

# Child Protection Mediation: The Potential Role of ADR in Child Welfare Reform

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## I. INTRODUCTION

Nelson Mandela once said, “There can be no keener revelation of a society’s soul than the way in which it treats its children.”<sup>1</sup> Child welfare has created tensions throughout the years by juxtaposing the need to prioritize parental rights and the societal prerogative to provide for the best interest of the child.<sup>2</sup> In the United States, a parent’s right to the care, custody, and control of their children is deemed fundamental, and thus any interference with such rights should be avoided wherever possible.<sup>3</sup> However, by the same token, states possess a *parents patriae* interest, affording the ability to step in when parents fail to meet the obligations to their children that are circumscribed by law.<sup>4</sup> Although there have been significant strides towards promoting child welfare over the last century, current research indicates there is much more work to be done to ensure the best possible outcomes for children.<sup>5</sup> Studies suggest a child’s involvement with the modern child welfare system in and of itself is traumatic. Moreover, critics contend child protection in practice is little more than thinly veiled punitive measures that disproportionately target minority and impoverished families.<sup>6</sup> Indeed, in 2019, 61% of all maltreatment cases only involved child neglect, a category of cases with obvious ethnic and socioeconomic trends.<sup>7</sup> African American, Native American, and Latinx children are disproportionately represented in the United States foster care system.<sup>8</sup> It is likely no coincidence that these communities possess many of the risk factors associated with child maltreatment, such as extreme poverty,

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<sup>1</sup> Nelson Mandela, South African President, Address at the Launch of the Nelson Mandela Children’s Fund (May 8, 1995).

<sup>2</sup> See Soo Jee Lee, Note, *A Child’s Voice vs. a Parent’s Control: Resolving a Tension Between the Convention on the Rights of the Child and U.S. Law*, 117 COLUM. L. REV. 687, 693 (2017).

<sup>3</sup> See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>4</sup> See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>5</sup> See, e.g., Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. REV. L. & SOC. CHANGE 523 (2019).

<sup>6</sup> Vivek Sankaran et al., *A Cure Worse than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1165 (2019).

<sup>7</sup> Administration for Children and Families (ACF), *Child Maltreatment Report* (2019) <https://www.acf.hhs.gov/cb/report/child-maltreatment-2019>; see also Bruce A. Boyer & Amy E. Halbrook, *Advocating for Children in Care in a Climate of Economic Recession: The Relationship Between Poverty and Child Maltreatment*, 6 NW. J. L. & SOC. POL’Y 300, 301–304 (2011).

<sup>8</sup> See Shamini Ganasarajah et al., *Disproportionality Rates for Children in Foster Care (Fiscal Year 2015)*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES (2017), [https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015\\_0.pdf](https://www.ncjfcj.org/wp-content/uploads/2017/09/NCJFCJ-Disproportionality-TAB-2015_0.pdf).

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due to generational racial inequities that stymied opportunities for persons of color and withheld vital resources that would have allowed for the accumulation of generational wealth.<sup>9</sup>

On a related note, there has been some scholarship on whether the Fourteenth Amendment Due Process Clause actually prohibits states from penalizing parents for lacking the necessary resources to provide for their children.<sup>10</sup> Despite any potential constitutional tensions, far more families living under the poverty line find themselves entwined with the child welfare system as compared with their middle and upper-class counterparts, according to research conducted by the National Incidence Study (NIS), which provides estimates of the rates of child maltreatment based on socioeconomic data provided by state child welfare agencies.<sup>11</sup> This issue is expanded upon in Part II of this note.

Arguments for child welfare reform are further bolstered by the realities of life after foster care. In the United States, only an estimated 58% of foster youth graduate from high school by age 19.<sup>12</sup> Additionally, youth who have experienced foster care face a higher likelihood of involvement with the juvenile justice system, eventual incarceration as an adult, and homelessness.<sup>13</sup> Even the data collected on the wellbeing of children who experienced short, temporary stays in foster care<sup>14</sup> show poor outcomes, and

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<sup>9</sup> *But cf.* Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 ARIZ. L. REV. 871 (2009) (acknowledging the statistical overrepresentation of poor minority children in foster care, but arguing that African American children are disproportionately represented in foster care because they are disproportionately victims of maltreatment).

<sup>10</sup> See Daan Braveman & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447 (1997) (arguing that removing children from their homes solely due to poverty is unconstitutional).

<sup>11</sup> The NIS studies were mandated by Congress in an attempt to understand existing discrepancies between reported and actual child maltreatment. There have been four NIS studies to date, with the most recent containing data spanning from 2004–2009. Katherine Hunt Federle, CHILD. AND THE L.: AN INTERDISC. APPROACH 533 (2013); <https://www.acf.hhs.gov/opre/project/national-incidence-study-child-abuse-and-neglect-nis-4-2004-2009>.

<sup>12</sup> *Issue Brief: Cost Avoidance, The Business Case for Investing in Youth Aging out of Foster Care*, JIM CASEY YOUTH OPPORTUNITIES INITIATIVE 5 (2013), <https://assets.aecf.org/m/resourcedoc/JCYOI-CostAvoidance-2013.pdf>.

<sup>13</sup> Rachel Anspach, *The Foster Care to Prison Pipeline: What it is and How it Works*, TEEN VOGUE (May 25, 2018), <https://www.teenvogue.com/story/the-foster-care-to-prison-pipeline-what-it-is-and-how-it-works>.

<sup>14</sup> Eli Hager, *The Hidden Trauma of “Short Stays” in Foster Care*, THE MARSHALL PROJECT (Feb. 11, 2020), <https://www.themarshallproject.org/2020/02/11/the-hidden-trauma-of-short-stays-in-foster-care>.

the experts who noted these outcomes have suggested several attempted reforms – including initiatives to reduce the overall number of children removed from their families.<sup>15</sup>

This note contends that the current method of adjudicating child maltreatment cases attempts to solve complex sociological issues with simple, formulaic, and inefficient solutions, thereby increasing the number of children who unnecessarily enter or remain in foster care. Current child welfare judicial processes are rooted in discernible historical traditions of social injustices such as overt marginalization of poor and minority individuals. Such systemic racism and classism in child welfare must be dealt with aggressively in furtherance of a more equitable society. Furthermore, once children enter foster care, the timeline to family reunification is unnecessarily long due to the overcrowded family court system. Shifting away from traditional family court proceedings and embracing methods of Alternative Dispute Resolution (ADR), such as Child Protection Mediation (CPM), could have a profound impact on youth and families who experience the child welfare system. These ADR methods could reduce structural barriers to permanent family placement and decrease the overall number of overzealous removals.<sup>16</sup> This is particularly true in cases of neglect, which can occur due to a lack of familial resources, rather than any malicious intent to harm a child.<sup>17</sup>

In Part I, this note will analyze the relevant legal and sociopolitical history of child welfare in America, as well as more contemporaneous legislative reform attempts. Part II will discuss the modern family court judicial processes and the societal problems posed by it, including institutionalized racism, classism, and unnecessary familial separation. Finally, Part III will explain the practice of Child Protection Mediation (CPM), highlight some of its benefits in solving prevalent issues in child welfare, and provide a jurisdictional example of how it may look in practice.

## II. A BRIEF HISTORY OF CHILD WELFARE IN AMERICA

### A. *The Era of Orphan Trains and Non-Governmental Child Welfare Organizations*

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<sup>15</sup> See, e.g., Family First Prevention Services Act, Pub. L. No. 115–23 (2018).

<sup>16</sup> Hager, *supra* note 14, “[E]very year, an average of nearly 17,000 children are removed from their families’ custody and placed in foster care only to be reunited within 10 days, according to .... [an] analysis of federal Department of Health and Human Services records dating back a decade.”

<sup>17</sup> See Boyer & Halbrook, *supra* note 7; see also Melissa Johnson-Reid et al., Is the Overrepresentation of the Poor in Child Welfare Caseloads Due to Bias or Need? 31 CHILD. & YOUTH SERVS. REV. 422–27 (2009).

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Child welfare has a turbulent history in terms of both humanitarian efforts and public policy.<sup>18</sup> For hundreds of years, the welfare of children was not seen as a problem requiring state intervention or action, both in the United States and around the world.<sup>19</sup> Thus, prior to the late eighteenth century, American law contained no functional equivalent to our modern-day legally enforceable parental rights and obligations to children.<sup>20</sup> Historians have dubbed the late nineteenth century as the era that “invented” the concept of the modern childhood.<sup>21</sup> The beginning of the societal shift in attitude towards child protection is often traced back in part to the orphan trains which began in 1854.<sup>22</sup> The orphan train movement, rather than focus on the protection of children and their welfare, centered around identifying solutions to mitigate the social and economic community burden exacerbated by the significant presence of ‘street children’ in New York City.<sup>23</sup> The initiative was headed by the Children’s Aid Society of New York and sought to relocate orphaned and destitute children from urban New York City to farms in the Western United States where they were often treated as employees.<sup>24</sup> At the time, it was relatively commonplace to expect displaced children to work as indentured servants in exchange for room and board, and prior to the passage of child labor laws, no statute existed to prevent this practice.<sup>25</sup> During this period, there were not any geographic limitations on children’s placements.<sup>26</sup> Consequently, an orphan train passenger could reasonably expect to be separated from their siblings and placed anywhere in the country—in many cases far away from their biological parents and any life they had previously known.<sup>27</sup> The last orphan train ran in 1929, by which time roughly 200,000 children had been separated from their families and relocated.<sup>28</sup> Notably, the New York Society for the Prevention of Cruelty to Children, the first organization specifically dedicated to the protection of children, was founded

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<sup>18</sup> See Rebecca S. Trammell, *Orphan Train Myths and Legal Reality*, 5 AM. UNIV. MOD. AM. 3 (2009).

<sup>19</sup> See Holly Brewer, *The Transformation of Domestic Law*, THE CAMBRIDGE HIST. OF L. IN AM. 288–89, 302–04, 311 (Michael Grossberg & Christopher Tomlin, eds., 2008).

<sup>20</sup> See *id.*; see also *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (states may enforce compulsory laws that require parents to fulfill obligations to their children).

<sup>21</sup> See Steven Mintz, *HUCK’S RAFT: A HISTORY OF AMERICAN CHILDHOOD* 75–93 (2004).

<sup>22</sup> Trammell, *supra* note 18.

<sup>23</sup> See *id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

in 1875.<sup>29</sup> This date is significant as it shows that the focus of the orphan trains was neither viewed as a mechanism of cruelty nor was it really focused on preventing cruelty to children. Rather, it was viewed as a tool used to relieve the economic burden placed on the broader community by impoverished children and their families. Indeed, there are many accounts of children who rode the orphan trains falling victim to abuse in their foster or adoptive placements in the west.<sup>30</sup> The very roots of child welfare initiatives in America are entrenched in practices of separating poor families.

Historical accounts, such as those of the orphan trains, support the assertion that child welfare efforts have often been either the direct or indirect result of marginalization of impoverished populations. The youth placed in this early form of foster care often were not true orphans.<sup>31</sup> Many of them had surviving parents who, in some cases, signed temporary custody of their children to charities while they attempted to gain financial stability.<sup>32</sup> In a society that was not temporally far removed from actually imprisoning people for being a racial or class minority,<sup>33</sup> even the best intentions for child welfare social programs were subject to a deeply rooted cultural bias against the racialized poor. Further, the child welfare system was a highly privatized industry,<sup>34</sup> meaning child protective initiatives were frequently left to churches, charities, and other private organizations<sup>35</sup> that had their own agendas and were susceptible to monetary influences and corruption. This point may be best exemplified by the infamous case of the Memphis branch of the Tennessee Children's Home Society (TCHS).

Under the leadership of Georgia Tann, TCHS guised itself as an orphanage but, in reality, the organization kidnapped children from poor families to sell them like cattle into illegal adoptions to wealthy families.<sup>36</sup> In

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<sup>29</sup> John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449 (2008).

<sup>30</sup> See Karen Harris, *The Orphan Trains Delivered Homeless Children to Rural Farmers*, HISTORY DAILY (July 10, 2018), <https://historydaily.org/the-orphan-trains-delivered-homeless-children-to-rural-farmers>.

<sup>31</sup> Clay Gish, *Rescuing the "Waifs and Strays" of the City: The Western Emigration Program of the Children's Aid Society*, 33 J. SOC. HIST. 122, 124–25 (1999).

<sup>32</sup> See Trammell, *supra* note 18.

<sup>33</sup> Congress did not outlaw debtors' prisons in the United States until 1833. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 16 (1995).

<sup>34</sup> See Trammell, *supra* note 18.

<sup>35</sup> *Id.*

<sup>36</sup> See generally, Hannah Noll-Wilensky, Note, *Black Market Adoptions in Tennessee: A Call for Reparations*, 30 HASTINGS WOMEN'S L. J. 287 (2019) (examining the history of the Georgia Tann story and proposing a framework for launching reparations).

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addition to treating children as profitable objects for sale in black market adoptions, the orphanage itself has been described as a “house of horrors” where its occupants experienced severe abuse and even death.<sup>37</sup> To add insult to injury, Tann was heralded as the “mother of adoption”<sup>38</sup> and her tenure at TCHS continued for over 20 years between 1927 and 1951, despite evidence that the City of Memphis should have been apprised of her illicit activities.<sup>39</sup> Although many of the adoptions were illegal under the law at the time, Tann never faced legal repercussions; she died from cancer mere days after her actions were made public.<sup>40</sup>

The early history of child welfare supports arguments for reform by illustrating the deeply classist ideals that supplied the foundation for modern child protection. Removing children from indigent parents rather than providing relief via more robust social services is not a novel concept. But the American political and legal reputation for scarce social safety nets highlights the desperate need for innovative approaches to better preserve the structural integrity of as many families as possible while continuing to prioritize the safety of children.

### B. *New Deal Legislation and its Impact on Modern Child Welfare*

Prior to the 20th century, there were very few state child welfare departments, and the federal government played virtually no role in funding or implementing child welfare policy.<sup>41</sup> Although the federal Children’s Bureau was established in 1912, it was not until the Great Depression that the federal government became a key player in the child welfare system.<sup>42</sup> The Social Security Act, passed in 1935, contained a provision to provide aid to dependent children.<sup>43</sup> This would later become one of the most important funding sources for state child welfare programs after several amendments

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<sup>37</sup> Erika Celeste, *For 20 Years, a Tennessee Baby Thief Kidnapped More Than 5,000 Children from the Streets, Hospitals, and Shanty Towns of Memphis. Now, 70 Years Later, Survivors of Her 'House Of Horrors' Are Confronting the Past*, INSIDER (Dec. 4, 2019), <https://www.insider.com/georgia-tann-tennessee-children-home-society-survivors-speak-out-2019-12#:~:text=For%20more%20than%2020%20years,parents%20at%20a%20steep%20profit>.

<sup>38</sup> *The Mother of Modern Adoption*, SWORD AND SCALE (May 11, 2016, 8:00 AM), <https://www.swordandscale.com/the-mother-of-modern-adoption/>.

<sup>39</sup> *See id.*

<sup>40</sup> *Id.*

<sup>41</sup> Myers, *supra* note 29, at 452–53.

<sup>42</sup> *Id.*

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

occurring in the early 1960s.<sup>44</sup> Today, federal allocations to states for child welfare, stipulated by Title IV of the Social Security Act, constitute a large part of state budgets.<sup>45</sup> For example, Title IV-E and IV-B make up 88% of Ohio's child welfare funding.<sup>46</sup> Providing these federal funds was a vital step in our evolution to a society that protects children. However, the funding structure may be problematic in some instances.<sup>47</sup> States are paid a certain dollar amount per each child it claims as a dependent.<sup>48</sup> Therefore, the more children who are in foster care, the more money the State receives.

Without going so far as to accuse a state of intentionally removing children from their families for the sole purpose of receiving increased federal funds, the financial incentive states' receive may encourage them to lean in favor of foster care when a child's wellbeing is in question. Even a slight degree of favoritism towards the use of foster care has the potential to increase the number of unnecessary child welfare interventions.<sup>49</sup> While the State may not profit from foster care directly, it does lose less money on foster care placements than it does on reunification efforts, according to Richard Wexler, Executive Director of the National Coalition for Child Protection Reform.<sup>50</sup> With an apparent lack of financial incentive to reunite families, youth may unnecessarily languish in foster care because a state deprioritizes the funding of necessary services to families that would aid in their ultimate family-unit preservation. The objective here is not to criticize the funding apparatus for state child welfare programs, but to highlight the institutionalized gaps that can allow implicit biases to slip through and outweigh evidence of a child's actual need to be declared dependent.

There have been significant changes since the New Deal era to both child welfare legislation and the role child protective organizations play in

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<sup>44</sup> See Child Trends Inc., *How States Fund Child Welfare Activities* (2016), <https://www.childtrends.org/wp-content/uploads/2016/01/2016-05HowStatesFundChildWelfare.pdf>.

<sup>45</sup> *Id.*

<sup>46</sup> Child Trends Inc., *Child Welfare Agency Spending in Ohio* (Dec. 2018), [https://www.childtrends.org/wp-content/uploads/2018/12/Ohio\\_SF2016-CWFS\\_12.13.2018.pdf](https://www.childtrends.org/wp-content/uploads/2018/12/Ohio_SF2016-CWFS_12.13.2018.pdf).

<sup>47</sup> See generally, Shardé Armstrong, Note, *The Foster Care System Looking Forward: The Growing Fiscal and Policy Rationale for the Elimination of the "AFDC Look-Back,"* 17 N.Y.U. J. LEGIS. & PUB. POL'Y 193 (2013) (arguing that the federal government should share in the cost of maintaining all foster children, not only those labeled "poor enough").

<sup>48</sup> See Social Security Act, 42 U.S.C. § 674 (2019).

<sup>49</sup> See Armstrong, *supra* note 47, at 194–95.

<sup>50</sup> Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALK POVERTY (Aug. 23, 2019), <https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/>.



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communities. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA)<sup>51</sup> in response to a generational “explosion of [societal] interest in child abuse.”<sup>52</sup> Prior to the passing of CAPTA, federal law was surprisingly silent on matters of child abuse and neglect.<sup>53</sup> CAPTA sets minimum standards for state statutory definitions of child maltreatment as well as reporting and investigatory procedures for all cases of suspected child maltreatment.<sup>54</sup> If a state fails to meet these minimum requirements, it is denied the federal funds allocated to the program.<sup>55</sup> Currently, all fifty states receive federal CAPTA funding, receiving a base allocation of \$50,000 per state with any additional funds distributed based on the state’s population density of children.<sup>56</sup> The increased investment in child welfare has placed additional responsibility on child protection agencies.<sup>57</sup> Today, child welfare programs receive one of the largest state budget allocations due to states’ increased responsibility to manage the safety and wellbeing of children through programs such as the Supplemental Nutrition Assistance Program (SNAP), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), Temporary Assistance for Needy Families (TANF), free school lunch programs, and of course, the costliest, Medicaid and foster care.<sup>58</sup>

In addition to legislative initiatives like CAPTA, other community initiatives, like the public Head Start program for preschool aged children,

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<sup>51</sup> Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247 (1974).

<sup>52</sup> Meyers, *supra* note 29, at 454.

<sup>53</sup> Kasia O’Neill Murray & Sarah Gesiriech, *A Brief Legislative History of the Child Welfare System*, MASS LEGAL SERVICES, <https://www.masslegalservices.org/system/files/library/Brief%20Legislative%20History%20of%20Child%20Welfare%20System.pdf> (last visited Nov. 16, 2021).

<sup>54</sup> *Id.*

<sup>55</sup> *About CAPTA: A Legislative History*, CHILD WELFARE INFO. GATEWAY (Feb. 2019), <https://www.childwelfare.gov/pubPDFs/about.pdf>.

<sup>56</sup> Emily Stoltzfus, *Child Welfare Funding in FY2018*, CONGR. RSCH. SERV. REPS. (July 30, 2018), <https://fas.org/sgp/crs/misc/R45270.pdf>.

<sup>57</sup> See Andrew Yarrow, *History of U.S. Children’s Policy, 1900-Present*, FIRST FOCUS (2009), <https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf>.

<sup>58</sup> See SHELLER WATERS BOOTS ET AL., STATE CHILD WELFARE SPENDING AT A GLANCE: A SUPPLEMENTAL REPORT TO THE COST OF PROTECTING VULNERABLE CHILDREN (1999), <https://www.urban.org/sites/default/files/publication/69626/309108-State-Child-Welfare-Spending-at-a-Glance.PDF>; see also John Sciamanna, *New Survey of State Child Welfare Spending Shows Continued Wide Variations in Strategies*, CHILD WELFARE LEAGUE OF AM., <https://www.cwla.org/new-survey-of-state-child-welfare-spending-shows-continued-wide-variations-in-strategies/> (last visited Sept. 17, 2021).

have come to play increasingly vital roles in the broader child welfare system since the mid-twentieth century.<sup>59</sup>

Despite the many benefits of such advances in promoting child health and safety, there is always room for improvement. Most recently, the federal Family First Prevention Services Act (FFPSA)<sup>60</sup> was passed in a bipartisan budget measure in 2018 as an effort to preserve families and prevent the trauma of separating families where feasible.<sup>61</sup> As the name suggests, the Act redirects federal funding to provide for services to mitigate the necessity for child removal, such as parental mental health and substance abuse counseling.<sup>62</sup> Although many states are still developing legislation for the utilization of these funds,<sup>63</sup> some have used the funds to implement Court Improvement Plans.<sup>64</sup> These plans study and implement best practices for courts to leverage in achieving stable, permanent home placements for

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<sup>59</sup> *Head Start History*, U.S. DEP'T HEALTH & HUM. SERVS. (last updated May 4, 2021), <https://www.acf.hhs.gov/ohs/about/history-head-start>.

<sup>60</sup> Family First Prevention Services Act (FFPSA) of 2018, Pub. L. No. 115-123, 132 Stat. 64, Enacted H.R. 1892.

<sup>61</sup> *The Family First Prevention Services Act: Historic Reforms to the Child Welfare System Will Improve Outcomes for Vulnerable Children*, CHILD'S DEF. FUND (Feb. 2018), <https://www.childrensdefense.org/wp-content/uploads/2018/02/ffpsa-short-summary.pdf> [hereinafter FFPSA].

<sup>62</sup> *Id.*

<sup>63</sup> States have begun to enact legislation in response to the passing of the FFPSA but have noted financial and logistical barriers to implementation. See National Conference of State Legislatures, *Family First Legislation* (Jan. 15, 2021), <https://www.ncsl.org/research/human-services/family-first-updates-and-new-legislation.aspx>. In Ohio for example, Governor Mike DeWine created the Office of Children's Services Transformation and appointed an Advisory Council to conduct research on best practices for child welfare reform and implementation of the FFPSA. Exec. No. 2019-27D (2019), <https://governor.ohio.gov/wps/portal/gov/governor/media/executive-orders/executive-order-2019-27da>. For initial findings, see Office of Children Services Transformation, *Initial Findings Report* (Feb. 2020), [https://content.govdelivery.com/attachments/OHOOD/2020/02/05/file\\_attachments/1373438/Transformation%20Report%20020520.pdf](https://content.govdelivery.com/attachments/OHOOD/2020/02/05/file_attachments/1373438/Transformation%20Report%20020520.pdf).

<sup>64</sup> "The highest court of each State and territory participating in the Court Improvement Plan (CIP) receives a grant from the federal Children's Bureau to complete a detailed self-assessment and develop and implement recommendations to enhance the court's role in achieving stable, permanent homes for children in foster care." *Court Improvement Program*, CHILD WELFARE INF. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/courts/reform/cip/#:~:text=The%20highest%20court%20of%20each,for%20children%20in%20foster%20care> (last visited Sept. 17, 2021).

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children in foster care.<sup>65</sup> States should consider implementing alternative dispute resolution programs like Child Protection Mediation, as part of their existing Court Improvement Plans.<sup>66</sup>

### III. THE CURRENT STATE OF CHILD WELFARE AND FAMILY COURT SYSTEMS

#### A. Institutionalized Classism Codified in Law

Part of the problem presently haunting even the best-intentioned child welfare programs is the overbreadth of relevant statutory language. Child maltreatment laws afford an incredible amount of discretion to the family court and the child welfare workforce to determine whether maltreatment has occurred and removal is necessary.<sup>67</sup> Alarming, the Fourth National Incidence Study of Child Abuse and Neglect found that “socioeconomic status is the strongest predictor of child maltreatment ....”<sup>68</sup> It is likely that this finding can be at least partially attributed to expansive legal definitions of child maltreatment and neglect. For example, Montana defines physical neglect in part as “failure to provide basic necessities, including but not limited to appropriate... nutrition, protective shelter from the elements, and appropriate clothing related to weather conditions, or failure to provide cleanliness and general supervision ...”.<sup>69</sup> Reading the Montana statute literally, a child could be adjudicated as neglected and removed simply because their parents could not afford to purchase a winter jacket. Alternatively, some have argued that child abuse definitions must be open-ended to some degree, as parents are endlessly creative in finding new ways to mistreat their children, and the law should account for a variety of possibilities in order to best protect children

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<sup>65</sup>See generally Utah Courts, *Utah’s Court Improvement Program*, <https://www.utcourts.gov/courts/juv/cip/index.html> (last visited Sept. 17, 2021) (providing an overview of Utah’s CIP).

<sup>67</sup> See Diane L. Redleaf, *Narrowing Neglect Laws Means Ending State-Mandated Helicopter Parenting*, AM. BAR ASSOC. (Sept. 11, 2020), <https://www.americanbar.org/groups/litigation/committees/childrens-rights/articles/2020/fall2020-narrowing-neglect-laws-means-ending-state-mandated-helicopter-parenting/>.

<sup>68</sup> Jesse Russell & Tracy Cooper, *The NIS-4: What it All Means (and doesn’t mean)*, NAT’L COUNCIL OF JUV. AND FAM. CT. JUDGES 8 (2011), <https://www.ncjfcj.org/wp-content/uploads/2012/03/nis-4-technical-assistance-brief.pdf>.

<sup>69</sup> MONT. CODE ANN. § 41-3-102(20) (2010).

and youth.<sup>70</sup> However, critics note that a state's interest in child protection does not supersede constitutional protections against excessively broad statutory language and/or misuses of state police power to interfere in family affairs.<sup>71</sup> Moreover, because such matters implicate fundamental rights and liberty interests of both parents and children, strict scrutiny should apply. In other words, child protection laws should be narrowly structured to support the State's *parens patriae* interest but burden fundamental rights as infrequently and to the slightest degree possible.<sup>72</sup>

Authorities on child welfare have additionally argued that poor, minority families are policed more heavily and therefore have more exposure to law enforcement and social workers, ultimately resulting in higher rates of reporting child maltreatment.<sup>73</sup> This phenomenon is known as visibility, or surveillance bias.<sup>74</sup> However, there is some dissonance among experts on this topic. Some child advocacy scholars, such as Harvard Law professor Elizabeth Bartholet, opine that available research does not support the notion that visibility bias poses an observable problem in child welfare.<sup>75</sup> Nevertheless, due to modern sociological discourse on the societal impacts of implicit bias in everyday life,<sup>76</sup> it may be ill-advised to reject out of hand the visibility bias theory, or other schools of thought that validate the presence of socioeconomic and racial biases in child welfare protection.

#### B. Racial Disproportionality in Foster Care

Another component that can be observed both historically and in modern child welfare practices is the systemic overrepresentation of racial minorities in the system. Even the orphan train movement notoriously targeted children of immigrants.<sup>77</sup> As to more modern forms of foster care, some go as far to argue that the system is "an apartheid institution ... designed to deal with the problems of minority families ... whereas the problems of white families

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<sup>70</sup> See Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745, 1799 (1987).

<sup>71</sup> Braveman & Ramsey, *supra* note 10, at 449.

<sup>72</sup> *Id.* at 450.

<sup>73</sup> Keva M. Millet et al., *Individual and Systemic/Structural Bias in Child Welfare Decision Making: Implications for Children and Families of Color*, CHILD. & YOUTH SERVS. REV. 35, 1634, 1637 (2013).

<sup>74</sup> *Id.*

<sup>75</sup> Bartholet, *supra* note 9, at 906.

<sup>76</sup> See Scott Sleek, *The Bias Beneath: Two Decades of Measuring Implicit Associations*, OBSERVER MAG. (Jan. 31, 2018), <https://www.psychologicalscience.org/observer/the-bias-beneath-two-decades-of-measuring-implicit-associations>.

<sup>77</sup> See Harris, *supra* note 30.

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are handled by separate and less disruptive mechanisms.”<sup>78</sup> Minority children, particularly African-American and Native-American children continue to be overrepresented in the foster care system.<sup>79</sup> That is to say that African-American and Native-American children make up a larger percentage of the foster care population than they do the general population.<sup>80</sup> In states like South Dakota, which have higher Native populations, Indigenous children are 11 times more likely than white children to be placed in foster care.<sup>81</sup> African-American children in the United States are at least twice as likely as white children to be removed from their biological families.<sup>82</sup>

Scholars have argued that disproportionately high representation of minority children in foster care is simply a direct reflection of many minority communities meeting indicators commonly associated with child maltreatment, including poverty, substance abuse, and untreated mental illnesses.<sup>83</sup> While this point may have some basis in truth, these scholars ultimately conclude, over-simplistically, that the percentage of minority children in foster care is an accurate representation of the minority children who are actually abused or neglected. This discounts the possibility that any observable overrepresentation is reflective of systemic racial bias.<sup>84</sup> To that argument, commonsense dictates that even the suggestion that perhaps minority children are just more likely to become victims of maltreatment is hopelessly marred by societal perceptions and stereotypes of different races and cultures.

Further, multiple studies in Texas provide evidence that race influences children’s services case decisions. In one Texas study, even where

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<sup>78</sup> DOROTHY ROBERTS, *SHATTERED BONDS THE COLOR OF CHILD WELFARE* 10 (2002).

<sup>79</sup> *Racial Disproportionality and Disparity in Child Welfare*, CHILD WELFARE INFO. GATEWAY (2016), [https://www.childwelfare.gov/pubPDFs/racial\\_disproportionality.pdf](https://www.childwelfare.gov/pubPDFs/racial_disproportionality.pdf).

<sup>80</sup> *Id.*

<sup>81</sup> Ruth Hopkins, *How Foster Care Has Stripped Native American Children of Their Own Cultures*, TEEN VOGUE (May 22, 2018), <https://www.teenvogue.com/story/foster-care-has-failed-native-american-youth>; Debra Utacia Krol, *Inside the Native American Foster Care Crisis Tearing Families Apart*, VICE (Feb. 8, 2018, 12:00 AM), <https://www.vice.com/en/article/a34g8j/inside-the-native-american-foster-care-crisis-tearing-families-apart>. It should not go without saying that America has a long history of removing Native American children as a part of forced cultural assimilation. See, e.g., Teresa Evans-Campbell et al., *Indian Boarding School Experience, Substance Use, and Mental Health Among Urban Two-Spirit American Indian/Alaska Natives*, 38 AMER. J. OF DRUG & ALCOHOL ABUSE 421–27 (2012).

<sup>82</sup> Dorothy Roberts, *Race and Class in the Child Welfare System*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/fostercare/caseworker/roberts.html>; Trivedi, *supra* note 5, at 534.

<sup>83</sup> See Bartholet, *supra* note 9.

<sup>84</sup> *See id.*

an African-American family was demarcated by Child Protective Services as lower risk than a white family, they were statistically more likely to have their cases substantiated, investigated, and have their children removed by the State.<sup>85</sup> The complexity of the collateral consequences of the disturbing racial history of the United States has no easy solution. However, implementing alternative dispute remedies, such as child protection mediation that can act as a check upon cognitive implicit and explicit biases, can help pave the way for better outcomes for minority children and families. No child of color should have to wonder if misconceptions surrounding their racial identity are to blame for their shattered family—a family that may have remained intact if it were a white one.

C. *Congested Dockets and Inefficient Family Court Procedures as an Impediment to Achieving Permanency*

There are multiple known systemic obstacles to obtaining permanency for displaced children. One such impediment is the inefficiency of the clogged family court system.<sup>86</sup> While there are statutory limitations upon how long a child may languish in foster care before being placed for adoption,<sup>87</sup> there are few regulations regarding the judicial timeline for family reunification. Federal law only requires that each child in foster care have a permanency plan determined by the stakeholders in each case. Stakeholders include the child and their biological family, the judge presiding over the case, the social workers assigned to the case, the *Guardian Ad Litem*, and all other legal counsel involved where applicable.<sup>88</sup> These permanency plans can range from reunification, adoption, or even long-term foster care.<sup>89</sup> If a child spends

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<sup>85</sup> Alan J. Dettlaff et al., *Racial Disproportionality and Disparities in the Child Welfare System*, CW360<sup>o</sup> CULTURALLY RESPONSIVE CHILD WELFARE PRAC. (2015), <http://cascw.umn.edu/wp-content/uploads/2015/03/CW360-Winter2015.pdf#page=4>; Stephanie L. Rivaux, *The Intersection of Race, Poverty, and Risk: Understanding the Decision to Provide Services to Clients and to Remove Children*, CHILD WELFARE J. OF POL'Y, PRAC., AND PROGRAM 87(2), 151–68 (2008).

<sup>86</sup> See, e.g., Naomi Schaefer Riley, *The Tragedy of Family Court*, CITY J. (Autumn 2018), <https://www.city-journal.org/family-court-fails-children>.

<sup>87</sup> See Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997).

<sup>88</sup> Child Welfare Information Gateway, *Reunification: Bringing Your Children Home from Foster Care*, CHILD.'S BUREAU (May 2016), <https://www.childwelfare.gov/pubPDFs/reunification.pdf> [hereinafter Child Welfare Reunification].

<sup>89</sup> *Pathways to Permanency: Expanding on APPLA Provisions and Youth Engagement to Improve Permanency*, CHILD.'S BUREAU, [https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/113530.pdf?w=+NATIVE\(%27recno=113530%27\)&upp=0&rpp=10&r=1&m=1](https://library.childwelfare.gov/cwig/ws/library/docs/gateway/Blob/113530.pdf?w=+NATIVE(%27recno=113530%27)&upp=0&rpp=10&r=1&m=1) (last visited Sept. 15, 2021).

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fifteen of twenty-two months in foster care, termination of parental rights proceedings are often initiated so that the child becomes available for adoption.<sup>90</sup>

Once a child is initially removed from their biological family, there is often a prolonged and onerous family court process involved with facilitating reunification.<sup>91</sup> For example, in Ohio the procedure following an initial removal decision includes several different hearings adjudicated in family court to determine the child's short and long-term placements. The first of these is a shelter care hearing, also called a dependency hearing, typically held within seventy-two hours after the child is taken from their home.<sup>92</sup> The judge will then determine if there is adequate reason to believe that the child is in immediate danger, thus rendering placement in foster care appropriate.<sup>93</sup> Assuming the judge rules in favor of out-of-home placement in either a foster home or with a relative, an adjudicatory hearing must be held within thirty days after the dependency hearing. Congested dockets can often expand this timeline.<sup>94</sup>

At the adjudicatory hearing, the judge makes an official ruling on whether the child has been proven by clear and convincing evidence to have been abused, neglected, or otherwise in need of the guardianship of the State.<sup>95</sup> In the event maltreatment is proven, the judge has discretion to determine if the child should remain out of the home until the next judicial stage, the dispositional hearing.<sup>96</sup>

At the dispositional hearing, generally held within thirty days of the adjudicatory hearing, the judge decides which plan is best for the child.<sup>97</sup> The options the judge may choose from include full family reunification, reunification with protective supervision by child welfare workers, temporary foster care, permanent foster care (until adoption), or custodial placement with a family relative.<sup>98</sup> After the dispositional order is made, review hearings are

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<sup>90</sup> Child Welfare Reunification, *supra* note 88.

<sup>91</sup> Roughly three in five children in foster care are returned home or to other family members. U.S. Department of Health and Human Services, *The AFCARS report: Preliminary FY 2014 Estimates as of July 2015*, <https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport22.pdf>.

<sup>92</sup> Ohio Family Care Association, *The Judicial Process* (2019), <http://ofcaonline.org/judicial-process/>.

<sup>93</sup> *Id.*

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

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

held on an annual basis.<sup>99</sup> Notably, the national average length of stay in foster care for fiscal year 2019 was 19.8 months,<sup>100</sup> which can be attributed to many factors, particularly where family reunification is contingent upon biological parents performing drug testing, mental health counseling, or parenting classes.<sup>101</sup> If even short stays in foster care can be harmful to a child's development, being separated for over a year is all the more detrimental.

#### IV. HOW CHILD PROTECTION MEDIATION CAN HELP ON THE PATH TO REFORM

##### A. *What is Child Protection Mediation?*

Child protection mediation (CPM) is an alternative that eschews traditional family court procedures. In a 2012 publication on guidelines for CPM, the Association of Family and Conciliation Courts (AFCC) defined CPM as:

[A] collaborative problem-solving process involving an impartial ... person who facilitates constructive negotiation and communication among parents, lawyers, child protection professionals, and possibly others, in an effort to reach a consensus regarding how to resolve issues of concern when children are alleged to be abused, neglected or abandoned. The child's voice in the decision making process is essential and is typically presented either directly by the child or by other means, such as by an advocate for the child.<sup>102</sup>

Ideally, this mediation could occur at any point during the child's involvement with the child welfare system, including pre-removal in cases where a child is not yet determined to be at immediate risk of serious harm. Available research currently indicates that the most notable benefits of CPM include increased parental engagement and compliance, reductions in time and monetary costs for both the system and families, and increased engagement of

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<sup>99</sup> *Id.*

<sup>100</sup> Sarah Catherine Williams, *State-Level Data for Understanding Child Welfare in the United States*, CHILD TRENDS (Oct. 28, 2020), <https://www.childtrends.org/publications/state-level-data-for-understanding-child-welfare-in-the-united-states>.

<sup>101</sup> Child Welfare Reunification, *supra* note 88.

<sup>102</sup> Association of Families and Conciliation Courts, *Guidelines for Child Protection Mediation*, ASS'N OF FAM. AND CONCILIATION CTS. (2012), <https://www.afccnet.org/Portals/0/Guidelines%20for%20Child%20Protection%20Mediation.pdf> [hereinafter AFCC Guidelines].



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extended family.<sup>103</sup> Although these are all important improvements, the benefits of this method of alternative dispute resolution could be maximized by widening its scope and applicability to include protections against the systemic issues mentioned in Parts I and II of this note.

### 1. PREVENTING OVERZEALOUS REMOVALS

Part I of this note discussed how structural classism and racism has splintered American families throughout history, while Part II focused on how that tradition continues to be perpetuated by broad statutory language and modern family court processes. While implementing CPM would not address the full magnitude of these problems, it could lessen the severity of their impact on vulnerable, marginalized children and families. In cases of neglect, for example, CPM could act as a proactive measure to resolve the State's concerns at the root. A mediation could reveal that children have been left unsupervised due to circumstances such as lack of available childcare in a working-class family,<sup>104</sup> or a parent's underlying health conditions requiring extended hospitalization.<sup>105</sup> Ideally, those involved in the mediation would take such circumstances into account and create a plan to best provide for the child moving forward without relying on removal as the sole mechanism for ensuring the child's safety. Mediation could also create an opportunity for families to be matched with available state and nonprofit resources that address their demonstrated need, such as provisions of subsidized childcare or

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<sup>103</sup> Nancy Thoennes, *What We Know Now: Findings from Dependency Mediation Research*, 47 FAM. CT. REV. 21 (2009).

<sup>104</sup> For example, in 2014 an African-American mother was arrested and had her nine-year-old child removed by the State of South Carolina for allowing her daughter to play in a nearby park while she worked. Conor Friedorsdorf, *Working Mom Arrested for Allowing Her 9-Year-Old Play Alone at Park*, THE ATLANTIC (July 15, 2014), <https://www.theatlantic.com/national/archive/2014/07/arrested-for-letting-a-9-year-old-play-at-the-park-alone/374436/>. More recently, a young single mother in Ohio was arrested and is being charged with child endangerment for leaving her two children, ages 10 and 2, in a motel room while she worked. The children were placed with their father. Mike Gauntner, *Liberty Police: Kids Left in Motel as Mom Works in Pizza Shop*, WFMJ (Feb. 13, 2021), <https://www.wfmj.com/story/43342578/liberty-police-kids-left-in-motel-as-mom-works-in-pizza-shop>.

<sup>105</sup> One New Jersey mother had her children removed while she was hospitalized due to coronavirus complications. Topher Sanders & David Armstrong, *Covid-19 Put her Husband in the ICU. She Had to be Hospitalized Next. The State Demanded to Know: Who Would Care for Her Children?*, PROPUBLICA (April 15, 2020), <https://www.propublica.org/article/covid-19-put-her-husband-in-the-icu-she-had-to-be-hospitalized-next-the-state-demanded-to-know-who-would-care-for-their-children>.

clothing vouchers. Plans arising from mediation often result in more services provided for children and families than non-mediated plans.<sup>106</sup>

## 2. GIVING CHILDREN AND YOUTH A VOICE

The child's voice often goes unheard in traditional family court processes.<sup>107</sup> Generally speaking, a team of well-intentioned professionals determine the fate of a child and their family without ever consulting the child's desires or perspective. While it is true that minors are frequently assigned a *Guardian Ad Litem* (GAL), in many cases it is a misnomer to say that the child's voice is truly represented by the assigned GAL.<sup>108</sup> With some exceptions,<sup>109</sup> the GAL often advocates for the course of action they deem to be within the best interests of the child, rather than a specific position the child has voiced.<sup>110</sup> This is clearly different from any other attorney-client relationship where the attorney is ethically obligated to represent the express preferences of their client.

The guidelines for CPM recommend that the level of youth involvement in the mediation should be predicated upon the child's age, desires, the type of allegations involved in the case, and the child's developmental capacity to understand the proceedings.<sup>111</sup> These are the same factors used by judges during family court proceedings, where a child's voice often goes unheard. CPM has a unique opportunity to elevate the child's voice during these proceedings by using the same factor analysis as traditional family court. Youth participation in CPM could also prove to be a constructive and therapeutic opportunity for children to confront caretakers and express their emotions in a safe, controlled environment in cases of actual maltreatment. While parental rights and the State's interest in the well-being of a child are important considerations, so too is the voice of the child who will forever live with the consequences of any decisions made on their behalf.

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<sup>106</sup> Thoennes, *supra* note 103, at 31.

<sup>107</sup> A national survey of foster youth revealed under 15% had even attended court hearings. Vivek Sankaran, *In Court, Children are Unseen and Unheard*, THE IMPRINT (Feb. 14, 2019), <https://imprintnews.org/opinion/in-court-children-are-too-often-unseen-and-unheard/33819>.

<sup>108</sup> *Representation of Children in Child Abuse and Neglect Proceedings*, CHILD WELFARE INFO. GATEWAY (Dec. 2017), <https://www.childwelfare.gov/pubPDFs/represent.pdf> [hereinafter CHILD WELFARE].

<sup>109</sup> For example, Lawyers for Children in New York City uses a multi-disciplinary approach and directly represent minor clients themselves, rather than their best interests. LAWYERS FOR CHILDREN, <https://www.lawyersforchildren.org/our-model> (last visited Sept. 14, 2021).

<sup>110</sup> CHILD WELFARE, *supra* note 108.

<sup>111</sup> AFCC Guidelines, *supra* note 102, at 16.

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### 3. *REDUCING RACIAL DISPROPORTIONALITY IN FOSTER CARE*

Child welfare workers are given much discretion to determine when intervention or removal is necessary. In turn, judges rely heavily upon the professional opinions of these workers, who are not immune from prejudice or bias. Having a Child Protection Mediator, who is trained to identify and remove biases from conversations and act as a neutral third party, can help facilitate conversations between the State and the family and can mitigate against possible biases that may infiltrate the decision-making process.

#### B. *Jurisdictional Example—Santa Clara County, California*

In Santa Clara County, California, CPM has been practiced for over 10 years, even before it was considered a best practice by child welfare experts.<sup>112</sup> Superior Court of California Judge Leonard Edwards noted in 2004 that the practice of CPM has “profoundly changed ... the way in which the participants in the court system approach child protection, the way that these participants relate to each other, and their attitude toward the resolution of issues.”<sup>113</sup> He noted further that CPM has illustrated how harmful the adversarial process can be for families by often producing mediocre results.<sup>114</sup> In Santa Clara County, CPM is a confidential proceeding that can happen at any point in a particular case from the first hearing up until the termination of parental rights.<sup>115</sup> Any statements made during mediation are inadmissible in court proceedings, unless such statements include new allegations of child abuse or neglect.<sup>116</sup> If the minor involved has the capacity to make an “informed choice,” they have the right to attend mediation discussions.<sup>117</sup> In addition, mediators undergo special training to ensure the best possible outcomes.<sup>118</sup> Were this practice to be expanded to help prevent removals based on race or socioeconomic status, it stands to reason that part of a mediator’s training would necessarily involve a thorough education on the impact of cognitive bias in child welfare.

The nuts and bolts of CPM in Santa Clara County consist of five components: orientation to the process, fact finding, problem solving,

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<sup>112</sup> Hon. Leonard P. Edwards, *Mediation in Child Protection Cases*, J. OF CTR. FOR FAMS. CHILD. & CTS. 57, 62 (2004).

<sup>113</sup> *Id.* at 63–64.

<sup>114</sup> *Id.* at 64.

<sup>115</sup> *Id.* at 62.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Capacity analyses examine factors similar to those that would be considered to attend family court proceedings, such as age, maturity, and desire to attend.

<sup>118</sup> *Id.*

agreement/disagreement, and closure.<sup>119</sup> The impact of CPM was not immediately ascertainable, but as it became an accepted practice due to its success rate, attorneys noted a positive change in the family court legal culture.<sup>120</sup> More importantly, all stakeholders, on average, were more satisfied with the results of the mediated agreement compared to an agreement reached through traditional adversarial means.<sup>121</sup> Parental participation and compliance with mediated agreements was higher than those agreements reached through traditional family court proceedings.<sup>122</sup>

CPM is a well-established practice in some jurisdictions, and these jurisdictional examples can inform a standardized process to be implemented across family court systems and modified to address contemporaneous issues facing the child welfare system. CPM has already been shown to yield many benefits, including increased efficiency, shorter timelines to permanent placement or reunification, and overall stakeholder satisfaction. As individual states struggle with strategies of implementing Court Improvement Plans, alternative dispute methods such as CPM are evidence-based solutions that should be integrated.

### C. *Best Practices for Implementation*

There is much to be learned from the Santa Clara model for CPM. As noted above, not only has it achieved better outcomes for families, but its practice has also improved the professional atmosphere in the legal community. Federal and state governments are recognizing the gaps and inequities of the system now more than ever, and legislation like the Family First Prevention Services act has catalyzed federal and state investments in systemic reform.<sup>123</sup> Societally, the environment is ripe for meaningful change to better support vulnerable youth and families.

Implementation of a mediation program could take many different forms, depending on the state, and the needs of the community. In a county-administered state such as Ohio, for example, CPM could begin as a pilot project limited to certain counties so that expenditures are limited, and the program could expand to additional counties if results are favorable. Santa Clara County is only one pertinent example, others include counties in

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 64.

<sup>121</sup> *Id.* at 64–65.

<sup>122</sup> *Id.* at 64–65.

<sup>123</sup> FFPSA, *supra* note 61.

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Utah,<sup>124</sup> Arizona,<sup>125</sup> New Jersey,<sup>126</sup> New Mexico,<sup>127</sup> Nevada,<sup>128</sup> Michigan,<sup>129</sup> and Florida.<sup>130</sup> These models provide a strong evidentiary showing that these programs can work well and to the ultimate benefit of the populations they serve. States would do well to look to these existing examples as they work to create systemic improvements for families and children in their own communities.

### V. CONCLUSION

The history of child welfare in America, in combination with observable phenomena in modern-day child protection services, support the contention that the system remains ineffective for many, and has been broken for quite some time. If CPM became standardized practice, families all over the country could reap the benefits found in Santa Clara County. Further, the implementation of CPM can act as an additional protection mechanism against the known systemic biases lurking in child protection services, including racism, classism, and visibility bias. While turning to methods of ADR, such as CPM, in lieu of conventional family court proceedings is not a guaranteed fix-all, it has many notable benefits, and it could be the kind of radical step necessary in the progression to a better and more equitable society for marginalized youth. Better outcomes for our children mean better outcomes for our country. Especially during this time when states are being federally

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<sup>124</sup> Utah Courts, *Mediation*, UTAH CTS., <https://www.utcourts.gov/mediation/cwm/> (last visited Sept. 15, 2021).

<sup>125</sup> Stephanie Lewis-Smale, *Pinal County Child Protection Mediation*, PINAL CNTY. JUV. CT. SERVS., <https://www.pinalcountyaz.gov/JuvenileCourtServices/Documents/Dependency%20Resources/Child%20Protection%20Mediation%20Brochure.pdf> (last visited Sept. 15, 2021).

<sup>126</sup> New Jersey Judiciary, *Child Welfare Mediation Creating Solutions Together*, N.J. CTS. (June 23, 2017), [https://www.njcourts.gov/forms/10742\\_cwm\\_brochure.pdf](https://www.njcourts.gov/forms/10742_cwm_brochure.pdf).

<sup>127</sup> New Mexico Courts, *Children's Court Mediation*, N.M. CTS., <https://adr.nmcourts.gov/home/childrens-court-mediation/> (last visited Sept. 15, 2021).

<sup>128</sup> National Council of Juvenile and Family Court Judges, *Outcome Evaluation of the Second Judicial District Court's Dependency Mediation Program (Washoe County, Nevada)* (2017), <https://www.ncjfcj.org/wp-content/uploads/2017/09/Outcome-Eval-FINAL-8.11.17.pdf>.

<sup>129</sup> Christopher A. Kierkus & Brian R. Johnson, *Child Protection Mediation in Michigan* (2019), <https://www.courts.michigan.gov/48dedd/siteassets/reports/odr/cpm-final-report-2019.pdf>.

<sup>130</sup> Eleventh Judicial Circuit of Florida, *Frequently Asked Questions For Dependency Court Mediation*, <https://www.jud11.flcourts.org/Frequently-Asked-Questions-for-Dependency-Court-Mediation> (last visited Sept. 15, 2021).

encouraged and incentivized to implement best practices for child welfare, CPM should not be overlooked.

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