

Multiple Foster Care Placements Should be Considered a Mitigating Factor in Criminal Proceedings

DANIEL POLLACK^α
KHAYA EISENBERG^β
AMANDA DOLCE^χ

INTRODUCTION

On August 26, 2013, 20 year-old John Paul Shobe III fired one round at 51 year-old Harold Dean Johnson in the back of the head.¹ Shobe was robbing a Domino's pizza store in Bowling Green, Kentucky, and Johnson and his son were trying to stop him.² Police found a six-shot Ruger Blackhawk revolver with a long barrel in Shobe's apartment.³

Eventually, Shobe was charged with murder, first-degree robbery, other lesser crimes, and faced a possible death penalty.⁴ While Kentucky law articulates specific mitigating circumstances that come into play during the prosecution of any number of criminal defendants like Shobe,⁵ was there

^α Daniel Pollack, M.S.S.A. (M.S.W.), Esq., is a professor at Yeshiva University's School of Social in New York City, and a frequent expert witness in child welfare cases. Contact: dpollack@yu.edu; 212-960-0836.

^β Khaya Eisenberg, Psy.D., is a clinical psychologist in private practice in Jerusalem, Israel. Contact: khayaeisenberg@gmail.com.

^χ Amanda Dolce, Esq. is a licensed attorney in Florida. She practices child welfare law in the area of constitutional civil rights. She has also served as an attorney ad litem for children in delinquency and dependency court proceedings. Contact: mandy.dolce@yahoo.com.

1. Justin Story, *Man Pleads Guilty to Murder, Unable to Tell Judge Why He Fired the Kill Shot*, BOWLING GREEN DAILY NEWS (Aug. 8, 2015), <https://archive.is/p6keR#selection-3321.0-3321.76>.

2. *Id.*

3. *Id.*

4. Justin Story, *Shobe Pleads Not Guilty to Murder, Robbery Charges*, BOWLING GREEN DAILY NEWS (Oct. 22, 2013), http://www.bgdailynews.com/news/shobe-pleads-not-guilty-to-murder-robbery-charges/article_46689407-d30b-575c-a733-921796c55d6c.html.

5. KY. REV. STAT. ANN. § 532.025(2)(b) (West 2017). Section 2(b) states:

Mitigating circumstances: 1. The defendant has no significant history of prior criminal activity; 2. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime; 3. The victim was a participant in the defendant's criminal conduct or consented to the criminal act; 4. The capital offense was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct even though the circumstances which the defendant believed to provide a moral justification or extenuation for his conduct are not sufficient to constitute a defense to the crime; 5. The defendant was an accomplice in a capital offense committed by another person and his participation in the capital offense was relatively minor; 6. The defendant acted under duress or under the domination of another person even though the duress or the domination of another person is not sufficient to

another compelling circumstance to be considered when judging Shobe for his crime? Specifically, might Shobe's history of multiple foster care placements be considered as a mitigating circumstance?⁶

Several years ago we queried whether, in certain circumstances, foster care *per se* should be considered a mitigating circumstance in criminal proceedings.⁷ At that time, although we offered an informative discussion about the foster care experience which could have affected the perspectives of those contemplating the issue, we did not come to a definitive conclusion.⁸

In the ensuing years, what has become clear is that *multiple* foster placements – arbitrarily defined as more than five placements – warrant treatment as a mitigating circumstance in criminal proceedings.⁹ The case for considering such placements as a mitigating circumstance is compelling, particularly if the placements took place during a contracted period of time and during pre-adolescence or adolescence.¹⁰

In Part I, we review numerous professional studies regarding the effects of foster care in general.¹¹ Part II examines the legal implications of designating multiple foster care placements as a mitigating circumstance.¹²

constitute a defense to the crime; 7. At the time of the capital offense, the capacity of the defendant to appreciate the criminality of his conduct to the requirements of law was impaired as a result of mental illness or an intellectual disability or intoxication even though the impairment of the capacity of the defendant to appreciate the criminality of his conduct or to conform the conduct to the requirements of law is insufficient to constitute a defense to the crime; and 8. The youth of the defendant at the time of the crime.

Id.

6. See generally KY. DEP'T FOR SOC. SERVS. REHABILITATIVE SER. MONTHLY PROGRESS REP., JOHN SHOBE at Appendix A (May 2008) (on file with OHIO N.U.L. REV.) (detailing John's extensive foster care record).

7. Daniel Pollack et al., *Foster Care as a Mitigating Circumstance in Criminal Proceedings*, 22 TEMP. POL. & CIV. RTS. L. REV. 45, 47, 67 (2012).

8. *Id.* at 47.

9. See IAN SINCLAIR ET AL., FOSTER PLACEMENTS: WHY THEY SUCCEED AND WHY THEY FAIL 139

We used three main measures of instability to explore its relationship with outcome. These were: the number of different episodes of care the child had experienced[;] the number of different placements in foster care (five or more were treated as five)[; and] the length of time the child had spent in the placement.

Id.; see also Rae R. Newton et al., *Children and Youth in Foster Care: Disentangling the Relationship Between Problem Behaviors and Number of Placements*, 24 CHILD ABUSE & NEGLECT 1363, 1371 (2000) (there was also a study concerning placement change and problem behaviors in which one group had fewer than five changes, while a second group had five or more changes.).

10. Pollack, *supra* note 7, at 66.

11. See *infra* Part I.

12. See *infra* Part II.

Part III concludes that the time to affirmatively consider multiple foster care placements as a possible mitigating factor in criminal proceedings is now.¹³

PART I

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”¹⁴

Much research suggests a statistical association between experiencing foster care and poor adult outcomes,¹⁵ particularly a high risk of criminality¹⁶ and delinquency.¹⁷ In fact, nearly 20% of prisoners under the age of 30 and 25% of repeat offenders report that part of their youth was spent in foster care.¹⁸ The nature of this relationship, however, is complex and multifaceted.¹⁹

The effects of child maltreatment and foster care appear to be heterogeneous for a variety of reasons.²⁰ Children vary in their levels of resilience and sensitivity to environments, suggesting that the association between foster care and later functioning could be stronger for some than for others.²¹ Additionally, some argue that foster care can be a positive experience, which can actually reduce behavioral difficulties for some children,²² particularly if there is a supportive relationship between foster youth and foster parents²³ and if the foster child is well-integrated into the

13. See *infra* Part III.

14. Nelson Mandela, President, South Africa, Address at the Launch of the Nelson Mandela Children’s Fund (May 8, 1995) (transcript available at http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS250&txtstr=Mahla).

15. Richard P. Barth et al., *Felony Arrests of Former Foster Care and TANF-Involved Youth*, 1 J. SOC’Y FOR SOC. WORK & RES. 104 (2010); Christopher Wildeman & Jane Waldfogel, *Somebody’s Children or Nobody’s Children? How the Sociological Perspective Could Enliven Research on Foster Care*, 40 ANN. REV. SOC. 599, 608 (2014).

16. Matthew J. Lindquist & Torsten Santavirta, *Does Placing Children in Foster Care Increase Their Adult Criminality?*, 31 LAB. ECON. 72, 82 (2014).

17. Kevin W. Alltucker et al., *Different Pathways to Juvenile Delinquency: Characteristics of Early and Late Starters in a Sample of Previously Incarcerated Youth*, 15 J. CHILD & FAM. STUD. 479, 487 (2006); see C. Bjorkenstam et al., *Suicidal Behavior Among Delinquent Former Child Welfare Clients*, 22 EUR. CHILD ADOLESCENT PSYCHIATRY 349, 351 (2013) (discussing the connection between suicide rates in delinquent child welfare cases); Deborah R. Baskin & Ira Sommers, *Child Maltreatment, Placement Strategies, and Delinquency*, 36 AM. J. CRIM. JUST. 106, 107 (2011).

18. Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 J. POL. ECON. 746, 747 (2008).

19. See Lindquist & Santavirta, *supra* note 16, at 73.

20. See Baskin & Sommers, *supra* note 17, at 107-08; Sarah DeGue & Cathy Spatz Widom, *Does Out-of-Home Placement Mediate the Relationship Between Child Maltreatment and Adult Criminality?*, 14 CHILD MALTREATMENT 344, 354 (2009).

21. Philip A. Fisher et al., *A Translational Neuroscience Perspective on the Importance of Reducing Placement Instability Among Foster Children*, 92 CHILD WELFARE 9, 16 (2014).

22. Lenore M. McWey et al., *Changes in Externalizing and Internalizing Problems of Adolescents in Foster Care*, 72 J. MARRIAGE & FAM. 1128, 1129 (2010).

23. Joseph P. Ryan et al., *African American Males in Foster Care and the Risk of Delinquency: The Value of Social Bonds and Permanence*, 87 CHILD WELFARE 115, 117 (2008); IAN SINCLAIR, ET

foster home.²⁴ Some researchers have gone so far as to suggest that foster care may be a protective factor against involvement in adult criminality for some youth, depending on their history.²⁵ That being said, other researchers argue that studies of foster placement are influenced by a selection bias, whereby only the children who are most likely to benefit from being removed from their homes are placed in foster care leading researchers to possibly overestimate the positive effects of foster care.²⁶ Furthermore, the fact that some children are more affected than others by their foster care experience does not diminish the effect this experience can have on some individuals.²⁷

Some research has focused on the different factors that predict whether foster care will have a positive or negative impact upon foster youth.²⁸ For example, a child's age upon entry into the foster care system appears to be significant, with younger children seeming to be less adversely affected than older children by this experience.²⁹ Children who were placed after the age of seven were found to have a higher risk for adult criminality,³⁰ perhaps because they had more preexisting difficulties.³¹ Older children in the foster care system appear to have a greater number of mental health issues,³² which may not be properly addressed.³³ Whereas younger children, particularly boys who enter foster care with preexisting behavior problems, show some improvement according to some research; problem behaviors for adolescents in foster care seem to remain stable.³⁴

Gender may be another factor, although results appear to be mixed.³⁵ On the other hand, foster parents' parenting practices, particularly harsh

AL., *supra* note 9, at 225 (discussing the results of a specific program designed to analyze the improvement rate among foster children; showing that in some categories, like self-confidence and emotional ties, some children improved while in foster care).

24. Sonya J. Leathers, *Placement Disruption and Negative Placement Outcomes Among Adolescents in Long-Term Foster Care: The Role of Behavior Problems*, 30 CHILD ABUSE & NEGLECT 307, 321 (2006).

25. See DeGue & Widom, *supra* note 20, at 351-52; Lindquist & Santavirta, *supra* note 16, at 82.

26. See Doyle, *supra* note 18, at 748.

27. See Wildeman & Waldfogel, *supra* note 15, at 608.

28. See Lindquist & Santavirta, *supra* note 16, at 80 (analyzing the connection between foster care and crime).

29. See *id.*

30. See DeGue & Widom, *supra* note 20, at 349-50.

31. See Barth et al., *supra* note 15, at 105 (difficulties such as living in poverty and other environmental factors).

32. J. Curtis McMillen et al., *Prevalence of Psychiatric Disorders Among Older Youths in the Foster Care System*, 44 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 88, 92 (2005).

33. See Barth et al., *supra* note 15, at 120.

34. See McWey et al., *supra* note 22, at 1129-30, 1134.

35. See, e.g., Lindquist & Santavirta, *supra* note 16 at 82 (“[W]e find no relationship for boys who were placed in foster care before age 13 and no association between foster care and adult criminality for girls regardless of when they were placed.”); DeGue & Widom, *supra* note 20, at 350 (indicating a correlation that males are more likely to be arrested than females).

punishment and negative control, were clearly predictive of an increase in problem behavior for foster children.³⁶ With regard to offending patterns and juvenile justice involvement among foster youth, early behavior problems and arrest and placement instability were also significant factors.³⁷

Ultimately, while the relationship between foster care and negative adult outcomes may be stronger for some than for others, depending on a variety of factors, much research supports this connection overall.³⁸

Possible Underpinnings of the Negative Impact of Foster Care

It is widely believed that attachment to a primary caregiver is an inherent need and a prerequisite for healthy psychological development.³⁹ For foster children, this attachment may be challenged.⁴⁰ Many foster care adolescents perceive their biological and foster parents to be less invested in them,⁴¹ which can lead to weaker social bonds and increased vulnerability to delinquency.⁴² Difficulties with attachment have been associated with lack of impulse control or empathy and criminality.⁴³ Some suggest that the lack of opportunity to experience parents as benevolent, result in children feeling devalued and perhaps reacting defensively by devaluing others through aggressive or defiant behavior.⁴⁴

Poor attachment is one of many contributing factors to a high risk for psychiatric disorders in foster children.⁴⁵ Other factors include the loss of family and familiar environments, as well as the challenges of living in

36. Johan Vanderfaeillie et al., *Children Placed in Long-Term Family Foster Care: A Longitudinal Study into the Development of Problem Behavior and Associated Factors*, 35 CHILD. & YOUTH SERVS. REV. 587, 591 (2013).

37. See DeGue & Widom, *supra* note 20, at 346-47; see also Joseph P. Ryan et al., *Developmental Trajectories of Offending for male Adolescents Leaving Foster Care*, 31 SOC. WORK RES. 83, 88 (2007).

38. See, e.g., DeGue & Widom *supra* note 20, at 344, 349-50; Wildeman & Waldfogel, *supra* note 15, at 608. But see Lindquist & Santavirta, *supra* note 16, at 82.

39. See Ryan et al., *supra* note 23, at 117.

40. See *id.* at 118 (“Despite high levels of perceived attachment, 37% reported running away from the foster home at least once, 32% reported feeling lonely, 28% felt foster parents treated their biological children better than they treated foster children, and 34% reported being “mistreated” at least some of the time while in substitute care placement.”).

41. Brea L. Perry, *Understanding Social Network Disruption: The Case of Youth in Foster Care*, 53 SOC. PROBS. 371, 382 (2006).

42. See Ryan et al., *supra* note 23, at 117.

43. See Michelle A. Stinehart et al., *Reactive Attachment Disorder in Adopted and Foster Care Children: Implications for Mental Health Professionals*, 20 THE FAM. J. 355, 356-57 (2012).

44. Daniel J. Pilowsky & Li-TzyWu, *Psychiatric Symptoms and Substance Use Disorders in a Nationally Representative Sample of American Adolescents Involved with Foster Care*, 38 J. ADOLESCENT HEALTH 351, 355-56 (2006).

45. Brenda Jones Harden, *Safety and Stability for Foster Children: A Developmental Perspective*, 14 FUTURE CHILD 30, 34 (2004).

foster care;⁴⁶ a possible family history of emotional instability, which may have contributed to the need for placement; the experience of maltreatment; multiple moves; and relationship losses.⁴⁷ Multiple researchers have attested to the high level of need for mental health services among foster children, which is unfortunately not always adequately met by the foster care system.⁴⁸

Foster children also experience various developmental challenges.⁴⁹ The effects of abuse and neglect on the developing brain have been well documented.⁵⁰ Foster children's physical health may be compromised during their early childhood, which can lead to developmental and cognitive delays, poor academic functioning, and poor mental health outcomes.⁵¹

Children who are maltreated often suffer in terms of their academic engagement and achievement⁵² (e.g., low graduation rates, special education enrollment, grade retention, behavioral difficulties, and poor academic performance).⁵³ While some researchers posit that this is a function of the experience of maltreatment rather than out-of-home placement *per se*,⁵⁴ others suggest that frequent school changes for foster children, in particular, result in gaps in instruction that lead to foster youth's overrepresentation in special education.⁵⁵ Children in foster care also have a higher likelihood of substance abuse, a factor which increases their likelihood of delinquency.⁵⁶

Another challenge for foster children is making the transition to adulthood once they age out of foster care.⁵⁷ Children aging out of foster care experience many difficulties.⁵⁸ Apart from the fact that they may still be recovering from their traumatic experiences in their family of origin and

46. Peter J. Pecora et al., *Mental Health of Current and Former Recipients of Foster Care: A Review of Recent Studies in the USA*, 14 CHILD & FAM. SOC. WORK 132, 133-34 (2009).

47. See McMillen et al., *supra* note 32, at 92-93.

48. See, e.g., Laurel K. Leslie et al., *Addressing the Developmental and Mental Health Needs of Young Children in Foster Care*, 26 J. DEV. & BEHAV. PEDIATRICS 143, 143-44 (2005); Barbara J. Burns et al., *Mental Health Need and Access to Mental Health Services by Youths Involved with Child Welfare: A National Survey*, 43 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 960, 961 (2004); Peter J. Pecora, *Why Current and Former Recipients of Foster Care Need High Quality Mental Health Services*, 37 ADMIN. POL'Y MENT. HEALTH 185, 188 (2010).

49. See Harden, *supra* note 45, at 37.

50. See Fisher et al., *supra* note 21, at 14.

51. Harden, *supra* note 45, at 32 (2004).

52. See Ryan et al., *supra* note 37, at 84.

53. Nora Gustavsson & Ann E. MacEachron, *Educational Policy and Foster Youths: The Risk of Change*, CHILD. & SCH. 83, 83 (2012).

54. See Lawrence M. Berger et al., *Children's Academic Achievement and Foster Care*, 135 PEDIATRICS e109, e110 (2015).

55. Tracey G. Scherr, *Educational Experiences of Children in Foster Care*, 28 SCH. PSYCHOL. 419, 430 (2007).

56. See Ryan et al., *supra* note 23, at 84.

57. MARK E. COURTNEY ET AL., *MIDWEST EVALUATION OF THE ADULT FUNCTIONING OF FORMER FOSTER YOUTH CONDITIONS OF THE YOUTH PREPARING TO LEAVE STATE CARE 3* (2004).

58. *Id.*

within the foster care system, they have few social resources and limited access to education, employment, housing, and other opportunities.⁵⁹ Many foster children drop out of school⁶⁰ and are less likely to be employed.⁶¹ Foster children have a higher rate of mental disorder compared to other youth.⁶² The transition to adulthood from foster care tends to be abrupt rather than gradual, which can exacerbate the effects of the trauma they have experienced.⁶³

It is perhaps unsurprising that aging out of foster care is associated with being arrested for a felony.⁶⁴ Some researchers have cited anecdotal evidence which suggests that many young people transition directly from foster care into juvenile justice detention, and that “juvenile justice becomes a de facto state parent for” them.⁶⁵ Researchers attribute this transition largely to the lack of a supportive adult to ease foster children in accomplishing the necessary tasks to achieve adult independence.⁶⁶

Placement Instability

One factor with particular relevance for the outcomes of foster children is placement instability, which is a common experience for foster children.⁶⁷ Figures cited by researchers include frequent placement moves for one in five,⁶⁸ one in three,⁶⁹ and even one in two children in foster care.⁷⁰ Some posit the number of placements experienced to be three or more moves for

59. Phillip Mendes & Badal Moslehuddin, *Transitioning from State Care to State Prison: A Critical Analysis of the Relationship Between Leaving Out of Home Care and Involvement in the Criminal Justice System*, 28 SOC. ALT. 51, 56 (2009); COURTNEY ET AL., *supra* note 57; Mark E. Courtney & Amy Dworsky, *Early Outcomes for Young Adults Transitioning from Out-of-Home Care in the USA*, 11 CHILD & FAM. SOC. WORK 209, 212 (2006).

60. Anne Havalchak et al., *Foster Care Experiences and Educational Outcomes of Young Adults Formerly Placed in Foster Care*, 34 SCH. SOC. WORK J. 1, 2 (2009).

61. Courtney & Dworsky, *supra* note 59, at 213.

62. *See id.* at 214-15; *see also* Pecora, *supra* note 48, at 188.

63. Pecora et al., *supra* note 46, at 133; Amy M. Salazar et al., *Trauma Exposure and PTSD Among Older Adolescents in Foster Care*, 48 SCH. PSYCHIATRY PSYCH. EPIDEMIOLOGY 545, 550 (2013).

64. Barth et al., *supra* note 15, at 118; *see also* Courtney & Dworsky, *supra* note 59, at 216; GRETCHEN R. CUSICK & MARK E. COURTNEY, OFFENDING DURING LATE ADOLESCENCE: HOW DO YOUTH AGING OUT OF CARE COMPARE WITH THEIR PEERS? 5 (Issue Brief No. 111, 2007); *See also* Ryan et al., *supra* note 37, at 90.

65. *See* Mendes & Moslehuddin, *supra* note 59, at 54.

66. *See id.* at 51-52.

67. David M. Rubin et al., *The Impact of Placement Stability on Behavioral Well-Being for Children in Foster Care*, 119 PEDIATRICS 336, 341 (2007).

68. Rubin et al., *supra* note 67 (noting that “one in five children (20%) failed to achieve any stability in the first 18 months of foster care.”).

69. Peter J. Pecora, *Why Should Child Welfare Focus on Promoting Placement Stability?*, in *A Comprehensive Look at a Prevalent Child Welfare: Promoting Placement Stability*, CW360, Spring 2010, at 4.

70. Elizabeth Fernandez, *Unravelling Emotional, Behavioural, and Educational Outcomes in a Longitudinal Study of Children in Foster-Care*, 38 BRITISH J. SOC. WORK 1283, 1295 (2008).

25% of foster children,⁷¹ an average of 3.2 placements per child,⁷² and even four or more placements for almost 70% of foster children.⁷³ With multiple placements comes an increased risk of emotional and behavioral problems and mental health costs;⁷⁴ placement instability is an important factor in adult outcomes for youth who experience foster care.⁷⁵

The impact of placement instability on attachment and social bonds is self-evident.⁷⁶ It is likely that changing placements means changing schools and relationships with peers and adults.⁷⁷ Repeatedly changing placements results in depleted social resources and weaker social attachments and commitments, leading to a higher likelihood of delinquency.⁷⁸ Not surprisingly, caregivers reported more challenges for children who had experienced three or more placements than compared to children who had experienced fewer than three placements.⁷⁹

Placement instability creates educational obstacles and may contribute to school failure.⁸⁰ It also appears to be related to deficits in self-regulation for children.⁸¹ Even the few studies, which failed to establish a statistical connection between placement instability and behavioral outcomes, attributed this finding to research design, suggesting that this connection would have been in evidence had different statistical methods been used.⁸²

71. See Doyle, Jr., *supra* note 18, at 747.

72. See Pecora, *supra* note 69.

73. PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY.(2005) (demonstrating that the percentage of children with four to seven placement moves is 35.8, and the percentage for eight or more placements is 32.3, which is nearly seventy percent total for all children moved four or more times).

74. Fisher et al., *supra* note 21, at 11; David M. Rubin et al., *Placement Stability and Mental Health Costs for Children in Foster Care*, 113 PEDIATRICS 1336, 1336 (2004); Thomas Hillen & Leonie Gafson, *Why Good Placements Matter: Pre-placement and Placement Risk Factors Associated with Mental Health Disorders in Pre-School Children in Foster Care*, 20 CLINICAL CHILD PSYCHOL. & PSYCHIATRY 486, 487 (2014).

75. See Barth et al., *supra* note 15, at 120; See also Baskin & Sommers, *supra* note 17; Ryan et al., *supra* note 23, at 121.

76. See Fernandez, *supra* note 70, at 1286.

77. See *id.* at 1295.

78. Ravinder Barn & Jo-Pei Tan, *Foster Youth and Crime: Employing General Strain Theory to Promote Understanding*, 40 J. CRIM. JUST. 212, 218-19(2012).

79. Josephine A. Carbone et al., *The Health-Related Quality of Life of Children and Adolescents in Home-Based Foster Care*, 16 QUAL. LIFE RES. 1157, 1163 (2007).

80. Delilah Bruskas, *Children in Foster Care: A Vulnerable Population at Risk*, 21 JCAPN 70, 71 (2008); See Gustavsson & MacEachron, *supra* note 53, at 83 (“Youths in out-of-home care are likely to struggle academically. Foster youths are at an elevated risk for a number of negative educational outcomes.”); Andrea G.Zetlin et al., *Seeing the Whole Picture: Views from Diverse Participants on Barriers to Educating Foster Youths*, 28 CHILD. & SCH. 165, 165 (2006).

81. Fisher et al., *supra* note 21, at 18.

82. See, e.g., Catherine R. Lawrence et al., *The Impact of Foster Care on Development*, 18 DEV. & PSYCHOPATHOLOGY 57, 72 (2006) (“[T]he small sample size . . . did not general significantly

While the relationship between experiencing foster care and later negative outcomes may be multifaceted, research points to a clear correlation between placement instability and later negative adult outcomes.⁸³ For example, in one study, seven out of ten maltreated foster children with a history of three or more foster placements had been arrested as adults, in contrast to those with two or fewer placements, whose rate of arrest was 1.5-2.0 times lower.⁸⁴ Adults who had experienced only one foster placement were three times as likely to return to school after dropping out, compared with those who had experienced five or more foster placements.⁸⁵ Placement instability was found to increase the likelihood of substance abuse in young adulthood, even beyond the other adverse circumstances experienced by foster youth.⁸⁶ One study, which focused on children exhibiting sexual behavior problems, found that placement instability compared with having experienced sexual victimization or physical victimization, was more strongly associated with sexually inappropriate and aggressive behaviors.⁸⁷ More broadly, a study on resilience in adolescents in foster care (measuring outcomes that included educational attainment, avoidance of teen pregnancy, homelessness, mental illness, substance use, and criminal involvement) found that placement instability was associated with lower resilience scores.⁸⁸

Of course, one may question the direction of causality here: did the placement instability create the behavior problems, or did the behavior problems lead to placement instability?⁸⁹ Certainly, foster children with more challenging behaviors experience more frequent placement moves, which can further impact negatively on their behavior.⁹⁰ However, it is noteworthy that many placement moves appear to be system-related or

meaningful relations between qualitative aspects of the foster care experience and subsequent behavior.”); *see also* Carbone et al., *supra* note 79, at 1165.

83. *See, e.g.*, DeGue & Widom, *supra* note 20, at 352.

84. *See id.*

85. *See* Havalchak et al., *supra* note 60, at 16 (“Young adults who reported having one placement while in Casey care had 2.9 times higher odds of returning to school after dropping out compared with those who reported having five or more placements in Casey care.”).

86. Tonia Stott, *Placement Instability and Risky Behaviors of Youth Aging Out of Foster Care*, 25 *CHILD & ADOLESC. SOC. WORK J.* 29, 76 (2012).

87. Robert A. Prentky et al., *Placement Instability as a Risk Factor in Proximal Sexually Inappropriate and Aggressive Behaviors in a Child Welfare Sample*, 11 *J. CHILD CUSTODY* 251, 269, 270-71(2014).

88. Svetlana Shpiegel, *Resilience Among Older Adolescents in Foster Care: the Impact of Risk and Protective Factors*, 14 *INT. J. MENT. HEALTH ADDICTION* 6, 10, 18 (2016).

89. *See* Harden, *supra* note 45, at 38; *see also* Rubin et al., *supra* note 67, at 342.

90. Julie Shaw, *Professionals’ Perceptions of Offending in Children’s Residential Care*, 17 *CHILD & FAM. SOC. WORK* 359, 364(2012).

administrative in nature rather than a response to the child's behavior.⁹¹ Many researchers have attested to the independent negative consequences of placement instability, even when accounting for early behavioral problems and delinquency.⁹² When adults who had experienced foster care were asked to recall their experiences, they remembered multiple placement moves as experiences of severe loss, which impacted negatively on their present-day lives.⁹³ A number of children who were interviewed in a study on placement instability reported that their repeated experience of loss and disconnection caused them to adopt a distancing style when relating to adult caregivers,⁹⁴ which has clear implications for these children's ability to trust and relate to authority figures.⁹⁵

Is Foster Care to Blame?

The "chicken-or-egg" question with regard to placement instability can be broadened to include the overall experience of foster care itself.⁹⁶ Having established that there is a connection between experiencing foster care and negative adult outcomes,⁹⁷ we come to the central question of this paper: should multiple foster care placements be considered a mitigating circumstance in criminal court proceedings?

It is important to note that researchers have acknowledged the difficulty of separating the impact of foster care from the impact of other adversities,⁹⁸ particularly the maltreatment that these children have experienced.⁹⁹ Research suggests that foster care is seen as a sign of having experienced childhood adversities that are associated with negative adult outcomes, rather than foster care being a cause of these negative adult outcomes.¹⁰⁰ One study found that the increased risk of adult criminality for foster children may be predicted by preexisting behavior problems instead of, or in addition to, foster care.¹⁰¹ Others, though, found evidence that placement

91. See Fernandez, *supra* note 70, at 1296; see, e.g., Sigrid. James et al., *Placement Movement in Out-of-Home Care: Patterns and Predictors*, 26 CHILD. & YOUTH SERVS. REV. 185, 201(2004).

92. See DeGue & Widom, *supra* note 20, at 352; see also Fisher et al., *supra* note 21, at 11; Rubin et al., *supra* note 68, at 341.

93. Yvonne. Unrau et al., *Former Foster Youth Remember Multiple Placement Moves: A Journey of Loss and Hope*, 30 CHILD. & YOUTH SERVS. REV. 1256, 1259 (2008).

94. Viktoria Skoog et al., *Disconnection and Dislocation: Relationships and Belonging in Unstable Foster and Institutional Care*, 45 BRITISH J. SOC. WORK 45, 1888, 1900 (2015).

95. See *id.* at 1890.

96. See UNIV. OF CAL., DAVIS, EXTENSION: THE CENTER FOR HUMAN SERVS., A LITERATURE REVIEW OF PLACEMENT STABILITY IN CHILD WELFARE SERVICE: ISSUES, CONCERNS, OUTCOMES, AND FUTURE DIRECTIONS 4 (2008).

97. See *supra* Part I.

98. See Wildeman & Waldfogel, *supra* note 15, at 607.

99. See Doyle, Jr., *supra* note 18, at 747.

100. See Pilowsky & Wu, *supra* note 44, at 357.

101. DeGue & Widom, *supra* note 20, at 351.

experience contributed to behavior problems regardless of the child's baseline level of behavioral difficulties before placement.¹⁰²

Perhaps the best way to attempt to filter out the effects of foster care from those of other adverse experiences or behavioral difficulties is to compare the outcomes of children who were placed in foster care with those of children from similar backgrounds who remained in their homes. In one case, researchers compared the outcomes of foster care alumni with those of maltreated children who were not placed outside the home, and found no statistical difference.¹⁰³ In contrast, another study found that children who were placed in foster care had a two to three times higher likelihood of criminal justice involvement than did their counterparts who remained at home.¹⁰⁴ Other research found that males who were placed in foster care as adolescents, in contrast to those who were investigated but not removed from the home, were significantly more likely to be convicted as adults.¹⁰⁵ Doyle went so far as to suggest that there was a causal connection between foster placement and later criminality,¹⁰⁶ although other researchers found more heterogeneous results and questioned whether causality could actually be established.¹⁰⁷ While removing children from abusive parents may protect them from further abuse, the removal itself may be traumatic and is arguably a factor in negative adult outcomes for these children.¹⁰⁸

It is well known that correlation is not causation.¹⁰⁹ Causality can only be inferred when a variable is actively manipulated,¹¹⁰ and researchers cannot ethically or practically determine whether a child experiences multiple foster placements in order to study the effects of placement instability on a representative sample.¹¹¹ Therefore, while we can demonstrate a clear association between multiple foster placements and a variety of negative effects, we must stop short of making conclusive

102. Rubin et al., *supra* note 67, at 341.

103. Joshua P. Mersky & Colleen Janczewski, *Adult Well-Being of Foster Care Alumni: Comparisons to Other Child Welfare Recipients and a Non-Child Welfare Sample in a High-Risk, Urban Setting*, 35 CHILD. & YOUTH SERVS. REV. 367, 368 (2013) (“Another study . . . found no overall differences in employment or earnings between maltreated children who were placed in foster care and maltreated children who were never placed in care.”).

104. See Lindquist & Santavirta, *supra* note 16, at 82.

105. See *id.*

106. Doyle, Jr., *supra* note 18, at 766.

107. William P. Warburton et al., *The Impact of Placing Adolescent Males into Foster Care on Education, Income Assistance, and Convictions*, 47 CANADIAN J. ECON. 35, 64 (2014).

108. Doyle, Jr., *supra* note 18, at 747.

109. Robin D. Froman & Steven V. Owen, *Why You Want to Avoid Being a Causist*, 37 RES. NURSING HEALTH 171, 171 (2014).

110. *Id.*

111. Robyn Gilbertson & James G. Barber, *Obstacles to Involving Children and Young People in Foster Care Research*, 7 CHILD & FAM. SOC. WORK 253, 253 (2002).

statements about causality.¹¹² That being said, while we cannot say with certainty whether or not foster children would not have become criminals had they remained in their homes, we can attest that having been placed in foster care, at the very least, does not appear to be a protective factor against criminality.¹¹³ Certainly, the suggestion that foster care is not a causal factor in negative adult outcomes does not necessarily imply that foster care promotes well-being.¹¹⁴ The preponderance of the evidence cited here suggests an association between having experienced multiple foster placements and a variety of negative emotional, behavioral, and legal outcomes.¹¹⁵ While it is impossible to empirically prove that the connection is causal, it is clear that the connection exists.¹¹⁶

PART II

“Being a foster child, by definition, means you are a person adrift in life. You do not have the benefit of a family unit to anchor to in times of trouble.”¹¹⁷

Marvin

Often, when you talk to those who lived in foster care, they paint a pretty grim picture. They say they felt invisible. They felt less than. They felt they didn’t have a voice, because speaking out could mean retaliation, abuse or being cast as a liar.

This isn’t perception — it’s reality. Far too many kids are children unseen. I was one of them. My mother was taken from this world when I was young, and my father spent most of my childhood in prison. I was cycled through several group homes, foster homes and, eventually, the juvenile justice system.

Not every foster home was bad. But the majority were. Some families wanted me only for the paycheck, rather than to love, teach, groom and protect me. Others let their children make fun of

112. See Froman, *supra* note 109 (causality requires active manipulation of one of the variables.)

113. See Barth et al., *supra* note 15, at 105.

114. Mersky & Janczewski, *supra* note 103, at 373.

115. See *supra* Part I.

116. See *supra* Part I (Is Foster Care to Blame?).

117. John Walsh, Esq., co-supervisor of the Foster Children’s Project, operating in Palm Beach County, Florida. He has served as an attorney in the area of child welfare for approximately 25 years.

me and barred me from being in the same room as them. It made me feel as though the adults in my life simply couldn't see me.¹¹⁸

April

April spent her teen years in the child welfare system “marked by a variety of foster care homes, some good, some not-so-good,” and “in between the foster care homes were stops at juvenile halls, group homes, and a mental hospital;” April found herself, like Marvin, behind bars.¹¹⁹

“In prison, I never discussed anything like foster care. You kind of put a brick wall up around you when you are there to protect yourself. I was a chameleon. I fit in.”¹²⁰

Trevor

At the age of 12, when most kids are simply trying to figure out middle school, Trevor was taken out of his home, which was damaged by alcoholism. During his teens he was moved a lot—he says that he lived in every group home in Sonoma County and when those ran out, he was moved as far away as Stockton and San Bernardino.

Through these years Trevor says he was unstable, battling depression and anger. He had difficulty trusting others, blew up easily and got into fights. At the age of 17, he walked out of his group home and never went back. Living on the streets, homeless, he developed a drug addiction and finally landed in jail for two years.¹²¹

118. MARVIN BING, CHILDREN UNSEEN PERSONAL ACCOUNTS OF CHILDREN IN FOSTER CARE: A COLLECTION OF BLOGS FROM CR'S 2014 FOSTERING THE FUTURE CAMPAIGN 1 (2014), <http://www.childrensrights.org/wp-content/uploads/2014/12/CR-Blog-brochure-9.22-spreads-LowRes1.pdf> [hereinafter CHILDREN UNSEEN].

119. Sara McCarthy & Mark Gladstone, CAL. SENATE OFFICE OF RESEARCH: POLICY MATTERS, STATE SURVEY OF CALIFORNIA PRISONERS: WHAT PERCENTAGE OF THE STATE'S POLLED PRISON INMATES WERE ONCE FOSTER CARE CHILDREN?, 9 (2011), http://www.sor.govoffice3.com/vertical/Sites/%7B3BDD1595-792B-4D20-8D44-626EF05648C7%7D/uploads/Foster_Care_PDF_12-8-11.pdf.

120. *Id.*

121. *Youth Profile: Trevor*, VOICES (Aug. 31, 2016), <http://voicesyouthcenter.org/youth-profile-trevor> [<https://web.archive.org/web/20160831013949/voicesyouthcenter.org/youth-profile-trevor>].

*Joiner*¹²²

He wants to fit in and will do whatever he is told. He has been shuffled from placement to placement, finding no permanent place to call home, no secure place to rest his head at night, no one person to call mom or dad, and no one to meet his emergent needs as a result of abuse, maltreatment and removal from his family of origin. Joiner ages out of foster care only to pick up his first charge for being in the wrong place at the wrong time.

Unfortunately, the stories of Marvin, April, Trevor, and Joiner could be the stories of any of the thousands of foster youth living in the child welfare system in the United States during any given year.

In 2010, former prosecutor Miriam Krinsky lamented that many of the nearly half a million foster children who had suffered abuse and neglect would cross into the juvenile and then adult justice systems.¹²³ In these systems, mandatory penalties afforded little flexibility or consideration of the offender's individual needs and characteristics.¹²⁴ Krinsky also noted that although the total number of crimes committed by youth was declining, public fear of youth offenders was on the rise.¹²⁵ That fear was accompanied by a stronger call for stricter and harsher penalties for crimes, and as a result, an estimated 200,000 children were being transferred to the adult system for prosecution.¹²⁶ Such a trend can have an especially damning impact upon foster youth and former foster children, many of whom may remain locked away for many years.¹²⁷

We have already discussed many possible reasons for the disproportionate number of foster youth involved in the criminal justice system.¹²⁸ As a practical matter, we will now consider whether there might be an identifiable common denominator amidst all the studies, statistics, and

122. This is a hypothetical that uses a generic name to reflect the countless number of foster youth who fit this description, many of whom join gangs and end up dead or serving serious time behind bars. As one former foster youth said, "Without those people who stepped up I can honestly say I don't think I would be alive today. Others aren't. Over the years I have met hundreds of foster children like myself. A few have committed suicide. Others are in prison." VANNAK KONG, FROM CRIME TO COUNSELOR – AND HOW FOSTER CARE HELPED, in CHILDREN UNSEEN, *supra* note 118, at 22-23.

123. Miriam Aroni Krinsky, *Disrupting the Pathway from Foster Care to the Justice System – A Former Prosecutor's Perspectives on Reform*, 48 FAM. CT. REV. 322, 322 (2010).

124. *Id.*

125. *Id.* at 327.

126. *Id.* (citing DANIELLE MOLE & DODD WHITE, TRANSFER AND WAIVER IN THE JUVENILE JUSTICE SYSTEM (2005)).

127. Krinsky, *supra* note 123 at 327-28 (2010). ("Many youthful offenders will never surface from our jails. In particular, over 2500 individuals are serving life without parole sentences . . . for crimes they committed at age seventeen or younger.")

128. *See infra* Part I.

variables, which we argue, make our case for multiple foster placements as a mitigating circumstance.¹²⁹

If we look at the stories of Marvin, April, Trevor, and Joiner, one key factor is evident – the simple matter of belonging.¹³⁰ Regardless of why children may have come into the system, and irrespective of what effects maltreatment, abuse, and genetics may have already had upon them prior to entry into foster care, the fact remains that multiple moves and placement instability create further chaos in lives already in upheaval.¹³¹ No study or statistic is needed to prove what common sense already dictates – that disrupting a growing child’s sense of stability, time and time again, facilitates insecurity.¹³²

During his extensive history of practice as an attorney in the state of Florida, John Walsh has seen foster children move from home to home.¹³³ He now supervises the Foster Children’s Project, a full service legal practice in which attorneys represent foster children ages twelve and under in Palm Beach County, Florida.¹³⁴ The project’s overarching goal is to expedite the establishment of permanent homes and to reduce the number of placement changes any one child might be forced to endure.¹³⁵ While there are other offices around the country which represent foster children, Walsh’s Foster Children’s Project is one of the few programs in the country whose work has been studied and proven to reduce the length of children’s stay in foster care.¹³⁶

When asked why permanent homes are so important, Walsh comments:

To put it simply, because kids are made to be with parents. Anything else is unnatural. What happens to kids the longer they stay in foster care and do not find a permanent caregiver is that they are told that no one wants them. It’s a silent message. You can’t hear it, but to them it’s like living in a POW camp that blasts loud music or propaganda over the speakers constantly.

129. See *infra* Part II.

130. See CHILDREN UNSEEN, *supra* note 118; see also McCarthy & Gladstone, *supra* note 119; *Youth Profile: Trevor*, *supra* note 121.

131. See *supra* Part I

132. See Rubin, *supra* note 67, at 341.

133. Anna Valdes, “Only 8 Percent of foster kids have a lawyer”, PALM BEACH POST (May 31, 2012), <http://www.palmbeachpost.com/news/state—regional/only-percent-florida-foster-kids-have-lawyer/N0MR9VVGNmFDI9vtoyZoNO/>.

134. *Id.*

135. ANDREW E. ZINN & JACK SLOWRIVER, EXPEDITING PERMANENCY: LEGAL REPRESENTATION FOR FOSTER CHILDREN IN PALM BEACH COUNTY 1 (2008), http://www.chapinhall.org/sites/default/files/old_reports/428.pdf.

136. *Id.* at 14.

If you just think about what a day in the life of a kid without parents is like, the magnitude of the problem comes into focus. The child sits in a classroom where a mother of another child comes in to volunteer, or bring cupcakes for her child's birthday. What is the effect on the foster child when she sees her classmates being loved? Being picked up from school by parents? Talking about soccer or dance or vacations?

I don't mean to be overly emotional, but if the adult does not put oneself into the child's headspace, you can't grasp the problem.

Almost every day is filled with interactions that reinforce the message: you aren't as good as everybody else or you would have someone to love you too. That's just how the message is received.

Our job is to interrupt that message and replace it with the one kids need to hear in order to establish self-respect and respect for others, the two things that will most effectively keep people out of trouble with other people and by extension, the law. We do that by trying to make sure their first placement in foster care will be their last. We also do that by trying to get them out of foster care and home, to a birth family or adoptive family, as quickly as humanly possible.¹³⁷

In 1991 the National Commission on Children criticized the foster care system, remarking that “[i]f the nation had deliberately designed a system that would frustrate the professionals who staff it, anger the public who finance it, and abandon the children who depend on it, it could not have done a better job than the present child welfare system.”¹³⁸

Almost two decades later, Krinsky argued that not much had changed since the Commission's critique.¹³⁹ She noted that “a conspicuous lack of cohesive and collaborative decision making” continued to plague the system, with “no collective sense of accountability for the individual child.”¹⁴⁰ As a result, she found “far too many problems are left unidentified or unresolved because the various arms of the government responsible for raising these youth operate in silos and no one takes overall responsibility for ensuring the well-being and success of foster children.”¹⁴¹

137. Walsh, *supra* note 117.

138. NAT'L. COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 293. (1993), <http://files.eric.ed.gov/fulltext/ED336201.pdf>.

139. See Krinsky, *supra* note 123, at 324.

140. See *id.*

141. See *id.*

PART III

In *Penry v. Lynaugh*,¹⁴² the Supreme Court of the United States held that the Texas capital sentencing scheme provided a constitutionally inadequate vehicle for jurors to consider and give effect to the mitigating evidence of mental retardation and childhood abuse.¹⁴³ Why? “[B]ecause the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant’s character or record or the circumstances of the offense.”¹⁴⁴ It is time for multiple foster care placements to be acknowledged as a possible mitigating circumstance when those placements have been a significant part of a person’s “background.”¹⁴⁵

In death penalty cases, a mitigating circumstance can be broadly defined as an aspect of the defendant’s background or character or any of the circumstances of the offense that might reasonably serve as a basis for imposing a sentence less than death.¹⁴⁶ Were the multiple foster care placements that John Shobe III experienced sufficient to be considered a mitigating circumstance?

In August, 2015, just over two years after robbing the Domino’s pizza store, Shobe pled guilty to murdering Harold Dean Johnson.¹⁴⁷ The recommended sentence was life in prison with the chance for parole after 20 years.¹⁴⁸

142. 492 U.S. 302 (1989), *abrogated by* *Atkins v. Virginia*, 563 U.S. 309, 318, 321 (2002).

143. *Id.* at 323-25.

144. *Id.* at 319 (quoting *Cal. v. Brown*, 479 U.S. 538, 545 (1987) (O’Connor, J., concurring)).

145. *Id.* (discussing the policy behind considering an individual’s background as a mitigating factor for the death penalty: “evidence about the defendant’s background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.”).

146. *See Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *see also Campbell v. State*, 571 So. 2d 415, 419 n.4 (1990).

147. *See* Story, *supra* note 1.

148. *See id.*