1980 had been violated.<sup>114</sup> The District Court of Massachusetts acknowledged that the State owed a special duty to the plaintiff class for six particular rights:

- (1) "a living environment that protects foster children's physical, mental and emotional safety and well-being";
- (2) "services necessary to prevent foster children from deteriorating or being harmed physically, psychologically, or otherwise while in government custody";
- (3) "treatment and care consistent with the purpose of the assumption of custody by DCF";
- (4) "be maintained in custody [no] longer than is necessary";
- (5) "receive care, treatment and services determined and provided through the exercise of accepted professional judgment";
- and (6) "be placed in the least restrictive placement according to a foster child's needs."<sup>115</sup>

However, the district court ruled against the plaintiffs, dismissing the case and granting judgment for the defendants on all claims.<sup>116</sup> The plaintiffs appealed, but the First Circuit affirmed, agreeing with the district court that there was no substantive due process violation in a state "choosing among aspects of a problem to approach at a given time,"<sup>117</sup> so long as the decision is not "such a substantial departure from accepted professional judgment" that it appears not to be based on professional judgment at all.<sup>118</sup> The case warned others considering potential litigation that federal law claims on behalf of foster youth were unlikely to be successful. The judge in the district court and the opinion from the Chief Judge of the First Circuit both stated that this was a sympathetic situation for which there was no legal recourse, and so was a matter for the Governor of Massachusetts and the state legislature to take up, rather than the courts.<sup>119</sup> *Connor B.* was a particularly harsh blow because the plaintiffs were unable even to reach the discovery stage. Getting to the discovery stage is important in many jurisdictions because it often exposes to public view

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<sup>112</sup> SANDLER & SCHOENBROD, *supra* note 10, at 146-47, 193-94.

<sup>113</sup> *Id.* at 193.

<sup>114</sup> *See generally* *Connor B. v. Patrick*, 985 F. Supp. 2d 129 (D. Mass 2013).

<sup>115</sup> *Id.* at 158-59 (citing Complaint, *Connor B. v. Patrick*, Civil Action No. Case 3:10-cv-30073 (2010), ¶ 303(b)-(g), [http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15\\_ma\\_complaint\\_as\\_filed.pdf](http://www.childrensrights.org/wp-content/uploads/2010/04/2010-04-15_ma_complaint_as_filed.pdf) [<https://perma.cc/9J83-ZN2B>]).

<sup>116</sup> *Connor B.*, 985 F. Supp.2d at 166.

<sup>117</sup> *Connor B. v. Patrick*, 774 F.3d 45, 53 (2014) (citing *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982)).

<sup>118</sup> *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982).

<sup>119</sup> *Connor B.*, 774 F.3d at 48.

data that has not previously been available.<sup>120</sup>

Child welfare reform litigation that has actually had court rulings is a small subset of the larger field, so what is said matters despite the fact that most of it is not technically precedent for any other given case. That states have some obligation to care for children who are in their custody and that they should attempt to follow state and federal law while doing so may be the limit of what the rulings establish. That the settlements go so much further than what prior cases have established can be attributed to other forces, particularly the media's influence on both public understanding and governmental decisions.

## II. MEDIA AND PUBLIC UNDERSTANDINGS OF THE CHANGES TO THE CHILD WELFARE SYSTEMS

Lawsuits that end in settlement agreements have been successful in part through not waiting for a judge to issue rulings but instead moving to settlement agreements and consent decrees. According to Marcia Robinson Lowry, "Children's Rights has the legal expertise to litigate these kinds of cases. But we view these cases more as reform campaigns than as lawsuits."<sup>121</sup> They have created actual change in policies and procedures, despite struggles implementing the settlement agreements and consent decrees. The organizations conducting the litigation have recognized that using media expands their legal reform efforts into a public conversation about the duties owed to children in the child welfare system. Despite their stated recognition of the importance of media, litigators' public statements have failed to demonstrate the public relations skills that are necessary for successful campaigns.

### *A. Despite Setbacks and Slow Implementation, Real Systems Change*

Most sources agree that child welfare reform litigation has been successful in its goal of improving the child welfare system, but this strategy still has significant costs. The litigation has brought more funding to the sites named as problems in the lawsuits, and administrators have taken concrete steps to remedy issues described in the complaints. Yet many jurisdictions have resisted implementing the settlement agreements, leading plaintiffs to return to court years after the initial settlement. Retrospective looks at the various child welfare reform litigation efforts have given it mixed reviews.

Child welfare reform litigation has had some clear benefits. This litigation "can spotlight ignored problems, put a halt to the most grievous harms, and often results, at least initially, in more money for services, more staff with lower caseloads, and closer scrutiny of agency process and procedure."<sup>122</sup> Marcia Robinson Lowry, who led child welfare reform litigation in many states, has

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<sup>120</sup> See e.g., Shimica Gaskins, *Is it Possible to Reform a Child Welfare System? An Evaluation of the Current Progress in the District of Columbia and the Advocacy Strategies that Led to Reform*, 5 WHITTIER J. CHILD & FAM. ADVOC. 165, 170 (2005).

<sup>121</sup> Marcia Robinson Lowry, *A Powerful Route to Reform or When to Pull the Trigger: the Decision to Litigate*, in FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION 1, 6 (Center for the Study of Social Policy, ed., 2012), [http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children\\_Lessons-Learned-from-Class-Action-Litigation\\_January-2012.pdf](http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf) [<https://perma.cc/L928-XQFH>] [hereinafter Lowry, *A Powerful Route to Reform*].

<sup>122</sup> Ellen Borgersen & Stephen Shapiro, *G.L. v. Stangler: A Case Study in Court-Ordered Child Welfare*

claimed that litigation was the primary force behind change in Tennessee, New Jersey, New York, and other states in which she has filed suit. Because of the litigation, experts were able to collect data from the child welfare system. When the experts reported on that data, the public found out just how badly the system treated children.<sup>123</sup> Further, the lawsuits sustain political pressure on the system in a way that releases of single reports or lobbying days at the state capitol cannot maintain.<sup>124</sup> This article advocates for understanding the mass of litigation and settlements as important in their structure and not just in their results. By saying that all of the problems are important and need to be addressed right away, and that all of the federal and state laws together support the demands of the advocates, the litigation presents reform as inevitable. Litigation also allows advocates to return to court if or when compliance is less than desired, whereas advocates would have less influence on implementation of legislation.

One scholar calls child welfare reform consent decrees “popular and reasonably effective.”<sup>125</sup> A report of a court-appointed panel suggested New York City made significant progress in reforming its child welfare system, including committing to “neighborhood-based placements and services,” funding additional preventative services, and creating new meetings of families and providers.<sup>126</sup> Proponents claim an important role for class action lawsuits, arguing that “elements of systemic relief fall beyond the narrow and individualized parameters of judicial relief customarily considered by family courts as they adjudicate and enforce custodial rights, even in instances in which individual children are aggressively represented by counsel.”<sup>127</sup> Such benefits have not come from federal legislative reform efforts and cannot come from individual advocacy.

Lawsuits are a “blunt instrument” but sometimes necessary, said former New Jersey Governor Jon Corzine.<sup>128</sup> Other advocates insist that lawsuits cannot be the only strategy, but are a vital component of a mix that includes “partnerships with allies inside government, work to empower parents and children in their interactions with child welfare agencies, and enlist[ing] the aid of experts and community leaders.”<sup>129</sup> Child welfare litigation does not exist in a vacuum, and the agreement of various parties to a specific plan does not mean that it will succeed. Old conflicts between branches of government have impeded reform efforts in some states, with federal courts’ efforts to achieve social policy reform in Illinois blunted by local politics. Political leaders in Missouri gave more resources to child welfare only grudgingly, resenting the judicial mandate to improve the system.<sup>130</sup> In Georgia, child welfare reform began in 1990, with sweeping legislative

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*Reform*, 1997 J. DISP. RESOL. 189, 190 (1997) [hereinafter, Borgersen & Shapiro, *G.L. v. Stangler*].

<sup>123</sup> Marcia Robinson Lowry, *Reforming the Child Welfare System*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 389, 392 (2005).

<sup>124</sup> *Id.*

<sup>125</sup> Timothy Arcaro, *Florida’s Foster Care System Fails Its Children*, 25 NOVA L. REV. 641, 682 (2001).

<sup>126</sup> Sally K. Christie, *Foster Care Reform in New York City: Justice for All*, 36 COLUM. J.L. & SOC. PROBS. 1, 11 (2002) (citing N.Y. SPECIAL CHILD WELFARE ADVISORY PANEL, FINAL REPORT (Dec. 7, 2000)).

<sup>127</sup> Marcia Robinson Lowry & Sara Bartosz, *Why Children Still Need a Lawyer*, 41 U. MICH. J.L. REFORM 199, 212 (2007).

<sup>128</sup> Press Release, Children’s Rights, Fifth Annual Children’s Rights Benefit Honors Darryl “DMC” McDaniels, Features Gov. Jon S. Corzine — Oct. 19 in NYC (Sept. 29, 2010), <http://www.childrensrights.org/press-release/fifth-annual-childrens-rights-benefit-honors-darryl-dmc-mcdaniels-features-gov-jon-s-corzine-oct-19-in-nyc> [<https://perma.cc/H7PG-WAS6>].

<sup>129</sup> *Id.*

<sup>130</sup> MEZEY, *supra* note 102, at 159.

efforts. Yet an investigation in 1999 concluded, “[M]any of the more ambitious reforms of 1990 have failed. They were the victims of bureaucratic inertia, failure to hold the child welfare system accountable, funding problems and, most importantly, an inability to make sure the reforms were making a difference.”<sup>131</sup>

The settlements unfolded slowly and painfully in many states. In *G.L. v. Zumwalt*, after the court certified the class and the Children’s Rights Project of the American Civil Liberties Union (ACLU) joined Legal Aid as co-counsel, the Missouri Division of Family Services became willing to engage in settlement talks. The resulting consent decree was published in 1983, but implementation of the agreement failed after state officials failed to provide any extra resources to meet the demands of the settlement.<sup>132</sup> The tone of the initial consent decree was also very harsh for caseworkers or state officials who may have wanted to maintain any level of discretion in their work. The decree mandated the specific number of days of training each year that foster care workers needed to receive and in which areas, detailed rules about removals, information to be included in case files, and fixed deadlines for decisions on removals and for visits to foster homes.<sup>133</sup> These strict guidelines were impossible for workers to follow, especially because the state refused to give any extra resources to the affected jurisdiction out of fear that it would just be sued by others seeking extra funds for their jurisdictions.<sup>134</sup> Eventually the state was held in contempt of the agreement.<sup>135</sup>

There are also significant costs to the litigation. The Center for the Study of Social Policy wrote, “Many states have spent decades in the courts, diverting staff and other resources to the defense of class action lawsuits, sometimes at the expense of applying those resources to the delivery and enhancement of core services for at-risk children and families.”<sup>136</sup> Critics have claimed that the improvements due to the child welfare reform litigation have come at the expense of less quantifiable areas and that the financial and social costs of litigation create an environment hostile to productive relationships. Kathleen Noonan wrote, “[T]he most striking tendency in the early decrees, still prominent in some more recent ones, is a preoccupation with deadlines, quantitative measures, and specific procedural and documentation requirements.”<sup>137</sup>

Within specific states, there was not always agreement as to whether the litigation worked, but advocates saw litigation as one of the only methods to ensure visibility of the problem. Advocates in Georgia said, “With confidentiality barring the public from knowing the extent of the problems, politicians often lack the will to do anything.”<sup>138</sup> Children’s Rights filed a lawsuit against

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<sup>131</sup> Jane O. Hansen, *Georgia’s Forgotten Children: Empty Shoes Represent 844 Children in 6 Years Who Died After Their Families Were Reported For Mistreating a Child. Many Died Suspiciously or From Neglect. Most of Their Lives and Deaths Went Unnoticed. Until Now*, ATLANTA JOURNAL-CONSTITUTION, Dec. 5, 1999, at A1.

<sup>132</sup> Borgersen & Shapiro, *G.L. v. Stangler*, *supra* note 122, at 193-95.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Judith Meltzer et al., *Introduction & Overview* to FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION (Center for the Study of Social Policy ed., 2012), [http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children\\_Lessons-Learned-from-Class-Action-Litigation\\_January-2012.pdf](http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf) [<https://perma.cc/8D56-NZTE>].

<sup>137</sup> Kathleen G. Noonan et al., *Legal Accountability in the Service-Based Welfare State: Lessons from Child Welfare Reform*, 34 L. & SOC. INQUIRY 523, 531 (2009).

<sup>138</sup> Hansen, *supra* note 131, at A1.

the state of Georgia in 2002, and in 2003, state child welfare officials pointed to “higher caseworker salaries, new caseworkers, a new oversight agency and a list of in-house policy changes” as proof that new child welfare reform efforts worked.<sup>139</sup> Advocates pushed back, saying there was a lot of talk and almost no action as a part of the efforts.<sup>140</sup> That understanding was largely correct. Georgia state officials had few concrete plans for implementing any other changes demanded in the consent decree.<sup>141</sup> The Georgia governor’s response to child welfare reform was to propose an advocate with no power to sue and who would serve at the pleasure of the governor.<sup>142</sup> Advocates, frustrated, saw this a weak position where someone could immediately be fired for taking a stand.<sup>143</sup>

Similar patterns repeated in other states. The Center for the Study of Social Problems concluded that systems in Alabama, Kansas, Missouri, New Jersey, New Mexico, Tennessee, and Utah showed “measurable systemic improvements and better outcomes for children and their families. Others, such as systems in Washington, Maryland, and Washington, D.C., have been in litigation and under consent decrees for many years without much success.”<sup>144</sup> In state after state, plaintiffs filed complaints alleging terrible conditions affecting children in foster care or whose parents were being investigated for abuse or neglect, and state officials would capitulate and sign settlement agreements. Yet enforcement was uneven and monitoring stretched on over decades, with states alleging that they had made significant progress and advocates less convinced. Advocates often agreed that some progress had been made, but they believed that serious concerns remained and that they should still be involved in monitoring the situation. Media often sided with advocates, finding fault in the child welfare systems and showcasing horrific cases, even if the jurisdiction had made significant changes in response to the initial litigation.

#### *B. Clueless Public Relations and Qualified Results*

Advocates have largely succeeded in making the public conversation about foster care reform into one about the needs of a vulnerable population and the government’s responsibility to improve the situation. Attorneys use the structure of their legal complaints, with expansive interpretations of rights and dramatic plaintiff narratives, plus expert reports during monitoring stages, to promote the narratives that they see as compelling. However, they have failed to recognize the power of the media to showcase the troubling results of the litigation in addition to the initial need for it. Attorney Marcia Robinson Lowry has made abrasive statements that then affect other litigation because of her central role in the litigation. Advocates have also failed to address public concerns about costs. Media, then, shows the need for change, but little about how to fix it or why the immense cost is worth it. For the public, the result is a general sense of despair and chaos.

Child welfare reform litigation is important to capturing public attention in large part because children who have been abused and neglected rarely get to speak for themselves. Unlike

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<sup>139</sup> Margaret Newkirk, *4 Years Later, Child Welfare Reform Results Still Debated*, ATLANTA JOURNAL-CONSTITUTION, Feb. 2, 2003, at C1.

<sup>140</sup> *Id.*

<sup>141</sup> Ron Martz, *‘Scary’ Cost Seen to Fix Child Welfare*, ATLANTA JOURNAL-CONSTITUTION, Apr. 19, 2000, at D1.

<sup>142</sup> Jane Hansen, *Georgia’s Forgotten Children: Is Bill Strong Enough to Save Lives?* ATLANTA JOURNAL-CONSTITUTION, Mar. 5, 2000, at 1C.

<sup>143</sup> *Id.*

<sup>144</sup> Meltzer, *supra* note 136, at vi.

most other court cases, dependency cases are closed to the public. Only about 25 percent of Americans reported that they pay much attention to foster care issues,<sup>145</sup> although 41 percent said they knew someone who was adopted through foster care.<sup>146</sup> Children in the foster care system are the “quintessential pitiful plaintiffs, readily able to gather sympathy from the public, especially when confronting a highly unpopular state agency.”<sup>147</sup> The focus is one of pity and how terrible the lives of these poor children are, and how the state should act immediately to help these children. The public gaze is sympathetic but also othering; the named plaintiffs of these lawsuits never themselves speak to the media. Narrative descriptions of squalid conditions or heartbreaking stories in the complaints can overshadow agencies’ data or any speaking that youth in care may attempt to do for themselves.<sup>148</sup> Large foster care litigation has the potential to increase public awareness, but advocates have not been as careful in the construction of these public narratives as would perhaps be wise.

In a multi-decade movement, media coverage of the institutional reform litigation at some point acknowledges the failure of previous institutional reform litigation in each state. Ongoing litigation makes the failures of child welfare reform public in efforts to win yet more reforms. Failures are potential evidence that advocates’ roles should be further expanded, but repeated failures also have the effect of creating public uncertainty that these issues are indeed fixable. A newspaper article about *Wilder* was titled, depressingly, “Despite 20-Year Effort, City Can’t Fix System,” and detailed Lowry’s statements that the *Wilder* case not only failed to help children, but rather was used “as an excuse for decisions that hurt them,” such as separating an adolescent mother from her newborn because the newborn had not been waiting for placement as long as other children.<sup>149</sup> In Washington, D.C., a federal judge directed D.C.’s child welfare programs to be run by a receiver. Six years later plaintiffs alleged that the programs under the receiver had not improved, so the court returned the child welfare agency to D.C.’s government.<sup>150</sup> The time and expense of litigation and settlement had failed.

Litigation can also cause its own problems. Child welfare reform litigators do not seek to make the system worse, but their efforts can sometimes backfire. An editorial from the editors of a Nebraska newspaper described the child welfare system in the state as “in turmoil,” and stated, “[F]ew seem to have considered the possibility that the reform effort could take a bad situation and make it even worse.”<sup>151</sup> The editors wrote:

Now the front-line workers in the system must contend with job insecurity.

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<sup>145</sup> Jon Cohen, *ABC News Poll: Many Young Adults Would Consider Adoption*, ABC NEWS (May 30, 2006), <http://abcnews.go.com/Primetime/print?id=1990936> [<https://perma.cc/TMC5-UG9P>].

<sup>146</sup> DAVE THOMAS FOUNDATION FOR ADOPTION, NATIONAL FOSTER CARE ADOPTION ATTITUDES SURVEY 12 (2013), <https://davethomasfoundation.org/wp-content/uploads/2012/10/DTFA-HarrisPoll-REPORT-USA-FINALI.pdf> [<https://davethomasfoundation.org/wp-content/uploads/2012/10/DTFA-HarrisPoll-REPORT-USA-FINALI.pdf>] [<https://perma.cc/YGM9-Y3MY>].

<sup>147</sup> MEZEY, *supra* note 102, at 7.

<sup>148</sup> RICHARD NISBETTER & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS IN SOCIAL JUDGMENT* 43-62 (Prentice Hall, 1980).

<sup>149</sup> Nina Bernstein, *Despite 20-Year Effort, City Can’t Fix System*, NEWSDAY, Jul. 13, 1993, at 77.

<sup>150</sup> SANDLER & SCHOENBROD, *supra* note 10, at 5, *citing LaShawn A. v. Kelly*, 887 F. Supp. 297 (D.D.C. 1995), *aff’d*, 107 F.3d 923 (1996), *cert. denied*, 520 U.S. 1264 (1997).

<sup>151</sup> Editorial, *Child welfare reform needs help*, LINCOLN J. STAR, May 20, 2010, at B7.

Families and children must cope with changes in case management. Lines of supervision change abruptly. The ever-changing bureaucracy makes it harder for front-line workers to arrange appropriate services, especially when a child needs emergency care.<sup>152</sup>

The editors told the community that the child welfare reform efforts are failing, but the most interesting part was the editors' assumption that it is the government's responsibility to fix the situation. The reform solution in Nebraska had been to involve private nonprofits, but here, the editors conclude that the governor needs to get involved and fix the problem.<sup>153</sup> Invoking a public official to do a job for people who had no role in electing him shows that the cause has captured the public. The Nebraska state government in this case refused to step in, ordering a one-year delay in appointing a new lead agency.<sup>154</sup> Carolyn Rooker, executive director of Voices for Children in Nebraska, was quoted as saying, "A year is a long time to wait to help kids in the system."<sup>155</sup> In states in which lawsuits lasted for many years, like *Wilder* in New York City, generations of children grew up waiting for change.<sup>156</sup> In 1993, Marcia Robinson Lowry told the judge in the *Wilder* case, "To tell you the truth, your Honor, I don't know what we really accomplished."<sup>157</sup> One must wonder what efforts might have been made toward helping the youth in the New York City foster care system if *Wilder* had not been on the horizon as a beacon of hope that never came closer.

Some child welfare reform has been hindered by personality clashes and condescension among parties. A certain level of distrust is inherent among parties in litigation, but tensions can be greater or lesser. "[T]he outcome of these suits often depends to a large extent on the personalities and tactics of the plaintiff's lawyers and the defendants," said one analysis.<sup>158</sup> Marcia Robinson Lowry made the remarkable statement:

People who run child welfare systems cannot be left to their own devices. They will not use reasonable standards, they do have to be told "first, you put your left foot in front of your right foot, then you put your right foot in front of your left foot, then you do it again."<sup>159</sup>

Ms. Lowry's contempt for the people against whom she litigated was unlikely to help relationships, and in fact, many, if not all, of the jurisdictions in which she litigated became bogged down in personal conflicts.<sup>160</sup> Nicholas Scopetta, a New York City child welfare official, described his frustration with "the criticism that is unrelenting from some groups that just can't find it in their

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<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> JoAnne Young, *Child Welfare Reform Delayed*, LINCOLN J. STAR (April 13, 2011), at B2.

<sup>155</sup> *Id.*

<sup>156</sup> *Wilder v. Bernstein*, 645 F. Supp. 1292 (S.D.N.Y. 1986).

<sup>157</sup> SANDLER & SCHOENBROD, *supra* note 10, at 3.

<sup>158</sup> Daphne Eviatar, *Deep Impact*, LEGAL AFF., Jan.-Feb. 2004, [http://www.legalaffairs.org/issues/January-February-2004/review\\_eviatar\\_janfeb04.msp](http://www.legalaffairs.org/issues/January-February-2004/review_eviatar_janfeb04.msp) [<https://perma.cc/HZL6-S7A5>].

<sup>159</sup> Marcia Robinson Lowry, *Foster Care and Adoption Reform Litigation: Implementing the Adoption and Safe Families Act of 1997*, 14 ST. JOHN'S J. LEGAL COMMENT 447, 453 (1999–2000).

<sup>160</sup> Borgersen & Shapiro, *supra* note 122, at 195–96.

heart to acknowledge that reforms have taken place.”<sup>161</sup> The child welfare administrators saw the litigators as “outsiders who didn’t understand what was going on.”<sup>162</sup> Bob McKeagney, former head of Maine’s child welfare system, claimed that the lawsuits were “debilitating” and “demoralizing” to the child welfare agencies.<sup>163</sup> Animosity between parties can become so intense that it can become “an excuse for continued failure, fueling a culture of victimhood among embattled personnel.”<sup>164</sup> In her case study of Illinois child welfare reform litigation, Susan Gluck Mezey wrote that advocates who had come together to file the lawsuit in Illinois quickly splintered into opposing interests, in part due to issues of personality conflict.<sup>165</sup>

What Children’s Rights and others do or say in one state reflects elsewhere, too, with special consideration due to the presence of Marcia Lowry in repeated suits. An article in an Oklahoma newspaper warned, “[T]wo of the three most powerful people shaping the future of Oklahoma’s child-welfare system are former high-ranking administrators of the New Jersey child-welfare agency.”<sup>166</sup> Children’s Rights brought both cases. What happens in one state matters in all other states, as the same lawyers and even the same experts reappear. Marcia Robinson Lowry, of course, is the prime repeat player, with a high point in 1998 of serving as counsel in 13 foster care cases in eight states and Washington D.C.<sup>167</sup> Marcia Lowry has significant power over the people she represents. Plaintiffs in public interest litigations have intensified problems in holding their attorneys accountable due to the nature of class-action litigation, with numerosity of plaintiffs and interests, and the relative powerlessness of any individual participant.<sup>168</sup> The children she represents have no power on their own, but Marcia Lowry has large law firms and businesses sponsoring her work and a long track record on these issues.<sup>169</sup> She has experience at the negotiation table. She defines the class and shapes the strategy; she decides what remedies she wants and how hard to push for them. She decides when settlement negotiations should be concluded.<sup>170</sup> She “wield[s] the

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<sup>161</sup> Bob Port, *Child-Welfare Reforms Win Thumbs Up*, N.Y. DAILY NEWS, Dec. 8, 2000.

<sup>162</sup> Baruch College Center for Nonprofit Strategy & Management, *Child Welfare & Foster Care Reform: Going Mainstream: Advocates Take the Reins*, in N.Y.C. NONPROFIT ADVOCACY CASE STUDIES 1, 5 (2014), <https://www.baruch.cuny.edu/spa/centers-and-institutes/center-for-nonprofit-strategy-and-management/documents/ChildWelfare-Full.pdf> [<https://perma.cc/S4XH-XFBG>] (quoting statement of Administration of Child Services Commissioner John Mattingly).

<sup>163</sup> Kelly, *supra* note 98.

<sup>164</sup> CENTER FOR THE STUDY OF SOCIAL POLICY, *NEW ROLES FOR OLD ADVERSARIES: THE CHALLENGE OF USING LITIGATION TO ACHIEVE SYSTEM REFORM 3* (1998), <http://www.cssp.org/publications/child-welfare/top-five/new-roles-for-old-adversaries-the-challenge-of-using-litigation-to-achieve-system-reform.pdf> [<https://perma.cc/M9KT-C67C>].

<sup>165</sup> MEZEY, *supra* note 102, at 139-42.

<sup>166</sup> Randy Ellis, *Similar Lawsuit in New Jersey May Hint at Reforms to Come Once Tulsa Judge Approves Deal*, THE OKLAHOMAN, Jan. 8, 2012, at 23A.

<sup>167</sup> The states are Connecticut (two cases), Kansas, Kentucky, Louisiana, Missouri, New Mexico, New York (three cases), and Pennsylvania, in addition to the District of Columbia. SANDLER & SCHOENBROD, *supra* note 10, at 135 n. 40 (citing Nat’l Center for Youth Law, “Foster Care Reform Litigation Docket: 1998”) (source no longer available).

<sup>168</sup> Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO L.J. 1355, 1415 (1990-1991).

<sup>169</sup> Richard Wexler, *The Children Wronged by “Children’s Rights” \*and by “A Better Childhood,” too*, NAT’L COALITION FOR CHILD PROTECTION REFORM 2 (2016), [https://drive.google.com/file/d/0B291mw\\_hLAJsQXBfdmh2UIFudDA/view](https://drive.google.com/file/d/0B291mw_hLAJsQXBfdmh2UIFudDA/view) [<https://perma.cc/SZ4G-5TSX>].

<sup>170</sup> See Robert E. Buckholz, Jr. et al., *The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 884 (1978).

power of the office without running for office.”<sup>171</sup> Individuals and organizations with significant histories of work on single issues end up “owning the litigation and the issue,” such that “no policy can be adopted or advanced without their approval.”<sup>172</sup> One text names Marcia Lowry as an example of an individual owning an entire field of litigation.<sup>173</sup>

Repeated failures of child welfare reform have left the public with some uncertainty that these issues are fixable. Immediately after the Special Child Welfare Advisory Panel, a feature of the *Marisol v. Giuliani* settlement, issued its final report in 2002, the ACS Commissioner William Bell announced a new panel to continue its work. He insisted that the new panel was to provide continuity and oversight, but admitted it was also to improve public perception of the system.<sup>174</sup> Social workers react defensively to media portrayals of “child welfare agencies as systems in disarray,” but the public most often hears about child welfare issues when a child dies or when one of these lawsuits is filed, exposing all of the problems in the system.<sup>175</sup> Susan Gluck Mezey, in her case study about the Illinois child welfare litigation, wrote about the media’s “intense scrutiny” of DCFS:

[T]he press helped mobilize public opinion to support reform by alerting the citizenry to the failings of the system. It also provided a forum for public officials to rail against the evils of child abuse (a prudent stance for public officials of all ideological perspectives) and to criticize an unpopular government agency for failing to prevent the parade of horrors that were inflicted on innocent children. The stories about child abuse also allowed politicians to distance themselves from the issue by blaming the parents as well as DCFS and thereby avoid taking responsibility for the underlying societal causes that contributed to these conditions.<sup>176</sup>

The general public has no idea of the law, meaning that litigators have an opportunity to shape public ideas about what is right and what the state should do for children in its care. Litigators can expand public understanding of what duties government owes to children by contributing to media coverage.

Media interpretations of reform efforts shape public perceptions; New Jersey is a prime example of media effects. In a survey of people who work with children and families in New Jersey, sixty percent of people felt that the state had made progress, but forty percent felt the reform efforts had actually made things worse.<sup>177</sup> A court-appointed panel felt similarly disappointed in New Jersey’s progress, writing a report critiquing children “languishing in shelters, inadequate staff

<sup>171</sup> SANDLER & SCHOENBROD, *supra* note 10, at 7.

<sup>172</sup> *Id.* at 134-35.

<sup>173</sup> *Id.* at 135.

<sup>174</sup> Baruch College Center for Nonprofit Strategy & Management, *supra* note 162, at 6.

<sup>175</sup> NAT’L ASSOC. OF SOCIAL WORKERS, “IF YOU’RE RIGHT FOR THE JOB, IT’S THE BEST JOB IN THE WORLD”: THE NAT’L ASSOC. OF SOCIAL WORKERS’ CHILD WELFARE SPECIALTY PRACTICE SECTION MEMBERS DESCRIBE THEIR EXPERIENCES IN CHILD WELFARE 3 2004, <https://www.socialworkers.org/LinkClick.aspx?fileticket=Mr2sd4diMUA%3d&portalid=0> [<https://perma.cc/Q6E8-79WW>]; Lowry, *A Powerful Route to Reform*, *supra* note 121, at 6.

<sup>176</sup> MEZEY, *supra* note 102, at 53.

<sup>177</sup> Laura Fasbach, *N.J. Urged to Move DYFS Reform to Front Lines*, THE RECORD (Hackensack, N.J.) Oct. 20, 2005.

training and an adoption system in disarray.”<sup>178</sup> Media has “the potential to influence the meaning that is given to the information and the conclusions that are drawn from it,” and in local newspapers, media focused on the negative aspects, with headlines like, “Taxpayers’ bill for suit against DYFS is \$5 million.”<sup>179</sup> Media from distant states copied this framing, raising the specter that the \$350 million spent in three years to improve child welfare services was wasted, or at least not used to its best possible results.<sup>180</sup> Children’s Rights claimed that the money was well spent. Associate Director Susan Lambaise said, “New Jersey’s child-welfare system is being transformed by this court-ordered reform effort in ways that are producing increasingly clear and significant improvements in the lives of the state’s abused and neglected children and their families.”<sup>181</sup> However, she failed to give any specifics, and critics pointed out that children were still dying from abuse and neglect, including children who had open child welfare cases.<sup>182</sup>

The cost of child welfare reform litigation is perhaps the most discussed public issue, and the cost becomes especially frustrating when the results are weak. “Reform is not only costly, but also time consuming,” wrote the *New York Times* editorial board in an editorial about the plans for child welfare reform in New Jersey. The article was titled simply, “Reform Isn’t Cheap.”<sup>183</sup> State officials in Georgia described the price tag for improvements as “scary.”<sup>184</sup> In Illinois, legislative efforts at child welfare reform faced similar cost-based delays, with financial issues delaying the implementation of mental health assessment and treatment for Illinois children.<sup>185</sup> Public discussion of child welfare reform has been multi-dimensional, concerned at the same time about the need for the work and the cost of it. A letter to the editor from the director of a lead nonprofit doing reform work in Nebraska noted the high stakes: “more than \$100 million taxpayer dollars, hundreds of jobs in the public and private sectors and by far the most important consideration - the welfare of thousands of Nebraska’s most vulnerable children.” The public cares about children, but also about finances. The letter continued on to note the significant cost overruns and unfunded mandates under the “aggressive plan to improve outcomes” with “no additional funding” from the Governor or Health and Human Services, and concluded by stating that his organization would be withdrawing from its role in child welfare reform efforts in Nebraska.<sup>186</sup>

Advocates have failed to acknowledge that the public is paying the costs to defend this litigation, although the media is very aware of it. The *New York Times* noted that the state of Illinois hired the prestigious—and expensive—law firm Skadden, Arps, Slate, Meagher & Flom to defend

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<sup>178</sup> *Id.*

<sup>179</sup> Jennifer K. Robbenolt & Christina A. Studebaker, *News Media Reporting on Civil Litigation and Its Influence on Civil Justice Decision Making*, 27 LAW & HUM. BEHAV. 5, 6 (2003); Mitch Lipka, *Taxpayers’ bill for suit against DYFS is \$5 million*, PHILA. INQUIRER, July 21, 2003, at B01.

<sup>180</sup> Craig Schneider, *State Told to Fix Foster Care; Caseworkers Hail Suit Settlement*, ATLANTA JOURNAL-CONSTITUTION, July 7, 2005, at C1.

<sup>181</sup> Adrienne Lu, *Child-Welfare Agency Progressing, Report Says*, PHILA. INQUIRER, Apr. 28, 2009, at B01.

<sup>182</sup> *Id.*

<sup>183</sup> N.Y. TIMES (Apr. 30, 2006), at NJ27, <http://www.nytimes.com/2006/04/30/opinion/nyregionopinions/DYFS.html> [https://perma.cc/CTG9-VV6P].

<sup>184</sup> Martz, *supra* note 141, at D1.

<sup>185</sup> Dave Orrick, *DCFS offers plan to better child welfare*, CHICAGO DAILY HERALD, Oct. 9, 2004, at 1.

<sup>186</sup> James R. Blue, Letter to the Editor, *Future of State Child Welfare Reform Uncertain*, LINCOLN J. STAR, Aug. 29, 2010, at B8.

state child welfare officials, paying the firm \$7.9 million between 1989 and 1996.<sup>187</sup> New Jersey used in-house counsel at some points, but in 2015 hired an out-of-state law firm at \$25,000 each month, followed by an hourly rate of \$558, in an attempt to remove itself from the long-term monitoring that entrapped the state since the 1999 lawsuit.<sup>188</sup> State defendants have also had to pay plaintiffs' legal costs and the costs of monitoring, which included \$3.9 million for *Wilder*, \$5.8 million for *Marisol*, and \$7.5 million for *Charlie & Nadine H.*<sup>189</sup> There has been no indication that advocates have been concerned about fiscal implications for the affected jurisdictions. In 1990, Connecticut agreed to hand over direction of its child-welfare system to an outside panel, with Marcia Robinson Lowry, the lawyer who sued the state, quoted in the *New York Times* as saying that she now had "the agreement for a model system and a blank check to operate it."<sup>190</sup> Children's Rights has received millions of dollars in legal fees, and the Center for the Study of Social Policy, as a frequent court-appointed monitor, has received significant sums as well.<sup>191</sup> Marcia Robinson Lowry was also quoted saying, "[t]he child welfare system was lousy, so I decided to use the decree [in *Wilder*] beyond the narrow purposes we brought the lawsuit for . . . [W]e milked it for as much as we could."<sup>192</sup> One source's characterization of Children's Rights' response to complaints about the cost of litigation is that cities should, "[s]top running lousy systems and you won't get sued."<sup>193</sup> Children's Rights, for better or worse, has refused to consider public concerns about cost as important.

Systemic reform efforts have made measurable changes across the United States, but outcomes for individual children, even the named plaintiffs, can be lost in the conversation. An analysis of *Marisol v. Giuliani* concluded, "[i]f the goal of *Marisol* was to improve the day-to-day experiences of children who come into contact with the City's child welfare system, then success has yet to be achieved." Children's Rights is the attorney on record in *Marisol*,<sup>194</sup> but the organization does not list the case or host its documents anywhere on its website.<sup>195</sup> "Pretty much everybody agrees that none of those changes have had much effect if at all on the recipients of the

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<sup>187</sup> Robert Pear, *Many States Fail to Fulfill Child Welfare*, N.Y. TIMES, Mar. 17, 1996, at A1.

<sup>188</sup> Susan K. Livio, *Top N.J. Child Welfare Official Predicts Court Monitoring Will End By 2017*, NJ.COM, Apr. 22, 2015, [http://www.nj.com/politics/index.ssf/2015/04/top\\_nj\\_child\\_welfare\\_official\\_predicts\\_court\\_monit.html](http://www.nj.com/politics/index.ssf/2015/04/top_nj_child_welfare_official_predicts_court_monit.html) [<http://perma.cc/S9Q6-WV7H>].

<sup>189</sup> Susan K. Livio, *Christie Hires High-Powered Lawyer to End Supervision of N.J. Child Welfare System*, NJ.COM, Mar. 31, 2015, [http://www.nj.com/politics/index.ssf/2015/03/christie\\_administration\\_hires\\_prominent\\_attorney\\_t.html](http://www.nj.com/politics/index.ssf/2015/03/christie_administration_hires_prominent_attorney_t.html) [<http://perma.cc/T6TJ-A9GS>]; SANDLER & SCHOENBROD, *supra* note 10, at 131.

<sup>190</sup> J.C. Barden, *Panel to Direct Child Welfare in Connecticut*, N.Y. TIMES, Dec. 21, 1990, <http://www.nytimes.com/1990/12/21/nyregion/panel-to-direct-child-welfare-in-connecticut.html> [<http://perma.cc/RFA4-9CCV>].

<sup>191</sup> Kelly, *supra* note 98; Susan K. Livio, *\$6 Million and Counting: the Legal Costs of N.J. Child Welfare Reform*, NJ.COM, Apr. 21, 2013, [http://www.nj.com/politics/index.ssf/2013/04/child\\_welfare\\_reform.html](http://www.nj.com/politics/index.ssf/2013/04/child_welfare_reform.html) [<http://perma.cc/E9QM-PA6S>].

<sup>192</sup> Eviatar, *supra* note 158.

<sup>193</sup> Wexler, *supra* note 169, at 5.

<sup>194</sup> Case Profile: *Marisol v. Giuliani*, CIVIL RIGHTS LITIGATION CLEARINGHOUSE, <http://www.clearinghouse.net/detail.php?id=5> [<http://perma.cc/E8A8-ZNDW>].

<sup>195</sup> Search for "Marisol," CHILDREN'S RIGHTS, <http://www.childrensrights.org/?s=marisol> (search conducted Aug. 1, 2016) [<http://perma.cc/HZ6L-XACW>].

services,” said Doug Lasdon, founder of New York City’s Urban Justice Center, in a 2001 interview.<sup>196</sup> Further, part of the settlement agreement in *Marisol v. Giuliani*, the New York case in question, was that no other class action cases could be brought against New York City’s Administration for Children’s Services during the settlement period.<sup>197</sup> This agreement meant that if advocates from anywhere other than Children’s Rights saw unaddressed issues and wanted to sue ACS on behalf of children in care, they could not. Public perception of *Marisol* reflected an ambivalence similar to that which the lawyers expressed.

Media coverage has also recognized when lawsuits have succeeded, even if there are still issues. Advocates can harness this coverage to win public sympathy. An article described the money and effort New Jersey put into reforming its child welfare system as helping a family to stay together despite struggles with food insecurity and children’s mental health issues.<sup>198</sup> The article stated that under the old system, Eric, a single father, would have lost custody of his four sons, but now the boys were able to stay in a home where they have a “good relationship” with and “all respect” for their father.<sup>199</sup> Positive publicity about the changes that have come from child welfare reforms can show the public that its money is going to good use. The article quoted above outlined the new programs created with the “nearly \$1 billion” New Jersey spent to rebuild its child welfare system and profiled families helped by each program.<sup>200</sup> Even Marcia Robins Lowry made a positive comment, stating that she had seen “real progress” in the state.<sup>201</sup> Internet comments on the article ranged from “[t]his article is the largest crock of crap I have ever read” to “[i]t’s so nice to see government doing something good with our tax dollars!”<sup>202</sup> Media coverage matters, and litigators should be careful to remember the power of the media in shaping the stories.

Media involvement and public perception of a case can make a tremendous difference. Swiss banks stalled descendants of those who had money stolen from them during the Holocaust in the 1990s, until media attention led those banks to negotiate with a number of key organizations.<sup>203</sup> Immigration law reform advocates paid careful attention to media strategy, especially during the 2012 Presidential campaign, and came close to passing comprehensive immigration reform.<sup>204</sup> Like child welfare law reform, immigration law reform efforts began before a supportive social

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<sup>196</sup> Sarah Hultman Dunn, *The Marisol A. v. Giuliani Settlement: “Innovative Resolution” or “All-Out Disaster?”*, 35 COLUM. J.L. & SOC. PROBS. 275, 314 (2002).

<sup>197</sup> *Id.* at 278.

<sup>198</sup> Susan K. Livio, *Reforming DYFS: A Portrait of Change*, NJ.COM, June 22, 2008, [http://www.nj.com/news/index.ssf/2008/06/raising\\_four\\_boys\\_alone\\_on.html](http://www.nj.com/news/index.ssf/2008/06/raising_four_boys_alone_on.html) [<http://perma.cc/SZ2Z-L98K>]. That this article was published in 2008, and in 2017 New Jersey is still under monitoring raises questions about the appropriate length of monitoring post-settlement, but that question is outside the scope of this paper.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> Beth Van Schaack, *Unfulfilled Promise: The Human Rights Class Action*, 2003 U. CHI. LEGAL F. 279, 298-99 (2003).

<sup>204</sup> OPPORTUNITY AGENDA, MEDIA ANALYSIS: THE STATE OF MEDIA COVERAGE OF IMMIGRATION 2012–2013 (2013), [https://opportunityagenda.org/files/field\\_file/2013\\_imm\\_media\\_scan.pdf](https://opportunityagenda.org/files/field_file/2013_imm_media_scan.pdf) [<http://perma.cc/64SZ-8JF8>]; see generally Danny Hayes, *Media Frames and the Immigration Debate*, (paper presented at the Midwest Political Science Association 2008), <http://home.gwu.edu/~dwh/immigration.pdf> [<http://perma.cc/7MX-YH2K9>].

movement existed.<sup>205</sup> Child welfare advocates can still make use of the media work despite not having the full package of mobilization strategies. “The press is a very important player in keeping the issue in the public eye, reporting on developments in the case when appropriate and, of very great importance, providing editorial board support for the need for reform,” wrote Marcia Robinson Lowry.<sup>206</sup> She attributed the willingness of New Jersey’s formerly recalcitrant governor to settlement to intensive media coverage of a child’s death and then Children’s Rights’ expert reports about the system’s failings.<sup>207</sup> The continued updates of a settlement monitor in child welfare reform litigation also “generate media coverage, focus public attention, and invite political scrutiny of the agency,” according to a former Juvenile Court Judge in Tennessee.<sup>208</sup> Monitors are focused on evaluating compliance with change, which can be either positive or negative, so how the parties frame these reports for the media matters.

Strong communications and control of the public message will force the defendants to be more amenable to the changes the plaintiffs request, regardless of the legal basis for those claims. In the next section, I argue that plaintiffs should take advantage of media’s tendency to portray the agencies poorly and should center a group of children who have thus far been mostly ignored in the child welfare litigation. Children who have been in the foster care system for over two years are facing delay in permanency, and litigators could be using the complaints and the media together to change these children’s futures.

### III. THE FUTURE OF CHILD WELFARE REFORM LAWSUITS INCLUDES DELAY

I argue that advocates should consider building on the long history of settlements and largely sympathetic media coverage by including delay as one of the issues in future litigation. I advocate for continuing the pattern of settlements, because an actual trial would be unlikely to succeed, but the incentives for defendants to settle, outlined in Section I, remain. Defendants can win more funding, bind their successors to their plans, and reduce negative media coverage by agreeing to reforms, whether or not these reforms will actually be successful. From a plaintiff’s perspective, children who have been in the foster care system for long periods of time have particularly sympathetic stories and so would be well-positioned as named plaintiffs, but have been mostly ignored in legal complaints and settlements thus far. Legal writing on the issue of delay has focused on the concerns that strict ASFA deadlines will tear apart poor families of color at even higher rates than these families suffer now, but I argue that court delays keep families apart, too, and that broken social service systems keep these families from accessing the services they need to meet judicial demands in a timely manner.

With a mountain of litigation and settlements that are barely successful, questioning any impulse to add another issue to the list of injuries to children in the foster care system would be a logical response. After all, some scholars are critiquing the entire idea of comprehensive child

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<sup>205</sup> LEILA KAWAR, *CONTESTING IMMIGRATION POLICY IN COURT: LEGAL ACTIVISM AND ITS RADIATING EFFECTS IN THE UNITED STATES AND FRANCE*, 20-21 (Cambridge University Press, 2015).

<sup>206</sup> Lowry, *A Powerful Route to Reform*, *supra* note 121, at 6.

<sup>207</sup> *Id.*

<sup>208</sup> Andy Shookoff, *Reflections on the Role of the Monitor in Child Welfare Litigation*, in *FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTION LITIGATION*, 26 (Center for the Study of Social Policy, ed., 2012), [http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children\\_Lessons-Learned-from-Class-Action-Litigation\\_January-2012.pdf](http://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf) [<http://perma.cc/PUY5-P78H>].

welfare reform litigation. Susan Brooks and Dorothy Roberts wrote that the court system is biased against poor minority families, and “[m]aking a biased system more efficient increases the scope of its injustice.”<sup>209</sup> Yet ignoring the role these class action lawsuits have had, and continue to have, in child welfare reform would be preposterous. The effects of racism and poverty should be part of that reform. Other scholars have ably analyzed the need for child welfare reform that is more sensitive to the needs of poor minority families.<sup>210</sup>

These settlements and consent decrees have emerged as the predominant way to create change, as outlined in the previous sections of this paper, so it is important to ensure that the settlements are as comprehensive as possible and address the real needs of children in the foster care system. I propose to address a class of children often marked by poverty and minority racial and ethnic status, but also by age and disability. I propose to force child welfare systems to address the 28 percent of youth who remain in the foster care system for more than two years. I propose that child welfare reform efforts should all address delay in permanency in their complaints and settlements. Under federal law, permanency means reunification with a birth parent, adoption, legal guardianship, or another planned permanent living arrangement.<sup>211</sup> A permanent placement: “(1) is legally intended to be permanent”; (2) “is legally secure from modification”; (3) gives a permanent caregiver the same responsibilities for the child as the birth parent; and (4) means that “the state no longer has legal custody of the child” and the state has no supervision duties over the permanent caregiver.<sup>212</sup> Permanency includes reunification with birth parents, which is the most common outcome for children in the foster care system.<sup>213</sup>

#### A. Permanency and Delay in Legal Practice

Legal scholarship has thus far failed to analyze the promise and pitfalls of using delay as an argument in child welfare reform litigation, but practitioners have begun to do so on a small scale, with three complaints mentioning delay. The law review discussion of permanency has been largely limited to articles discussing the problems with ASFA prioritizing one type of permanency (adoption) over all others, particularly permanent guardianship, or the difficulties for parents of receiving needed services fast enough to meet the timelines of ASFA.<sup>214</sup> Some legal scholars argue

<sup>209</sup> Susan L. Brooks & Dorothy E. Roberts, *Social Justice and Family Court Reform*, 40 FAM. CT. REV. 453, 455 (2002).

<sup>210</sup> See, e.g. Sonia M. Gipson Rankin, *Black Kinship Circles in the 21<sup>st</sup> Century: Survey of Recent Child Welfare Reforms and How it Impacts Black Kinship Care Families*, 12 WHITTIER J. CHILD & FAM. ADVOC. 1 (2013) (describing how Black children in kinship care could benefit from Title IV-E waivers); Dorothy Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, WASH. U. J. LAW & POL’Y 63, 76 (1999).

<sup>211</sup> 42 U.S.C. § 675(E).

<sup>212</sup> DONALD N. DUQUETTE & MARK HARDIN, U.S. DEP’T OF HEALTH AND HUM. SERV.S, ADOPTION 2002: THE PRESIDENT’S INITIATIVE ON ADOPTION AND FOSTER CARE: GUIDELINES FOR PUB. POL’Y AND STATE LEGIS. GOVERNING PERMANENCE FOR CHILD. (2002), [https://archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu\\_djvu.txt](https://archive.org/stream/guidelinesforpub00duqu/guidelinesforpub00duqu_djvu.txt) [<https://perma.cc/5DHF-CMV9>].

<sup>213</sup> CHILD WELFARE INFORMATION GATEWAY, FAMILY REUNIFICATION: WHAT THE EVIDENCE SHOWS, 2 (U.S. Dep’t of Health and Hum. Serv.s, Child.’s Bureau, 2011), [https://www.childwelfare.gov/pubPDFs/family\\_reunification.pdf](https://www.childwelfare.gov/pubPDFs/family_reunification.pdf) [<https://perma.cc/RV6C-FVJH>].

<sup>214</sup> See generally Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113 (2013); Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 139 (2010); Randi Mandelbaum, *Re-examining & Re-defining Permanency from a Youth’s Perspective*, 43

that advocates should give up on permanency as a goal for older children, as it is unrealistic to think that very many of these adolescents will be adopted.<sup>215</sup> Instead, advocates should focus on other permanency options, like permanent guardianships and reunification.

My analysis of existing lawsuits shows that delay is mentioned in only a few of the child welfare reform complaints and two of the consent decrees, despite its central role in child welfare. My move to include delay of permanency in child welfare reform litigation is thus not entirely original, but it usually only a tiny piece of the complaints, whereas I think it should be central. Further, judges have never addressed remedies for delay, and law reviews contain no discussion about it. The 1989 *B.H.* case in Illinois described the named plaintiff, B.H., as “lost in the DCFS system for four years” and stated that another child, J.E., age 13, “ha[d] been in the custody of DCFS as long as he can remember.”<sup>216</sup> The only comment related to time or delay in the B.H. judgment, however, states that the Adoption Assistance Act requires the state to hold a dispositional hearing at least 18 months after the child is placed, and does so only to describe how it relates to a preclusions of a § 1983 complaint.<sup>217</sup> Stray mentions of how long a child has been in care are not enough. I argue that lawyers need to make the case that the delays are the problem.

Another case, the 1993 *Jeanine B.* complaint, goes slightly further in its discussion of delay, but not far enough. The complaint states, “[t]he length of time that Milwaukee children spend in foster care is so high that many children are permanently damaged by their prolonged and unnecessary stays in government custody.”<sup>218</sup> Yet the actual issues listed in the complaint as violations of AACWA do not include anything about a failure to file terminations of parental rights after a child has spent more than 15 of the last 22 months in care.<sup>219</sup> The only items that could be related to permanency under the section describing the specific legal violations are the lack of “regular judicial or administrative reviews” and “dispositional hearings within eighteen months of entering custody.”<sup>220</sup> Regular court dates are important to achieving permanency, but are of course not a guarantee of attaining permanency. The *Jeanine B.* judge ruled that those and other rights violations created enforceable rights under § 1983 and met the three-prong *Wilder* test.<sup>221</sup> However, after defendant’s request for reconsideration, the 1997 *Blessing* decision led the same court to believe that AACWA might lack specific enforceable rights under § 1983; the court asked for

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CAP. U.L. REV. 259 (2015); Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L & SOC. CHANGE 237 (2004); Kele Stewart, *The Connection Between Permanency and Education in Child Welfare Policy*, 9 HASTINGS RACE & POVERTY L.J. 511 (2012).

<sup>215</sup> Christine Diedrick Mochel, *Redefining “Child” and Redefining Lives: The Possible Beneficial Impact The Fostering Connections to Success Act and Court Involvement Could Have on Older Foster Care Youth*, 40 CAP. U. L. REV. 517, 518 (2012); William Wesley Patton & Amy M. Pellman, *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, 9 UC DAVIS J. JUV. L. & POL’Y 171 (2005).

<sup>216</sup> *B.H. v. Johnson*, 715 F. Supp. 1387, 1390 (N.D. Ill. 1989).

<sup>217</sup> *Id.* at 1403 (citing 42 U.S.C. § 675(5)(C)).

<sup>218</sup> Complaint at 6, *Jeanine B. ex rel. Blondis vs. Thompson*, Civil Action No: 93-C-0547 (1993).

<sup>219</sup> *Id.*

<sup>220</sup> *Id.*

<sup>221</sup> *Jeanine B. by Blondis v. Thompson*, 877 F.Supp. 1268, 1283-84 (E.D.Wis. 1995); *Wilder v. Virginia Hospital Ass’n*, 496 U.S. 498, 509 (1990). The *Jeanine B.* court held that plaintiff’s request for reasonable efforts to be made to reunify families to be too vague, following the Supreme Court’s decision in *Suter v. Artist M.*, 503 U.S. 347 (1992) (stating that there are no rights as to how a plan is implemented, only that the plan itself exists).

briefing on the matter.<sup>222</sup> Eventually the court dismissed all claims of the plaintiffs as moot because the state defendants had taken over the Milwaukee County child welfare agency, so the AACWA enforceability issue, even absent the timeline issue, was never heard.<sup>223</sup> Despite this missed opportunity, the failure to attain permanency became an important part of the settlement agreement, even though it was left out of the list of rights violations and there was a probable lack of enforceable rights in the case. The first substantive section of the settlement relates to permanency and sets out percentage-based goals for TPR petitions to be filed for children who have been in out-of-home care for more than 15 of the last 22 months.<sup>224</sup> Further, the parties' 2003 settlement agreement specifically stated in its preamble that "[d]efendants recognize that this lawsuit has helped achieve . . . reforms."<sup>225</sup> Even though the court never specifically adjudicated anything about delay of permanency, litigants successfully wrote it into the settlement agreement.<sup>226</sup>

Talking about delay in the complaint will not guarantee good settlements, but it is a step forward. Delay in services and delay attributable to placement moves played a role in the *Connor B.* complaint plaintiff narratives, but the state never responded with an offer of settlement.<sup>227</sup> Instead, the District Court dismissed the case, entering a judgment in favor of the defendants on all claims. The judgment stated that the actions of the defendants did not depart substantially from accepted professional conduct, and, as such, there was no constitutional violation.<sup>228</sup> The First Circuit affirmed the judgment.<sup>229</sup> This loss is somewhat concerning, but there is no reason to think that the one paragraph mentioning delay was the problem.

In a 2015 case, Marcia Lowry's new organization, A Better Childhood, along with Letitia James, public advocate for the City of New York, filed a class-action lawsuit against New York City and New York State child welfare agencies in the Southern District of New York. The case focused specifically on the delays of New York City's child welfare system, "causing devastating, ongoing and long-lasting harm to New York City children in its care" through delayed reunification, delayed adoptions, and high numbers of youth aging out of the system.<sup>230</sup> The case alleged violations of federal and state law as well as the children's rights under New York state law and regulations.<sup>231</sup> It also included the children's rights as third party beneficiaries to the contracts between New York City Administration for Children's Services (ACS), and the foster care agencies

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<sup>222</sup> *Jeanine B. by Blondis v. Thompson*, 967 F.Supp. 1104, 1119 (E.D. Wis. 1997) (citing *Blessing v. Freestone*, 520 U.S. 329 (1997)).

<sup>223</sup> Decision and Order by Judge Rudolph T. Randa, Jan. 30, 1998 (described in Civil Docket for Case 2:93-cv-00547-RTR, *Jeanine B. v. Walker*, at 39, <http://www.clearinghouse.net/chDocs/public/CW-WI-0001-9000.pdf> [<https://perma.cc/FA58-DRHG>]).

<sup>224</sup> Modified Settlement Agreement, *Jeanine B. v. Doyle*, Civ. Action 93-C-0547, Nov. 14, 2003.

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> Complaint at 19, *Connor B. v. Patrick*, *supra* note 81.

<sup>228</sup> *Connor B. ex rel. Vigurs v. Patrick*, 985 F. Supp. 2d 129, 160-65 (D. Mass. 2013).

<sup>229</sup> *Connor B. ex rel. Vigurs v. Patrick*, 774 F.3d 45, 55 (1st Cir. 2014) (stating "[t]he plaintiffs have sought to take aspirational statutory, regulatory, and private standards as to a variety of topics within the overall complex of foster child care and convert each of them to constitutional requirements. The district court correctly rejected that attempt, as do we").

<sup>230</sup> Complaint at 2-3, *Elisa W. v City of N.Y.*, Civil Action No: 1:15-cv-05273 (2015). The nonprofit law firm bringing the suit, A Better Childhood, is Marcia Robinson Lowry's new professional home since she left Children's Rights.

<sup>231</sup> *Id.* at 43.

to which ACS delegates the day-to-day care and case planning.<sup>232</sup> As a complaint, *Elisa W.* appears impressive, with good language about delay. The first lines of the complaint state:

Foster care is supposed to be safe and temporary. For children in New York City's foster care system, it is neither. Children in New York City's foster care system are in one of the most dangerous foster care systems in the country, and they spend longer in foster care than do foster children almost anywhere else in the country.<sup>233</sup>

The narratives for every named plaintiff state how long the child has been in care and the missed opportunities for permanency in each case. Every named plaintiff had been in foster care for over two years with no permanency, with almost all plaintiffs in care for most of their lives.<sup>234</sup> The complaint outlines how the permanency plan for Alexandria, a 12-year-old who has spent approximately 11 of the past 12 years in foster care, including the most recent eight years, is still return to parent, despite the case worker telling the child several years ago that she could be adopted by her long-time foster parents (who were interested). The complaint alleges that Alexandria is angry and confused about why her foster parents have been unable to adopt her.<sup>235</sup> This narrative is powerful, made more so by its repetition in the stories of the nine other named plaintiffs. Other plaintiffs also add issues related to delay like Thierry, who at age 3 had been in foster care for 21 months without any fact-finding or dispositional hearing against his biological mother. His first permanency hearing occurred when he had already been in foster care for over a year, even though ASFA requires permanency hearings to be held every 12 months.<sup>236</sup> The narratives are well written and clearly addresses delay as harm.

The other sections of the *Elisa W.* complaint are weaker. The complaint outlines laws and regulations that are not being followed for these young people. The connection between each statement and the source of law is unclear, which may be intentional as my analysis shows there may be no real legal backing for these claims.<sup>237</sup> The complaint states, for example, that defendants must: "Ensure that each child in foster care is not maintained in custody longer than is necessary to accomplish the purpose of custody, U.S. Const. amend. XIV; Provide each child in foster care with a permanent home and family within a reasonable period of time, U.S. Const. amends. I, IX, XIV." In every section, the attorneys reiterate that New York City is failing to return children to their parents within reasonable time periods, that families are waiting for services excessive amounts of time, that court delays are long and numerous, and that TPR petitions are not being filed when they are required.<sup>238</sup> All of these are important pieces of evidence pointing to custom and pattern of delay. In the complaint, the plaintiffs ask the court to enjoin the city from placing kids with agencies that are not following the laws, require the city to develop a new process to placing kids with contract agencies, conduct regular monitoring of the contract agencies, develop and fund post-

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<sup>232</sup> *Id.*

<sup>233</sup> Complaint at 1, *Elisa W. v City of N.Y.*, Civil Action No: 1:15-cv-05273 (2015).

<sup>234</sup> *Id.* at 2-6, 10, 13-15, 18-20, 24-25, 28, 31.

<sup>235</sup> *Id.* at 6-10.

<sup>236</sup> 42 U.S.C. § 675(5)(C) (2011).

<sup>237</sup> *Id.* at 46. *See also infra* IV-C. Difficulties of Addressing Delay Through Federal Law.

<sup>238</sup> *Id.*

permanency services, appoint a Special Master as Monitor, and pay attorneys' fees for the plaintiffs.<sup>239</sup> Those terms of relief are problematic, as there is no indication for how the contract agencies are supposed to stop disobeying the law. There is nothing suggesting that perhaps the city needs to fund the contract agencies more so that there can be lower caseloads and nothing about training for staff so that they understand the obligations. Suggesting that the City of New York desist from sending children to failing contract agencies without creating a path for contract agencies to improve ignores the realities of where to send the huge numbers of children who must be placed each week. The complaint's proposed relief also ignores the issues affecting the named plaintiffs, who are already in foster care with these agencies.

Whether the somewhat vague harms would have been deemed justiciable and the requested remedies provided by the court is unclear, as instead of proceeding with the lawsuit, the attorneys attempted to settle the case against the state.<sup>240</sup> However, the settlement to which the plaintiffs agreed, only 12 days after filing the suit, would have provided only a monitor for which the state would pay, a "research expert" for which the city would pay, paid plaintiff's attorneys' fees, and would make no actual changes to the system that was keeping children in care, while preventing other organizations from suing the state for the seven years that the agreement would be in effect.<sup>241</sup> Courts see themselves as providing "a framework within which parties negotiate and bargain," neither of which begins or ends when a complaint is filed.<sup>242</sup> A complete settlement of such a large lawsuit in only 12 days makes it appear that the lawsuit was either unnecessary or its results preordained. Other children's and family advocates in New York City complained about the proposed settlement, and the judge eventually refused to certify the proposed consent decree,<sup>243</sup> but the existence and weakness of the proposed settlement speak volumes.

Overall, arguments about permanency in complaints and arguing for the lack of it to be seen as a rights violation under federal law have been rare in child welfare reform litigation and absent in legal scholarship. Yet the effects of delay in permanency are dire enough that this issue should be addressed in any way possible, and institutional reform litigation is the way that change occurs in child welfare. Delay must be in the complaints for it to appear in the plans for solutions.

### *B. Permanency and Delay in Scholarship*

The psychology literature states that delay in permanency is incredibly harmful to children, but the legal scholarship has thus far failed to address these insights. Legal scholarship has instead focused mostly on the failure of ASFA to achieve its goals of permanency, as well as the possible racism of external figures assigning deadlines after which families should be legally dissolved. Looking at the psychology literature and the national statistics on delay shows a problem harming

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<sup>239</sup> *Id.* at 98-103.

<sup>240</sup> Andrew Denney, *Legal Providers Critical of Foster Care Pact with State*, N.Y.L.J. (Oct. 22, 2015); Jennifer Fermino, *New York City foster care system to see big reforms as Gov. Cuomo settles Public Advocate's lawsuit*, N.Y. DAILY NEWS (Oct. 20, 2015).

<sup>241</sup> Andrew Denney, *Legal Providers Critical of Foster Care Pact with State*, N.Y.L.J. (Oct. 22, 2015).

<sup>242</sup> Ralph Cavanagh & Austin Sarat, *Thinking About Courts: Toward & Beyond a Jurisprudence of Judicial Competence*, 14 LAW & SOC'Y 371, 373, 386 (1980).

<sup>243</sup> Denney, *supra* note 241; Daniel Heimpel, *New York Judge Rejects High-Profile Foster Care Settlement*, CHRON. OF SOCIAL CHANGE (Aug. 12, 2016), <https://chronicleofsocialchange.org/featured/breaking-new-york-judge-rejects-high-profile-foster-care-settlement/20337> [<https://perma.cc/T2TL-QRPJ>].

thousands of young people each year.

Federal guidelines state that children should be reunified or moved into permanent homes as quickly as possible, but how long a child stays in care can be more about geography than law. In 2013, the average length of time for a child to stay in foster care was almost 22 months, ranging from a low of 13.3 months in Wyoming to a high of 47.4 months in Washington, D.C.<sup>244</sup> In 2014, the most recent year for which any statistics are available, the median length of stay for children in the foster care system is 12.6 months, with the average length of time at 20.8 months.<sup>245</sup> The range within individual states is striking, with children in upstate New York spending a median of 32.6 months in foster care before being adopted and New York City children waiting a median of 55.8 months (over 4.5 years) to be adopted out of foster care.<sup>246</sup> That the average length of time is significantly higher than the median length of time in care can be explained by outliers on each end; 28% of children spend less than five months in care and 7% of children remain in care for five or more years.<sup>247</sup> Overall, 28% of children in foster care spent two years or more in a placement.<sup>248</sup>

Children who are racial minorities, children with disabilities, and older children all face disparate impacts in the form of significantly longer stays in the foster care system than white children, children without disabilities, or younger children.<sup>249</sup> In 1996, researchers reported that once in care, black children “are likely to remain indefinitely.”<sup>250</sup> These trends have not changed significantly in the past twenty years, despite increased attention to the negative effects of long stays in the foster care system. Statistics show this disparity, if only slightly. Only 19 percent of the children adopted out of the foster care system were labeled as non-Hispanic black, even as black children make up 24 percent of the children in foster care. Forty-eight percent of the children adopted out of the foster care system were labeled as non-Hispanic white, when non-Hispanic white children makes up only 42 percent of the children in foster care.<sup>251</sup> Self-report studies like the

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<sup>244</sup> ACF & ASPE staff, *A Temporary Haven: Children & Youth Are Spending Less Time in Foster Care*, U.S. DEP’T OF HEALTH & HUMAN SERVS. 5 (Sept. 1, 2014), [https://aspe.hhs.gov/sites/default/files/pdf/77056/rb\\_FosterCare.pdf](https://aspe.hhs.gov/sites/default/files/pdf/77056/rb_FosterCare.pdf) [<https://perma.cc/ZCS6-DJFV>].

<sup>245</sup> CHILDREN’S BUREAU, THE AFCARS REPORT, 2 (2015), <http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport22.pdf> [<https://perma.cc/8W28-9HH8>].

<sup>246</sup> Complaint at 63, *Elisa W. v City of N.Y.*, Civil Action No: 1:15-cv-05273 (2015).

<sup>247</sup> CHILDREN’S BUREAU, THE AFCARS REPORT, *supra* note 245, at 2 (2014).

<sup>248</sup> *Id.*

<sup>249</sup> Christian M. Connell et al., *Leaving Foster Care – The Influence of Child & Case Characteristics on Foster Care Exit Rates*, 28 CHILDREN & YOUTH SERVS. REV. 780, 792 (2006) (noting that “the likelihood of adoption was strongest for infants and decreased significantly for each successive age category”); Mark E. Courtney & Yin-Ling Irene Wong, *Comparing the Timing of Exits from Substitute Care*, 18 CHILDREN & YOUTH SERVS. REV. 307, 316 (1996) (reporting the results of a study showing that children who enter the foster care system after infancy were significantly less likely to be adopted. The study also showed that children with disabilities were less likely to be either reunified with their families or to be adopted than children without disabilities).

<sup>250</sup> *Id.* See also Fred Wulczyn, *Family Reunification*, 14 FUTURE OF CHILDREN (2004) (using data from the early 1990s to show that black children are less likely to be reunified with their birth families than Caucasian children).

<sup>251</sup> NATIONAL KIDS COUNT, CHILDREN IN CHILD WELFARE SYSTEM WHO HAVE BEEN ADOPTED BY RACE AND HISPANIC ORIGIN (2016), <http://datacenter.kidscount.org/data/tables/6677-children-in-child-welfare-system-who-have-been-adopted-by-race-and-hispanic-origin> [<https://perma.cc/6HZR-EKFF>] (last accessed June 24, 2016) (looking at 2014 data); NATIONAL KIDS COUNT, CHILDREN IN FOSTER CARE BY RACE AND HISPANIC ORIGIN (2016) <http://datacenter.kidscount.org/data/tables/6246-children-in-foster-care-by-race-and-hispanic-origin> [<https://perma.cc/6DRE-QDXU>] (last accessed Aug. 1, 2016) (looking at 2014 data).

Midwest Evaluation Report back up this conclusion, with 70% of the youth in the study who had aged out identifying themselves as non-white, including 55% who labeled themselves as African American.<sup>252</sup>

Reasons for removal also affect time spent in care. Removal due to sexual abuse or specific disabilities such as a child's diagnosis of an emotional or behavioral disorder increase the time a child is likely to spend in care.<sup>253</sup> Only 77% of youth with a diagnosed disability ever find a permanent home, in contrast to the overall percent of youth in foster care who ever successfully achieve permanency (87%).<sup>254</sup> More recent research has articulated how permanency may look different at different ages. "Younger children [are] more likely to be adopted out of the system, older children [are] more likely to be reunified with birth parents, and older adolescents [are] more likely to go AWOL."<sup>255</sup> Some exits from care are classified in research data as "AWOL," referring to children who run away from their placements, although running away is not the kind of permanency one would want for a vulnerable child or adolescent.<sup>256</sup> Further, approximately eleven percent of children never find permanency, instead aging out of foster care without being reunified, adopted, or running away.<sup>257</sup>

The longer a child stays in the foster care system, the older that child gets, and the greater that child's chances of never finding a permanent home. Even though only five percent of children in foster care have spent more than five years in care,<sup>258</sup> large percentages of youth who age out of the foster care system or who have "permanency goals" of emancipation have spent more than two years in care. A federal report states,

In about one-half of the states, 23.0 percent or more of the children who were emancipated from foster care were age 12 or younger when they entered foster care, and 41.9 percent or more of the children emancipated from foster care, or who turned age 18 while in care, were in care for three years or longer.<sup>259</sup>

Only 64% of youth who enter the foster care system when they are older than 12 ever find permanent homes.<sup>260</sup> Adding a narrative of delay to these class-action complaints would give voice to these children who are unlikely ever to have permanent adults of their own to advocate for them.

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<sup>252</sup> MARK E. COURTNEY ET AL., MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH: OUTCOMES AT AGE 26, 7 (2011), [http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation\\_Report\\_4\\_10\\_12.pdf](http://www.chapinhall.org/sites/default/files/Midwest%20Evaluation_Report_4_10_12.pdf) [<https://perma.cc/K6NE-RHUR>] [hereinafter, COURTNEY, MIDWEST EVAL].

<sup>253</sup> Christian M. Connell et al., *Leaving Foster Care – The Influence of Child & Case Characteristics on Foster Care Exit Rates*, 28 CHILDREN & YOUTH SERVS. REV. 780, 780 (2006).

<sup>254</sup> CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES 2009-2012: REPORT TO CONGRESS iii (2013), [http://www.acf.hhs.gov/sites/default/files/cb/cwo09\\_12.pdf](http://www.acf.hhs.gov/sites/default/files/cb/cwo09_12.pdf) [<https://perma.cc/VB3Z-A25G>].

<sup>255</sup> Connell, *supra* note 253, at 795.

<sup>256</sup> *Id.* at 793.

<sup>257</sup> CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS 2016, 6, <https://www.childwelfare.gov/pubPDFs/foster.pdf> [<https://perma.cc/T82G-DYQP>] (including the nine percent of youth who were emancipated and the two percent with "other outcomes," including "being transferred to another agency, running away, and death").

<sup>258</sup> CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS, *supra* note 245, at 3 (2014).

<sup>259</sup> CHILDREN'S BUREAU, CHILD WELFARE OUTCOMES, *supra* note 254, at iii.

<sup>260</sup> *Id.*

Including goals based on finding permanency to settlements, for both adoptions and other forms of permanency, could help these children avoid the negative outcomes associated with aging out of foster care.

Youth who age out of the foster care system tend to struggle. A large study of youth who had aged out found, “Across a wide range of outcome measures, including postsecondary educational attainment, employment, housing stability, public assistance receipt, and criminal justice system involvement, these former foster youth are faring poorly . . .”<sup>261</sup> Most young adults have emotional support, if not financial support, from their parents as they attend college or complete other tasks to transition to adulthood. Youth who age out of the system have nothing, and are significantly less likely to meet these major milestones. They are significantly more likely to be homeless as adults than young adults who were not in the foster care system, and report earning a median of \$18,000 less annually than their peers who were not in foster care.<sup>262</sup> One-fifth of the 25- and 26-year-olds in the study had neither a high school diploma nor a GED, and only eight percent had a 2- or 4- year degree (in contrast to the 40 percent of young adults overall with one of these degrees).<sup>263</sup> A lack of permanency is clearly linked with later life struggles.

While many law review articles acknowledge the struggles of youth aging out of care or the trauma of lives spent in care, no law review articles have discussed scoring poorly of measures of permanency, like time in care, time to TPR, or time between TPR and finalized adoptions, as a litigation strategy.<sup>264</sup> That is, no other law review articles thus far have suggested using a failure to attain permanency as a hook to change child welfare systems. One author does mention that federal or state statutory changes could be helpful in holding courts accountable in making sure that needed services are being provided, but does not connect her ideas to delay.<sup>265</sup> Practitioners, in contrast, have begun to use delay, and should be encouraged to use its narratives and laws more often. In the legal scholarship’s disillusionment with the ASFA timelines, we ignore possibilities to hold agencies accountable for failing to find and train more adoptive families or families interested in becoming permanent legal guardians and failing to support birth families to recover their children from the foster care system. Fewer than half of all children over age nine who are in foster care will ever be adopted, and most children who have been in foster care for over two years will never be adopted.<sup>266</sup> If agencies were motivated to follow ASFA timelines more closely, perhaps through the

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<sup>261</sup> COURTNEY, MIDWEST EVAL, *supra* note 252, at 6.

<sup>262</sup> *Id.* at 10, 36.

<sup>263</sup> *Id.* at 20.

<sup>264</sup> See generally Melinda Atkinson, Note, *Aging Out of Foster Care: Towards a Universal Safety Net for Former Foster Care Youth*, 43 HARV. C.R.-C.L. L. REV. 183 (2008) (calling for free basic services for all foster youth who age out of care); Karen Baynes-Dunning & Karen Worthington, *Responding to the Needs of Adolescent Girls in Foster Care*, 20 GEO. J. POVERTY LAW & POL’Y 321 (2013) (arguing that systems must focus more on the intersections of gender and trauma).

<sup>265</sup> Mandelbaum, *supra* note 214, at 291-92.

<sup>266</sup> HEATHER RINGEISEN ET AL., ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T. HEALTH & HUM. SERVS., NATIONAL SURVEY OF CHILD & ADOLESCENT WELL-BEING, NO. 19: RISK OF LONG-TERM FOSTER PLACEMENT AMONG CHILDREN INVOLVED WITH THE CHILD WELFARE SYSTEM 5 (2013), [http://www.acf.hhs.gov/sites/default/files/opre/nscaw\\_itfc\\_research\\_brief\\_19\\_revised\\_for\\_acf\\_9\\_12\\_13\\_edit\\_clean.pdf](http://www.acf.hhs.gov/sites/default/files/opre/nscaw_itfc_research_brief_19_revised_for_acf_9_12_13_edit_clean.pdf) [<https://perma.cc/6RSE-CLRU>] (“After spending 12 to 18 continuous months in foster care, children’s chances of leaving foster care rapidly decreased. After 36 to 42 months of continuous time spent in foster care, a child’s chances of leaving foster care are incredibly low”).

inclusion of permanency issues in child welfare reform litigation, more children might reach permanency and do so more quickly.

Permanency has been central to American child welfare for almost forty years, and even critics of its implementation admit that permanency's centrality is unlikely to change.<sup>267</sup> Acknowledging legal options for permanency other than adoption is important, and one outcome of pushing agencies and courts to enforce permanency measurements could be to expand that repertoire of possible futures. One scholar claims that legal permanency is unimportant for children, and that there is no difference for children between being adopted and being cared for by a guardian so long as "feelings of belongingness" exist.<sup>268</sup> I disagree, as "feelings of belongingness" can change at any time, and are not recognized by probate courts. That scholar recommends instead promoting ideas of relational permanency and emotional security, as well as more creative options in the "parental bundle of sticks," including joint custody, shared parenting, and other categories.<sup>269</sup> While those are interesting ideas for children who might not find permanency in other ways, giving up on permanency fails to recognize the possibilities for using permanency's legal and social currency to make positive changes. For example, the Fostering Connections Act currently requires states to rule out adoption before kinship caregivers can be eligible for a guardianship subsidy.<sup>270</sup> This requirement reifies adoption as the best option despite reunification, adoption and guardianship all existing as permanent options.<sup>271</sup> A realistic and important modification of permanency goals would be to amend ASFA to allow a child to have as a permanency goal, "Another Planned and Permanent Living Arrangement" before the age of 16, which is not currently allowed.<sup>272</sup> It is also realistic to increase the numbers and priority given to kinship guardianships, or long-term relative caregiving that does not terminate the birth parent's rights.<sup>273</sup> As Josh Gupta-Kagan points out, "Family courts nationally celebrate 'Adoption Day' – not 'Guardianship Day' or 'Permanent Families Day.'" <sup>274</sup> Agencies have wide discretion to determine child placements and whether or not they will pay guardianship subsidies.<sup>275</sup> Perhaps if agencies and judges were more willing to put aside their dreams of adoption sooner, more children could exit the system to some form of permanency.<sup>276</sup>

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<sup>267</sup> Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POLICY 72, 72 (1999) (stating that despite shifts in policy about how to achieve policy, permanency has remained a constant goal); Stewart, *supra* note 214, at 512.

<sup>268</sup> Goodsoe, *supra* note 214, at 1114.

<sup>269</sup> Lauren Frey et al., *Achieving Permanency for Youth in Foster Care: Assessing and Strengthening Emotional Security*, 13 CHILD & FAM. SOC. WORK 218, 218-19 (2008); Goodsoe, *supra* note 214, at 1125, 1129.

<sup>270</sup> Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. OF JUV. L. & POL'Y 1, 8-9 (2015), <https://jjlp.law.ucdavis.edu/archives/vol-19-no-1/Gupta.pdf> [<https://perma.cc/WFK5-6T5R>] [hereinafter Gupta-Kagan, *New Permanency*].

<sup>271</sup> *Id.* at 50-51.

<sup>272</sup> See Mandelbaum, *supra* note 214, at 286-88.

<sup>273</sup> Patten, *supra* note 214, at 271-75.

<sup>274</sup> Gupta-Kagan, *The New Permanency*, *supra* note 270, at 9.

<sup>275</sup> *Id.* at 26 n.55.

<sup>276</sup> See generally Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFFALO L. REV. 835 (2000). See also Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for of Parental Rights*, 71 N.Y.U. L. REV. 1252 (1996) (writing pre-ASFA about the dangers of length-of-time statutes, forecasting

Legal scholars have made significant critiques of ASFA's intense promotion of adoption and timelines requiring termination of parental rights (TPR) after a child has been in care for 15 of the past 22 months. ASFA created a surge of legal orphans already from agencies that did follow the rules, and pushing for that to happen sooner would only create more.<sup>277</sup> However, delaying TPRs does not help children to gain permanency, either. One law professor suggested that judges issue conditional TPRs to be vacated if an adoptive family is not found within a specified period of time.<sup>278</sup> This plan ignores the requirement that TPR be completed only if it is found that the parent is not able to safely care for the child. In the proposed scenario, a parent could be unable to safely care for the child and yet still retain custody of the child merely because an adoptive family has not been found.

No one wants a family to be ripped apart, and obviously agencies should provide the needed services to help families reunify. Court systems should operate with all due expedience such that the court is not a factor in whether a family is reunified or if a parent's rights are terminated. Families have long waits for trial dates and hearings are frequently adjourned, and appeals can become moot because they can take years to progress through the court system. During this time, children age out, new orders are written, and children form bonds with foster parents with whom they should perhaps never have been placed.<sup>279</sup> Martin Guggenheim, a long-time practitioner in New York and a clinical professor of law at New York University School of Law, wrote a strong critique of New York's Family Court. He said that the court system abdicates its responsibility to protect the rights of children and families by failing to ensure timely decisions. "ASFA imposes time-driven substantive law, while New York does not offer timely decision-making. This combination gravely threatens families who are involved in the foster care system in New York."<sup>280</sup>

This Article should in no way be taken as promoting adoption over reunification in the hunt for permanency. Multiple authors have pointed out that the ASFA timelines "are particularly challenging for families with complex mental health and substance abuse issues, for incarcerated parents, and for immigrant families."<sup>281</sup> Defending ASFA has become nearly synonymous with

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federal problems based on existing state issues; "The length-of-time-out-of-custody ground for termination, as drafted in many state statutes, can lead to the termination of parental rights without any corresponding permanency for the child.").

<sup>277</sup> Cheryl A. DeMichele, Comment, *The Illinois Adoption Act: Should a Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727, 750, 755-59 (1999); Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 LAW & INEQ. 401, 407-10 (2012);

<sup>278</sup> Kimberly Carpenter Emery, *Family Ties Dismissed: The Unintended Consequences of ASFA*, 12 VA. J. SOC. POL'Y & L. 400, 407 (2005).

<sup>279</sup> Martin Guggenheim, & Christine Gottlieb, *Justice Denied: Delays in Resolving Child Protection Cases in New York*, 12 VA. J. SOC. POL'Y & L. 546, 570-71 (2005).

<sup>280</sup> *Id.* at 576.

<sup>281</sup> Center for the Study of Social Policy, *Building Upon the Child Welfare Reform Efforts of the Adoption and Safe Families Act (ASFA)*, in INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 131 (2009); Stacia Walling Driver & Wright S. Walling, *Examining the Intersection of Chemical Dependency and Mental Health Issues with the Juvenile Protection System Timelines as Related to Concurrent Planning and Termination of Parental Rights*, 40 WM. MITCHELL L. REV. 1008, 1033 (2014) (noting "some therapy issues . . . that simply cannot be resolved in a six-month window and require ongoing therapy even if the parent was to be successful in the completion of the child protection plan"); Jude T. Pannell, *Unaccommodated: Parents with Mental Disabilities in Iowa's Child Welfare System & the Americans with Disabilities Act*, 59 DRAKE L. REV. 1165, 1174 (2011) (arguing that standardized services to which parents are often given referrals, including in-home services, may not meet the specific needs of a parent with a disability);

defending racism, as scholars and activists recognize ASFA's origins in the Clintonian assault on poor black families in the mid 1990s.<sup>282</sup> ASFA itself has been called "the federally mandated destruction of the black family," as ASFA's timelines prioritize permanency over eventual possible reunification, and black children are disproportionately represented in foster care.<sup>283</sup> While true that ASFA burdens some families more than others, delays accessing services or scheduling court hearings intensify the problem. I argue that litigators and legal scholars should not abandon ASFA, as the timelines provide some of the only potential area for enforcement of the rights of children in foster care, but people must be careful how they wield the law's power. Advocates should encourage jurisdictions to work for permanency in multiple forms, not just adoption. Reunification is also a form of permanency, and the real goal is to prevent children growing up in foster care without permanency. About 44% of children reunify with their birth families within two years of entering foster care.<sup>284</sup> Ten percent of children reunify with their birth families after being in foster care between 24 and 36 months; after 36 months in care, more children are adopted than reunified.<sup>285</sup> ASFA's stated goal was to increase adoptions and reduce the number of children growing up in foster care.<sup>286</sup> Increasing adoptions may not be the answer, but there are other routes to avoid children growing up in foster care, or the dreaded "foster care drift," by increasing reunifications and promoting other types of permanency. Reducing delay in accessing services and courts can achieve all of those ends.

Unfortunately, children in foster care have had no real means to compel faster decisions on their behalf. Research shows that the longer a child is in the foster care system, the more likely the child is to be forced to move between several placements and to change schools.<sup>287</sup> Children who are in foster care for longer periods of time are more likely to experience developmental delays and to struggle with attachment issues.<sup>288</sup> A child has a different sense of time than an adult, and so even time periods that may seem reasonable to adults are enormous in the shorter lifespan and memory of a child.<sup>289</sup> The issue of "who is the parent" is formative to children's identity, yet is left uncertain for this group of children. Since all separations from parent figures are traumatic to children, and foster care in its most essentialized form is a temporary separation of the child from

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Dorothy Roberts, *The Challenge of Substance Abuse for Family Preservation Policy*, 3 J. HEALTH CARE L. & POL'Y 72, 80-81 (1999) (saying that addicted parents can still be closely bonded with their children and that the time it takes to successfully recover from addiction should not be a reason to terminate parental rights).

<sup>282</sup> Richard Wexler, *What Hillary Clinton's Terrible Foster Care Law Did to Poor Children of Color*, DAILYKOS (Feb. 16, 2016), <http://www.dailykos.com/story/2016/2/16/1485775/-What-Hillary-Clinton-s-terrible-foster-care-law-did-to-poor-children-of-color> (last visited Sept. 13, 2016).

<sup>283</sup> Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL'Y. 303, 303 (2006).

<sup>284</sup> Fred Wulczyn, *Family Reunification*, 14 CHILDREN, FAMILIES, & FOSTER CARE 96, 101-02 (2004).

<sup>285</sup> *Id.* at 102, Fig. 3.

<sup>286</sup> H.R. REP. NO. 105-77, at 7 (1997), available at <https://www.congress.gov/congressional-report/105th-congress/house-report/77/1> (last visited Sept. 13, 2016).

<sup>287</sup> Kele Stewart, *The Connection Between Permanency and Education in Child Welfare Policy*, 9 HASTINGS RACE & POVERTY L.J. 511, 512 (2012).

<sup>288</sup> See generally JOSEPH GOLDSTEIN, ANNA FREUND, & ALBERT SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-39 (1976) (explaining that moving a child is highly traumatic to the child and should be avoided whenever possible).

<sup>289</sup> *Id.* at 40-41.

the parent for the child's best interests to be served, determining at what point the number of moves or the length of time spent in care should be too much is a difficult line to draw. Convincing a court that any length of time over that point should be considered an actionable harm will be even harder.

*C. Difficulties of Addressing Delay Through Federal Law*

Addressing delay in permanency legally is very difficult. It is difficult to define a single specific injury that would give rise to a claim, for like Lily Ledbetter's unequal pay multiplying over years of maltreatment, delay accumulates over time.<sup>290</sup> The only real deadline for states is that they are to begin termination proceedings after a child has been in care for 17 of the past 22 months unless there are certain documented exceptions. However, by the time that deadline has been missed, it is too late for a given child. One cannot erase time and fix the missed filings or slow filings that added months to the child's time in care before those 17 months are up. For example, if a parent needed intensive mental health services in order to be able to care for the child appropriately and to be reunified, but the appropriate services were not ordered until the child had already been in care for six months, and then there was a waiting list for services, and then the parent had transportation issues, and then the parent had a conflict with the provider, and then there was an issue with payment, and then the provider finished her internship and left the agency,<sup>291</sup> by 17 months, the parent may have only been receiving services for a short period. The judge might believe that it would be in the best interests of the child to attain permanency with a committed foster family, in this hypothetical, but could be hard-pressed to find that the child welfare agency had made reasonable efforts to reunify the family with so many issues in receiving a service.

Other delays can occur early in a case, affecting both children who may soon be out of the system and those who will spend many years within it. Research has shown that one change in a child's caseworker reduced a child's odds of attaining permanency within the year by 63 percent.<sup>292</sup> Employees cannot be stopped from leaving, but the high rate of turnover within child welfare agencies has negative repercussions on the youth they serve. Similarly, each time a child moved placements reduced the child's chances of permanency by 32 percent.<sup>293</sup> Agencies rarely move children for no reason, and suing a child welfare worker for moving a child is unrealistic even if the move is arguably not in the child's best interests. Further, suits must be against a suitable defendant. In the comprehensive child welfare reform litigation, the suits are always against the state, county, or city agency running the child welfare system. Suing individual caseworkers for failure to do their jobs would be very difficult. The 11<sup>th</sup> Circuit quotes *NBC v. Communications Workers of America* in *Rayburn*, noting "[P]rivate conduct is fairly attributable only when the [S]tate has had some affirmative role, albeit one of encouragement short of compulsion, in the particular conduct underlying a claimant's civil rights grievance." [italics removed.]<sup>294</sup> Even if the child welfare

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<sup>290</sup> Lily Ledbetter, <http://www.lillyledbetter.com/about.html> (last visited June 22, 2016).

<sup>291</sup> Many providers serving low-income communities are students who are there only on short rotations. See generally A. Dannenberg, *U.S. Medical Students' Rotations in Epidemiology & Public Health at State & Local Health Departments*, 77 *ACAD. MED.* 799 (2002) (describing elective rotations in health departments exposing medical students to career opportunities in short-term bursts).

<sup>292</sup> CHILD WELFARE INFORMATION GATEWAY, CONCURRENT PLANNING: WHAT THE EVIDENCE SHOWS 6 (April 2012) [https://www.childwelfare.gov/pubPDFs/concurrent\\_evidence.pdf](https://www.childwelfare.gov/pubPDFs/concurrent_evidence.pdf).

<sup>293</sup> *Id.* at 7.

<sup>294</sup> 860 F.2d 1022, 1025 n.4 (1988) (quoting *Frazier v. Board of Trustees of Northwest Miss.*, 765 F.2d 1278,

worker were moving the child to a different placement out of malevolence, the state would have had to encourage that action in order for the state to be found liable. So while lawsuits against caseworkers are unrealistic, an agency encouraging more effort in the beginning of a case to find appropriate placements and support foster families could be a part of a settlement agreement and could improve permanency data.

Delays within the court system show similar detrimental effects on permanency as the change in caseworkers above. One continuance granted to a parent who has not yet found legal representation adds, on average, 31.8 days to a dependency case, and a continuance granted to a lawyer in advance of a termination hearing will delay a case by 26 days.<sup>295</sup> Each dependency case averages 2.7 continuances,<sup>296</sup> and most continuances occur prior to fact-finding.<sup>297</sup> These delays, then, affect cases before the State is even required to put forth evidence that abuse or neglect has occurred. They threaten family integrity, as parents are kept from their children without any showing that they have harmed their children.<sup>298</sup> The 10<sup>th</sup> Circuit held that “the forced separation of parent from child, even for a short time,” is a violation of procedural due process and an infringement on the rights of both.<sup>299</sup> While courts need to act in the best interests of children who have been harmed by abuse or neglect, unnecessary delays seem to be an unjustifiable infringement.

States, local governments, and child welfare agencies all share responsibility for these delays. Studies examining reasons behind delays in permanency attribute court delays as a reason in 23 of the 33 states reviewed.<sup>300</sup> No state was found to be in compliance with ASFA’s timelines.<sup>301</sup> Courts and court systems assign too few judges, allow too many continuances, and stretch out trial time for years. A working group studying New York’s court system stated, “[T]here are simply too few lawyers and judges and too many cases in New York family courts. The current caseload of over 200,000 filings makes both timely case resolution and in-depth hearings nearly impossible.”<sup>302</sup> Delays can also be attributed to the actions of foster care agencies, which assign too many cases to a single caseworker and fail to file timely petitions to terminate parental rights.

There are areas where states could be pushed to help children find permanency more quickly. One such area would be trying to have agencies file a request to withdraw the requirement to make reasonable efforts toward reunification more quickly. An agency does not need to pursue reasonable efforts to reunify a family if the birth parent has done something so harmful that it is

1286 (5th Cir. 1985)).

<sup>295</sup> WASHINGTON STATE INST. FOR PUBLIC POL’Y, HOW DO COURT CONTINUANCES INFLUENCE THE TIME CHILDREN SPEND IN FOSTER CARE? (March 2004), 8-9, <http://www.wsipp.wa.gov/ReportFile/874> [<https://perma.cc/4YE2-JM7T>] (last visited June 21, 2017) (corresponding to 11.9 additional days in foster care for each dependency case continuance).

<sup>296</sup> *Id.* at 8.

<sup>297</sup> *Id.*

<sup>298</sup> See, e.g. Pamela McAvay, *Families, Child Removal Hearings, & Due Process: A Look at Connecticut’s Law*, 19 QUINNIPIAC L. REV. 125, 126 (2000) (considering the due process implications for family integrity after an expansion of 10 to 20 days before a meaningful due process hearing in CONN. GEN. STAT. § 46b-129).

<sup>299</sup> *J.B. v. Washington County*, 127 F.3d 919, 925 (10th Cir. 1997) (quoting *Jordan v. Jackson*, 15 F.3d 333, 346 (4th Cir. 1994)).

<sup>300</sup> *Id.* at 2.

<sup>301</sup> *Id.*

<sup>302</sup> Sarah Mullin et al., Note, *Foster Care and Permanency Proceedings*, 40 COLUM. J.L. & SOC. PROBS. 495, 497-8 (2007).

clear the child can never be returned. Possible reasons the Adoption and Safe Families Act (ASFA) lists to file a motion to release the agency from having to make reasonable efforts include, among others, aggravated circumstances under state law, such as abandonment, torture, chronic abuse, or sexual abuse; the parent murdered or attempted to murder another child, or the parental rights to a sibling of the child were already terminated involuntarily.<sup>303</sup> The purpose of filing motions to release an agency from reasonable efforts to reunify a family would be to move the child into a permanent placement more quickly. ASFA says that if continuation of reasonable efforts “is determined to be inconsistent with the permanency plan for the child, reasonable efforts shall be made to place the child in a timely manner in accordance with the permanency plan, and to complete whatever steps are necessary to finalize the permanent placement of the child.”<sup>304</sup> Yet this section provides no timeline for when this determination should be made or a timeline for completion of those necessary steps to finalize a permanent placement. Unfortunately, without clear guidelines about when the motion needs to be filed, the only failure of duty in a delayed motion is moral, rather than legal.

Delay can involve not just a failure ever to file a motion, but also slow filings that add months to a child’s time in care. These mini-failures, however, appear to be without remedy. If reasonable efforts are being put forth only because an agency has failed to file timely a motion to withdraw reasonable efforts, than a caseworker who likely has too many cases already is forced to do additional pro-reunification work, children can be forced to interact with family members who may have committed grievous crimes against them or their family members, and children are kept in a state of uncertainty about their permanent homes longer. Agencies are also not required to keep data about how many days they wait before filing such motions, so the number of children unnecessarily waiting in the foster care system is unknown.<sup>305</sup>

There is no legislative mandate on the number of days after which an agency must decide whether or not to file a request for reasonable efforts to reunify to be withdrawn. A failure to file such a motion unnecessarily extends the time a child is in care. A report that involved a case study of three random cases revealed that New York’s Administration for Children’s Services [ACS] delayed filing a motion to withdraw reasonable efforts to reunify in one of those three cases. In this case, the mother had murdered the siblings of the children in care. The delay lasted 71 days and ended only after the city’s Department of Investigations pursued the issue.<sup>306</sup> Apparently this delay was contrary to ACS policy, but a FOIA request by this author was unfulfilled.<sup>307</sup> The report announced: “For the last three fiscal years, 82% of children who had been in ACS custody for 17

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<sup>303</sup> CHILD WELFARE INFORMATION GATEWAY, REASONABLE EFFORTS TO PRESERVE OR REUNIFY FAMILIES AND ACHIEVE PERMANENCY FOR CHILDREN 3-4 (2012), <https://www.childwelfare.gov/pubPDFs/reunify.pdf> [https://www.childwelfare.gov/pubPDFs/reunify.pdf]. Some states include additional grounds to file a motion to not require an agency to make reasonable efforts toward reunification, including a parent’s conviction of murder or voluntary manslaughter of the child’s other parent, multiple removals of the same child for abuse and neglect from the same parent, or the child’s conception was the result of a sexual offense committed by the parent. *See id.*, at 4.

<sup>304</sup> Adoption and Safe Families Act of 1997, 42 U.S.C. § 671 (15)(C) (2013).

<sup>305</sup> MARK G. PETERS, NEW YORK CITY DEPARTMENT OF INVESTIGATION, REPORT ON ACS POLICY AND PRACTICE VIOLATIONS IDENTIFIED IN THREE CHILD WELFARE CASES AND RELATED ANALYSIS OF CERTAIN SYSTEMIC DATA 3 (2016), [https://www1.nyc.gov/assets/doi/press-releases/2016/may/14-ACSReport05-03-16\\_FINALwReport.pdf](https://www1.nyc.gov/assets/doi/press-releases/2016/may/14-ACSReport05-03-16_FINALwReport.pdf) [https://perma.cc/8UV5-ZJUK].

<sup>306</sup> *Id.* at 4.

<sup>307</sup> I filed a FOIA request seeking Memorandum from Ronald Richter, Commissioner, ACS, to All ACS attorneys, ACS Policy on 1039-b Motions (June 26, 2006), but received no response.

of the last 22 months and for whom there was no documented exception, did not have petitions to terminate parental rights filed timely on their behalf.”<sup>308</sup>

ASFA does require states to institute a plan to create goals regarding the absolute number or the percentage of children in each state’s care that will remain in foster care for more than two years,<sup>309</sup> as well as to have an independent audit of their programs at least every three years.<sup>310</sup> However, there is no requirement that the number of youth in care beyond two years drops to any specified level, nor is there any punishment outlined for states that fail to complete these minimal measures. A previous federal child welfare law did include warnings to the state that payments could be stopped due to “substantial failure to comply with the provisions of the plan,” but this line was removed from the law by amendment in 1994.<sup>311</sup> The appearance of an otherwise total lack of recourse may make it more likely that a court would find a private right of action, but there is no guarantee of that. Rather, the few cases that do exist, described earlier, show litigants avoiding the direct issue of whether delay is illegal and instead using the narratives of delay to access public sympathy and settlement accommodations.<sup>312</sup> Suing under federal law over delay in the foster care system looks challenging, and is of questionable value if there are other means to reach the same goals of changing the system to reduce those delays.

There are many reasons why delay is difficult to address in litigation, as stated above, but more reasons that it is worth the attempt to include it in some way, even if indirectly. Political approaches to reform, according to Marcia Robinson Lowry, “are likely to draw only on the most expedient approaches to quieting public outrage, for instance, by renaming and restaffing a bureaucracy without taking the time to fully examine why the system is not working.”<sup>313</sup> Litigation has the potential to hold the feet to the fire, and make ongoing change. For that reason, whatever harms can be addressed within the litigation should be addressed.

It may be possible to sue for delay under a combination of federal and state laws. Some states have specific statutes outlining timelines for actions to be taken within a case. For example, the New York state law at issue in the previous section, implementing the federal law about reasonable efforts, does not set forth a timeline at which point such a finding needs to be established, but does set timelines for other aspects of a case. The court must schedule a permanency hearing to be held within eight months of the child’s entry into foster care,<sup>314</sup> and must set a permanency hearing for a date within 30 days of the determination that reasonable efforts are not needed.<sup>315</sup> Similarly, Iowa requires a shelter hearing within 48 hours of a child’s placement in temporary care,

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<sup>308</sup> Press Release, City of New York Department of Investigation, DOI Investigation of Child Fatalities and Other Injuries Reveals Legal & Practice Violations by the City Administration for Children’s Services, (May 3, 2016), <https://www1.nyc.gov/assets/doi/reports/pdf/2016/2016-05-03-14-ACS-Report-FINAL.pdf> [<https://perma.cc/SV25-NJJP>].

<sup>309</sup> Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(14) (2013).

<sup>310</sup> *Id.* § 671(13).

<sup>311</sup> State Plan for Foster Care and Adoption Assistance, Pub. L. 103–432 (1994); <http://law.justia.com/codes/us/1999/title42/chap7/subchapiv/parte/sec671> [<https://perma.cc/CRP4-W7UR>].

<sup>312</sup> *See supra* Section IIIA.

<sup>313</sup> Marcia Robinson Lowry, Commentary 2, Four Commentaries: How We Can Better Protect Children From Abuse and Neglect, 8 *The Future of Children* 123, 126 (1998).

<sup>314</sup> NY CLS SOC. SERV. § 10 358-a (2-a)(b) (2015).

<sup>315</sup> *Id.* at (3)(b)(6).

and then also requires a removal hearing within 10 days.<sup>316</sup> A disposition hearing must be held within 45 days of the adjudication.<sup>317</sup> Iowa states that a petition for termination of parental rights “shall be filed” by the end of the child’s fifteenth month in placement.<sup>318</sup> Iowa requires a permanency hearing after a child has been out of the parent’s home for 12 months.<sup>319</sup> In contrast, ASFA only requires a permanency hearing 12 months after the first judicial finding of child abuse or neglect.<sup>320</sup> More stringent state law timelines are of course helpful for children in those states, although children in other states will not benefit.

States may also have laws that do not appear to be about permanency, but can be used to help avoid delay and keep a case on track. Minnesota requires the court to review the social service agency’s reported diligent efforts to identify and search for relatives no later than three months after a child has been placed in foster care.<sup>321</sup> This work finds potential relative placements early on, which could change the entire trajectory of a case in terms of placement and bonding. As a substandard relative search can prevent adoptions, doing a good job early will prevent a search from having to be re-run later on, delaying permanency further. Even if a specific case is not headed to adoption, keeping the agency on schedule with one requirement may help to keep the agency on track overall. In states with specific statutory language like Iowa or Minnesota, plaintiffs can and should sue when those timelines are not followed. However, in states without such language, another option is necessary.

#### IV. CONCLUSION

This analysis of child welfare reform litigation suggests several interesting features of the field. First, the law in the field is still unsettled despite decades of litigation. Lower courts have not come to consensus about the obligations states owe to children and families involved in the child welfare system, and the Supreme Court has been silent since *DeShaney*.<sup>322</sup> The field of law has survived despite this lack of clarity because almost all of the cases settle through the efforts of the parties; most are then signed by judges and made into enforceable consent decrees. While the cause of actions in the complaints cover a multitude of state laws, federal statutes related to child welfare and well-being, and the U.S. Constitution, the lawsuits all claim a right to family integrity and a right to be safe from harm. The courts agree that states owe a special duty of care to children in their foster care systems, but have not articulated anything clear beyond that.

The law is chaos, and the settlements are heavy with bureaucratic requirements, but light on both legal reasoning and results. The results of these settlements are generally increased regulations and added bureaucracy.<sup>323</sup> It is not clear that the settlements are creating positive change

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<sup>316</sup> IOWA CODE § 232.21 (4) (2015); IOWA CODE § 232.95 (1) (2015).

<sup>317</sup> IOWA CODE § 232.117(6) (2015).

<sup>318</sup> Petition, IOWA CODE § 232.111(1) (2015).

<sup>319</sup> IOWA CODE § 232.104(1) (2015).

<sup>320</sup> Adoption and Safe Families Act (ASFA) of 1997, Pub. L. No. 105-89, 111 Stat. 2115 § 103 (codified as amended in scattered sections of 42 U.S.C.).

<sup>321</sup> MINN. STAT. § 260C.221(d)(1).

<sup>322</sup> *DeShaney v. Winnebago County Dep’t. of Soc. Serv.*, 489 U.S. 189 (1989).

<sup>323</sup> *See, e.g.* Alvin L. Schorr et al., *The Bleak Prospect for Public Child Welfare*, 74 SOC. SERV. REV. 124, 127, 136 (2000) (discussing how increased regulations made line workers’ jobs “stultifying” and how class action lawsuits have added rigidity and increased bureaucracy); Theodore J. Stein, *The Vulnerability of Child Welfare Agencies to Class-*

when compared to the resources they consume. Yet bureaucracy and regulation, in practice, also means the locations affected by the lawsuits have increased staff, increased overall funding, and established new programs. While it is difficult to know whether those jurisdictions might have made similar or even more extensive improvements without the threat and cost of litigation, data shows that the law reform efforts have had overall positive effects. Further, the litigation is better for plaintiffs in that lawsuits assure child welfare will be funded even when other state or local agencies might have funding frozen or cut.<sup>324</sup> Settlements are better than the alternative of going to court and losing, and the settlements are changing the child welfare system. Yet they could be greatly improved.

The paper narrates how the strength of these lawsuits is not actually their legal claims, but instead the strength is their ability to use media and a narrative of sadness to effectively navigate political spheres. If the litigators paid more attention to media, to their public statements, and to their abilities to work with opposing parties, then the plaintiffs could have accomplished more of their goals of improving the child welfare system. Child welfare litigators have failed to perform the political niceties to enable greater success. Litigators in other fields have begun to create press kits, communicating the claims and narratives in an easy-to-understand way, including relevant statistics.<sup>325</sup> Child welfare litigators could do the same. While legal advocacy may once have been entirely within the courtroom, extrajudicial advocacy is now seen as an incredibly important part of being a zealous advocate for one's client.<sup>326</sup> Through being written into the complaints and, ideally, press kits, children who have suffered from delay in permanency in the foster care system can become a part of the narrative of horrors that will make the public support changes to the states' systems. Most of these lawsuits will be settled, and so the fact that most of the delay cannot be held to be a failed duty of any particular party will never need to be addressed. Child welfare reform as conducted by comprehensive class-action lawsuits is likely to continue, and it can be made more inclusive.

Adding delay as a harm within a comprehensive class-action child welfare reform lawsuit means that children who have been in the foster care system for longer than two years are less likely to be forgotten when it comes time to sit at the table and write a plan to reorganize the jurisdiction's child welfare system. Institutional reform litigation becomes a political practice as the conflict drags on, and so lawyers need to play politics.<sup>327</sup> Litigation is necessary, but not enough on its own, for creating change,<sup>328</sup> so lawyers should take advantage of those other change creating opportunities like media coverage and package the litigation appropriately. Unsuccessful lawsuits can still generate public outrage and spur change through social movement creation.<sup>329</sup> However, here there is no social movement. Further, it is highly questionable if the provisions of the Adoption and Safe

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Action Suits, 61 SOC. SERV. REV. 636, 637, 650 (1987) (stating that there are few ways for social service agencies to avoid lawsuits).

<sup>324</sup> MEZEY, *supra* note 102, at 135 (discussing how DCFS was spared budget cuts, instead winning a 12 percent increase, due in part to pending litigation against the agency).

<sup>325</sup> Robbenolt & Studebaker, *supra* note 179, at 10.

<sup>326</sup> Jonathan M. Moses, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1812, 1831-33 (1995) (“[V]ictories outside the courtroom may be more important than those inside.”).

<sup>327</sup> Colin S. Diver, *The Judge As Political Powerbroker: Superintending Structural Change in Public Institutions*, 65 VA. L. REV. 43, 45 (1979).

<sup>328</sup> Cummings & Rhode, *supra* note 3, at 605.

<sup>329</sup> *Id.* at 610.

Families Act related to terminating parental rights after a child has been in care for 15 of the last 22 months could be enforced in any way. Finally, settlements have been proven to create change. Therefore, maintaining the practice of complaints leading to settlements is a solid strategy.

It will be informative to watch *Elisa W.* progress through the court system or through settlement proceedings. A future paper should conduct an in-depth case study of *Elisa W.*, examining how the attorneys are able to mobilize media – or not—to center delay in any future settlement agreements, and how that is implemented. Perhaps the case will even involve a judicial decision. Future research should also closely examine the voices of children in foster care. Are there any suits in which plaintiffs have been able to speak for themselves? What legal strategies would they pursue? Also, future research should continue to examine the goals of public interest litigation in fields with no underlying social movement. What will child welfare litigation look like after the retirement of Marcia Robinson Lowry?

While I leave the exact contours of reconstructing child welfare systems to those in the trenches, my research on the failings of existing reform efforts has made certain things clear. A restructured foster care system after a settlement focusing on delay would ensure that families were able to access the services they needed without long waiting lists and court delays. An ideal plan would recognize that children of color receive fewer visits with their parents, are less likely to access needed mental health services, are less likely to receive services focused on reunification, and are less likely to be in contact with their foster care caseworkers.<sup>330</sup> Thus a strong plan would assign extra caseworkers focused specifically on those areas of service. This plan should also include positive incentives for staff to comply with new requirements, rather than fines, which take away funding from struggling units.<sup>331</sup>

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<sup>330</sup> Tanya Cooper, *Racial Bias in American Foster Care: The National Debate*, 97 MARQ. L. REV. 215, 243 (2013).

<sup>331</sup> *Implementation Problems in Institutional Reform Litigation*, 91 HARV. L. REV. 428, 449 (1977).